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

13
 14 **V.L., et al.,**

15 Plaintiffs,

16 v.

17 **JOHN A. WAGNER, et al.,**

18 Defendants.
 19

CV 09-4668 CW

**DEFENDANTS' OBJECTIONS AND
 PRELIMINARY OPPOSITION TO
 PLAINTIFFS' SUPPLEMENTAL
 RESPONSE RE: NOTICE TO
 COUNTIES AND PLAINTIFFS'
 MOTION FOR CLARIFICATION RE:
 USE OF PROVIDER INFORMATION**

1 Defendants simply seek to correct an error in the notices that plaintiffs mailed to
2 approximately 6,209 IHSS providers on November 21, 2009. Specifically, those notices
3 incorrectly stated that providers who did not work all of their hours in November because they
4 received incorrect time cards may make up those missing November hours in December. This
5 error needs to be corrected for numerous reasons, including but not limited to the following:

- 6 • The proper remedy for IHSS recipients who lose November hours due to incorrect
7 time cards is to compensate those recipients directly with monetary payments for
8 the hours that they lose, not to make up those lost hours with extra hours in a later
9 month.
- 10 • By law IHSS recipients may not receive, and providers may not receive IHSS
11 payments for, any hours above what the recipient has been determined to need in a
12 given month. *See generally* Cal. Welf. & Inst. Code § 12300(a); MPP §§ 30-
13 761.13-14, 30-765.1-12, 30-765.14, & 30-769.91-911. By definition, recipients
14 already have been determined *not* to need any more hours than they are currently
15 allotted for December.
- 16 • If left uncorrected, the November 21 notice to providers will cause tremendous
17 confusion because it states that providers may make up November hours in
18 December *if the recipient needs extra hours*. As discussed above, recipients by
19 definition already have been determined not to need any extra hours beyond what
20 they already are allotted for December, and accordingly the November 21 notice to
21 providers may not give recipients any actual remedy for missing November hours.
- 22 • Defendants' proposal, which is consistent with how the IHSS program already
23 operates, will ensure that recipients receive a remedy for any lost November hours
24 and will give recipients maximum flexibility to determine how to apply that
25 remedy, including using that money to pay for extra hours in December if they so
26 desire.

- 1 • The IHSS program and its CMIPS computer system are already equipped to
2 directly compensate recipients for missing hours in November and can quickly and
3 easily provide that relief.
- 4 • The IHSS program and CMIPS computer system are not currently equipped to
5 allow providers to make up November hours in December, and accordingly if
6 defendants are ordered to provide that remedy it will create a logistical nightmare
7 for recipients, providers, the counties, EDS, and the State, and will inevitably
8 require the parties and the court to expend additional time and resources sorting
9 out the implementation of that order.
- 10 • Payments to providers for hours above what recipients have been allotted for
11 December are not permitted under the Medicaid Act and thus cannot be certified to
12 the federal government for the federal share of Medi-Cal.
- 13 • Defendants have offered to pay the costs of preparing and mailing supplemental
14 notices to these 6,209 providers to correct the error in the November 21 notices.

15 Defendants have made the following proposals to correct the error in the November 21
16 notices: First, defendants have proposed sending the following email notices to the counties, with
17 PDF copies of the provider notices attached:

18 Subject: Notices to IHSS Providers Re: Potentially Incorrect Time Cards

19 By Order of the United States District Court in *V.L. v. Wagner*, N.D. Cal. No. CV-09-
20 4668-CW, the attached notices and supplemental time cards were mailed to
21 approximately 6,209 IHSS providers on November 21, 2009. The Court determined
22 that some of these providers may have received incorrect time cards for the pay
23 periods of November 1-15 and/or November 16-30 because the CMIPS records of
24 their recipients may not have been updated to reflect the reversal of the planned FI
25 under 2 and functional rank under 4 terminations and reductions in services. The
26 notices instruct providers who received incorrect time cards that they may fill out the
27 attached supplemental time cards with the corrected information and submit those
28 supplemental time cards for processing and payment even if they have already
submitted a time card (listing fewer hours) for that pay period. The notices also state
that providers who did not work all of their normal hours in November because they
received incorrect time cards may make up those hours later in November and submit
supplemental time cards.

The notices also contain one error, which is being corrected through supplemental
notices to these providers. Specifically, the notices incorrectly state that providers
may make up November hours in December. Recipients may not receive more than
their authorized hours in any month, and accordingly they may not make up

1 November hours in December. In the event that a recipient does not receive all of
2 his/her November hours because of an incorrect time card, the recipient will be
entitled to receive a payment to make up for those lost hours.

3 Accordingly, if you receive a supplemental time card from an IHSS provider, (1)
4 please verify that the file of each IHSS recipient for whom that provider works has
5 been properly updated in CMIPS in accordance with ACL 09-61, and (2) please
6 ensure that the provider is properly paid as soon as possible in accordance with the
attached notice to IHSS providers, including issuing a supplemental paycheck if
necessary.

7 Second, defendants also have proposed sending the following supplemental notices to the 6,209
8 providers who received the November 21 notices:

9 Dear IHSS Provider,

10 You were mailed a notice dated November 21, 2009 stating that you may have
11 received an incorrect time card for November 1-15 and/or November 16-30. This
follow-up notice is being sent to correct an error in that first notice.

12 The first notice incorrectly stated that if you did not work all your normal hours in
13 November because of the incorrect time card, you can make up those hours in
December if your recipient/employer needs extra hours. That statement was
14 incorrect. If you did not work your normal hours in November because of the
incorrect time card, you can make up those hours *later in November*, but you cannot
15 make up those hours in December. IN DECEMBER, YOU SHOULD CONTINUE
TO WORK THE HOURS THAT YOUR ARE AUTHORIZED TO WORK IN
DECEMBER.

16 If your recipient/employer did not receive all of his/her normal hours in November
17 because of an incorrect time card, your recipient/employer may be entitled to receive
a payment to make up for those lost benefits, and your recipient/employer should
18 contact his/her county to request that payment.

19 Finally, defendants also propose sending a notice to the recipients whose providers may have
20 received incorrect time cards, notifying those recipients that if they did not receive all of their
November hours because their provider(s) received incorrect time cards, they may be entitled to
21 receive payments to make up for their missing hours.

22 Defendants object to the unreasonably short time that they have been given to respond to
23 plaintiffs' motions in violation of due process and fundamental fairness. Defendants further
24 assert their right to file opposition papers once they have been given a reasonable time to respond.
25 Plaintiffs filed their papers the day before Thanksgiving, at a time when they knew that
26 defendants' counsel was out of town on vacation. Further, defendants were required to file
27 opposition papers by 8:30 a.m. the Monday immediately following the Thanksgiving holiday
28

1 weekend, which is prior to defendants' counsel's return from vacation and does not give
2 defendants any working days to prepare their opposition. Plaintiffs' motions are baseless and
3 should be rejected out of hand, but in the event that the court is inclined to grant them defendants
4 must be given a reasonable opportunity to respond in accordance with due process and
5 fundamental fairness.

6 Dated: November 29, 2009

Respectfully submitted,

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