

1 Elissa Gershon, State Bar No. 169741
elissa.gershon@disabilityrightsca.org
2 Elizabeth Zirker, State Bar No. 233487
elizabeth.zirker@disabilityrightsca.org
3 Kim Swain, State Bar No. 100340
kim.swain@disabilityrightsca.org
4 Daniel Brzovic, State Bar No. 89493
dan.brzovic@disabilityrightsca.org
5 Dara Schur, State Bar No. 98638
dara.schur@disabilityrightsca.org
6 Jay B. Koslofsky, State Bar No. 97024
jay.koslofsky@disabilityrightsca.org
7 DISABILITY RIGHTS CALIFORNIA
1330 Broadway, Suite 500
8 Oakland, CA 94612
Telephone: (510) 267-1200
9 Facsimile: (510) 267-1201

10 Attorneys for Plaintiffs

11 [Complete list of counsel on following pages]

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

14 LILLIE BRANTLEY, by her guardian ad)
litem Chauncey McLorin; GILDA GARCIA;)
15 ALLIE JO WOODARD, by her guardian ad)
litem Linda Gaspard-Berry; HARRY COTA;)
16 SUMI KONRAI by her guardian ad litem)
Casey Konrai; RONALD BELL by his)
17 guardian ad litem Rozene Dilworth,)
individually and on behalf of all others)
18 similarly situated,)

19 Plaintiffs,)

20 vs.)

21 DAVID MAXWELL-JOLLY, Director of the)
Department of Health Care Services, State of)
22 California, DEPARTMENT OF HEALTH)
CARE SERVICES,)

23 Defendants.
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25
26
27
28

Case No.: C:09-03798 SBA

CLASS ACTION

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

DATE: Tuesday, February 23, 2010

Time: 1:00 p.m.

**Place: Courtroom 1, Fourth Floor
U.S. District Court
1301 Clay Street
Oakland, CA 94612**

Honorable Sandra B. Armstrong

1 Anna Rich, State Bar No. 230195
arich@nslc.org
2 Kevin Prindiville, State Bar No. 235835
kprindiville@nslc.org
3 NATIONAL SENIOR CITIZENS LAW CENTER
1330 Broadway, Suite 525
4 Oakland, CA 94612
Telephone: (510) 663-1055
5 Facsimile: (510) 663-1051

6 Eric Carlson, State Bar No. 141538
ecarlson@nslc.org
7 NATIONAL SENIOR CITIZENS LAW CENTER
3435 Wilshire Boulevard, Ste 2860
8 Los Angeles, CA 90010-1938
Telephone: 213-674-2813
9 Facsimile: 213-639-0934

10 Barbara Jones, State Bar No. 88448
bjones@aarp.org
11 AARP FOUNDATION LITIGATION
200 So. Los Robles, Suite 400
12 Pasadena, CA 91101
Telephone: (626) 585-2628
13 Facsimile: (626) 583-8538

14 Kenneth W. Zeller, *Pro Hac Vice*
kzeller@aarp.org
15 Kelly Bagby, *Pro Hac Vice* pending
kbagby@aarp.org
16 AARP FOUNDATION LITIGATION
601 E Street NW
17 Washington D.C. 20049
Telephone: (202) 434-2060
18 Facsimile: (202) 434-6424

19 Sarah Somers, State Bar No. 170118
somers@healthlaw.org
20 Martha Jane Perkins, State Bar No. 104784
perkins@healthlaw.org
21 NATIONAL HEALTH LAW PROGRAM
211 N. Columbia Street
22 Chapel Hill, NC 27514
Telephone: (919) 968 - 6308
23 Facsimile: (919) 968-8855

24 Henry Su, State Bar No. 211202
suh@howrey.com
25 Lindsay White, State Bar No. 261610
whitel@howrey.com
26 HOWREY LLP
1950 University Ave., 4th Floor
27 East Palo Alto, CA 94303
Telephone: (650) 798-3500
28 Facsimile: (650) 798-3600

1 Farah Anthony, State Bar No. 252029
2 anthonyf@howrey.com
3 HOWREY LLP
4 525 Market Street, Ste 3600
5 San Francisco, CA 94105
6 Telephone: (415) 848-4900
7 Facsimile: (415) 848-4999
8
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1 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

2 TO DIRECTOR DAVID MAXWELL-JOLLY, THE DEPARTMENT OF HEALTH CARE
3 SERVICES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on February
4 23, 2010, or as soon thereafter as counsel may be heard before Judge Sandra Brown Armstrong, in
5 Courtroom 1, United States District Court, Northern District of California, located at 1301 Clay
6 Street, Fourth Floor, Oakland, CA, Plaintiffs individually and on behalf of “Termination of Benefits”
7 Subclass Members, will move the Court pursuant to Rule 65(a) of the FRCP and Rule 65-2 and 7-2
8 of the Local Civil Rules for an order issuing a Preliminary Injunction:

9 (a) Enjoining and prohibiting Defendants Director David Maxwell-Jolly and the
10 Department of Health Care Services, and their successors, agents, officers, servants, employees,
11 attorneys and representatives and all persons acting in concert or participating with Defendants, from
12 implementing or enforcing ABx4 5, or reducing, denying, terminating or suspending Adult Day
13 Health Care (“ADHC”) services to Plaintiffs and putative Class Members based on new eligibility
14 and medical necessity criteria contained in California Welfare & Institutions Code §§ 14522.4;
15 14525.1, and 14526.2, in violation of the Americans with Disabilities Act, Section 504 of the
16 Rehabilitation Act of 1973, federal Medicaid law, and the U.S. Constitution, until this Court rules on
17 a permanent injunction;

18 (b) Compelling Defendants, their officers, agents, employees, attorneys, and all persons
19 who are in active concert or participation with them, to take all actions necessary within the scope of
20 their authority to implement the above injunctions; and ordering Defendants to maintain this
21 Preliminary Injunction until such time as this Court rules on a permanent injunction in this case.

22 Plaintiffs further request that the Court waive the requirement for the posting of a bond as
23 security for the entry of preliminary relief, on the grounds of Plaintiffs’ indigency.

24 This Motion for a Preliminary Injunction is based upon this Notice of Motion and Motion, a
25 copy of the First Amended Complaint, the Memorandum of Points and Authorities, the Proposed
26 Preliminary Injunction Order, and declarations and exhibits filed in this matter and upon such oral
27 and written argument as may be presented at the hearing on the Motion.

28

1 The Motion will be made on the ground that Plaintiffs and Class Members will suffer
2 irreparable harm unless the activities described above are enjoined.

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 I. SUMMARY OF ARGUMENT

5 On or about March 1, 2010, unless this Court issues a Preliminary Injunction, illegal and
6 devastating cuts to the Adult Day Health Care (ADHC) benefit under the State Medi-Cal program
7 will take place, causing irreparable harm to thousands of elderly and disabled individuals.

8 On that date, A.B. 5, 4th Ex. Sess. (Cal. 2009) (Chapter 5, Statutes of 2009) (“ABx4 5”) is
9 targeted to go into effect, according to Defendants. The ADHC program provides cost-effective
10 community-based services to thousands of Californians, enabling them to avoid unnecessary
11 hospitalization and institutionalization, maintain community and family ties, and improve health
12 outcomes. ABx4 5 cuts ADHC benefits solely for budget reasons, without reasonable assessment of
13 participants’ needs or of the overall cost-effectiveness of ADHC services.

14 This Court has already preliminarily enjoined an across-the-board cutback in ADHC services
15 from a maximum of five to no more than three days per week. *Brantley, et al. v. Maxwell-Jolly*,
16 2009 WL 2941519 (N.D. Cal 2009). Now, Defendants intend to terminate all ADHC services for
17 approximately 15,000 vulnerable Californians and deny ADHC services to untold thousands of
18 future applicants, based on new arbitrary and restrictive eligibility requirements. Defendants have
19 failed to take any steps to ensure that affected ADHC participants will receive alternative services
20 they need to avoid unnecessary institutionalization and to which they are entitled, without
21 interruption, under the Medi-Cal program.

22 Without these vital ADHC services, Plaintiffs¹ will experience immediate and irreparable
23 harm. Plaintiffs and putative Class Members will be at risk of deterioration in health and
24 functioning, and will be forced into hospitals and nursing facilities due to Defendants’ violation of

25 _____
26 ¹ Plaintiffs have simultaneously moved for Class Certification, including certification of a subclass
27 defined as “all present and future Medi-Cal beneficiaries who have been authorized to receive any
28 Adult Day Health Care services, and whose ADHC services will be reduced, suspended, or
terminated, and otherwise qualified future ADHC applicants who will be denied ADHC services,
when the eligibility and medical necessity requirements of ABx4 5 become operative.” Reference
herein to Plaintiffs and putative Class Members means the “Termination of Benefits” Subclass as
defined and described in Plaintiffs’ Class Certification Motion.

1 the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12101-12213 (West 2008), and
2 Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. §§ 794-794a (West 2007).

3 Defendants have not issued, and, according to their own representation, will not issue,
4 statutorily required written notice to Plaintiffs and putative Class Members, informing them that
5 their benefits will be terminated and of their right to a pre-termination hearing, in violation of federal
6 Medicaid law and the Fourteenth Amendment of the U.S. Constitution.

7 The new eligibility restrictions violate the comparability and reasonable standards provisions
8 of federal Medicaid law, and the ADA, in that they will terminate services to people whose needs are
9 as great as or greater than others who will not be terminated, and therefore should be enjoined.

10 Plaintiffs further request that a preliminary injunction be issued prohibiting Defendants from
11 implementing the new, restrictive eligibility requirements for ADHC in violation of the ADA,
12 Section 504, federal Medicaid law and the United States Constitution.

13 **II. STATEMENT OF FACTS**

14 **A. Purpose of and Approval Process for ADHC**

15 This Court has described the purpose and background of ADHC in its Order Granting
16 Plaintiffs’ Motion for Preliminary Injunction, dated September 10, 2009. *Brantley*, 2009 WL
17 2941519, at *1. In short, ADHC is a Medi-Cal funded community-based day program for low-
18 income seniors and disabled adults under age 65. *Id.* One of the express purposes of the program is
19 to “provide a viable alternative to institutionalization for those elderly persons and adults with
20 disabilities who are capable of living at home with the aid of appropriate health care or rehabilitative
21 and social services.” Cal. Health & Safety Code § 1570.2(b) (West 2009). ADHC centers must
22 provide a full range of medical, nursing, therapeutic, and rehabilitative services for a daily all-
23 inclusive Medi-Cal reimbursement rate of \$76.22. Decl. of Lydia Missaelides (“Missaelides Decl.”)
24 ¶ 23; Decl. of Gary Steinke (“Steinke Decl.”) ¶ 17; Decl. of Cordula Dick-Muehlke (“Dick-Muehlke
25 Decl.”) ¶ 12). ADHC is an especially effective program in that it serves to enhance and supplement
26 primary care. Steinke Decl. ¶ 13; Decl. of Dawn Myers Purkey (“Myers Purkey Decl.”) ¶ 42.

27 To receive Medi-Cal approval for funding, individuals must be certified as having a need for
28 ADHC services on each day of attendance in order to “avoid emergency department visits,

1 hospitalizations, or other institutionalization” and “a high potential” for deterioration without ADHC
 2 services. Cal. Welf. & Inst. Code §§ 14526.1(d)(4) and (5). *See also, Brantley*, 2009 WL 2941519,
 3 at *2, 7. “High potential” is defined by Defendants as “having at least a 50 percent probability of
 4 occurring within [six months] . . . (more likely to occur than not to occur).” Missaelides Decl.,
 5 Exhibit J, Draft Provider Manual, BR000538. These certifications are documented in each
 6 participant’s Individual Plan of Care (“IPC”), as illustrated below:

7 **(16) MEDICAL NECESSITY CRITERION #4**

Criterion Met		A high potential exists for the deterioration of the participant’s medical, cognitive, or mental health condition or conditions in a manner likely to result in emergency department visits, hospitalization, or other institutionalization if ADHC services are not provided.
YES	NO	
●	O	

10 **B. New, Restrictive Eligibility Criteria**

11 Pursuant to ABx4 5, new, restrictive eligibility requirements limiting who will receive
 12 ADHC services will go into effect on or about March 1, 2010. The new eligibility restrictions will
 13 result in termination of all ADHC services for an estimated 15,000 individuals who have been
 14 determined to need and currently receive them, and denial of eligibility for otherwise qualified future
 15 applicants to ADHC. Missaelides Decl. ¶ 47.

16 Currently, all participants must show that they require assistance or supervision with at least
 17 two of 15 qualifying daily activities which are used as a measure of the person’s overall functioning
 18 abilities. Cal. Welf. & Inst. Code §§ 14525 (b); 14526.2 (d)(2)(A); Missaelides Decl. ¶ 48. No
 19 distinctions are made based on an individual’s cognitive status or the level or type of help needed.
 20 *Id.* Missaelides Decl. ¶ 49. ABx4 5 shrinks the list of qualifying activities to only eight areas of
 21 need: bathing, dressing, self-feeding, toileting, ambulation, transferring, hygiene, and medication
 22 management. Cal. Welf. & Inst. Code §§ 14525.1 (a)(2) & 14526.2(d)(2)(A). The seven activities
 23 which no longer qualify as qualifying areas of need are: transportation, money management,
 24 shopping, meal preparation, laundry, accessing resources, and housework. *Id.* ABx4 5 still requires
 25 individuals demonstrate deficits in two areas of need. *Id.*

26 Individuals will need to show that they require assistance with two or more of the activities
 27 on the new, abbreviated list *while at the ADHC center*, which effectively ends consideration of
 28 bathing, dressing, and hygiene, as these are activities typically not performed at ADHC centers.

1 Missaelides Decl. ¶ 54; Decl. of Tracy McCloud (“McCloud Decl.”) ¶¶ 20-21; Decl. of Diane
 2 Puckett (“Puckett Decl.”) ¶¶ 19-22; Myers Purkey Decl. ¶¶ 22-23; Decl. of Debbie Toth (“Toth
 3 Decl.”) ¶¶ 24-25; Decl. of Nina M. Nolcox (“Nolcox Decl.”) ¶¶ 25-27; Decl. of Celine Regalia.
 4 ¶¶ 19-20; Decl. of Anne French (“French Decl.”) ¶¶ 15-16.

5 The new eligibility rules will apply different need standards depending on whether an
 6 individual has certain conditions, including: (1) chronic mental illness; (2) moderate to severe
 7 Alzheimer’s disease; or (3) other “cognitive impairments.” Cal. Welf. & Inst. Code §§ 14525.1 (b),
 8 (c) & 14522.4 (a)(11). Missaelides Decl. ¶ 51. Individuals who fall into any of these categories will
 9 be required to show a need for “assistance” with two or more of the eight specified activities. Cal.
 10 Welf. & Inst. Code §§14525.1(a)(3)(B), 14526.2(d)(2)(B), 14522.4(a)(9). Missaelides Decl. ¶ 51.

11 Individuals not falling into any of the three categories above must meet a heightened level of
 12 need: that they require “substantial human assistance” (defined as “hands-on” assistance) to perform
 13 two or more of the abbreviated list of specified activities. Cal. Welf. & Inst. Code
 14 §§ 14525.1(a)(3)(A); 14526.2(d)(2)(B); 14522.4(a)(10); McCloud Decl. ¶ 19; Missaelides Decl.
 15 ¶ 50. In addition, they must meet a new level of institutional care equivalent — Nursing Facility
 16 Level A. Cal. Welf. & Inst. Code §§ 14525.1(b). Missaelides Decl. ¶ 50. Current participants will
 17 be terminated from ADHC without any reassessment of already established individual risk factors,
 18 which include medication mismanagement, self-neglect, fall risk, isolation, and frailty. Missaelides
 19 Decl. ¶ 26.

20 **C. New, Restrictive Eligibility Criteria Will Not Measure Actual Need for ADHC**

21 These new, restrictive eligibility criteria are not a reasonable or rational means of deciding
 22 who should receive ADHC services. First, the new, budget-driven eligibility requirements ignore a
 23 significant portion of important individualized information previously used to determine eligibility
 24 and medical necessity for ADHC, including an individualized determination of risk of medical,
 25 cognitive, or mental health deterioration and risk of institutionalization without ADHC. This Court
 26 has already found that Plaintiffs’ IPCs were prepared following a “comprehensive assessment by a
 27 team of health care professionals — and approved by Medi-Cal,” and that these IPCs were
 28 “compelling evidence of Plaintiffs’ need for ADHC services.” *Brantley*, 2009 WL 2941519, at *10.

1 Yet the new criteria do not provide for an assessment of overall functional limitations, other than the
2 very limited list of activities outlined in Section II.B. above, nor do they consider already established
3 risk factors. McCloud Decl. ¶¶ 54, 82; Puckett Decl. ¶¶ 24-26; Nolcox Decl. ¶¶ 12-14; Toth Decl.
4 ¶¶ 38, 47, 49; Myers-Purkey Decl. ¶ 38; French Decl. ¶¶ 25, 38-39; Decl. of William I. Gardner
5 (“Gardner Decl.”) ¶ 14. The new criteria do not allow for a determination of who, among those to be
6 terminated, is most at risk of institutionalization without ADHC services or a suitable alternative, as
7 there is no exception process. Cal. Welf. & Inst. Code § 14525.1; Missaelides Decl. ¶ 47.

8 In addition to failing to consider important information needed to identify those most in need
9 of ADHC services, the new, restrictive eligibility criteria will have an arbitrary and disproportionate
10 impact on certain types of individuals who have a high need for ADHC services, but whose abilities
11 and needs do not happen to match the new criteria. One group of individuals whose needs will not
12 be adequately or accurately measured by the new criteria is individuals with mental or cognitive
13 impairments who are physically capable but highly dependent on ADHC services to maintain health,
14 or who critically need only one service – often medication management – of the new, abbreviated
15 list of qualifying areas of need. In shrinking the list of qualifying areas of need, Defendants have
16 eliminated consideration of activities that require the use of judgment and cognition, which will
17 disproportionately harm “[i]ndividuals with mental or cognitive disabilities [who] are more likely to
18 be unable to manage their medication, to exercise poor judgment, are prone to social isolation,
19 debilitating anxiety, feelings of hopelessness, and depression, and are therefore just as ‘at risk’,
20 despite being more physically capable. These additional deficits and risk factors are not given
21 adequate consideration under the new eligibility criteria.” Gardner Decl. ¶¶ 14-15, 20-24; *see also*
22 Steinke Decl. ¶¶ 31-35; Decl. of Ron Smith (“Smith Decl.”) ¶ 6; Nolcox Decl. ¶¶ 14, 15; Regalia
23 Decl. ¶ 33; Dick-Muehlke Decl. ¶¶ 16-18; Myers Purkey Decl. ¶ 30.

24 The new eligibility criteria also will not adequately measure the needs of individuals who are
25 cognitively intact but who have very high medical needs, such as unstable diabetes or other unstable
26 medical conditions, and medically frail elders who do not meet the test of requiring hands-on
27 assistance in performing daily care activities because they are ambulatory and can move their limbs,
28 but are dependent on the medical monitoring, nursing treatments, medication monitoring, therapies,

1 structured environment and social support to maintain stable health. Steinke Decl. ¶¶ 22-26; Decl.
2 of Courtney Chinn (“Chinn Decl.”) ¶¶ 11-16; French Decl. ¶¶ 29, 39.

3 Finally, the new “Nursing Facility Level A” level of care requirement threatens to terminate
4 services to all individuals who reside in “board and care” facilities, and/or result in overbroad and
5 inconsistent application due to a lack of definitions, guidance, clarification, or training by
6 Defendants. Missaelides Decl. ¶¶ 56-59; Steinke Decl. ¶¶ 27-30; Dick-Muehlke Decl. ¶¶ 19-21;
7 Nolcox Decl. ¶¶ 23-24; Myers Purkey Decl. ¶¶ 28-29; Toth Decl. ¶ 30. Termination of ADHC
8 based on whether a person happens to live in a “board and care” facility is an arbitrary and irrational
9 result that does not correlate to need for ADHC services. Steinke Decl. ¶¶ 29-30.

10 As a result of these inadequacies, the new eligibility criteria will result in arbitrary and
11 unreasonable outcomes. A person for whom ADHC services prevent catastrophic health events—
12 like Plaintiff Ronald Bell, described below—has as great or greater “need” for ADHC as a similarly
13 situated person who happens to need physical assistance to move from one room to another.
14 Gardner Decl. ¶¶ 16, 18. Plaintiff Gilda Garcia was originally among the group planned to be
15 terminated from ADHC. Yet just recently, she was diagnosed with depression, changing her
16 classification, and allowing her to remain eligible for ADHC even though her treatment needs have
17 not changed. Steinke Decl. ¶ 26; McCloud Decl. ¶¶ 69-71, 80.

18 **D. Implementation of New, Restrictive Eligibility Criteria**

19 Prior to implementation of the new, restrictive eligibility criteria, Defendant Maxwell-Jolly is
20 required by law to conduct a meet and confer with ADHC providers and others to determine the
21 methods and procedures for implementation of the new criteria, and issue a declaration certifying
22 that the new requirements are ready to be implemented. Cal. Welf. & Inst. Code §§ 14525.1(f), (g).
23 This declaration has not been issued, but Defendants have indicated that the new criteria are
24 scheduled to go into effect on March 1, 2010. Defendants held two 2-hour meetings, on November
25 17, 2009 and December 1, 2009, during which they reviewed the new eligibility requirements and
26 new, draft participant plan of care with attendees.

27 Despite repeated requests by providers, Defendants have failed to provide clarification as to
28 essential definitional and procedural aspects of implementation of the new eligibility requirements,

1 and have declined to offer training to ADHC providers who will be required to conduct assessments
2 and make eligibility determinations. McCloud Decl. ¶¶ 27-30; Missaelides Decl. ¶¶ 78-82, 91, 94;
3 French Decl. ¶ 31; Toth Decl. ¶ 54; Puckett Decl. ¶ 27. Defendants have not responded adequately
4 to written questions submitted by the California Association of Adult Day Services. Missaelides
5 Decl. ¶ 78. Thus, there is a virtual certainty of overly broad, improper and inconsistent application
6 of the new requirements. *Id.* at ¶ 81; Myers Purkey Decl. ¶ 29. Defendants have failed to arrange
7 for or provide information about securing alternative community services, make arrangements for
8 affected individuals to avoid institutionalization, or develop procedures for requesting reasonable
9 accommodations. Missaelides Decl. ¶ 94; McCloud Decl. ¶¶ 47-49; Puckett Decl. ¶ 28.

10 Defendants have informed providers that it is their responsibility to give notice of
11 termination to affected participants, but have not offered or provided any information about pre-
12 termination hearings and continuation of benefits pending a decision challenging a termination.
13 Missaelides Decl. ¶¶ 70-72, 76-77; McCloud Decl. ¶¶ 30, 43; Myers Purkey Decl. ¶¶ 44-45; French
14 Decl. ¶¶ 32-33; Toth Decl. ¶¶ 55-61, 64; Nolcox Decl. ¶ 26.

15 **E. Plaintiffs and Putative Class Members**

16 1. Ronald Bell

17 Ronald Bell is a 45 year-old-man with diabetes, organic brain syndrome, a seizure disorder,
18 arthritis, hypertension, and hyperlipidemia. Nolcox Decl. ¶ 30. He is Medi-Cal eligible and has
19 been approved by Medi-Cal to receive three days a week of ADHC services through the Graceful
20 Senescence ADHC Program in Los Angeles, California. *Id.*; Decl. of Rozene Dilworth (“Dilworth
21 Decl.”) ¶ 3.

22 Mr. Bell lives with his grandmother, Rozene Dilworth, and Mr. Bell and Ms. Dilworth rely
23 on the ADHC services Mr. Bell receives to keep him safely at home with her. Dilworth Decl. ¶¶ 21-
24 23. Mr. Bell’s most recent Medi-Cal approved IPC authorizes him to receive the following ADHC
25 services three days per week: professional nursing services; personal care; social services;
26 therapeutic activities; physical therapy; occupational therapy; and registered dietician services. He
27 also receives mental health services, on a one-on-one basis, twice a month and as needed to assist
28 him with coping skills and decrease his depression and social isolation. Nolcox Decl. ¶ 34.

1 Due to his cognitive impairments, Mr. Bell needs assistance with accessing resources,
2 housework, laundry, meal preparation, money management, and shopping, and is totally dependent
3 on others for transportation and medication management. Because the only qualifying factor he
4 meets is assistance with medication management, he will be terminated from ADHC when the new
5 criteria go into effect. Nolcox Decl. ¶ 35. In the professional opinion of the Graceful Senescence
6 Program director, who is also a nurse, “[w]ithout ADHC services, Mr. Bell likely would suffer a
7 catastrophic medical incident ... ADHC services have probably saved Mr. Bell’s life, and have
8 helped him avoid nursing home care.” *Id.*; *see also* Gardner Decl. ¶ 16.

9 2. Harry Cota

10 Plaintiff Harry Cota is a 60 year-old man with a left-sided hemiparesis, hypertension, insulin
11 dependent diabetes, arthritis, a peptic ulcer, a seizure disorder, muscle spasms, neuropathy,
12 myelopathy, and obstructive sleep apnea. French Decl. ¶¶ 22, 24; Decl. of Michele Burke (“Burke
13 Decl.”) ¶ 6; Chinn Decl. ¶ 9. He is Medi-Cal eligible, and currently receives five days a week of
14 ADHC at Lifelong Medical Care ADHC in Oakland, California. French Decl. ¶ 22. Mr. Cota lives
15 alone and receives 134 hours of IHSS per month. French Decl. ¶¶ 22, 26.

16 Mr. Cota depends upon the services of ADHC to remain living as independently as possible
17 in the community. According to Michele Burke, the Nursing Supervisor for Lifelong, and Mr.
18 Cota’s treating nurse, “Mr. Cota has suffered from multiple disabling conditions for decades.. He
19 tolerates excruciating pain, disabling spasticity and weakness and blood sugar abnormalities. He has
20 fought fiercely to maintain his independence — for instance, he gets up at 4:00 AM every morning
21 in order to take his high dose of diuretics and ensure that he has enough time to use the bathroom
22 before he leaves his home so that he will not have incontinence at or on the way to the ADHC.”
23 Burke Decl. ¶ 12.

24 In the professional opinion of his treating physician, Dr. Courtney Chinn, “Mr. Cota has
25 made the gains he has in terms of his mobility as a direct result of the physical therapies he receives
26 on a daily basis at the ADHC program. In addition, his complex medical conditions, which are
27 frequently unstable because of the combination of effects from his diabetes, medication side effects,
28 left-sided hemiparesis, muscle spasms, and neuropathy, make the daily availability of skilled nursing

1 a critical part of his ability to remain safely in the community.” Chinn Decl. ¶¶ 12-13.

2 Mr. Cota’s most recent Medi-Cal approved IPC authorizes him to receive the following
3 ADHC services on a daily, weekly, and monthly basis: professional nursing; personal care services;
4 social services; therapeutic activities including social groups, physical therapy, occupational therapy,
5 and pain treatments; and registered dietician counseling services as needed. French Decl. ¶ 24.

6 Mr. Cota needs supervision with ambulation; assistance with accessing resources,
7 housework, meal preparation, shopping, and transportation; and is dependent on others for laundry.
8 He primarily uses a wheelchair for ambulation, though sometimes uses a walker. Because he does
9 not require “substantial human assistance” with any of the qualifying factors, he will be terminated
10 from ADHC. French Decl. ¶¶ 23, 27. “Without [ADHC, Mr. Cota is] at significant risk for
11 deterioration of function, loss of independence, and injury related to falls. . . . I believe he would
12 face hospitalizations and nursing facility placements without the five days a week of ADHC services
13 he currently receives.” Burke Decl. ¶¶ 16-17; *see also* Steinke Decl. ¶¶ 22-25; Chinn Decl. ¶¶ 11-16.

14 3. Sumi Konrai

15 Sumi Konrai is an 87 year-old woman with dementia, hypertension, and a history of
16 depression. Toth Decl. ¶ 33; Decl. of Casey Konrai (“Konrai Decl.”) ¶ 3. Mrs. Konrai has been
17 attending the Mt. Diablo Center for ADHC in Pleasant Hill, California, for four years. She is Medi-
18 Cal eligible and approved by Medi-Cal to receive ADHC services five days per week. Mrs. Konrai
19 and her family rely on her receiving ADHC services five days a week in order for her to be able to
20 remain in her own apartment and avoid institutionalization. Konrai Decl. ¶ 16.

21 Pursuant to her most current IPC, Mrs. Konrai receives, on a daily, weekly, or monthly basis:
22 professional nursing services; personal care services; assistance with consuming appropriate and
23 adequate nutrition; social services case management; therapeutic activities including cognitive
24 stimulation activities, physical therapy, and occupational therapy; and registered dietician services to
25 address her poor intake of food and history of failure to thrive. Toth Decl. ¶ 37.

26 As set forth in her most current IPC, approved by the Mt. Diablo Center multi-disciplinary
27 team, Mrs. Konrai needs supervision with bathing, dressing, and hygiene, and assistance with
28 housework. She is dependent on others for medication and money management accessing resources,

1 laundry, meal preparation, shopping, and transportation. She can feed herself, but she needs to have
 2 her food portions prepared specially. *Id.* ¶¶ 35-36. Because the only qualifying factor she meets is
 3 assistance with medication management, she will be terminated from ADHC when the new criteria
 4 go into effect. *Id.* ¶ 39. Mrs. Konrai’s daughter-in-law says, “My family and I are so grateful that
 5 she has been able to go to this program. We feel that it has saved her life. She thanks me every day
 6 when I drop her off at the center.” Konrai Decl. ¶ 10. Mrs. Konrai’s family will be forced to place
 7 her in a nursing facility if she loses ADHC. Toth Decl. ¶ 52; Konrai Decl. ¶¶ 14-16; *see also* Steinke
 8 Decl. ¶ 32 (“[S]he is at great risk of institutional placement without ADHC, because of her lack of
 9 judgment, self-neglect, and dementia.”).

10 4. Harm to Other Affected Class Members

11 Approximately 15,000 putative Class Members who will lose services face serious harm
 12 resulting from the loss of ADHC services, including emergency room visits, hospitalizations,
 13 institutionalizations, and even death. Toth Decl. ¶ 68; McCloud Decl. ¶¶ 24-25, 82-83; Puckett
 14 Decl. ¶ 35; French Decl. ¶ 39; Myers Purkey Decl. ¶¶ 49-50; Regalia Decl. ¶ 32; Nolcox Decl. ¶¶
 15 36-39; Decl. of Catherine Davis (“Davis Decl.”) ¶¶ 30, 32; Burke Decl. ¶¶ 18-32, 35.

16 For example, putative Class Members Fred Palmer and Ron Smith both have psychiatric
 17 disabilities and only require assistance with medication management at the ADHC Center. Regalia
 18 Decl. ¶¶ 25-28; McCloud Decl. ¶ 59; Smith Decl. ¶ 6. Thus, they will be terminated from ADHC,
 19 despite their risk factors. Without ADHC, they are at high risk for decompensation, hospitalization,
 20 and institutional placement. Gardner Decl. ¶¶ 15, 17; Regalia Decl. ¶¶ 29-31; McCloud Decl. ¶ 60;
 21 Smith Decl. ¶¶ 4-10.

22 Putative Class Member Chuck Peterson is also threatened with termination of ADHC despite
 23 his blindness and multiple chronic health conditions, because he does not require “substantial human
 24 assistance” with two or more qualifying areas of need. Decl. of Chuck Peterson (“Peterson Decl.”)
 25 ¶ 3; Myers Purkey Decl. ¶¶ 32-36. Nonetheless, he is at high risk for hospitalization and
 26 institutionalization without ADHC. Myers Purkey Decl. ¶¶ 37-39. According to Mr. Peterson, “I
 27 am also worried about my mental health if I am left alone during the week ... I am really afraid I
 28 will end up in a nursing home if I am unable to attend the center.” Peterson Decl. ¶¶ 7-9.

1 The 15,000 putative Class Members who will be discharged from ADHC include current
 2 participants with needs as high or higher than the needs of people who will be not be terminated.
 3 McCloud Decl. ¶¶ 63, 78-81; Puckett Decl. ¶ 26; Toth Decl. ¶¶ 31, 42-49; Burke Decl. ¶ 36; Regalia
 4 Decl. ¶ 32; Davis Decl. ¶ 29; Steinke Decl. ¶¶ 26, 30, 35; Gardner Decl. ¶ 18; Perelman Decl. ¶ 15.

5 According to one ADHC provider: “I am very concerned about all of the participants we will
 6 have to discharge...[t]hey face a downward spiral in their health and mental well-being which will
 7 lead to increased hospitalizations and eventual nursing facility or other institutional placements.”
 8 McCloud Decl. ¶ 82. Another provider states: “I am terribly concerned that Mrs. Konrai, as well as
 9 the 48 other individuals [we] will have to discharge, face serious consequences to their health . . .
 10 including hospitalizations and institutionalization.” Toth Decl. ¶ 68.

11 Many programs will be forced to discharge dozens of their participants, which may
 12 jeopardize their ability to continue to operate, threatening access to services even for people who
 13 remain eligible. McCloud Decl. ¶ 83 (30% termination, or 38 people); Regalia Decl. ¶¶ 22-24, 35
 14 (13 of 64 to be terminated); French Decl. ¶ 18 (26 of 76 to be terminated); Toth Decl. ¶¶ 28, 69 (49
 15 of 89 to be terminated); Puckett Decl. ¶ 24 (21 of 85 to be terminated); Davis Decl. ¶ 24 (26 of 86 to
 16 be terminated); Myers Purkey Decl. ¶¶ 25-26, 49 (26-36 of 56 to be terminated); Nolcox Decl. ¶ 11
 17 (40% to be terminated).

18 **III. PLAINTIFFS MEET THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION**

19 “A plaintiff seeking a preliminary injunction must establish that he is [1] likely to succeed on
 20 the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that
 21 the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Am.*
 22 *Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *Winter v. Natural Res.*
 23 *Def. Council, Inc.*, U.S., 129 S. Ct. 365, 374 (2008). *Brantley*, 2009 WL 2941519, at *6. Plaintiffs
 24 meet all four criteria.

25 **A. Plaintiffs will Suffer Irreparable Harm in the Absence of an Injunction**

26 Plaintiffs and putative Class Members will suffer irreparable harm by the implementation of
 27 the new, restrictive eligibility criteria in ABx4 5, as demonstrated in three ways, as set forth below.
 28

1 1. Irreparable Harm as a Matter of Law

2 Consistent with this Court’s prior order, numerous courts have held that reductions in
3 government benefits or medical care cause irreparable harm. *See, Brantley*, 2009 WL 2941519, at
4 *12; *see also, Beno v. Shalala*, 30 F. 3d 1057, 1063-64, n. 10 (9th Cir. 1994).

5 2. Irreparable Harm Based on Defendants’ Determination of Risk of
6 Institutionalization

7 This Court has previously found that Defendants’ own conditions of eligibility and Medi-Cal
8 authorization establish risk of irreparable harm to individuals threatened with reduction of ADHC
9 services. *See, Brantley* 2009 WL 2941519, at *7. Thus, Plaintiffs and putative Class Members
10 threatened with complete termination of ADHC are also, by Defendants’ own determination, at risk
11 of harm. Cal. Welf. & Inst. Code §§ 14526.1(d)(4), (5); McCloud Decl. ¶¶ 14, 54; Dick-Muehlke
12 Decl. ¶ 11; Regalia Decl. ¶¶ 13, 26; Toth Decl. ¶ 38; Myers Purkey ¶¶ 16, 38; Nolcox Decl. ¶¶ 34,
13 35; Puckett Decl. ¶ 12; Davis Decl. ¶ 16; French Decl. ¶¶ 9, 25.

14 3. Evidence in Support of Irreparable Harm

15 This Court has previously determined that “[e]ach of the Plaintiffs [threatened with reduction
16 of ADHC services] suffers from debilitating physical and/or mental conditions for which the
17 availability of ADHC services is critical to ensuring that their tenuous physical and mental
18 conditions to remain stable, enabling them to remain in the community.” *Brantley*, 2009 WL
19 2941519, at *12. Here, Plaintiffs and putative Class Members have similarly debilitating conditions
20 and are threatened with complete termination of ADHC. McCloud Decl. ¶¶ 25-26, 61, 78-82. The
21 harm they will suffer is equally irreparable and imminent. *See supra*, Section II.E; *see also*, Peterson
22 Decl. ¶¶ 7-9 (“I think I would be dead if it wasn’t for this program.”); Chinn Decl. ¶¶ 11-16; Regalia
23 Decl. ¶ 34; Puckett Decl. ¶ 35; Steinke Decl. ¶¶ 18-19, 136; Gardner Decl. ¶¶ 19-25; McCloud Decl.
24 ¶¶ 25-26, 63-82; Toth Decl. ¶ 68; Myers Purkey Decl. ¶¶ 38, 48; French Decl. ¶ 39.

25 Plaintiffs’ situations are typical of thousands of individuals who receive ADHC services, all
26 of whom face imminent harm if the ADHC cuts are enacted. There are approximately 36,860
27 recipients of ADHC services; approximately 15,000 of them who currently receive services will be
28 terminated by these new, restrictive eligibility requirements. Missaelides Decl. ¶¶ 32, 47.

1 **B. Plaintiffs are Likely to Succeed on the Merits of their Claims that Defendants**
 2 **are Violating the ADA and Section 504**

3 This Court has already established that the loss of one or two days per week of ADHC
 4 services constitutes a violation of the “integration mandate” of the ADA and Section 504. Here,
 5 Plaintiffs and putative Class Members, many of whom are included in the Court’s prior order, are
 6 threatened with complete termination or denial of ADHC services, and are therefore at even greater
 7 risk of institutionalization. Moreover, Defendants have further violated the ADA and Section 504
 8 by: utilizing discriminatory methods of administration, including failing to make reasonable
 9 modifications to their programs and policies; and imposing illegal and unreasonable eligibility
 10 criteria.

11 1. ABx4 5 Violates ADA and Section 504 Prohibitions Against Unjustified and
 12 Unnecessary Institutionalization

13 Defendants are violating Plaintiffs’ rights to receive Medi-Cal services in the most integrated
 14 setting appropriate. This Court, in its prior order, found that “[a] State’s failure to provide services
 15 to a qualified person in a community-based setting as opposed to a nursing home presents a violation
 16 of Title II of the ADA.” *Brantley*, 2009 WL 2941519, at *7.

17 Plaintiffs do not need to wait until they are institutionalized to bring a claim under the
 18 integration mandate. Individuals at risk of placement in nursing homes are also protected. *Id.* Each
 19 Plaintiff meets all of the criteria necessary to show that the community integration mandate has been
 20 violated. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999).

21 a) The State’s Treatment Professionals Have Determined That
 22 Community Placement is Appropriate

23 Defendants have determined that ADHC is appropriate for each Plaintiff and putative Class
 24 Member, on each day of attendance, to remain safe in the community. *Brantley*, 2009 WL 2941519,
 25 at *7, 9-11. Such need is documented on each individual’s IPC, which this Court has found to be
 26 “compelling evidence of their need for ADHC.” *Id.* at *10; McCloud Decl. ¶¶ 53-54; Toth Decl. ¶
 27 38; French Decl. ¶ 25; Regalia Decl. ¶¶ 25-27; Nolcox Decl. ¶¶ 30-34; Myers Purkey Decl. ¶¶ 36-37.

28 b) Plaintiffs Want to Stay in the Community

1 Far from opposing community placement, these Plaintiffs and Putative Class Members are
 2 fighting to remain in their homes. Cota Decl. ¶¶ 14-16; Burke Decl. ¶¶ 7, 12; Konrai Decl. ¶ 16;
 3 Dilworth Decl. ¶¶ 22, 25; Smith Decl. ¶¶ 8-9; French Decl. ¶ 25; Nolcox Decl. ¶ 35; Myers Purkey
 4 Decl. ¶ 39; Peterson Decl. ¶¶ 7-9. As a result of Defendants' actions, however, the only way
 5 Plaintiffs can receive the services they need is to move to a nursing home or risk hospitalization. *Id.*;
 6 Steinke Decl. ¶¶ 20, 23-25, 29-30, 32-34, 36; Gardner Decl. ¶¶ 11, 15-18; Chinn Decl. ¶ 15; Regalia
 7 Decl. ¶ 29; Toth Decl. ¶¶ 52-53.

8
 9 c) Defendants can Reasonably Accommodate Plaintiffs' Desire to
 Receive Services in the Community

10 Under *Olmstead*, the integration mandate requires that Plaintiffs receive Medi-Cal services in
 11 the community when this desire can be reasonably accommodated, taking into account the resources
 12 available to the state and the needs of others with disabilities. *Olmstead*, 527 U.S. at 527. Here, this
 13 Court previously found that Defendants have an obligation to ensure compliance with the ADA and
 14 that one means of their doing so is by offering ADHC to qualified individuals. *Brantley*, 2009 WL
 15 2941519, at *10-11. While Defendants may employ different means, such as ensuring that Plaintiffs
 16 and putative Class Members are provided with alternative Medi-Cal services without interruption or
 17 by making reasonable modifications such as an exception process, they have not done so, and have
 18 thus failed once again, to meet their obligations to prevent unnecessary institutionalization of people
 19 with disabilities. *Id.* at *7-11; Steinke Decl. ¶¶ 14-17, 36; Chinn Decl. ¶¶ 11-16; Regalia Decl.
 20 ¶¶ 29-31; French Decl. ¶¶ 36-37; Toth Decl. ¶ 66; Puckett Decl. ¶¶ 29-32; Myers Purkey Decl. ¶¶
 21 46-47; Davis Decl. ¶ 32; Smith Decl. ¶¶ 4-5; Nolcox Decl. ¶ 11; Missaelides Decl. ¶¶ 91-98.

22 2. Defendants are Violating the Prohibition on Employing Methods of
 23 Administration that Result in Discrimination

24 The ADA and Section 504 prohibit methods of administration or contractual arrangements
 25 which have a discriminatory effect on people with disabilities. 28 C.F.R. § 35.130 (b)(3); 28 C.F.R.
 26 § 41.51(b)(3)(i); 45 C.F.R. § 84.4(b)(4) (2005). Defendants' actions violate the methods of
 27 administration provision of the ADA and Section 504 by denying Plaintiffs access to community-
 28 based Medi-Cal services and by subjecting them to unnecessary institutionalization in hospitals and

1 nursing facilities, as follows:

- 2 1. by imposing ADHC cuts without regard to the individual needs of Plaintiffs and other
3 beneficiaries;
- 4 2. by providing no system by which Plaintiffs and beneficiaries may obtain exceptions to
5 the new, restrictive eligibility criteria; Cal. Welf. & Inst. Code §§ 14525.1; 14526.2;
- 6 3. by failing to provide reasonable modifications, including the provision of ADHC
7 services as required to avoid unnecessary institutionalization of Plaintiffs and other
8 beneficiaries; 28 C.F.R. § 35.130(b)(7);
- 9 4. by forcing ADHC doctors and other providers into terminating or denying services
10 contrary to the documented medical needs of Plaintiffs and other beneficiaries, placing
11 them at risk of institutionalization, physical harm or death; and
- 12 5. by imposing eligibility criteria that screen out or tend to screen out otherwise qualified
13 ADHC participants. (*See, infra*, Section III. B. 3).

14 *See*, Regalia Decl. ¶¶ 28-32; Missaelides Decl. ¶¶ 47, 49-50, 56-59, 83-84; McCloud Decl. ¶¶ 25-26,
15 60-61, 63, 78-82; Toth Decl. ¶¶ 31-32, 49, 52; Nolcox Decl. ¶¶ 12-14; Steinke Decl. ¶¶ 20, 22-26,
16 27, 30, 31, 35-36; Gardner Decl. ¶¶ 11, 14, 18-25; Puckett Decl. ¶¶ 21, 30-34; Dick-Muehlke Decl.
17 ¶¶ 17-18; Myers Purkey Decl. ¶¶ 23, 30, 39-43.

18 Further, Defendants' actions and inactions defeat or substantially impair the very purpose of
19 the ADHC Medi-Cal program which is to "provide a viable alternative to institutionalization" and
20 "ensure that elderly persons and adults with disabilities are not institutionalized in appropriately or
21 prematurely." Cal. Health & Safety Code §§ 1570.7(a), (b) (West 2009); *see also*, Steinke Decl.
22 ¶¶ 13-17. Defendants' methods of administration undermine these goals and must be judged in that
23 light. Plaintiffs have shown a likelihood of success on this claim.

24 3. Defendants Have Imposed Unreasonable and Illegal Eligibility Criteria

25 The ADA and Section 504 prohibit the use of:

26 [E]ligibility criteria that screens out or tends to screen out an individual with a disability or
27 any class of individuals with disabilities from fully and equally enjoying any service,
28 program, or activity unless such criteria can be shown to be necessary for the provision of the
service, program, or activity being offered.

28 C.F.R. §35.130(b)(8); 45 C.F.R. § 84.4(b)(4). ABx4 5 imposes eligibility criteria which screen
out individuals who need the services to live in the community as much as others who will remain
eligible. Moreover, the basis on which these individuals will be excluded bears no relation to their

1 actual need for the services. Such individuals will be excluded, not on the basis of need, but on
 2 arbitrary eligibility criteria that ignore their already established risk factors. *See supra*, Section II.B.,
 3 C., E.; Dick-Muehlke Decl. ¶ 18; Regalia Decl. ¶ 32 (“The requirement that some participants need
 4 to show ‘substantial human assistance’ while others only need to show a need for ‘assistance’ is
 5 nonsensical because whether or not participants need ‘hand-over-hand assistance’ or ‘prompting,
 6 cueing or stand-by assistance,’ they still need the assistance, and without it, either group is at serious
 7 risk if the care is not provided.”).

8 The new eligibility criteria are “contrary to the purpose of the [ADHC] program” which is to
 9 avoid premature and unnecessary hospitalization and institutionalization. “In the past, [ADHC has]
 10 been about restoring, maintaining, and improving an individuals’ functioning, but now ADHC will
 11 emphasize dependence. . . . Under the new criteria, if a participant gains independence and moves
 12 from total dependence to a need for stand-by assistance, they may be discharged.” Regalia
 13 Decl. ¶ 32; *see also, supra* § II. A-C, E; Gardner Decl. ¶¶ 19-25; Steinke Decl. ¶¶ 13-17; Nolcox
 14 Decl. ¶¶ 12-14; Myers Purkey Decl. ¶¶ 23, 30; Dick-Muehlke Decl. ¶ 13; Toth Decl. ¶ 53; Cal.
 15 Health & Safety Code § 1570.2(b); Relying on an unreasonable and arbitrary basis for excluding
 16 these disabled individuals denies them meaningful access and violates the ADA and Section 504.
 17 *See also, infra*, Section III.D.

18 **C. Plaintiffs are Likely to Succeed on the Merits of their Claims that Defendants**
 19 **are Violating the Due Process Clause of the Fourteenth Amendment and**
 20 **Medicaid Law by Failing to Provide Adequate Pre-termination Notice and**
 21 **Opportunity for a Hearing**

22 Defendants have failed to, and have indicated they have no intentions of providing, adequate
 23 pre-termination notice, opportunity for a hearing, and continued benefits pending a hearing decision,
 24 in violation of the U.S. Constitution and the federal Medicaid statute and regulations. The
 25 Fourteenth Amendment to the U.S. Constitution prohibits a state from depriving any person of
 26 property without due process of law. U.S. Const. amend XIV, § 1. It is well established that
 27 Medicaid recipients are statutorily entitled to benefits that are protected by the Due Process Clause
 28 of the Fourteenth Amendment. *See, e.g., O’Bannon v. Town Court Nursing Center*, 447 U.S. 773,

1 785-787 (1980) (Medicaid recipient has a right, protected by due process, to continued Medicaid
2 benefits to pay for services from the qualified provider of his choice).

3 Before benefits can be terminated, the federal Medicaid statute and regulations require that a
4 state provide notice and an opportunity for an administrative hearing. 42 U.S.C. § 1396a(a)(3);
5 42 C.F.R. § 431.220; *Catanzano v. Dowling*, 847 F. Supp. 1070, 1081-1082 (W.D.N.Y. 1994) (“A
6 state Medicaid agency *must* comply with these notice and hearing requirements in order to comply
7 with federal law as a condition of its participation in the Medicaid program” (*emphasis in original*)).
8 The regulations require that at the time of any action affecting an individual’s claim to services, an
9 individual must receive written notice: (1) of the right to a hearing; (2) of the method by which she
10 may obtain a hearing; and (3) that she may represent herself or be represented by another. 42 C.F.R.
11 § 431.210. The notice must contain specific explanatory information and must be mailed at least 10
12 days before the date of the action. *Id.*; 42 C.F.R. § 431.211; Cal. Code of Regs. tit. 22 §§ 50179(d)
13 & 51014.1(c). In addition, if a hearing is requested within 10 days, benefits must continue until the
14 agency reaches a final decision. 42 C.F.R. § 431.230(a).

15 In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court held that individuals receiving
16 public assistance are entitled, under due process, to an evidentiary hearing *before* benefits can be
17 discontinued. According to the Court, such recipients must also be given an “opportunity to be
18 heard . . . at a meaningful time and in a meaningful manner.” *Goldberg*, 397 U.S. at 267. Therefore,
19 any cuts to Plaintiffs’ ADHC services must comply with due process protections, including the right
20 to continued benefits and pre-termination fair hearings. *See Goldberg*, 397 U.S. at 264-267.

21 Defendants have failed to issue, and, according to their own representations, will not issue,
22 statutorily required written notices to Plaintiffs and putative Class Members, informing them that
23 their benefits are being terminated and of their right to a pre-termination hearing. *See* 42 U.S.C.
24 § 1396a(a)(3); *see also* 42 C.F.R. § 431.220; French Decl. ¶¶ 31-33; McCloud Decl. ¶ 30;
25 Missaelides Decl. ¶¶ 70-72, 76-77. Nor have Defendants given any information or guidance to
26 providers as to whether or how affected participants will have an opportunity for a pre-termination
27 hearing and continued benefits pending the outcome of such hearing. McCloud Decl. ¶¶ 30, 43;
28 Toth Decl. ¶ 54; Nolcox Decl. ¶ 26; Myers Purkey Decl. ¶¶ 44-45; Missaelides Decl. ¶¶ 76, 81.

1 According to information provided by Defendants, when current ADHC participants are
2 determined by the ADHC providers to not meet the new, restrictive eligibility criteria contained in
3 ABx4 5, it will be the responsibility of the provider to issue a “notice of discharge” to the
4 participant. Toth Decl. ¶¶ 54-61; French Decl. ¶¶ 32-34; McCloud Decl. ¶¶ 27-30; Puckett Decl.
5 ¶ 27. However, State regulations require only “reasonable advance notice to ensure orderly
6 discharge.” 22 C.C.R § 78437(a)(12). There is no standard, state-issued notice, nor any guidelines
7 provided by the State as to notice contents necessary to fulfill federal and State notice requirements.
8 Missaelides Decl. ¶ 72. Thus, ADHC programs will be left to issue their own notices, with no
9 assurance that they will comply with federal and state requirements. Moreover, the State regulatory
10 notice provision does not give rise to the right to a pre-termination fair hearing. 22 C.C.R.
11 § 78437(a)(12). This blatant denial of due process rights is in direct violation of federal Medicaid
12 law and the Fourteenth Amendment.

13 While Defendants may rely on ADHC providers to make eligibility determinations and may
14 delegate to them the power to issue notices of denial to beneficiaries, such notices must meet the
15 standards in 42 C.F.R. § 431.210. *See Catanzano*, 847 F.Supp. at 1081-1082. Thus, the Defendants
16 cannot simply disclaim their federal responsibility by shifting it to the providers. “The law demands
17 that the designated single state Medicaid agency must oversee and remain accountable for uniform
18 statewide utilization review procedures conforming to bona fide standards of medical necessity.”
19 *J.K. v. Dillenberg*, 836 F. Supp. 694, 699 (D. Ariz. 1993). Defendants have not met their procedural
20 due process obligations under the Medicaid law, or the Constitution’s due process clause.
21 Accordingly, Plaintiffs have a strong likelihood of success on these claims.

22 **D. Plaintiffs are Likely to Succeed on their Claims of Violations of the**
23 **Comparability and Reasonable Standards Requirements of the Medicaid Act**

24 Medicaid is a cooperative program between federal and state governments that allows states
25 to receive federal financial assistance for the provision of medical assistance to low-income
26 individuals. 42 U.S.C. § 1396. Participation is voluntary, but when a state chooses to participate, it
27 must comply with the Medicaid Act and its implementing regulations. 42 U.S.C. § 1396; *Alexander*
28 *v. Choate*, 469 U.S. 287, 289 n.1 (1985). As discussed below, Defendants violate Medicaid

1 requirements by imposing arbitrary eligibility criteria that will terminate or deny critical ADHC
2 services to people who have a need for them which is equal to those who will remain eligible.

3 1. By Restricting Access to ADHC Services Based on the New Restrictive
4 Eligibility Criteria, ABx4 5 Violates the Reasonable Standards Requirement

5 The Medicaid Act requires that all participating states employ “reasonable standards ... for
6 determining ... the extent of medical assistance under the plan which ... are consistent with the
7 objectives of this subchapter.” 42 U.S.C. § 1396a(a)(17); *see also Wisconsin Dep't of Health &*
8 *Fam. Serv. v. Blumer*, 534 U.S. 473, 479 (2002); *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37
9 (1981). The primary objectives of Medicaid are to provide medical assistance to individuals whose
10 income and resources are insufficient to pay for necessary medical services and to furnish
11 “rehabilitation and other services to help such ... individuals attain and retain capability for
12 independence or self care.” 42 U.S.C. § 1396-1. While a state may place limits on a service “based
13 on such criteria as medical necessity or on utilization control procedures,” it may not “arbitrarily
14 deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible
15 recipient solely because of the diagnosis, type of illness or condition.” 42 C.F.R. §440.230(c), (d)

16 When state Medicaid rules deny coverage of services on an arbitrary or irrational basis,
17 courts have invalidated those state rules as contrary to the reasonable standards requirement. *See*
18 *Lankford v. Sherman*, 451 F.3d 496, 511-13 (8th Cir. 2006) (finding likelihood of success on
19 reasonable standards claim where state unreasonably restricted optional medical equipment benefit);
20 *Hern v. Beye*, 57 F.3d 906, 910-11 (10th Cir. 1995) (holding state law restricting medically
21 necessary treatment to only those whose lives were at risk not a reasonable standard); *Preterm, Inc.,*
22 *v. Dukakis*, 591 F.2d 121, 131 (1st Cir. 1979) (holding state could not restrict medically necessary
23 services solely on the basis of diagnosis); *White v. Beal*, 555 F.2d 1146, 1151 (3^d Cir. 1977)
24 (enjoining classification policy for coverage of eyeglasses because it discriminated “based upon
25 etiology rather than need for the services”). Restrictive medical eligibility criteria enacted solely for
26 cost-cutting purposes are not a reasonable basis for limiting access to Medicaid covered services.
27 *See Kerr v. Holsinger*, 2004 WL 882203, at *9 (E.D. Ky. March 25, 2004) (holding that cuts based
28 solely on budget did not meet Medicaid’s “reasonable standard” requirement).

1 Defendants intend to invalidate prior medical necessity determinations, including
 2 consideration of risk factors as set forth in Plaintiffs' and putative Class Members' IPCs, which, as
 3 this Court has already found, are "compelling evidence" of individuals' need for ADHC services.²
 4 *Brantley*, 2009 WL 2941519 at *10. Moreover, the new criteria are unreasonable in that they curtail
 5 eligibility without justification, utilizing arbitrary standards which have not been scientifically
 6 designed or validated as a measure of need. *See, supra*, Section II. C; Missaelides Decl. ¶¶ 83-84;
 7 *Cf. Allen v. Mansour*, 681 F. Supp. 1232, 1238 (E.D. Mich. 1986) (state medical necessity criteria
 8 arbitrary when unsupported by expert opinion or scientific data).

9 As Plaintiffs have amply demonstrated, the new eligibility criteria would have the effect of
 10 denying needed ADHC services to individuals, like Mr. Bell, Mr. Cota and Ms. Konrai, whose need
 11 for those services are just as great as that of others will continue to qualify for ADHC. Steinke Decl.
 12 ¶¶ 26, 35; Gardner Decl. ¶ 18; Toth Decl. ¶ 31; Davis Decl. ¶ 29; McCloud Decl. ¶¶ 26, 61, 79;
 13 Puckett Decl. ¶ 26; Burke Decl. ¶ 36; Myers Purkey ¶ 30; Regalia Decl. ¶ 32; Perelman Decl. ¶ 15.
 14 As Debbie Toth states, "[i]n my professional opinion, these new, restrictive eligibility requirements
 15 do not make any sense, in that they are going to require the discharge from the program of some of
 16 our participants who need these services the most." Toth Decl. ¶ 31.

17 By way of example, Defendants' choice of certain daily activities to be considered in the
 18 new, narrowed list of qualifying areas of need is particularly nonsensical. Defendants have
 19 interpreted eligibility requirements as requiring that individuals demonstrate that they require
 20 assistance or substantial human assistance with the eight specified activities **at the ADHC center**.
 21 McCloud Decl. ¶¶ 20-22; Toth Decl. ¶ 28; Puckett Decl. ¶¶ 19-22; Myers Purkey Decl. ¶ 23; Nolcox
 22 Decl. ¶ 25; French Decl. ¶¶ 15-16; Regalia Decl. ¶ 20. Since participants do not typically bathe,
 23 dress, or maintain hygiene at the center, individuals who require assistance or substantial human
 24 assistance with those activities will not be allowed to count a need for such assistance towards
 25

26 ² Indeed, the imposition of automatic termination or denial based solely on the restrictive new
 27 medical eligibility criteria contradicts the evidence by Defendants' own expert that need for ADHC
 28 is a highly individualized determination. Docket No. 35, Muchmore Decl. ISO Opposition to
 Preliminary Injunction, ¶ 9 ("Each person has individual needs, and determining whether and how to
 address those needs . . . is necessarily an individualized determination based on the multidisciplinary
 team assessment and delineation of specific needed services").

1 ADHC eligibility. McCloud Decl. ¶¶ 20-22. Thus, Defendants have included, and then will
 2 disregard, need factors which would assess an individual's overall functioning capabilities and their
 3 need for ADHC to remain stable and healthy. Puckett Decl. ¶ 21; Myers Purkey Decl. ¶ 23.

4 *V.L. v. Wagner*, a recently filed case involving a challenge to new, budget-based eligibility
 5 restrictions on a different Medi-Cal service (In-Home Supportive Services or IHSS), is directly on
 6 point. 2009 WL 3486708 (N.D. Cal. 2009) (Wilken, J.) , appealed to 9th Cir., Case No. 09-17581,
 7 Doc. Entry 7178639 (2009). There, the court found that the new criteria proposed by the state to
 8 restrict access to IHSS did not “reasonably measure the individual need of a disabled or elderly
 9 person for a particular service.” *Id.* at *12. Among other problems, the court found that the state's
 10 proposed form of measurement failed to weigh the “critical nature of the services recipients need,”
 11 potentially denying services to those whose unmet needs could “be equally or more life-threatening
 12 than those” who continued to get services. *Id.* at *14, 15. As a result, the court ruled that the new
 13 eligibility criteria likely violated both the comparability and reasonable standards and requirements,
 14 and that a preliminary injunction was warranted. Preliminary relief is appropriate in this case for the
 15 same reasons.

16 By restricting access to ADHC using arbitrary and unreasonable criteria, Defendants violate
 17 section 1396a(a)(17). Plaintiffs are therefore likely to succeed on their Medicaid reasonable
 18 standards claim.

19 2. By Providing Differing Levels of Medical Assistance to Individuals with
 20 Similar Needs, ABx4 5 Violates Medicaid's Comparability Requirement

21 The “comparability” requirement of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B),
 22 provides “that medical assistance made available to any individual described in subparagraph (A)
 23 [describing categorically needy recipients] -- (i) shall not be less in amount, duration, or scope than
 24 the medical assistance made available to any other such individual, and (ii) shall not be less in
 25 amount, duration, or scope than the medical assistance made available to individuals not described in
 26 subparagraph (A).” *See* 42 C.F.R. § 440.240. In effect, the comparability requirement mandates
 27 “comparable services when individuals have comparable needs,” and it is violated “when some
 28 recipients are treated differently from other recipients where each has the same level of need.”

1 *Jenkins v. Washington State Dep't Social & Health Servs.*, 157 P.3d 388, 392 (Wash. 2007); *see also*
2 *Sobky v. Smoley*, 855 F. Supp. 1123, 1139 (E.D. Cal. 1994) (comparability requirement “creates an
3 equality principle by which all categorically needy individuals must receive medical assistance
4 which is no less than that provide to any other categorically or medically needy individual”);
5 *Hodgson v. Bd. Of County Comm'rs, Hennepin County*, 614 F.2d 601, 608 (8th Cir. 1980) (“Once a
6 state designates services it will subsidize, it may distinguish between eligible and ineligible
7 recipients only on the basis of their medical need.”).

8 Courts have thus found that states violate the Medicaid Act when they fail to offer the same
9 service to all with the same need. *See, e.g., Conlan v. Bonta*, 102 Cal. App. 4th 745, 753-54 (2002)
10 (comparability violated where state policy resulted in some Medi-Cal recipients incurring
11 unreimbursed expenses); *Parry v. Crawford*, 990 F. Supp. 1250, 1257 (D. Nev. 1998) (comparability
12 violated where state offers ICF-MR placement only to those with mental retardation, not those with
13 “related conditions” and no basis on which to infer difference in medical need); *Charpentier v.*
14 *Belshe*, 1994 WL 792591, at *5 (E.D. Cal. Dec. 21, 1994) (limiting reimbursement for those eligible
15 for both Medi-Cal and Medicare to no more than 20% of Medicare's reasonable charge while placing
16 no such limitation on Medi-Cal-only recipients violates comparability).

17 As with the reasonable standards claim, the recent decision by a sister court in *V.L.*, 2009 WL
18 3486708 is instructive. The state's new restrictive eligibility criteria, the court determined, are:

19 not a meaningful measure of an individual's degree of need for services. Because need is
20 the only basis upon which distinctions between recipients can be made without violating the
21 comparability requirement, Plaintiffs have made a strong showing of likelihood of success
22 on the merits that ABX4 4 violates the comparability requirement of the Medicaid Act.

23 *V.L.* at 17; *see also White v. Beal*, 555 F.2d 1146, 1151 (3d. Cir. 1977) (optional Medicaid services
24 must be “distributed in a manner which bears a rational relationship” to the underlying federal
25 purpose of helping those in greatest need, and finding that provision of eyeglasses only to Medicaid
26 recipients with eye diseases, but not refractive error, violated comparability requirement); *Jenkins v.*
27 *Washington State Dep't Social & Health Servs.*, 157 P.3d 388, 393 (Wash. 2007) (holding that the
28 state violated the comparability requirement because it “reduce[d] a recipient's benefits based on a
consideration other than the recipient's actual need”); *Jeneski v. Myers*, 163 Cal. App. 3d 18 (1984)

1 (finding that across-the-board restrictions violated Medicaid comparability requirement by failing to
2 account for individual needs).

3 Here, automatic termination or denial of ADHC for recipients who fail to meet the new
4 restrictive eligibility criteria, without consideration of their individual circumstances or risk factors,
5 would deprive the named Plaintiffs and similarly situated participants of ADHC which they need just
6 as critically as other ADHC participants who are allowed to remain in the program. *See supra*,
7 Sections II.C., II.E, and III.B.(3) & C.(1); *see also*, McCloud Decl. ¶¶ 26, 60-61, 63, 78-82.
8 Consequently, the new medical eligibility criteria fail to treat that population similarly to those who
9 will continue to receive services and therefore remain safely in their homes. *Jenkins*, 157 P.3d at
10 393 (“Once an individual is assessed to require and receive a certain number of care hours, the
11 assessment cannot be reduced absent a specific showing that fewer hours are required.”).

12 Further, because of the arbitrary elimination of qualifying areas of need, heightened care
13 standard for people without cognitive impairments, the new and unclarified level of care
14 requirement, and the “at the center” limitation, the new restrictive eligibility criteria will
15 disproportionately harm certain groups regardless of their actual need for adult day health care
16 services. *See supra*, Section II. C., Steinke Decl. ¶¶ 20, 22 (explaining that the new criteria will not
17 adequately account for needs and risk factors of those who rely on ADHC for skilled medical
18 monitoring and regular routine); Gardner Decl. ¶ 11 (new criteria are “unreasonable and biased
19 against persons with cognitive and psychiatric disabilities”).

20 Finally, Defendants' failure to provide training or substantive guidance to assist ADHCs in
21 making determinations about who meets the new eligibility standards will also likely contribute to
22 violation of the comparability requirement. Medi-Cal recipients should receive consistent access to
23 treatment regardless of which ADHC center happens to be evaluating them. *See Sobky v. Smoley*,
24 855 F. Supp. 1123, 1139-40 (finding violation of comparability where availability of methadone
25 treatment varied by county in an arbitrary way). Currently, ADHC providers are confused about the
26 new criteria and are not sure how to apply it. Toth Decl. ¶¶ 54, 30; McCloud Decl. ¶¶ 22, 27-29;
27 Nolcox Decl. ¶¶ 24, 27; Puckett Decl. ¶¶ 27-28; Myers Purkey Decl. ¶¶ 28-29, 43, 44. In the
28 absence of adequate guidance from Defendants, Medi-Cal recipients attending different ADHC

1 programs will inevitably end up with disparate access to ADHC services. Missaelides Decl. ¶ 81.
 2 The result will violate the comparability requirement.

3 For these reasons, Plaintiffs have shown a likelihood of success on their comparability claim.

4 **E. The Balance of Equities is in Plaintiffs' Favor and an Injunction is in the Public**
 5 **Interest**

6 The balance of hardships tips sharply towards Plaintiffs. They stand to lose vital services at
 7 risk to their health and lives. They are also at risk of institutionalization and its attendant loss of
 8 independence and separation from family and community. In contrast, Defendants will suffer no
 9 harm — a preliminary injunction will only require them to continue providing services in exactly the
 10 same manner they have done for years. Moreover, if the injunction is *not* granted, they would be
 11 required to provide the same services in costly nursing facilities, which are likely to be more
 12 expensive.

13 The public interest will be served by granting an injunction. In a case such as the present
 14 where the issue concerns the proposed reduction in medical benefits to indigent people due to
 15 budgetary concerns, the Ninth Circuit has recognized that both the balance of hardships and the
 16 public interest favor Plaintiffs. *Brantley*, 2009 WL 2941519, at *3, citing *Independent Living Ctr. of*
 17 *S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 657-58 (9th Cir. 2009).

18 **IV. CLASSWIDE RELIEF IS APPROPRIATE**

19 Per this Court's prior order in this case, class wide relief is appropriate if the Court finds that
 20 putative Class Members will suffer the same harm as Plaintiffs. *Brantley*, 2009 WL 2941519, at
 21 *14. Nevertheless, Plaintiffs have filed a motion for Class Certification to be heard on or after
 22 March 16, 2010. Should the Court determine that a certified class is necessary for preliminary relief,
 23 Plaintiffs request that their motion be heard and decided simultaneously with the motion.

24 **V. PLAINTIFFS SHOULD NOT BE REQUIRED TO POST BOND**

25 Per this Court's prior order, Plaintiffs should not be required to post bond. *Id.*

26 **VI. CONCLUSION**

27 Therefore, Plaintiffs request that the Court issue a Preliminary Injunction enjoining the
 28 implementation of new, restrictive eligibility requirements for ADHC pursuant to ABx4 5.

1 Date: January 19, 2010

Respectfully submitted,

2 DISABILITY RIGHTS CALIFORNIA
3 NATIONAL SENIOR CITIZENS LAW CENTER
4 AARP FOUNDATION LITIGATION
5 NATIONAL HEALTH LAW PROGRAM
6 HOWREY LLP

7 By: /s/
8 Elissa Gershon
9 Attorneys for Plaintiffs
10
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