

1 Elissa Gershon, State Bar No. 169741
2 elissa.gershon@disabilityrightsca.org
3 Elizabeth Zirker, State Bar No. 233487
4 elizabeth.zirker@disabilityrightsca.org
5 Kim Swain, State Bar No. 100340
6 kim.swain@disabilityrightsca.org
7 DISABILITY RIGHTS CALIFORNIA
8 1330 Broadway, Suite 500
9 Oakland, CA 94612
10 Telephone: 510.267.1200
11 Facsimile: 510.267.1201
12 Additional Counsel Listed on Page 2

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

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

24 Plaintiffs,

25 v.

26 TOBY DOUGLAS, Director of the Department of
27 Health Care Services, State of California,
28 DEPARTMENT OF HEALTH CARE
SERVICES,

Defendants.

) **Case No.: C-09-03798 SBA**
)
) **CLASS ACTION**
)
) **JOINT NOTICE OF MOTION AND**
) **MOTION FOR PRELIMINARY**
) **APPROVAL OF CLASS SETTLEMENT**
) **AGREEMENT, AND FOR AN ORDER**
) **DIRECTING NOTICE TO THE CLASS**
) **AND SCHEDULING A FAIRNESS**
) **HEARING; MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF MOTION**
) **Hearing Date: December 13, 2011**
) **Time: TBD**
) **Judge: Hon. Sandra Armstrong**
) **Address: 1301 Clay Street**
) **Oakland, CA 94102**
) **Courtroom: 1, 4th Floor**

1 Kenneth A. Kuwayti, State Bar No. 145384
2 Kkuwayti@mofo.com
3 Benjamin A. Petersen, State Bar No. 267120
4 Bpetersen@mofo.com
5 Morrison & Foerster LLP
6 755 Page Mill Road
7 Palo Alto, California 94304-1018
8 Telephone: 650.813.5600
9 Facsimile: 650.494.0792

Anna Rich, State Bar No. 230195
arich@nslc.org
Kevin Prindiville, State Bar No. 235835
kprindiville@nslc.org
NATIONAL SENIOR CITIZENS LAW
CENTER
1330 Broadway, Suite 525
Oakland, California 94612
Telephone: 510.663.1055
Facsimile: 510.663.1051

6 Eric Carlson, State Bar No. 141538
7 ecarlson@nslc.org
8 NATIONAL SENIOR CITIZENS LAW CENTER
9 3435 Wilshire Boulevard, Suite 2860
10 Los Angeles, CA 90010
11 Telephone: 213.674.2813
12 Facsimile: 213.639.0934

Barbara Jones, State Bar No. 88448
bjones@aarp.org
AARP FOUNDATION LITIGATION
200 So. Los Robles, Suite 400
Pasadena, California 91101
Telephone: 626.585.2628
Facsimile: 626.583.8538

11 Kenneth W. Zeller, *Pro Hac Vice*
12 kzeller@aarp.org
13 Kelly Bagby, *Pro Hac Vice*
14 kbagby@aarp.org
15 AARP FOUNDATION LITIGATION
16 601 E Street N.W.
17 Washington, D.C. 20049
18 Telephone: 202.434.2060
19 Facsimile: 202.434.6424

Sarah Somers, State Bar No. 170118
somers@healthlaw.org
Martha Jane Perkins, State Bar No. 104784
perkins@healthlaw.org
NATIONAL HEALTH LAW PROGRAM
101 East Weaver Street, Suite G-7
Carrboro, North Carolina 27510
Telephone: 919.968.6308
Facsimile: 919.968.8855

18 **Attorneys for Defendants**

19 KAMALA D. HARRIS Attorney General of California
20 SUSAN M. CARSON(CA SBN 135875)
21 Susan.Carson@doj.ca.gov
22 Supervising Deputy Attorney General
23 JOSHUA N. SONDHEIMER
24 Joshua.Sondheimer@doj.ca.gov
25 455 Golden Gate Avenue, Suite 1100
26 San Francisco, California 94102-7004
27 Telephone: 415.703.5615
28 Facsimile: 415.703.5480

JOINT MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION AND SUMMARY OF SETTLEMENT**

Plaintiffs, who are elderly persons and adults with disabilities, brought this class action suit against the California Department of Health Care Services and its Director (Defendants) to enjoin changes being made to the Medi-Cal Adult Day Health Care (ADHC) optional benefit. Plaintiffs asserted that the changes to the program, as enacted by the California Legislature, would place them at risk of unnecessary institutionalization and thus, violate the Americans with Disabilities Act (ADA). Plaintiffs also alleged violation of the Medicaid Act and the due process clause of the United States Constitution. Defendants denied these arguments. Following the issuance of two preliminary injunctions (one of which is pending on appeal) and pending resolution of a third motion for a preliminary injunction, the parties have now reached a Settlement Agreement (“Settlement”). The fully executed proposed Settlement Agreement, as approved by the parties, is attached as Exhibit 1 to the Declaration of Elissa Gershon ("Gershon Declaration"). The Settlement provides significant relief to all Class Members.

Under the proposed Settlement, Defendants will develop a new program, Community-Based Adult Services (CBAS) in areas where ADHC services are currently available under an existing Medicaid waiver to serve individuals currently receiving ADHC services with the highest needs. The Settlement Agreement also provides for the provision of CBAS for individuals who may qualify in the future for those services. There will be no enrollment cap on the CBAS program. CBAS services will be substantially similar to ADHC services, and will be an outpatient, facility-based services program that delivers skilled nursing care, social services, therapies, personal care, family/caregiver training and support, meals and transportation to eligible Medi-Cal beneficiaries. CBAS will be available at former ADHC centers that are approved as CBAS providers.

Under the Settlement, the elimination date for the ADHC benefit will be February 29, 2012, to ensure a seamless transition for eligible ADHC participants to move to the CBAS program. The Centers for Medicare and Medicaid Services (CMS) has approved this change in elimination date.

1 The Settlement sets forth a process for assessment for eligibility for CBAS; Class Members who are
2 not eligible for CBAS will receive Enhanced Case Management to assist them to transition to other
3 community-based long-term care services. The Settlement includes a process to ensure a smooth
4 transition to these new forms of services, as well as notice and due process procedures for Class
5 Members. Finally, the Settlement provides for reimbursement of Plaintiffs' attorneys' fees and
6 costs, as well as monitoring of the Settlement. All claims in this matter, including the pending
7 appeal of the second preliminary injunction, are resolved by the Settlement.

8 **II. PROCEDURAL HISTORY**

9 Plaintiffs initially filed their complaint for declaratory and injunctive relief against the
10 California Department of Health Care Services and its Director on August 18, 2009. Pursuant to
11 Assembly Bill 5, 4th Ex. Session (Cal. 2009) (Chapter 5, Statutes of 2009) ("ABx4 5"), the
12 Legislature enacted a temporary reduction to ADHC services from a maximum of five to no more
13 than three days per week for all Medi-Cal funded program participants until new medical necessity
14 and eligibility criteria could be developed. Plaintiffs sought and obtained a preliminary injunction,
15 issued on September 10, 2009, which enjoined Defendants from implementing this temporary
16 reduction in services. *Brantley v. Maxwell Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009.)
17 Defendants did not appeal this preliminary injunction. On December 18, 2009, Plaintiffs filed their
18 first amended complaint.

19 ABx4 5 also required Defendants to develop and implement new medical necessity and
20 eligibility requirements for receipt of ADHC services. The District Court preliminarily enjoined
21 implementation of these new eligibility criteria in an Order issued February 24, 2010. *Cota v.*
22 *Maxwell-Jolly*, 688 F. Supp. 2d 980, 994 (N.D. Cal. 2010.) On March 23, 2010, Defendants
23 appealed this preliminary injunction to the Ninth Circuit Court of Appeal. That appeal is still
24 pending. (Appellate Case No. 10-15635).

1 Defendants filed their Answer to Plaintiffs' first amended complaint on March 5, 2010. The
2 Court issued its Order granting class certification on August 10, 2010. On November 8, 2010, the
3 parties filed a Stipulation to stay proceedings pending the appeal in the Ninth Circuit.

4 On March 24, 2011, the Governor signed Assembly Bill 97 (Statutes of 2011) ("AB 97"),
5 which proposed to eliminate ADHC as a Medi-Cal optional benefit. The Parties stipulated to
6 partially lift the stay on April 25, 2011. Plaintiffs filed a contested motion for leave to supplement
7 the First Amended Complaint, which was granted. On May 12, 2011, Defendants submitted a State
8 Plan Amendment (SPA) to the Center for Medicare and Medicaid Services (CMS), and received
9 federal approval on July 1, 2011 to eliminate ADHC as a Medi-Cal optional benefit as of September
10 1, 2011.

11 On June 2, 2011, Plaintiffs filed their Second Amended Complaint. On June 27, 2011,
12 Defendants filed a writ of mandamus in the Ninth Circuit challenging the District Court's granting of
13 leave to amend the First Amended Complaint. The writ was denied on November 15, 2011. (Case
14 No. 11-71801).

15 Plaintiffs filed their third motion for preliminary injunction on June 9, 2011 seeking to
16 preliminarily enjoin implementation of AB 97. The U.S. Department of Justice filed Statements of
17 Interest regarding Plaintiffs' third motion for preliminary injunction on July 12, 2011 and on
18 October 31, 2011. Plaintiffs' third motion for preliminary injunction was initially set for hearing on
19 July 26, 2011. On July 21, 2011, Defendants submitted an amended State Plan Amendment to CMS
20 to postpone the elimination date to December 1, 2011. On July 22, 2011, Defendants requested and
21 were granted a continuance of the third preliminary injunction hearing until November 1, 2011. The
22 Court subsequently continued the hearing to November 8, 2011 and then again to November 17,
23 2011. On November 17, 2011, the Parties notified the Court that they had reached a Settlement, and
24 the motion on the preliminary injunction hearing was subsequently taken off calendar.

25 **III. DESCRIPTION OF SETTLEMENT PROVISIONS**

26 **A. Provisions for Named Plaintiffs (Section VIII of the Settlement)**

1 All Plaintiffs identified as Class Representatives in Plaintiffs' Second Amended Complaint
2 will be deemed eligible for CBAS services at their current ADHC level, at least until a regularly
3 scheduled reassessment as set forth in Section XI.C. of the Agreement. This includes Ronald Bell,
4 Esther Darling, Gilda Garcia, Wendy Helfrich, Jessie Jones, Raif Nasyrov, and Allie Jo Woodard.

5 **B. Amendment to the 1115 Waiver to Provide CBAS Services (Section IX of the**
6 **Settlement)**

7 Defendants agree, with the express written support from Plaintiffs, to act as soon as possible
8 to seek and secure an amendment to the State's Medi-Cal 1115 Waiver to ensure the provision of
9 CBAS services to eligible Class Members. The eligibility criteria for CBAS are set forth in the
10 Settlement Agreement in Section X.

11 **C. Eligibility for the New CBAS Services (Section X of the Settlement)**

12 Eligibility criteria for CBAS services are designed to enable Class Members who are at high
13 risk for institutionalization to receive CBAS services.

14 Individuals will be eligible for CBAS if they meet any of the following five criteria:

- 15 1. They meet Nursing Facility Level of Care A (NF-A) as set forth in 22 CCR section
16 51120(a) and 51334(l) and meet current ADHC medical necessity and eligibility
17 criteria set forth in Cal.Welf. & Inst. Code §§ 14525(a),(c),(d),(e) and
18 14526.1(d)(1),(3),(4),(5), and 14526.1(e); *or*
- 19 2. They are an individual with an organic, acquired, or traumatic brain injury, and/or an
20 individual with chronic mental illness, and they meet both of the following criteria:
 - 21 a. They meet current ADHC medical necessity and eligibility criteria set forth in
22 Cal.Welf. & Inst. Code §§ 14525 and 14526.1(d),(e) and
 - 23 b. They need assistance in two (2) of the following ADLS/IADLS¹: bathing,
24 dressing, self-feeding, toileting, ambulation, transferring, medication

25 ¹ Activities of Daily Living (ADL)/Instrumental Activities of Daily Living (IADL).

1 management, and hygiene; *or* One (1) ADL/IADL listed above and money
2 management, accessing resources, meal preparation, or transportation; *or*

- 3 3. They have moderate to severe Alzheimer’s Disease or other dementia, *and* meet
4 current ADHC medical necessity and eligibility criteria set forth in Cal.Welf. & Inst.
5 Code §§ 14525(a),(c),(d),(e) and 14526.1(d)(1),(3),(4),(5); and 14526.1(e); *or*
6 4. They have mild cognitive impairment including moderate Alzheimer’s Disease or
7 other dementia, *and* meet current ADHC medical necessity and eligibility criteria set
8 forth in Cal.Welf. & Inst. Code §§ 14525 and 14526.1(d), (e); *or*
9 5. They are developmentally disabled, *and* meet current ADHC medical necessity and
10 eligibility criteria set forth in Cal.Welf. & Inst. Code §§ 14525(a),(c),(d),(e) and
11 14526.1(d)(1),(3),(4),(5); and 14526.1(e).

12 **D. Assessment for CBAS Services (Section XI. of the Settlement)**

13 The parties have agreed on a process for assessment of all Class Members, details of which
14 are set forth in Section XI of the Agreement. All Class Members will receive assessments and a
15 determination of their eligibility for CBAS. In order to streamline the process, the Parties have
16 identified a mechanism for identifying those Class Members who are most likely to meet the
17 eligibility criteria and expediting their enrollment in CBAS. The process for all Class Members who
18 currently receive ADHC includes: a) the Defendants will identify current ADHC participants who
19 are “categorically eligible” for CBAS as defined in Section VI.(4) of the Agreement, and provide a
20 list of these participants to ADHC centers by December 2, 2011;² b) the Defendants will identify
21 current ADHC participants who are “presumptively eligible” for CBAS as defined in Section VI.(19)
22 of the Agreement, and provide a list of these participants to ADHC centers on a rolling basis;³ and c)

23
24 ² Categorically eligible for CBAS means current ADHC recipients who are: Regional Center clients; Multi-
25 Purpose Senior Services Program (MSSP) clients; eligible for Specialty Mental Health services; and/or eligible to
26 receive 195 or more hours of In-Home Supportive Services (IHSS) per month.

³ Presumptively eligible means current ADHC recipients who are likely to meet NF-B level of care, or whose
ADHC IPCs indicate a need for assistance or supervision with three ADLs/IADLs and one nursing intervention.

1 the Defendants will assess the remaining ADHC participants with an agreed-upon assessment tool
 2 By January 20, 2012. (To further assist in streamlining this process, ADHC centers will be asked to
 3 complete a screen on all of their participants who are not identified as categorically or presumptively
 4 eligible and provide the results to DHCS). There are also assessment procedures for individuals who
 5 wish to apply for CBAS services during the term of the Settlement.

6 **E. Provision of CBAS Services (Section XII. of the Settlement)**

7 After the initial transition period (estimated to be until July 1, 2012), CBAS will only be
 8 offered through managed care plans, except in geographic areas where Medi-Cal managed care is
 9 not available, and for Class Members who do not qualify for managed care. Class Members who are
 10 found eligible for CBAS services shall be promptly notified of their eligibility and the process for
 11 obtaining CBAS services, and, as applicable, provided with information on enrolling in managed
 12 care.⁴ Eligible Class Members shall transition from ADHC to CBAS as a fee-for-service benefit,
 13 without interruption, and at their current level of service.⁵

14 The Department agrees to take all necessary and timely steps to ensure adequate provider
 15 capacity.

16 **F. Enhanced Case Management Services for Class Members not Enrolled in CBAS
 17 (Section XIII. Of the Settlement)**

18 Each Class Member who does not meet the eligibility criteria for CBAS shall, prior to the
 19 termination of ADHC benefits, receive Enhanced Case Management Services as defined in Section
 20 VI of the Agreement. Enhanced Case Management includes person-centered planning and complex
 21 case management to assist Class Members in getting the services they need to remain in their homes
 22 and communities. Enhanced Case Management will include development of a care plan that
 23 addresses the Class Member's assessed needs, as identified in an ADHC discharge plan, and which

24 _____
 25 ⁴ "Managed Care" refers to California's system for providing Medi-Cal services through contracts between the
 Department of Health Care Services and managed care organizations (MCO) or health plans.

26 ⁵ "Fee-for-Service" refers to a payment model for medical services under Medi-Cal where health care providers
 receive a fee for each service from DHCS.

1 includes involvement of the Class Member and his or her family as appropriate. Class Members
2 shall have the option to receive Enhanced Case Management Services on a Fee-for-Service basis or,
3 for eligible Class Members, through Medi-Cal managed care.

4 **G. Due Process/Appeals (Section XIV. of the Settlement)**

5 Nothing in the Settlement Agreement abrogates class members' due process rights under
6 state or federal law. Section XIV.B.(1-5) of the Agreement provides detailed information about
7 actions by DHCS or a managed health care plan that will trigger a Class Member's right to written
8 notice of adverse actions, an opportunity for a hearing, and an opportunity to file appeals and
9 grievances in response to those actions. In addition, the right to an independent medical review of a
10 managed care internal review decision is set forth in Section XIV.C. of the Agreement. The right to
11 Aid-Paid-Pending in certain circumstances is set forth in Section XIV.D.(1-3) of the Agreement.

12 **H. Provision of Information and Notices During the Term of the Settlement**
13 **(Section XV of the Settlement)**

14 Class Members are entitled to notice, access to information, and assistance in order to secure
15 CBAS services and Enhanced Case Management, as set forth in Section XV.A(1-5) of the
16 Agreement.

17 **I. Data Collection and Reporting: (Section XVI.A of the Settlement)**

18 Defendants agree to provide data to Plaintiffs' counsel for purposes of monitoring the
19 Settlement. The data collection and reporting components are in Section XVI.A. of the Settlement.

20 **J. Quality Assurance: (Section XVI.B of the Settlement)**

21 Defendants agree as part of the Settlement to provide quality assurance monitoring and
22 oversight of services to all Class Members.

23 **K. Form of the Judgment: (Section XVII of the Settlement)**

24 The Parties join in asking the Court to enter a consent judgment approving this Settlement
25 and to retain jurisdiction over this matter for the purpose of assuring compliance with the terms of
26 the Settlement until the termination of this Agreement as set forth in Section XXII of the Agreement.

1 single combined Class definition is appropriate. Therefore, for settlement purposes, the parties have
2 proposed a modified Class definition as follows:

3 “All Medi-Cal beneficiaries in the State of California for whom Adult Day Health Care
4 benefits will be eliminated under the provisions of AB 97 including those who met or will
5 meet the current eligibility and medical necessity criteria for ADHC at any point prior to the
6 Effective Date of this Settlement; or (2) who will meet the eligibility and medical necessity
7 criteria for CBAS at any point prior to Termination of this Agreement.”

8 (Section XVI of the Settlement). The Parties ask the Court to preliminarily approve this
9 comprehensive, revised definition.

10 The Parties also request that the Court preliminarily determine that the Class Representatives
11 and Class Counsel are appropriate for settlement purposes. On August 10, 2010, the Court
12 determined that Harry Cota, Gilda Garcia, Allie Jo Woodard (by and through her guardian ad litem
13 Linda Gaspard-Berry) and Ronald Bell (by and through his guardian ad litem Rozene Dilworth)
14 were appropriate Class representatives and that Plaintiffs’ counsel Disability Rights California,
15 National Health Law Program, National Senior Citizens Law Center, AARP Foundation Litigation,
16 and Howrey LLP would adequately represent the Class. ECF No. 198 at 11. Harry Cota is now
17 deceased and the Second Amended Complaint added additional putative Class Representatives. The
18 parties request that this Court preliminarily determine that Plaintiffs Wendy Helfrich, Jessie Jones,
19 Raif Nasyrov, and Esther Darling, are appropriate Class representatives for the Settlement Class and
20 that Ronald Bell, Gilda Garcia, and Allie Jo Woodard, will continue to be deemed to be appropriate
21 Class Representatives for the Settlement Class. The parties further request that the Court
22 preliminarily determine, for purposes of Settlement only, that the Settlement Class will be deemed to
23 meet the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2), and that Plaintiffs’
24 counsel Disability Rights California, National Health Law Program, National Senior Citizens Law
25 Center, AARP Foundation Litigation, and Morrison & Foerster LLP shall continue as Class counsel
26 for the Settlement Class, pursuant to Federal Rules of Civil Procedure Rules 23(a), (c) and (g).

27 **V. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE UNDER FED.
28 RULE OF CIV. PROC. 23(e)**

1 **A. The Settlement is Fair to Class Members**

2 Federal Rule of Civil Procedure 23(e) requires that any proposed settlement or compromise
3 in a class action suit be subject to court approval and a determination that it is “fair, reasonable, and
4 adequate.” The court may approve the settlement preliminarily, establishing an initial presumption
5 of fairness. *In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation* 55
6 F.3d 768 (3rd Cir.1995); *Hanlon v. Chrysler Corp.*, .150 F.3d 1011, 1026 (9th Cir. 1998). Where a
7 “proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has
8 no obvious deficiencies, does not improperly grant preferential treatment to class representative or
9 segments of the class and falls within the reasonable range of approval, preliminary approval is
10 granted.” *Bourlas v. Davis Law Associates*, 237 F.R.D. 345 (E.D.N.Y.2006). *Id* at 355 (internal
11 citations omitted).

12 The standard by which a proposed settlement is to be evaluated is whether the settlement is
13 fundamentally fair, adequate and reasonable. FRCP 23(e); *Officers for Justice v. Civil Service*
14 *Commission of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). This
15 determination involves a balancing of factors which may include: “the strength of plaintiffs' case; the
16 risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class
17 action status throughout the trial; the amount offered in settlement; the extent of discovery
18 completed, and the stage of the proceedings; the experience and views of counsel; the presence of a
19 governmental participant; and the reaction of the class Members to the proposed settlement. The
20 relative degree of importance to be attached to any particular factor will depend upon and be dictated
21 by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and
22 circumstances presented by each individual case.” *Id.* at 625 (internal citations omitted).

23 **B. The Settlement is the Product of Serious, Informed, Non-collusive Negotiations**
24 **Conducted by Experienced Counsel**

25 This case has been aggressively and effectively litigated by the parties, as set forth in more
26 detail in the Procedural History, Section II, *supra*. In September 2011, the Parties began discussions

1 regarding a potential settlement agreement. In addition to numerous telephone calls and email
 2 exchanges, the Parties met in person more than 11 times in October and November 2011, at length,
 3 often for full-day sessions, and exchanged multiple written proposals. Discussions included direct
 4 participation of with high-level DHCS staff and the Director of DHCS, Toby Douglas; plaintiffs'
 5 experts; providers of ADHC services; and named plaintiffs and/or their Guardians ad Litem.

6 Gershon Decl. ¶ 11.

7 Plaintiffs have been vigorously represented in the litigation and the settlement discussions by
 8 non-profit law firms and private counsel. Co-Counsel for the Plaintiffs include the AARP
 9 Foundation Litigation in Washington D.C., which has significant national experience representing
 10 older adults; the National Health Law Program (NHELP), the pre-eminent national experts in
 11 Medicaid law; the National Senior Citizens Law Center (NSCLC), which has with significant
 12 national experience representing older adults and with specific expertise in managed health care
 13 plans and Medicaid law; and the firms of Howrey LLP and of Morrison & Foerster LLP,
 14 representing the class *pro bono*. Lead Counsel Disability Rights California is a statewide disability
 15 rights non-profit organization with extensive experience in litigation under the Americans with
 16 Disabilities Act. Gershon Declaration ¶ 10.. Collectively, Plaintiffs' counsel have a longstanding
 17 commitment to protecting the rights of people with disabilities.. Defendants were represented by the
 18 Office of the Attorney General and the Chief Counsel of DHCS who participated throughout the
 19 settlement negotiations.

20 There can be no dispute that the negotiations were serious, informed and non-collusive.

21 **C. The Settlement Fairly and Adequately Addresses the Concerns Underlying the**
 22 **Litigation and Provides Similar Benefits to All Similarly Situated Class**
 23 **Members**

24 Determination of adequacy of a settlement includes the degree to which the primary concern
 25 of plaintiffs in filing the suit is addressed by the proposed agreement. *Officers for Justice*, 688 F.2d
 26 at 628. The Settlement fully addresses the concerns that were the basis of Plaintiffs' claims,

1 providing significant relief to the Class, and disposes of all claims filed against Defendants.
2 Plaintiffs brought this suit to challenge changes to the ADHC program, including its elimination as a
3 Medi-Cal benefit, alleging that these changes would place Class Members at risk of unnecessary
4 institutionalization. The requested relief was for the continuation of ADHC services unless and until
5 Class Members were provided adequate Medi-Cal-covered alternatives, without interruption of
6 services, and that due process rights to challenge denial, termination, reduction or suspension of
7 plaintiffs' and Class Members' Medi-Cal covered services be maintained. The Settlement
8 accomplishes these goals. It provides for the creation of a new but similar program, CBAS, which
9 will replace ADHC and offer eligible Class Members an outpatient, facility-based service program
10 that delivers skilled nursing care, social services, therapies, personal care, family/caregiver training
11 and support, meals and transportation. The Settlement provides for monitoring of implementation of
12 the agreement by Plaintiffs' counsel in order to ensure Class Members receive services to which they
13 are entitled under the Agreement.

14 The proposed Settlement is also fair in that this is an action for declaratory and injunctive
15 relief, not for money damages, and the relief afforded to named plaintiffs is not greater than that
16 afforded to Class Members as a whole.

17 **D. The Settlement is Reasonable in Light of the Risks of Further Litigation and Other**
18 **Factors**

19 Significant in evaluating the reasonableness of a proposed settlement are the risks at trial for
20 both sides, the costs of continuing the litigation, and the delay and/or preclusion in achieving the
21 favorable results for Class Members that continued litigation, including appeals, would entail.
22 *Officers for Justice*, 688 F.2d at 625. This Settlement provides immediate, significant, and
23 individually tailored benefits to over 35,000-38,000 Class Members, despite a significant California
24 budget crisis. It ensures that an adult day health care program or other community-based services
25 will be available to those Class Members for at least 30 months and potentially much longer, despite
26 cuts in other California safety net programs due to budget restrictions. The continuation of this

1 litigation and its related appeal would be expensive and would place a significant demand on judicial
2 resources. Furthermore, in light of the fact that the case raises issues of first impression under the
3 Americans with Disabilities Act and the Medicaid Act, and other factors, there is a risk that Class
4 Members would end up with no adult day health care program or enhanced case management
5 benefits at all or with a much smaller set of benefits. Therefore, the Settlement is reasonable.

6 **VI. THE PROPOSED CLASS NOTICE AND PROCEDURE FOR APPROVAL ARE**
7 **APPROPRIATE UNDER FED. RULE OF CIV. PROC. 23(e)(1)**

8 **A. The Proposed Settlement Notice Provides Appropriate Information to Class**
9 **Members in Easily Understandable Language.**

10 Rule 23(e)(1) of the Federal Rules of Civil Procedure requires that prior to final approval of a
11 class settlement, "The court must direct notice in a reasonable manner to all class members who
12 would be bound by the proposal." Generally, notices to class members must be "clearly and
13 concisely state[d] in plain, easily understood language." Rule 23(c)(2)(B).

14 The parties have prepared a draft Settlement Notice for approval by the Court that concisely
15 and accurately summarizes the major provisions of the proposed Settlement. Gershon Decl, Exhibit
16 2. The Settlement Notice is in simple understandable language, and was modeled after the sample
17 notices prepared by the Federal Judicial Center. *See*, <http://www.fjc.gov/>. The Notice generally is
18 designed to be understandable by people with a ninth grade education. The notice provides phone
19 numbers and emails for people to contact counsel to ask questions or obtain additional information,
20 and Class Members can obtain copies of the full Settlement Agreement from the parties or on line
21 on the parties' websites.

22 **B. The Process for Distribution of Class Notice is Reasonably Calculated to Reach**
23 **Class Members.**

24 The parties propose to distribute the Settlement Notice to Class Members in three ways.
25 Within one (1) business day of Court Approval of the form of the notice:
26

1 1) DHCS will send a copy of the Class Settlement Notice to all current Medi-Cal
2 ADHC participants and to individuals who received ADHC under Medi-Cal at any time since
3 July 1, 2011, at his/her last known address;

4 2) DHCS will distribute the notice via fax blast to all ADHC providers; and

5 3) Upon approval of the Settlement Notice by the Court, DHCS and Disability Rights
6 California will post the Settlement Notice on their respective websites.

7 Thus, the proposal is designed to reach individual Class Members and their family members
8 both at their homes and in their ADHC centers, and to provide information to the ADHC centers to
9 help ensure that the Class Members and their family members receive the Settlement Notice.

10 In addition, the Settlement Notice will be translated into the 13 Medi-Cal threshold
11 languages. For individuals who need accommodations due to their disabilities, the Notice will be
12 available in alternative formats, such as electronic versions, tapes and Braille, as feasible.

13 **C. The Settlement Approval Process Provides Adequate Opportunity for Class**
14 **Members to Raise Objections or Comment on the Settlement.**

15 A process for raising objections is set forth in Paragraph 16 of the Class Notice, which also
16 informs Class Members about the methods for communicating any objections. The parties may file
17 written objections with the Court and may appear at the proposed Fairness Hearing (after mailing
18 written notices of intent to appear.) Class Members have a reasonable time to respond to the
19 proposed notice, pursuant to the following proposed schedule:

- 20 **December 13, 2011:** Hearing re Preliminary Approval of Settlement and Class
21 Certification. (1:00 p.m.)
- 22 **December 14, 2011:** Notice to be mailed to Class Members
- 23 **January 10, 2012:** Last day for Class Members to mail objections to settlement
24 agreement.
- 25 **January 17, 2012:** Parties to file Summary of Objections and Responses with the
26 Court.
- 27 **January 24, 2012:** Fairness Hearing (1:00 p.m.)

