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ATTORNEYS FOR UNITED STATES

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

DAVID OSTER, *et al.*,

Plaintiffs,

v.

WILL LIGHTBOURNE, Director of the California Department of Social Services; TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, DEPARTMENT OF HEALTH CARE SERVICES; and CALIFORNIA DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No.: CV 09-04668 CW

CLASS ACTION

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Hearing Date: January 19, 2012

Time: 2:00 p.m.

Judge: The Hon. Claudia Wilken

I. INTRODUCTION

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517,[1] because this litigation implicates the proper interpretation and application of title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA"), and in particular, its integration mandate. *See* 28 C.F.R. § 35.130(d); *Olmstead v. L.C.*, 527 U.S. 581 (1999). 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.

This lawsuit alleges that Will Lightbourne, the Director of the California Department of Social Services ("DSS"), Toby Douglas, the Director of the California Department of Health Care Services ("DHCS"), and their respective agencies (collectively, "Defendants"), will place hundreds of thousands of individuals with disabilities at risk of unnecessary institutionalization, in violation of the ADA, if they are not enjoined from implementing a twenty percent reduction in In-Home Support Services ("IHSS") hours to Medi-Cal beneficiaries. (*See* Third Am. Class Action Compl. ("Compl."), ECF No. 431, Dec. 6, 2011, ¶ 6.) On December 1, 2011, this Court granted Plaintiffs' *ex parte* Application for a Temporary Restraining Order, enjoining Defendants from implementing the reduction in hours, finding that Senate Bill 73 ("SB 73") – the Statute mandating the reduction – raises serious questions of violations of the Medicaid Act, the ADA, and the Rehabilitation Act, and that unless enjoined, the reduction in IHSS hours would "cause immediate and irreparable harm by placing members of the plaintiff class at imminent and serious risk of harm to their health and safety, as well as unnecessary and unwanted out-of-home placement including institutionalization." (Order Granting Application for TRO, ECF No. 417, Dec. 1, 2011, at 1-2.)

[1] 28 U.S.C. § 517 permits the Attorney General to send any officer of the Department of Justice "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."

Defendants' legal arguments regarding Plaintiffs' standing, the ripeness of Plaintiffs' ADA and Rehabilitation Act claims, and the Tenth Amendment are without merit.[2] Plaintiffs have standing to bring these claims because they have alleged the threat of concrete, particularized injuries that Defendants' actions will cause, and which relief from this Court will address. And contrary to Defendants' contentions, ensuring that the State's programs comply with the requirements of the ADA neither conflicts with the Medicaid Act nor violates the Tenth Amendment.

II. BACKGROUND

A. In Home Support Services

IHSS is an optional Medi-Cal benefit that provides in-home assistance with basic tasks of daily living, including domestic services, personal care services, accompaniment during travel to health-related appointments or to alternative resource sites, protective supervision, teaching and demonstration directed at reducing the need for other supportive services, and paramedical services to assist individuals in maintaining an independent living arrangement. Cal. Welf. & Inst. Code §§ 12300(b). The IHSS program is designed to make these services available to those who are "unable to perform the services themselves and who cannot safely remain in their homes or abodes of their own choosing unless these services are provided." *Id*. §12300(a). Approximately 440,000 individuals in California receive IHSS, which is funded through a combination of state, county, and federal dollars. *See* Cal. Welf. & Inst. Code §12306; (Decl. of Eileen Carroll ("Carroll Decl."), ECF No. 446, Dec. 23, 2011, ¶ 4.)

SB 73 was signed into law on June 30, 2011 and required the hours of most IHSS recipients to be reduced by 20 percent, effective January 1, 2012. *See* Cal. Welf. & Inst. Code §12301.07(a); (*see also* Pls.' Third Request for Judicial Notice ("3rd RJN"), ECF No. 335, Dec.

[2] Plaintiffs also allege that Defendants' plan to implement the reduction in IHSS hours violates the Due Process Clause of the Constitution and the Medicaid Act. In this Statement of Interest, the United States addresses solely the merits of Defendants' legal arguments regarding standing, ripeness, and the Tenth Amendment as it relates to the ADA and Rehabilitation Act.

1, 2011, Ex. 1.) The statute established a number of exemptions from the reductions for certain IHSS recipients and required DSS to establish a process to pre-approve supplemental hours for certain recipients. *See* Cal Welf. & Inst. Code §12301.07(a)(5), (b); (Carroll Decl. ¶ 7). All individuals who do not fall into the exemptions (over 300,000 people) will have their IHSS hours reduced, but will have the opportunity to apply for supplemental hours to fully or partially restore the reduced hours. (*See* Carroll Decl. ¶ 8; Ex. A to Carroll Decl. at 13.) Plaintiffs have presented evidence that Defendants assume that approximately 164,458 IHSS recipients will not be eligible for restoration of hours, and that approximately 61,672 IHSS recipients will be eligible for restoration but will not return the application for IHSS Care Supplements. (*See* Second Decl. of Karen Keeslar, ECF No. 376, Dec. 1, 2011, Ex. A.)

III. Statutory and Regulatory Background

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

As directed by Congress, the Attorney General issued regulations implementing title II, which are based on regulations issued under section 504 of the Rehabilitation Act.[3] *See* 42

[3] In all ways relevant to this discussion, the ADA and Section 504 of the Rehabilitation Act are generally construed to impose similar requirements. *See Sanchez v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005); *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1045 n. 11 (9th Cir.

U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C. § 2000d-1. The title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The preamble discussion of the "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible…." 28 C.F.R. Pt. 35, App. B at 673 (2011) (addressing § 35.130).

Twelve years ago, the Supreme Court applied these authorities and held that title II prohibits the unjustified segregation of individuals with disabilities. *Olmstead*, 527 U.S. at 596. There, the Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. *Id.* at 607.

The ADA's protections are not limited to those individuals who are currently institutionalized. The integration mandate also prohibits public entities from pursuing policies that place individuals at serious risk of unnecessary institutionalization.[4] *See M.R. v. Dreyfus*,

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1999). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent[ ] imposition of inconsistent or conflicting standards for the same requirements under the two statutes." *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-9 (4th Cir. 1999) (citing 42 U.S.C. § 12117(b)) (alteration in original).

[4] Defendants incorrectly presume that the ADA would not prohibit policies placing individuals at risk of placement from their own home into "residential care-type facilities [that] do not maintain 24-hour nursing care." (*See* Defs' Opposition to Pls.' Mot. for a Prelim. Inj. ("Defs.' Opp."), ECF No. 445, Dec. 23, 2011, at 35). The ADA requires public entities to provide services in the most integrated setting appropriate, which affords individuals with disabilities the opportunity to interact with nondisabled individuals to the fullest extent possible. 28 C.F.R. § 35.130(d); 28 C.F.R. Pt. 35, App. B at 673 (2011). *See also, e.g., DAI v. Paterson*, 653 F.Supp. 2d 184, 224 (E.D.N.Y. 2009) (recognizing Adult Homes as "settings [that do] not enable interactions with nondisabled people to the fullest extent possible.")

___ F.3d ____, 2011 WL 6288173, *16 (9th Cir. 2011); *see also Fisher* v. *Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (noting that "nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements").

To comply with the ADA's integration requirement, a state must reasonably modify its policies, procedures, or practices when necessary to avoid discrimination. 28 C.F.R. § 35.130(b)(7). The obligation to make reasonable modifications may be excused only where a state demonstrates that the requested modifications would "fundamentally alter" the programs or services at issue. *Id.*; *see also Olmstead*, 527 U.S. at 604-07.[5]

IV. ARGUMENT

A. Plaintiffs have Article III Standing to Assert a Violation of the ADA's Integration Mandate

Defendants argue that Plaintiffs lack Article III standing for a preliminary injunction because "none of the [named plaintiffs] face[s] an imminent risk of institutionalization." (Defs.' Opp. at 32-33.) This argument is without merit and conflates the requirements of standing with the merits of Plaintiffs' ADA claims. It is well settled that to establish standing, a litigant must show (1) that he suffered actual or threatened injury; (2) that the condition complained of caused the injury or threatened injury, and (3) that the requested relief will redress the alleged injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). When examining

[5] Budgetary concerns alone do not sustain a fundamental alteration defense. *M.R.*, 2011 WL 6288173, *18; *see also Fisher*, 335 F.3d at 1183 ("that [a state] has a fiscal problem, by itself, does not lead to an automatic conclusion" that providing the community services that plaintiffs seek would be a fundamental alteration). Further, "[i]f every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed." *Fisher*, 335 F.3d at 1183; *see also Pennsylvania Protection and Advocacy, Inc. v. Pennsylvania Dept. of Pub. Welfare*, 402 F.3d 374, 380 (3d Cir. 2005). Congress was aware that integration "will sometimes involve substantial short-term burdens, both financial and administrative," but the long-term effects of integration "will benefit society as a whole." *Fisher*, 335 F.3d at 1183 (*citing* H.R. Rep. No. 101-485, pt.3, at 50, *reprinted* in 1990 U.S.C.C.A.N. 445,773).

whether plaintiffs suffered actual or threatened injury, the inquiry focuses on whether the injury-in-fact is (1) "concrete and particularized," and (2) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560.

Plaintiffs have standing because the reduction of their IHSS services is concrete, actual and not hypothetical and thus this injury alone is sufficient to establish standing. *See Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003); *United States v. Antelope*, 395 F.3d 1128, 1132 (9th Cir. 2005). Plaintiffs seek to represent a class of individuals who "have received or will receive notices of action that include a reduction of IHSS hours based on SB 73 or Defendants' implementation of SB 73…" (Compl. ¶ 225.) Receipt of this notice means that a recipient's IHSS hours are due to be or have already been administratively reduced, and recipients must then affirmatively apply for IHSS Care Supplements to even attempt to have their hours partially or fully restored. (*See* Pls.' Reply in Support of Motion for Class Certification, ECF No. 442, Dec. 22, 2011, at 3; Carroll Decl., Ex. A, at 7 (instructing county departments of social services to "reinstat[e] the reduced hours" if recipient returns IHSS Supplemental Care application within 15 days of postmark or by January 3, 2012.)) Plaintiffs, and hundreds of thousands of others similarly situated individuals, thus face the imminent threat of a twenty percent reduction of services. It is the partial or full *restoration* of these hours – not their reduction – that rests on contingent, future events. That these Plaintiffs may ultimately have some or all of their current amount of IHSS hours restored, either through county-level determinations of eligibility for Care Supplement hours or by pursuing state administrative appeals, does not render their injuries non-imminent, hypothetical, or speculative. *See Pashby v. Cansler*, ___ F.Supp. 2d ____, 2011 WL 6130819, *3 (E.D.N.C. 2011) ("because each Plaintiff faced, at the time this lawsuit commenced, the termination of his or her [personal care services] due to the change in requirements that was to be implemented … each Plaintiff had standing to

challenge the implementation of [the official policy changing eligibility requirements].") *appeal docketed*, No. 11-2363, (4th Cir. Dec. 14, 2011).[6]

Further, even the threat of future harm is sufficient to confer standing. *Cent. Delta Water Agency v. United States,* 306 F.3d 938, 947 (9th Cir. 2002) ("[T]he possibility of future injury may be sufficient to confer standing."); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000). By receiving notices of an impending reduction in their IHSS hours, there can be no question that Plaintiffs face a threat of harm. "[A] credible threat of harm is sufficient to constitute actual injury for standing purposes." *Cent. Delta Agency*, 306 F.3d at 950. Indeed, the threat of injuries to plaintiffs resulting from the reduction in IHSS hours is "credible" and is not "speculative or imaginary." *See Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (citing *Babbitt v. United Farm Workers,* 442 U.S. 289, 298 (1979); *see also Mental Disability Law Clinic v. Hogan*, No. 06-cv-6320, 2008 WL 4104460, at *8 (E.D.N.Y. Aug. 26, 2008) ("the likely harm of another hospitalization and the fact that this harm could be avoided if [Plaintiff were to continue to receive existing services] is not too speculative or conjectural to preclude standing."). Thus, Plaintiffs have standing to pursue their title II and Rehabilitation Act claims.

For the same reasons, Plaintiffs' claims are ripe. A court considers two factors in determining whether a case is ripe: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1211 (9th Cir. 2006) (citing *Abbot Labs. v. Gardner*, 387 U.S. 136, 149 (1967) *overrul*ed *on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Fitness for review means that a question "can be decided without considering contingent future events that may or may not occur as anticipated, or that may not occur at all."

[6] Defendants' comparison of this case to *Summer H. v. Fukino*, No. 09-cv-00047, 2009 WL 1249306 (D. Haw. 2009), is inapt. There, the Court specifically declined to dismiss plaintiffs' ADA and Section 504 claims for lack of standing or ripeness. *See id*. at *8.

Addington v. U.S. Airline Pilots Ass'n., 606 F.3d 1174, 1179 (9th Cir. 2010). A number of the Plaintiffs, and by definition, members of the proposed class, will receive notices indicating that their IHSS hours have been reduced. (*See* Compl. ¶ 225.) That any individual plaintiff or member of the proposed class may avail themselves of the application process to have their IHSS hours partially or fully restored does not render their claims unfit for judicial review. *See Pashby,* 2011 WL 6130819, *4 (holding that plaintiffs' claims were ripe and that they "need not wait until the resolution of their administrative appeals under [a new policy altering eligibility for personal care services] to challenge the legality of it."). And the hardship to the Plaintiffs from withholding judicial consideration is considerable here: Plaintiffs have submitted substantial evidence from their care providers, experts, county officials and individual IHSS recipients that recipients face a serious risk of institutionalization if their hours are in fact reduced.

B. ADA Compliance Does Not Conflict With the Medicaid Act and Does Not Violate the Tenth Amendment

Defendants argue that plaintiffs' ADA and Rehabilitation Act claims run afoul of the Tenth Amendment because remedying Plaintiffs' claims may require the continuation of the current level of IHSS services to prevent individuals' unnecessary institutionalization. (*See* Defs.' Opp. at 33-34.) Defendants appear to argue that because IHSS is an optional, rather than mandatory, program under the federal Medicaid Act, this Court is without power to enjoin Defendants from operating the program in a manner that discriminates against individuals with disabilities. This contention lacks merit.

A determination that Defendants should refrain from implementing policies that present a serious risk of institutionalization does not require a finding that the State must provide IHSS services as a mandatory (as opposed to optional) Medicaid service. Rather, once a state has elected to provide services (whether mandatory or optional under the Medicaid Act), the state must administer those services in accordance with the ADA and Rehabilitation Act. *See Doe v. Chiles,* 136 F.3d 709, 714 (11th Cir. 1998) (when a state chooses to provide an optional

Medicaid service, it must do so in accordance with the requirements of federal law); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) (even though a waiver program is optional, a state may not, under title II of the ADA, amend optional programs in such a way as to violate the integration mandate).

Indeed, another district court recently rejected a similar argument. In *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1302 (M.D. Fla. 2010), defendants argued that plaintiff's integration claim would abrogate or amend Medicaid Act provisions allowing states to limit the number of participants in its waiver programs. The district court rejected this argument, finding defendants' attempt to characterize ADA compliance "as an invalidation of the Medicaid Act [was] without merit." *Id*. at 1303. The court reasoned that "[a] state that chooses to provide optional services, cannot defend against the discriminatory administration of those services simply because the state was not initially required to provide them." *Id.* at 28. Thus, here, as in *Haddad*, requiring Defendants' to administer their Medicaid program in a nondiscriminatory manner does not conflict with the Medicaid Act.

Further, contrary to Defendants' assertions, compliance with the ADA's integration mandate does not violate the Tenth Amendment principles of *New York v. United States*, 505 U.S. 144 (1992) or *Printz v. United States*, 521 U.S. 898 (1997). *See Reno v. Condon*, 528 U.S. 141, 150-51 (2000) ("That a state wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.") (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)).

DATED: January 9, 2012

Respectfully submitted,

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