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13 ATTORNEYS FOR UNITED STATES

14 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

15 ESTHER DARLING; RONALD BELL by
16 his guardian ad litem Rozene Dilworth;
GILDA GARCIA; WENDY HELFRICH by
17 her guardian ad litem Dennis Arnett;
JESSIE JONES; RAIF NASYROV by his
18 guardian ad litem Sofiya Nasyrova; ALLIE
JO WOODARD, by her guardian ad litem
19 Linda Gaspard-Berry; individually and on
behalf of all others similarly situated,

20
21 Plaintiffs,

22 v.

23 TOBY DOUGLAS, Director of the
Department of Health Care Services, State
24 of California, DEPARTMENT OF
HEALTH CARE SERVICES,
25

26 Defendants.
27

Case No. C09-03798 SBA

CLASS ACTION

**SUPPLEMENTAL STATEMENT OF
INTEREST OF THE UNITED STATES
OF AMERICA**

Hearing Date: Nov. 8, 2011

Time: 1:00 p.m.

Judge: Hon. Saundra B.
Armstrong

Address: 1301 Clay Street
Oakland, CA 94612

Courtroom: 1, 4th Floor

1 The United States respectfully submits this Supplemental Statement of Interest, pursuant
2 to 28 U.S.C. § 517,¹ in support of Plaintiffs’ Motion for Preliminary Injunction.² On July 22,
3 2011, Defendants California Department of Health Care Services (“DHCS”) and its director,
4 Toby Douglas (collectively, the “Defendants”) requested a continuation of the hearing on
5 Plaintiffs’ motion. *See* Letter to Hon. Judge Sandra Brown Armstrong, ECF No. 299 (Jul. 22,
6 2011). Defendants represented that continuing the hearing would “afford [them] additional time
7 to finish evaluating all current recipients of ADHC services....” and “allow [Defendants] to
8 further develop the transition program to ensure that there is a seamless transition of ADHC
9 beneficiaries to alternative services.” *Id.* at 2. This Court granted Defendants’ request on July
10 22, 2011, and ordered the parties to file supplemental briefing “to incorporate factual
11 developments regarding the Defendants’ transition plans since the filing of [Plaintiffs’] Motion.”
12 Order Continuing Hearing, ECF No. 302, at 2-3 (Jul. 22, 2011).

13 Several weeks after this Court granted Defendants’ request for a continuance, Defendants
14 substantially shifted course in structuring their transition plan, announcing a plan to encourage
15 and assist enrollment of a majority of individuals currently receiving ADHC services into Medi-
16 Cal managed care plans by October 1, 2011. (*See* Supp. Decl. of Jane Ogle (“Ogle Supp. Decl.”),
17 ECF No. 370, ¶¶ 3-4). The abrupt change in direction included the rollout of a highly
18 compressed timeline in which DHCS sought to notify ADHC beneficiaries of the elimination of
19 ADHC services, inform them of the impact of enrolling in a managed care plan versus remaining

20 _____
21 ¹ 28 U.S.C. § 517 permits the Attorney General to send any officer of the Department of Justice
22 “to any State or district in the United States to attend to the interests of the United States in a suit
pending in a court of the United States.”

23 ²As noted in the United States’ initial Statement of Interest in this matter, this litigation
24 implicates the proper interpretation and application of title II of the Americans with Disabilities
25 Act, 42 U.S.C. § 12131 *et seq.* (“ADA”), and in particular, its integration mandate. *See* 28
26 C.F.R. § 35.130(d); *Olmstead v. L.C.*, 527 U.S. 581 (1999); Statement of Interest of the United
States of America, ECF No. 298 (Jul. 12, 2011). The Department of Justice has authority to
enforce title II and to issue regulations implementing the statute. 42 U.S.C. §§ 12133-34. The
United States thus has a strong interest in the resolution of this matter.

1 in fee-for-service (FFS) Medi-Cal, and present to them the specific services that would be
2 offered through either option.³

3 Approximately one month before the elimination of ADHC services is due to take effect,
4 Defendants’ efforts to craft a realistic transition plan remain well below the required threshold to
5 ensure that “necessary alternative services will be *identified and in place* for Plaintiffs so that
6 there will not be a period where they are not receiving the care prescribed by their [Individual
7 Plans of Care (IPCs)].” *See Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1174 (N.D. Cal.
8 2009) (emphasis added). The importance of a clearly delineated transition plan and
9 identification of available alternative services is unmistakable – “even temporary gaps in services
10 would present serious consequences for Plaintiffs and place them at great risk of being
11 institutionalized.” *Id.*

12 Defendants’ current plan relies in large part on the transition of ADHC participants from
13 fee-for-service Medi-cal into Medi-cal managed care plans, (*See Ogle Supp. Decl.* ¶¶ 4, 17), but
14 this transition still does not ensure that necessary alternative services are actually provided to
15 individuals affected by the ADHC elimination.⁴ For individuals enrolling into managed care,
16

17 ³ In August and September, DHCS mailed approximately 40,000 notices to ADHC participants,
18 informing each participant of the elimination of the ADHC benefit. (*See Ogle Supp. Decl.* ¶ 11;
19 ADHC Managed Care Enrollment Project, Notification Mailing Schedule (“Notification Mailing
20 Schedule”), Ex. Q to Decl. of Elizabeth Zirker, ECF No. 352, at 1-2). For the approximately
21 25,000 ADHC participants who are dually-eligible for Medicare and Medicaid services, the
22 notice advised that DHCS planned to enroll each ADHC participant into a DHCS assigned
23 managed care plan effective October 1, 2011, unless the participant chose a particular plan or
24 opted to remain in fee-for-service (FFS) Medi-Cal. (*See Notification Mailing Schedule*, Ex. Q to
25 Decl. of Elizabeth Zirker, at 1). Participants had until September 16, 2011 to elect a specific
26 plan or to opt out of this enrollment. (*Id.* at 3). As of October 25, 2011, 654 ADHC participants
27 elected to enroll in a particular managed care plan, 10,297 did not respond and defaulted into a
28 plan chosen by DHCS, and 15,117 elected to remain in FFS Medi-Cal. (*Ogle Supp. Decl.* ¶ 11).

⁴ Even though Defendants’ current transition plan relies substantially on contracts with managed
care organizations and APS, (*see Ogle Supp. Decl.* ¶¶ 16-17), this Court has held, and indeed
Defendants have conceded, that they “bear the ultimate responsibility for ensuring compliance
with federal disability laws.” *Brantley*, 656 F. Supp. 2d at 1174; *see also* 28 C.F.R. §§
35.130(b)(1) (prohibiting discrimination “through contractual, licensing, or other

1 some of the component services of the ADHC service are “categorically beyond the scope of the
2 primary and acute medical services Plans are currently obligated to provide.” (Decl. of Russell
3 Foster, ECF No. 325, ¶ 30; *see also* August 19, 2011 Letter from California Association of
4 Health Plans to DHCS, Ogle Dep. Ex. 8, Ex. G to Zirker Decl., ECF No. 342, at 1-2 (expressing
5 association’s concern that DHCS clarify that plans are “not responsible” for certain ADHC
6 component services); Decl. of Kaye Bunch, ECF No. 322, ¶¶ 13-14; Supp. Decl. of Catherine
7 Davis, ECF No. 324, ¶ 7; Second Supp. Decl. of Dawn Myers Purkey, ECF No. 333, ¶¶ 28-32;
8 Second Supp. Decl. of Debbie Toth, ECF No. 337, ¶ 20). Indeed, Defendants admit that certain
9 services offered at ADHC centers are “not generally available”, but instead suggest that a plan
10 *may* go “above and beyond the minimal requirements” of the plan’s contract with DHCS. (*See*
11 Decl. of Maya Altman, ECF No. 361, ¶ 31). Although Defendants suggest that managed care
12 plans may contract with ADHC centers to provide certain services, the extent plans will enter
13 such engagements, and the specific content of these arrangements, remain unclear. (*See* Decl. of
14 Ingrid Lamirault (“Lamirault Decl.”), ECF No. 368, ¶¶ 12-15; Supp. Decl. of Peter H. Behr, ECF
15 No. 320; ¶¶ 12-13; Decl. of Corinne Jan, ECF No. 330, ¶ 17; Second Supp. Decl. of Nina Nolcox
16 (“Nolcox 2d Supp. Decl.”), ECF No. 334, ¶ 9). And as of October 25, 2011, the state had not yet
17 amended its contracts with plans to authorize payment for bundled services provided at ADHC
18 centers. (*See* Lamirault Decl., ¶ 12).

19 For those individuals who have opted out of enrollment in managed care (approximately
20 15,000 participants), DHCS has contracted with APS, Inc. to provide care coordination and
21 “refer and help link participants with needed medical and social services in the community.”
22 (Defs.’ Supp. Opp. at 6; Ogle Supp. Decl. ¶¶ 13-14).⁵ The “service coordination and support

23 arrangements”); 35.130(b)(3) (prohibiting methods of administration, “through contractual or
24 other arrangements,” that have the effect of discriminating against individuals with disabilities).

25 ⁵ DHCS has also contracted with APS Healthcare, Inc. to perform assessments of ADHC
26 participants enrolling in most managed care programs and those remaining in fee-for-service
27 Medi-Cal. (*See* Decl. of Louis Rico, ECF No. 372, ¶¶ 3-4) Assessments for some individuals
28 may be delivered as late as November 30 (the day before the elimination of ADHC), or not at all.

1 services” offered through this arrangement, however, do not include the actual provision of
2 necessary services, and instead consist primarily of referrals to existing services, many of which
3 ADHC participants may already receive. (See Nolcox 2d. Supp. Decl. ¶¶ 22-25; Supp. Decl. of
4 Diane Puckett, ECF No. 335, ¶¶ 10-11, 14). These referrals may therefore be insufficient to
5 connect individuals to necessary alternative services upon the elimination of ADHC services on
6 December 1, 2011.

7 For the reasons stated above, and in the United States’ initial Statement of Interest in this
8 matter, the Court should grant Plaintiffs’ Motion for Preliminary Injunction and enjoin the State
9 from eliminating ADHC services unless and until adequate, appropriate, and uninterrupted
10 services are provided.⁶ With the Court’s permission, counsel for the United States will be
11 present at any upcoming hearings.

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19 (See *id.* ¶ 6) (stating that APS is contractually obligated to make three attempts to contact
20 individuals, and has agreed to continue such attempts until November 30, 2011)). Potential
21 delays in performing the assessment, or in the delivery of its results, suggests the likelihood that
22 some assessments may be delivered as late as the day before the ADHC service is eliminated.
23 These uncertainties may leave a significant number of individuals unable to effectively transition
24 to alternative services upon the elimination of ADHC services on December 1.

25 ⁶ Plaintiffs have asked this Court to enjoin the State’s termination of ADHC as a *Medi-Cal*
26 *benefit*. (See Pls.’ Mot. for Prelim. Inj., ECF No. 225, at 1.) As noted in the United States’ initial
27 Statement of Interest in this matter, CMS has approved a State Plan Amendment that eliminates
28 ADHC as a federal/state Medi-Cal benefit. We recommend that this Court enter an injunction
preserving ADHC services unless and until adequate, appropriate, and uninterrupted replacement
services are provided to prevent unnecessary institutionalization, without specifically addressing
the services’ status as federal/state Medi-cal benefit as Plaintiffs originally proposed in their
Motion.

1 DATED: October 31, 2011

2 Respectfully submitted,

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