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 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 OAKLAND DIVISION

13
 14 **DAVID OSTER et al,**

15 Plaintiffs,

16 v.

17 **WILL LIGHTBOURNE, Director of the**
 18 **California Department of Social Services,**
 19 **TOBY DOUGLAS, Director of the**
 20 **California Department of Health Care**
 21 **Services; CALIFORNIA DEPARTMENT**
 22 **OF HEALTH CARE SERVICES; and**
 23 **CALIFORNIA DEPARTMENT OF**
 24 **SOCIAL SERVICES,**

25 Defendants.

CV 09-4668 CW

**DECLARATION OF EILEEN CARROLL
 IN SUPPORT OF DEFENDANTS'
 OPPOSITION TO PLAINTIFFS'
 MOTION FOR A PRELIMINARY
 INJUNCTION**

Date: January 19, 2012
 Time: 2:00 p.m.
 Courtroom: 4
 Judge: Honorable Claudia Wilken
 Date Filed: October 1, 2009

1 I, EILEEN CARROLL, hereby declare:

2 1. I am employed by the California Department of Social Services (CDSS) as the
3 Deputy Director of the Adult Programs Division. In my capacity as Deputy Director, I am
4 responsible for state oversight, policy, regulations, operations, litigation, technical assistance,
5 legislation, and related matters for all Adult Programs, including the In-Home Supportive
6 Services (IHSS) program. In this position, and in my former position as Branch Chief over the
7 former Adult Programs Branch (October 2007 to June 2010), I have been responsible for
8 oversight, policy, regulations, operations, litigation, technical assistance, legislation, and quality
9 assurance/program integrity activities for Adult Programs, and systems oversight and
10 implementation of the Case Management Information and Payrolling Systems (CMIPS). Adult
11 Programs include: In-Home Supportive Services (IHSS), State Supplemental Payment (SSP),
12 Cash Assistance Program for Immigrants (CAPI), Adult Protective Services (APS) and California
13 Veterans Cash Benefit (CVCB) programs.

14 2. The facts stated in this declaration are of my own knowledge, and I could, and would,
15 testify about them competently.

16 3. This declaration is being submitted in support of Defendants' Opposition to
17 Plaintiffs' Motion for a Preliminary Injunction.

18 **BACKGROUND**

19 4. There are approximately 440,000 Californians who receive IHSS. Supportive
20 services are limited to 283 hours per month for the severely impaired, and to 195 hours per month
21 for the non-severely impaired. The number of hours a recipient receives per month is determined
22 by a trained county social worker who assesses a recipient's need for "supportive services,"
23 which may include domestic and related services, heavy cleaning, personal care services,
24 accompaniment by a provider during travel to health-related appointments or to alternative
25 resource sites, yard hazard abatement, protective supervision, teaching and demonstration, and
26 paramedical services for the recipient to establish and maintain an independent living
27 arrangement. Our most recent statistics show that beneficiaries currently receive, on average,
28 approximately 85 hours of service per month.

1 5. The recipients' services are self-directed, and recipients are considered to be the
2 employers of the services insofar as they perform the hiring, directing, and, if necessary, firing of
3 their providers. Approximately 70% of IHSS recipients receive services from a relative, and 50%
4 of recipients live with the person from whom they receive services.

5 6. In determining the services and number of hours a recipient will receive, the social
6 worker conducts a face-to-face assessment in the recipient's home, interviews the recipient,
7 observes the recipient, and considers the home environment. Since 1988, Welfare and
8 Institutions Code section 12309 has required that counties conduct IHSS assessments using a
9 uniform needs assessment tool (Uniformity). Uniformity guides the evaluation of an individual's
10 ability to accomplish tasks without human assistance in each of eleven areas correlating to the
11 Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs). The
12 individual's functional limitations are assessed based on a defined scale of 5 ranks:

- 13
- 14 1 – The individual can perform the tasks in that area independently;
 - 15 2 – The individual can perform the tasks in that area but requires verbal reminding or
 guidance from another;
 - 16 3 – The individual requires minimal human assistance with the tasks;
 - 17 4 – The individual requires substantial human assistance with the tasks, but can provide
 assistance with completion of the tasks, and
 - 18 5 – The individual cannot perform any part of the task, with or without human assistance.

19 Based on the assessment, a determination is made whether the individual's rank
20 demonstrates a need for service, and if so, the amount of each type of service that is needed. The
21 social worker has substantial discretion in determining the functional ranks for each service and
22 the number of hours available within the range of hours for each rank. The social worker may
23 afford more or fewer hours than the ranking calls for and need only document the reason for the
24 deviation. Approximately 70% of hours assessed are within the guidelines; 30% are not. The
25 total number of hours allotted to a recipient does not reflect the minimum number of hours that a
26 recipient needs to avoid out-of-home placement. Rather, the number of hours represents the
27 social worker's best determination of what the recipient needs given a number of factors
28

1 including the recipient's living environment and fluctuation in a recipient's need due to daily
2 variances in functional capacity.

3 **IMPLEMENTATION OF SB 73**

4 7. The Department has determined that approximately 66,000 IHSS recipients will be
5 completely exempt from the 20% reduction. This number includes those recipients who are on
6 one of the home and community-based Medicaid waivers (42,394), children covered by Early and
7 Periodic Screening, Diagnostic and Treatment (EPSDT) under Medi-Cal who are not otherwise
8 on a waiver (6,767), and those recipients who meet the other pre-approval criteria set forth in All-
9 County Letter (ACL) 11-81 (16,744). (A true and correct copy of this ACL is attached hereto as
10 Exhibit A.)

11 8. However, a recipient who is not automatically exempt may still submit a
12 Supplemental Care application to the county, explaining why there is a serious risk of out-of-
13 home placement if his/her hours are reduced. The counties will assess the application using a
14 supplemental care worksheet, which was designed to identify recipients who were the most likely
15 to qualify for admission to a skilled nursing facility or to have a serious cognitive impairment
16 such that the loss of any IHSS hours would render them at serious risk for out-of-home
17 placement. Unless the social worker can either: (1) re-arrange the IHSS recipient's hours to
18 eliminate the serious risk of out-of-home placement; or (2) arrange for the recipient to receive
19 services from an informal alternative resource, thereby eliminating the risk of out-of-home
20 placement, the social worker must partially or fully restore the recipient's hours.

21 9. As explained in my prior declaration, if the functional rank criteria on the
22 supplemental worksheet are not met, the social worker still retains the discretion to restore some
23 or all the hours if the worker believes that a reduction in hours would cause a serious risk of out-
24 of-home placement. Social workers are not prevented from restoring hours if the functional rank
25 criteria are not met. As explained in ACL 11-81, the county social worker's mandate is to take
26 "steps necessary to alleviate any serious risk of out-of-home placement." Ex. A, p.8. The social
27 worker must restore enough hours to eliminate the serious risk of out-of-home placement. Ex. A,
28 p. 20. If necessary, once the TRO is lifted and we are permitted to do so, the Department is

1 willing to provide clarifying guidance to the counties that their social workers retain discretion to
2 look beyond the functional ranks when considering IHSS Supplemental Care applications.

3 10. County social workers assess and reassess IHSS recipients and determine what
4 services they need and how many hours a recipient needs each month. Thus, they are qualified to
5 determine if a recipient will need full or partial restoration of his/her hours to avoid a serious risk
6 of out-of-home placement.

7 11. If a recipient submits the Supplemental Care application within 15 days or prior to the
8 effective date of the reduction, the recipient will not be subject to the 20% reduction pending the
9 county's determination of whether the recipient is at serious risk of out-of-home placement. If a
10 recipient does not timely submit a Supplemental Care application, he/she will be subject to the
11 20% reduction, but may still pursue a restoration of hours.

12 12. If a county denies a recipient's Supplemental Care application, the county will send
13 the recipient a Notice of Action informing the recipient that the 20% reduction will be effective as
14 of a certain date. If the county does not restore all the hours, the recipient may file a request for a
15 state fair hearing. If the recipient files the request within 10 days of receiving the Notice of
16 Action or prior to the effective "date" of the reduction, the recipient will receive aid-paid pending
17 (will not be subject to the 20 % reduction) until the state fair hearing process is complete.

18 13. During the fair hearing process, the administrative law judge will consider all relevant
19 factors pertaining to whether or not a recipient will be at serious risk of out-of-home placement if
20 his or her IHSS hours are reduced.

21 14. I have read the declaration submitted by Karen Keeslar, the Executive Director of the
22 California Association of Public Authorities (CAPA) for IHSS and the emails that she has
23 attached to her declaration. The numbers and percentages regarding how many recipients would
24 be exempt from the 20% reduction, how many would apply for supplemental care and how many
25 would ultimately not have any hours restored were high level fiscal estimates my staff and I made
26 regarding budget estimates. There is no way to predict how many recipients will submit a
27 Supplemental Care application, or who will ultimately not have their hours restored, modified
28 partially or reduced. The emails attached to Ms. Keeslar's declaration are merely budgetary

1 assumptions and projections the Department made with regard to the 20% reduction. These
2 projections do not represent what will actually occur for the supplemental care application
3 population. There is no way to predict with any level of certainty what will happen through the
4 Supplemental Care Application and fair hearing processes.

5 **NAMED PLAINTIFFS**

6 15. Through data the Department received from the Department of Health Care Services,
7 we have determined that plaintiffs David Oster and Dottie Jones are on home and community-
8 based waivers, and therefore, will not be subject to the 20% reduction of IHSS hours. Through
9 review of this same data, we have determined that neither plaintiff C.R. nor L.C. will have their
10 hours reduced because they are receiving EPSDT services.

11 16. I have received CMIPS data and the county's file for each of the remaining named
12 plaintiffs, Willie Beatrice Sheppard, Andrea Hylton, Helen "Polly" Stern, and Charles Thurman.
13 None of these recipients is "severely impaired," and only Ms. Stern receives more than the
14 average monthly number of hours.

15 a. Willie Beatrice Sheppard. Attached hereto as Exhibit B is a true and correct copy of
16 the reassessment of Ms. Sheppard conducted by an Alameda County social worker on November
17 29, 2011. Ms. Sheppard currently receives 77.20 hours per month of IHSS, including assistance
18 with domestic services, meal preparation, meal clean-up, shopping, dressing, bathing, ambulation,
19 and moving in/out of bed. As a result of this recent reassessment, Ms. Sheppard's hours for meal
20 preparation, dressing, ambulation and bathing were increased. However, she receives fewer
21 hours under her current functional rank for ambulation (she only needs assistance to and from a
22 vehicle) and moving in/out of bed because she only needs a "boost" when "[her] knee pain is
23 most severe." According to the reassessment, Ms. Sheppard receives Meals on Wheels five times
24 a week.

25 b. Andrea Hylton. Attached hereto as Exhibit C is a true and correct copy of the last
26 assessment of Ms. Hylton conducted by a Santa Barbara County social worker on March 29,
27 2011. Ms. Hylton is currently authorized to receive 45.3 hours per month of domestic and
28 personal services, including housework, meal preparation, meal clean-up, laundry, and shopping.

1 Her authorized hours are well below the average of 85 hours per month. Her current hours are
2 essentially the same as they were two years ago.

3 c. Helen "Polly" Stern. Ms. Stern, an 86-year-old woman who lives alone has received
4 IHSS since August 2009, and currently receives 121.6 hours per month. She receives assistance
5 with domestic chores, meal preparation, meal clean-up, laundry, shopping, dressing, bathing, skin
6 care, ambulation, and accompaniment to medical appointments. Attached hereto as Exhibit D is a
7 true and correct copy of her last assessment by a Shasta County social worker in January 2011.
8 Attached hereto as Exhibit E is a Public Health Nurse Narrative, dated March 30, 2010.

9 d. Charles Thurman. Attached here to as Exhibit F is a true and correct copy of the
10 IHSS reassessment of Mr. Thurman conducted on September 9, 2011. Mr. Thurman receives the
11 following IHSS: domestic services, meal preparation, meal clean-up, laundry, shopping,
12 dressing, ambulation, bathing/grooming, and accompaniment to medical appointments. Although
13 Mr. Thurman has a Rank 3 for ambulation, dressing, and bathing, he receives fewer hours than
14 listed under the guidelines because his actual need for these services is minimal. He only needs
15 assistance with putting on his shoes and socks five times per week; he only needs help with
16 ambulation in going to medical appointments, not around his house; and the only assistance he
17 needs with bathing is getting in and out of the shower, washing and drying off his back, legs and
18 feet, and shaving once a week. Mr. Thurman lives with his wife who also receives IHSS and so
19 their hours for domestic services are prorated for two.

20 17. If any of the named plaintiffs listed in paragraph 16 believe that the 20% reduction of
21 IHSS hours would require them to move out of their homes, they may submit a Supplement Care
22 application to the county, explaining why they believe that they need to have all or some of their
23 hours restored. If any of these named plaintiffs do not agree with the outcome of the
24 Supplemental Care application process, they may file a state fair hearing request. If these are
25 timely filed, the named plaintiff will not have a reduction in IHSS hours until their claim is finally
26 adjudicated.

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1 I declare under penalty of perjury that the foregoing is true and correct, and that this
2 declaration was executed electronically, at my request, on December 23, 2011, while I was in
3 Sacramento, California.

4 /s/ Eileen Carroll
Eileen Carroll

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8 **GENERAL ORDER 45 ATTESTATION**

9 I, Nimrod Elias, am the ECF user whose ID and password are being used to file this request
10 for an order. In compliance with General Order 45, X.B., I hereby attest that declarant Eileen
11 Carroll has concurred in the filing of this document with her electronic signature.

12 Dated: December 23, 2011

/s/ Nimrod Elias
Nimrod Elias

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