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ATTORNEYS FOR UNITED STATES

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

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

Plaintiffs,

v.

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

Defendants.

Case No. C09-03798 SBA

CLASS ACTION

**COMMENTS OF THE UNITED
STATES OF AMERICA IN SUPPORT
OF APPROVAL OF THE PROPOSED
SETTLEMENT AGREEMENT**

Hearing Date: Jan. 24, 2012

Time: 1:00 p.m.

Judge: Hon. Sandra B.

Armstrong

Address: 1301 Clay Street

Oakland, CA 94612

Courtroom: 1, 4th Floor

INTRODUCTION

The United States respectfully submits these Comments in support of final approval of the Proposed Settlement Agreement (hereinafter, the “Agreement”). The United States has a strong interest in the resolution of this matter because it advances the important public interest of compliance with title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*, including the prevention of segregation, isolation, and unnecessary institutionalization of individuals with disabilities. *See Olmstead v. L.C.*, 527 U.S. 581, 607, 119 S.Ct. 2176, 2190 (1999). The Agreement between Plaintiffs and Defendants is “fair, reasonable, and adequate,” *see In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946 (9th Cir. 2011) (citing *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)), affords considerable relief to all class members, and addresses Plaintiffs’ challenge to the manner in which the State of California plans to eliminate the Medi-Cal Adult Day Health Care (“ADHC”) optional benefit, which enables elderly individuals and individuals with physical and mental disabilities to live in the community and avoid hospitalization and institutionalization. Accordingly, the United States respectfully urges this Court to grant approval of the Agreement.

BACKGROUND

Plaintiffs brought this class action lawsuit against the California Department of Health Care Services, and its Director (together, “Defendants”) to enjoin a planned reduction of ADHC services. (*See* Second Am. Compl. (“Compl.”), ECF No. 218 (June 2, 2011), ¶¶ 1, 3, 4, 7). Plaintiffs alleged that the reduction and/or elimination of ADHC services, as enacted by the State’s legislature and implemented by the Defendants, would place them and thousands of others similarly situated at risk of unnecessary institutionalization, in violation of the ADA.¹ (*Id.* ¶ 7); *see also* Cal. Welf. & Inst. Code §§ 14589(b), 14589.5(a) (eliminating ADHC). Previously,

¹ Plaintiffs also alleged that the Defendants’ actions violate the Medicaid Act, the Due Process Clause of the United States Constitution, and the California Government Code. (Compl. ¶¶ 250-272.)

1 this Court issued two preliminary injunctions preventing the State from: (1) reducing the
2 maximum number of days of available ADHC services per week, and (2) implementing more
3 restrictive eligibility criteria for the ADHC service. *See Brantley v. Maxwell-Jolly*, 656 F. Supp.
4 2d 1161 (N.D. Cal. 2009); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980 (N.D. Cal. 2010), *appeal*
5 *pending*, No. 10-15635 (9th Cir. filed Mar. 24, 2010). Plaintiffs’ third motion for preliminary
6 injunction sought to enjoin Defendants from eliminating ADHC services, pursuant to Assembly
7 Bill 97 (Statutes of 2011), without first ensuring that “adequate, appropriate, and uninterrupted”
8 alternative services were provided to prevent ADHC recipients from being placed at risk of
9 unnecessary institutionalization. (See Pls.’ Mot. for Prelim. Inj., ECF No. 225 (June 9, 2011) at
10 1-2.) With that motion pending, the parties reached settlement on November 17, 2011. (See
11 Joint Mot. for Prelim. Approval of Settl. Agr. (“Mot. for Prelim. Approval”), ECF 412, at 5.)
12 This Court granted the parties’ Joint Motion for Preliminary Approval of Settlement Agreement
13 on December 14, 2011. (Order Granting Prelim. Approval of Settl. Agr., ECF No. 415.) For
14 settlement purposes, this Court conditionally certified a “Settlement Class” defined as:

15 All Medi-Cal beneficiaries in the State of California for whom Adult Day Health
16 Care benefits will be eliminated under the provisions of AB 97 including those
17 who met or will meet the current eligibility and medical necessity criteria for
18 ADHC at any point prior to the Effective Date of this Settlement; or who will
19 meet the eligibility and medical necessity criteria for CBAS at any point prior to
20 Termination of this Agreement.

19 (*Id.* at 1.) The named Plaintiffs have been identified as appropriate class representatives for the
20 Settlement Class. (*Id.*)

21 **THE AGREEMENT**

22 The State and plaintiffs have reached an Agreement to provide members of the plaintiff
23 class services necessary to prevent their unnecessary institutionalization. The Agreement
24 requires Defendants, as soon as practicable, to submit to the Centers for Medicare and Medicaid
25 Services (“CMS”) an application to amend the State’s existing Demonstration Waiver under
26 Section 1115 of the Social Security Act (known as the “California Bridge to Reform

Demonstration Waiver”), to establish a new Medi-Cal program called Community-Based Adult Services (“CBAS”).² (See Settl. Agr. § IX.) The Agreement defines CBAS as an “outpatient, facility based service program that delivers skilled nursing care, social services, therapies, personal care, family/caregiver training and support, meals and transportation to eligible Medi-Cal beneficiaries.” (*Id.* § VI.5.)³

The Agreement establishes specific criteria for determining eligibility for CBAS services. (See *id.* § X).⁴ Similar to the criteria for determining eligibility for ADHC services, these

² Although the United States supports final approval of the Agreement, CMS must also conduct a full and independent review of any proposed State Plan Amendment or amendment to the State’s Bridge to Reform Demonstration Waiver to ensure compliance with the requirements of the Medicaid Act.

³ CBAS will initially be made available as a Medi-Cal fee-for-service benefit to all current ADHC recipients. (See Settl. Agr. § XII.A, D(1)). The Agreement establishes a timetable for the transition of CBAS from a Medi-Cal fee-for-service benefit to a Medi-Cal managed care benefit, during which eligible individuals may transition to Medi-Cal managed care to remain eligible for CBAS services. (*Id.*) No earlier than July 1, 2012, CBAS will only be available to individuals enrolled in Medi-Cal managed care, however, CBAS will remain available as a fee-for-service benefit for those individuals in geographic areas where Medi-Cal managed care is not available, and for those individuals who do not qualify for managed care. (See *id.* § XII.D.)

⁴ To be eligible to receive CBAS services, individuals must fall into any one of the following categories:

1. Individuals who meet Nursing Facility Level of Care A (NF-A) as set forth in 22 CCR section 51120(a) and 51334(l) and meet current ADHC medical necessity and eligibility criteria set forth in Cal. Welf. & Inst. Code §§ 14525(a),(c),(d),(e) and 14526.1(d)(1),(3),(4),(5), and 14526.1(e); or
2. Individuals with an organic, acquired, or traumatic brain injury, and/or an individual with chronic mental illness, and they meet both of the following criteria:
 - a. They meet current ADHC medical necessity and eligibility criteria set forth in Cal. Welf. & Inst. Code §§ 14525 and 14526.1(d),(e) and
 - b. They need assistance with two of the following Activities of Daily Living (“ADL”)/ Instrumental Activities of Daily Living (“IADL”): bathing, dressing, self-feeding, toileting, ambulation, transferring, medication management, and hygiene; or one ADL/IADL listed above and money management, accessing resources, meal preparation, or transportation; or
3. They have moderate to severe Alzheimer’s Disease or other dementia, *and* meet current ADHC medical necessity and eligibility criteria set forth in Cal. Welf. & Inst. Code §§ 14525(a),(c),(d),(e) and 14526.1(d)(1),(3),(4),(5); and 14526.1(e); or

1 eligibility criteria are intended to identify and provide CBAS services to individuals who are “at
2 high risk for institutionalization” in the absence of such services. (Mot. for Prelim. Approval at
3 6.) The named Plaintiffs will be deemed eligible for CBAS services at their current ADHC level
4 pending a reassessment of their needs. (Settl. Agr. § VIII.) The Agreement also sets out
5 specific timelines during which each class member will receive an assessment, using an agreed-
6 upon assessment tool, and an individual determination regarding their eligibility for CBAS. (See
7 Settl. Agr. § XI.) To facilitate the assessment and transition process, the parties have established
8 a mechanism to identify and preliminarily enroll into CBAS class members who are most likely
9 eligible for CBAS, including individuals with developmental disabilities, existing participants in
10 the State’s Multi Purpose Senior Services Program, individuals eligible for Specialty Mental
11 Health Services, and those individuals eligible to receive 195 or more hours of In-Home Support
12 Services (IHSS) per month. (See Settl. Agr. § VI.4 (defining “categorical eligibility” for CBAS);
13 Mot. for Prelim. Approval at 7-8).) For each class member not enrolled in CBAS, the
14 Agreement requires Defendants to offer Enhanced Case Management Services, which includes
15 person-centered planning and complex case management to assist these individuals to remain in
16 their homes and the community. (*Id.* § XIII; Mot. for Prelim. Approval at 8-9.)

17 Under the Agreement, the planned ADHC elimination date of December 1, 2011 has
18 been postponed until February 29, 2012 to ensure a seamless transition of eligible ADHC
19

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- 20
- 21 4. They have mild cognitive impairment including moderate Alzheimer’s Disease or other
22 dementia, *and* they meet both of the following criteria:
 - 23 a. They meet current ADHC medical necessity and eligibility criteria set forth in
24 Cal.Welf. & Inst. Code §§ 14525 and 14526.1(d), (e); *and*
 - 25 b. They need assistance with two of the following ADLs/IADLs: bathing, dressing,
26 self-feeding, toileting, ambulation, transferring, medication management, and
27 hygiene; or
 - 28 5. They are developmentally disabled, meet the criteria for regional center eligibility, *and*
meet current ADHC medical necessity and eligibility criteria set forth in Cal.Welf. &
Inst. Code §§ 14525(a),(c),(d),(e) and 14526.1(d)(1),(3),(4),(5); and 14526.1(e).
(See Settl. Agr. § X.)

1 participants to the CBAS program, and afford the Court time to rule on final approval of the
2 Agreement. (See Mot. for Prelim. Approval. at 3.) CBAS services will be available on March 1,
3 2012. (Ex. 2 of Order Granting Prelim. Approval of Setl. Agr. at 3 (Notice to Class)).

4 **THE UNITED STATES SUPPORTS THE FINAL APPROVAL OF THE AGREEMENT**

5 The United States supports the final approval of the Agreement because it represents a
6 “fundamentally fair, reasonable, and adequate” resolution of this litigation that addresses the
7 significant harms identified in the Complaint and affords considerable relief to all Class
8 Members. Fed R. Civ. P. 23(e)(2); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458
9 (9th Cir. 2000). To determine whether a settlement is “fair, reasonable, and adequate,” a court
10 generally looks to the following factors: (1) the strength of Plaintiffs’ case; (2) the risk, expense,
11 complexity, and likely duration of litigation; (3) the risk of maintaining a class action status
12 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed
13 and the stage of proceedings; (6) the experience and views of counsel; (7) the presence of a
14 governmental participant; and (8) the reaction of class members to the settlement. *In re*
15 *Bluetooth Headset Products Liability Litigation*, 654 F.3d at 946 (citing *Churchill Vill., L.L.C. v.*
16 *Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370,
17 1375 (9th Cir. 1993)). The United States addresses only the first and second factors – the
18 strength of Plaintiffs’ case and the advantages of avoiding litigation and arriving at settlement
19 agreement through good faith negotiations.⁵ Further, the Agreement advances the public interest
20 in furthering the State’s compliance with the integration mandate of title II of the ADA.⁶

21
22 ⁵ The reaction of class members does not appear to weigh against approval of the Agreement. As
23 of January 9, 2012, only four objections to the Agreement were filed in the District Court. (See
24 Letter Dated Dec. 20, 2011 re Settlement, ECF No. 428; Letters Dated Dec. 27, 2011, ECF Nos.
25 430 & 431; Letter Dated Dec. 21, 2011 re: Settlement Agreement, ECF No. 429.) These
26 objections seem to be addressed by various provisions of the Agreement. For example, a number
27 of class members have raised the concern that their ADHC centers will not be offered sufficient
28 reimbursement rates under the terms of the Agreement. (See Letters Dated Dec. 27, 2011, ECF
Nos. 430 & 431.) This concern would likely be addressed by a number of provisions in the
Agreement, including requirements that Defendants “monitor CBAS provider capacity to ensure

1 Plaintiffs brought this action seeking declaratory and injunctive relief to prevent
2 Defendants from eliminating ADHC services until adequate, appropriate, and uninterrupted
3 services are available to avoid unnecessarily forcing Plaintiffs into segregated, institutional
4 settings, in violation of the ADA. (See Compl. §§ X.E-F; Pls.’ Mot. for Prelim. Inj. at 1-2.) This
5 Court previously found ADHC services to be “critical to [Plaintiffs’] ability to avoid
6 institutionalization, and to remain in a community setting.” *Cota*, 688 F. Supp. 2d at 994; see
7 also *Brantley*, 656 F. Supp. 2d at 1170 (finding that “even temporary gaps in services would
8 present serious consequences for Plaintiffs and place them at great risk of being
9 institutionalized.”) Absent a reasonable modification of state policies, the elimination of services
10 that have enabled individuals with disabilities to remain in the community violates the ADA.
11 See *M.R. v. Dreyfus*, ___F.3d___, 2011 WL 6288173, at *16 (9th Cir. 2011).

12 The Agreement reflects the strength of Plaintiffs’ claims. The Agreement develops a
13 reasonable modification of State policies to prevent the unnecessary institutionalization of
14 Plaintiffs and Class members by requiring Defendants to establish CBAS – a program similar to
15 ADHC – that will ensure the continuation of medically necessary skilled health and nursing care,
16 therapies, personal care, transportation and other services for eligible class members who,
17 without these services, would be at serious risk of institutionalization. (See Settl. Agr. §§ IX-X,

18
19 sufficient access in geographic areas where ADHC is provided at the time of the execution of the
20 Agreement,” to “use due diligence to address access issues,” and develop actuarially sound
21 reimbursement rates that reflect the costs of providing CBAS services to eligible class members.
(See Settl. Agr. §§ XII.B.5, F.)

22 ⁶ As directed by Congress, the Attorney General has issued regulations implementing title II of
23 the ADA, which are based on regulations issued under section 504 of the Rehabilitation Act. See
24 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995
25 (1980), reprinted in 42 U.S.C. § 2000d-1. The title II regulation requires public entities to
26 “administer services, programs, and activities in the most integrated setting appropriate to the
needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The preamble
discussion of the “integration regulation” explains that “the most integrated setting” is one that
“enables individuals with disabilities to interact with nondisabled persons to the fullest extent
possible....” 28 C.F.R. Pt. 35, App. B at 673 (2011).

XII.) The Agreement also establishes specific processes and timetables designed to assess and seamlessly transition eligible class members from ADHC services to CBAS or other services. (See *id.* § X-XI.) These provisions are designed to ensure that class members receive the services they need to remain in the community.

The Agreement also represents the outcome of good faith negotiations and avoids the need for further costly litigation. The Parties arrived at this Agreement after numerous face-to-face meetings supervised by United States Magistrate Judge Natanael Cousins throughout two months in 2011. (See Decl. of Elissa Gershon, ECF No. 413, Dec. 1, 2011, ¶¶ 11-12.) These meetings, which included high-level staff from DHCS, plaintiffs' experts, ADHC providers, and named plaintiffs and/or their Guardians ad Litem, have afforded the parties the opportunity to cooperatively construct an Agreement that is beneficial to class members and the product of good faith negotiations. (*Id.* ¶ 11.) Representatives from the United States Department of Justice were also present at a substantial number of meetings to assist the parties in reaching a successful resolution. Although this Court may have properly granted a preliminary injunction to enjoin elimination of the ADHC benefit, further proceedings to determine Defendants' liability and an appropriate remedy would be complex, lengthy, would involve the testimony of numerous experts at significant expense, and may have ended in appeals to the Ninth Circuit, adding further expense and time without offering more than temporary relief to class members. Here, all parties have agreed to the terms of the Agreement, obviating the need for what would be a complex, lengthy, and expensive continuation to the litigation. Thus, this Agreement will further the State's compliance with the integration mandate of title II of the ADA and is fair, reasonable, and adequate.

CONCLUSION

For the foregoing reasons, the United States respectfully urges this Court to grant final approval of the Agreement.

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3 DATED: January 10, 2012

Respectfully submitted,

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