

1 THOMAS E. PEREZ, Assistant Attorney General  
 EVE HILL, Senior Counselor to the Assistant Attorney General  
 2 ALISON BARKOFF, Special Counsel for *Olmstead* Enforcement  
 ALLISON J. NICHOL, Chief  
 3 RENEE M. WOHLLENHAUS, Deputy Chief  
 REGAN RUSH, Trial Attorney  
 4 TRAVIS W. ENGLAND, Trial Attorney, NY SBN 4805693  
 U.S. Department of Justice  
 5 950 Pennsylvania Avenue, N.W. - NYA  
 Washington, D.C. 20530  
 6 Telephone: (202) 307-0663  
 Travis.England@usdoj.gov

7 MELINDA HAAG  
 United States Attorney  
 8 ILA C. DEISS, NY SBN 3052909  
 Assistant United States Attorney  
 9 450 Golden Gate Avenue, Box 36055  
 10 San Francisco, California 94102  
 Telephone: (415) 436-7124  
 11 FAX: (415) 436-7169  
 12 Ila.Deiss@usdoj.gov

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  
 25 HEALTH CARE SERVICES,

26  
27 Defendants.

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. Sandra B. Armstrong

**Address:** 1301 Clay Street  
Oakland, CA 94612

**Courtroom:** 1, 4<sup>th</sup> Floor

1 The United States respectfully submits this Supplemental Statement of Interest, pursuant  
 2 to 28 U.S.C. § 517,<sup>1</sup> in support of Plaintiffs' Motion for Preliminary Injunction.<sup>2</sup> 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 <sup>1</sup> 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  
 23 pending in a court of the United States."

24 <sup>2</sup>As noted in the United States' initial Statement of Interest in this matter, this litigation  
 25 implicates the proper interpretation and application of title II of the Americans with Disabilities  
 26 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); 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.<sup>3</sup>

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.<sup>4</sup> For individuals enrolling into managed care,  
16

---

17 <sup>3</sup> 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).

<sup>4</sup> 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).<sup>5</sup> 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 <sup>5</sup> 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.<sup>6</sup> With the Court’s permission, counsel for the United States will be  
 11 present at any upcoming hearings.

12  
 13 ///

14 ///

15  
 16  
 17  
 18  
 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 <sup>6</sup> 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,

3 MELINDA HAAG  
4 United States Attorney  
5 Northern District of California

THOMAS E. PEREZ  
Assistant Attorney General

EVE HILL  
Senior Counselor to the Assistant Attorney General

7 ALISON BARKOFF  
8 Special Counsel for Olmstead Enforcement

9 Civil Rights Division

10  
11 /s/ Ila Deiss  
12 ILA C. DEISS, NY SBN 3052909  
13 450 Golden Gate Avenue, Box 36055  
14 San Francisco, California 94102  
15 Telephone: (415) 436-7124  
16 Facsimile: (415) 436-7169  
17 Ila.deiss@usdoj.gov

/s/ Travis England  
ALLISON J. NICHOL,  
Chief  
KATHLEEN R. WOLFE,  
Acting Special Legal Counsel  
RENEE M. WOHLNHAUS  
Deputy Chief  
REGAN RUSH  
Trial Attorney  
TRAVIS W. ENGLAND, NY SBN 4805693  
Trial Attorney

18 Disability Rights Section  
19 Civil Rights Division  
20 U.S. Department of Justice  
21 950 Pennsylvania Avenue, N.W. - NYA  
22 Washington, D.C. 20530  
23 Telephone: (202) 307-8987  
24 Facsimile: (202) 307-1197  
25 travis.england@usdoj.gov