UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

C.S. *ex rel.* K.C.; K.C. *ex rel* L.C.; T.B. *ex rel.* C.B.; B.B. *ex rel* C.B.; T.C. *ex rel* L.C., on their own behalf and on behalf of all those similarly situated,

Plaintiff,

v.

CLYDE SAIKI, in his official capacity as Director of Department of Human Services, State of Oregon; and LILIA TENINTY, in her official capacity as the Director of the Office of Developmental Disabilities Services, Oregon Department of Human Services,

Defendants.

Civ. No.

Plaintiffs' MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

NOTICE OF EFFORTS TO COMMUNICATE (LR 7-1)

Prior to filing the complaint and the present motion in this case, the plaintiffs, through counsel, made extensive efforts to prevent this litigation. Counsel for the plaintiffs met with the head of the Oregon Office of Developmental Disabilities Services on May 16, 2016; July 22, 2016; and August 22, 2016 to discuss problems with the inadequacy of due process in notification of reductions in service hours and in the exceptions process. These issues, as well as the Medicaid Act and disability discrimination claims, were also raised by e-mail and telephone with an ODDS staffer and with counsel for DHS multiple times in December 2016.Finally, representatives for the plaintiffs discussed the intent to file this litigation and associated motions on March 31, 2017 by telephone and via e-mail on April 6, 2017, unless DHS would concede to the interim relief described in them. Counsel for DHS informed plaintiffs via e-mail that they would decide their position on this motion after the pleadings were filed.

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MOTION FOR PRELIMINARY INJUNCTION

For the reasons stated in the below memorandum of law, the plaintiff moves this court for a preliminary injunction, restoring the status quo for in-home care assistance to the plaintiffs and other similarly-situated recipients of in-home care benefits. Fed. R. Civ. Pro. 65(b). Only by sustaining the long-standing status quo of a higher level of individual care can the plaintiffs' right to due process and to live at home safely be protected. Allowing the defendants (collectively, "DHS") to cut the plaintiffs' in-home care hours without considering the risk of removal from their homes to a less-integrated environment or without providing adequate due process would violate their rights. Absent the court's intervention**,** the plaintiffs will be deprived of life-saving services without due process of law.

MEMORANDUM OF LAW

The cuts to the plaintiffs' in-home care hours were made in such a peremptory and opaque way that the reduction of their in-home care hours violated their due process rights. The plaintiffs' request for interim relief is well-trodden territory in the Ninth Circuit. *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 974 (9th Cir. 2015) (holding preliminary injunction appropriate where systemic cuts to Idaho's in-home care services for people with developmental disabilities were likely to violate the ADA and due process clause); *M.R. v. Dreyfus*, 663 F.3d 1100, 1102 (9th Cir. 2011), *opinion amended*, 697 F.3d 706 (9th Cir. 2012) (cuts to in-home care hours adequately stated basis for preliminary injunction where they exacerbated risk of institutionalization under the ADA); *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1121 (N.D. Cal. 2009), *order enforced*, No. C 09-04668 CW, 2009 WL 4282079 (N.D. Cal. Nov. 25, 2009) (granting preliminary injunction halting reductions in in-home care hours based on due process and ADA claims). The overwhelming consensus of these cases is that courts should and must

grant interim injunctive relief where plaintiffs show either that a state has cut in-home care services without adequate notice to the consumer or where such cuts put consumers in danger of removal to a less-integrated setting.

The plaintiffs are entitled to preliminary injunctive relief if they show (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in favor of issuing an injunction; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Alternately, a party may argue that, where she a balance of harms tilting sharply in the plaintiffs favor, the court need only find a fair chance of success on the merits, irreparable harm, and favor to the public interest in order to grant the preliminary injunction. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The plaintiffs will argue each of the four *Winter* prongs in turn, and separately address the alternative "strong questions and sharply tilted balance of harms" formulation of the same calculus.

I. Factual Overview

The named plaintiffs in this case are five Oregonians with intellectual and developmental disabilities. Each of them receives in-home care services, funded by Medicaid and state money through Oregon's Office of Developmental Disabilities, a division of the Department of Human Services. The defendants are the heads of the Office of Developmental Disabilities and the Department of Human Services (collectively, "DHS"). The plaintiffs have filed a complaint and motion for class certification, alleging that DHS, by cutting past levels of in-home care hours by roughly 30 percent,[1] has violated their rights and those of other people similarly situated.

[1] Lilia Teninty, Office of Developmental Disabilites, ODDS Director's Message, July 14, 2016 (stating that the service cuts "implement the item by item reduction at 30%") *available at*

Specifically, the plaintiffs have alleged that DHS has violated their due process rights by failing to give them adequate individualized notice of the reasons for service cuts; by using a secret formula to determine their hours of care; by operating an opaque process to challenge those cuts in its exceptions process; and by creating a functionally meaningless administrative hearing process. The plaintiffs also argued that the service cuts put them at risk of movement to a less integrated placement, such as a group home, foster care placement, or nursing home, in violation of the Americans with Disability Act and the Rehabilitation Act. Finally, the plaintiffs alleged that DHS refused to grant them services adequate to meet their needs, as required by the Medicaid Act.

The plaintiffs receive in-home care benefits, allowing them to hire personal care workers to assist them in meeting their daily needs for hygiene, communication, mobility, and community integration, among others. Without those services, the plaintiffs would be unable to meet essential human needs, like eating, washing, toileting, expressing their ideas, moving around, and going out to stores, parks, and other public places. These services are administered through the Oregon Department of Human Services and its Office of Developmental Disabilities Services, using federal Medicaid money and state funds.

DHS does not provide individualized notice to consumers of cuts to in-home care hours. Instead, DHS created a boilerplate notice that says that the assessment has determined the consumer needs fewer hours for in-home care, without giving any individualized reason for the decision.[2] Instead, a case worker plugs into the model notice the number of hours previously authorized, the number of hours authorized after the new evaluation, the date of the evaluation,

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http://www.oregon.gov/DHS/SENIORS-DISABILITIES/DD/DirectorMessages/ODDS%20Director's%20Message%2007-14-16.pdf

[2] Declaration of Thomas Stenson, Exh. 1(Department of Human Services, Template Notification of Planned Action). A nearly identical notice is sent to child consumers.

and the effective dates of these changes. Although the notice generically states that DHS has revised the formula providing hours to individual consumers, the notice does not differentiate between reductions in hours related to revised DHS policies and the changes relating to increased or decreased individual needs. The plaintiffs, in reading their notices, could not determine the reason why their hours were reduced, beyond the bare assertion that their assessments mandated the reduction. The plaintiffs allege the lack of individualized notice violates due process.

The plaintiffs also could not determine their reduced hours were calculated. The needs assessment generally asks a series of questions about daily functions (e.g., toothbrushing, dressing, eating, meal preparation, bathing, medication administration), usually asking whether the individual needs full assistance, partial assistance, or is independent, where a person needs no disability-related assistance.[3] Once all those questions are answered, a formula "embedded in the functional needs assessment" automatically determines how many hours are required to assist the individual, without needing or permitting any further input or adjustment from the assessor. OAR 411-450-0020(21). The plaintiffs and other consumers have no access to the formula, nor any understanding of its operation, because the formula calculating the extent of their benefits is secret and changes regularly. The needs assessment's determination of hours conclusively determines the measure of the benefit under Oregon law. *Id.* The plaintiffs allege that the secret calculation of their benefits violates substantive and procedural due process.

DHS allows consumers to request an exception in order to obtain benefits in excess of the caps DHS has imposed. The exceptions process is not mentioned in the notice given to consumers. Consumers who discover the exceptions process are only permitted to file an

[3] Children who need age-appropriate assistance comparable to what a child of that age without a disability would need (for instance, a three-year-old who cannot prepare meals) are scored as independent on that provision of the needs assessment.

application for the exception. They may not provide testimony or argument before the committee, nor participate in any way before the committee, unless the committee specifically invites them to participate. The nature of the exceptions committee, its composition, and its operation is not described anywhere in the Oregon Administrative Rules. The plaintiffs allege that this opaque process, of which they receive no formal notice and in which they may not participate, violates their rights to due process.

Consumers are notified about the separate administrative hearing process. The consumer can file an administrative appeal of the reduction in service hours. Since the needs assessment completely determines their service level as a matter of law, direct administrative appeal yields no meaningful opportunity to be heard on the question of whether the needs assessment adequately reflects their needs or yields the hours needed to meet those needs. Recently, administrative law judges have also permitted consumers to appeal the outcome of the exceptions process as well, although the efficacy of the exceptions appeals seems seriously impaired by the lack of notice and lack of clear standards in the process as well. The plaintiffs allege that a largely meaningless right to administrative appeal, at which the nature of their substantive rights cannot be directly addressed, violates their right to due process.

II. The Plaintiffs Are Likely to Prevail on the Merits of Their Claims

A party may obtain a preliminary injunction by showing a likelihood of success on the merits of the claim. *Winter*, 555 U.S. at 20. In the present case, the plaintiffs are likely to succeed on their due process claim, since DHS's service cuts and the lack of notice violate black letter due process law requiring individualized notice. The plaintiffs are also likely to succeed on the integration mandate claim under the ADA and Rehabilitation Act because multiple decisions in

the Ninth Circuit have granted preliminary injunction motions for similar service cuts that put people with disabilities at risk of placement in less integrated settings.

A. Providing Boilerplate, Nonindividualized Notice in Reducing Services and Benefits Violates Basic Due Process Norms

The reduction of government benefits in disability programs and public welfare programs are a sufficient property interest to require due process protections before any change in status. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). In virtually every government benefits case, courts have held that reasonable notice and a meaningful opportunity to be heard must be provided before the benefit is removed. *Goldberg*, 397 U.S. at 267-68. Adequate notice must "give[] an agency's reason for its action in sufficient detail that the affected party can prepare a responsive defense." *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992). Due process is not satisfied by a notice that would leave a claimant "guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether." *Gray Panthers v. Schweiker*, 652 F.2d 146, 168-69 (D.C. Cir. 1980). Since typical benefit reduction or denial cases rely on allegations of "incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases," the notice must show both the underlying factual premises of agency action and illustrate how the agency applied its rule to the case. *Goldberg*, 397 U.S. at 268.

In the present case, DHS produced notices that gave no meaningful factual or legal explanation for the cuts to the plaintiffs' services.[4] Instead, DHS's notice presents essentially the same lack of detail in notices enjoined by the District of Idaho and on appeal in 2015 in *K.W.*

[4] Declaration of Thomas Stenson, Exh. 2 (C.S.'s Notification of Planned Action); Exh. 3 (K.C.'s Notification of Planned Action); Exh. 4 (T.B.'s Notification of Planned Action); Exh. 5 (B.B.'s Notification of Planned Action); Exh. 6 (T.C.'s Notification of Planned Action).

K.W. ex rel. D.W. v. Armstrong, 298 F.R.D. 479, 490 (D. Idaho 2014), *aff'd K.W.*, 789 F.3d 962. In *K.W.*, the Idaho counterpart of Oregon's DHS sent out notices of cuts in services to people with developmental disabilities broadly stating that some combination of changes in the consumer's needs, in their behavior assessment, in Idaho or federal law, or in the Medicaid tool resulted in reductions in services. *K.W.*, 298 F.R.D. at 490. The lack of individualized notice left Idahoans with disabilities to "do the math and hope [their] post hoc analysis matches the analysis actually employed by" Idaho authorities. *Id.*at 491. The Ninth Circuit agreed with the District Court's requirement of individualized notice. *K.W.*, 789 F.3d at 974 (holding notices inadequate "because they did not specify why participants' budgets had decreased"). Due process requires meaningful notice that articulates why benefits have been cut *ex ante*, rather than encouraging agencies to cut services broadly and come up with excuses later.

The notice provided to the plaintiffs did not explain the needs assessment or formally incorporate it as an exhibit. The notice does make consumers aware that the needs assessment was relied on and was available upon request, although merely making the assessment available does not meet the due process notice requirement. *Barnes*, 980 F.2d at 579 (alleging that beneficiary "can request further explanation or an accounting misses the point" because burden to perfect notice falls on government, not beneficiary); *Vargas v. Trainor*, 508 F.2d 485, 489 (7th Cir. 1974) (ruling due process not satisfied by the opportunity to consult with a caseworker).

Basic concepts of due process going back decades require that individualized notice of the reasons for reductions or terminations in public benefits be provided in the original notice, whenever individualized cuts are made.[5] The notices issued to plaintiffs contained no meaningful

[5] Courts recognize a "broad statutory change" exception to the individual notice rule, allowing non-individualized notices to issue in cases of systemic statutory change that alter the whole program, where individualized notice would be meaningless and unnecessary. *Atkins*, 472

explanation of the factual premise or the legal justification for the reduction in services. The formula used to calculate their benefits is wholly secret and has not been disclosed to them or to the public. Basic due process norms do not allow benefits cuts on the basis of undisclosed legal and factual premises.

B. The Plaintiffs Are Likely to Succeed on Their Claim that Calculating Their Benefits Using a Secret Formula Violates Due Process

Even for a consumer who has a copy of the needs assessment, DHS's notice does not explain *how* the assessment turns the needs assessed into hours of care. The algorithm is a secret, not disclosed or explained to consumers. The secret nature of the algorithm that determines the results of the assessment further denies due process to the plaintiffs. "[W]ritten notice must explain the formula by which the benefit amount was calculated." *Ford v. Shalala*, 87 F. Supp. 2d 163, 178 (E.D.N.Y. 1999) *judgment entered sub nom. Ford v. Apfel*, No. CV-94-2736 (CPS), 2000 WL 281888 (E.D.N.Y. Jan. 13, 2000). The risk of wrongful calculation of a benefit is particularly acute where a beneficiary has "no meaningful way to ascertain whether agency calculations as to grant amounts are accurate." *Schroeder v. Hegstrom*, 590 F. Supp. 121, 127 (D. Or. 1984). "Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose and resembles more a scene from Kafka than a

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U.S. at 130 (food stamp recipients did not require individualized notice where Congress passed a statute reducing benefits for all recipients); *Pashby v. Delia*, 709 F.3d 307, 328 (4th Cir. 2013) ("broad statutory change" completely altering North Carolina's in-home care program did not require individualized notices). Here, DHS's notices of reduced services reflected only internal tinkering with its own algorithm, not a statutory change that drastically altered the program. *See* Jt. Comm. on Ways & Means, Oregon Legislature, Preliminary Budget Report and Measure Summary—SB 5701A, at 39 *available at* https://olis.leg.state.or.us/liz/2016R1/Downloads/CommitteeMeetingDocument/89392 (ordering DHS to take steps to contain costs that "do not require statutory changes"). Further, the notices of reduced services conflated reductions due to changed needs and those due to system-wide policy changes, making it impossible to distinguish hours cuts related to an individual's allegedly reduced need and those related to changes in the algorithm.

constitutional process. " *Gray Panthers*, 652 F.2d at 168; *Dilda v. Quern*, 612 F.2d 1055, 1057 (7th Cir. 1980) (due process in reduction in welfare benefits required detailed "breakdown of income and allowable deductions" in notice). Here, not only is the formula for determination not provided in the notice, it is completely unobtainable.

Generally, a "dramatic reduction of services to persons who had been previously approved under the rules" without any change in the underlying rules is *prima facie* evidence of arbitrary decisionmaking that violates substantive due process. *M.A. v. Norwood*, 133 F. Supp. 3d 1093, 1099 (N.D. Ill. 2015); *see also Mayer v. Wing*, 922 F. Supp. 902, 911 (S.D.N.Y. 1996) ("The capricious nature of these decisions [cutting in-home care hours] is evidenced by the fact that Plaintiffs received notices of reduction while in the same or worse physical condition they were in when home care was initially authorized, and were given no explanation for why they were assessed differently the second time around."). Although DHS's explanation of the cut in its model notice states that DHS was generally instructed by the state legislature to review its assessment to reduce in-home care hours,[6] the notice does not indicate whether or how the past assessment was inaccurate for the particular consumer who receives the notice.

Taken together, the opacity of the formula for calculating benefits and the aberrant results, where clients with the same or increased needs saw service reductions, violates both procedural and substantive due process.

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[6] DHS's characterization of the Budget Note in its model notice is incorrect. The Oregon Legislature only directed that DHS "take immediate action that may help contain costs without changing the current service system structure. . . ." The legislature then *noted*, without instructing DHS to follow through, that DHS's own "action plan includes . . . tak[ing] action to more efficiently align service authorization with people's needs . . . ." Preliminary Budget Report—SB5701A, at 38-39. The legislature did not specifically instruct DHS to alter its assessment; DHS created its own plan to change the tool on its own initiative.

C. The Plaintiffs Are Likely to Succeed on Their Claims that DHS's Exceptions and Administrative Appeal Processes Violate Due Process

DHS violates due process by creating caps on services that cannot be effectively challenged in an administrative appeal, but must go through the exceptions process, an opaque process in which the consumer cannot meaningfully participate. A basic requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner. *Goldberg*, 397 U.S. at 267. As described in the complaint, certain benefits beyond DHS-imposed caps—incorporated into the secret algorithm of the assessment tool—are only obtainable through the exceptions process. No matter how great an individual need is, the consumer can never get above a certain level of care through the needs assessment tool, which apparently incorporates designated service caps.

To obtain relief exceeding those caps, a consumer would have to go through the exceptions process. The notice provided by DHS does not tell consumers that the exceptions process exists or how to invoke it. A consumer who figures out how to request an exception cannot appear before the exceptions committee, cannot present live argument, has no right to offer live testimony, and can only guess at what concerns the committee may have. The consumer can only file an exceptions request, presenting any argument or documentation that seems best to them, and hope for the best.[7] "It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker." *Id.* at 269.

[7] The exceptions process is not explained or defined anywhere in Oregon Administrative Rules or statutes. The best description comes through DHS's website. *See* Oregon Office of Developmental Disabilities, Exceptions Process Step 2, *at* http://www.oregon.gov/DHS/SENIORS-DISABILITIES/DD/Pages/Exception-Step2.aspx (stating that, once the consumer's request is received, "it will be reviewed by someone at ODDS" and ODDS will make its decision, with no indication that the consumer may participate beyond initial submission of the request).

This exceptions procedure is particularly inappropriate given 1) DHS's already inscrutable and generic notice of reductions in service that hinder a person from preparing useful argument and 2) the unique circumstances of every consumer's disability and how it affects the consumer's life and needs. Unlike primarily financial benefits, like TANF or food stamps, where the scope of benefits is primarily a mathematical question, in-home care hours are uniquely oriented around the specific needs of a person with disabilities.[8] Relevant testimony and argument would be specially focused on the unique needs of the individual to receive certain kinds of assistance in order to remain at home and in the community. These needs require the opportunity to meet with committee members and offer direct evidence and argument.

The administrative hearing process is no help to the consumer either. At an administrative hearing, DHS rules make the process into a sham. The measure of the individual's service level is whatever the needs assessment determined, and the hearing officer is not permitted by law to award any higher benefit than that already provided by the needs assessment. OAR 411-450-0020(21); OAR 411-450-0060 (7)(b). An appellant who claims at the hearing that the needs assessment did not give her enough hours and presents evidence showing the inadequacy of the hours in meeting her needs will simply be told that she is entitled to no more hours than the assessment gives her.[9] Such a Kafkaesque proceeding is not "meaningful" as due process requires.

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[8] 42 U.S.C. 1396n(k)(1)(A)(iv) (requiring that services administered under the Medicaid plan at issue should be "controlled, to the maximum extent possible, by the individual or where appropriate, the individual's representative"); 42 U.S.C. 1396n(k)(1)(A)(i) (requiring states using the Medicaid plan at issue to provide in-home attendant supports "under a person-centered plan of services and supports that is based on an assessment of functional need").

[9] This sham process was evident in the administrative hearing process for C.S.'s reduction in hours, where the administrative law judge quickly concluded that C.S. could not possibly succeed except through the exceptions criteria. *See* Declaration of Thomas Stenson, Exh. 7, at 3-4 (Final Order in the Matter of C.S.).("The number of attendant care hours a DDS-

D. The Plaintiffs Are Likely to Succeed in Their Argument That DHS Puts Consumers at Risk of Placement in Less Integrated Settings

The Americans with Disabilities Act and the Rehabilitation Act both require government agencies to operate their programs in the "most integrated setting." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599 (1999); *M.R.* 697 F.3d at 733; 28 C.F.R. 41.51(d); 28 C.F.R. 35.130(d). Any change in benefits that "exacerbates [the] risk" of placement in a less integrated setting for a person with disabilities constitutes prohibited discrimination under the Americans with Disabilities Act and the Rehabilitation Act. *M.R.*, 697 F.3d at 729. The plaintiffs are people with disabilities, DHS and ODDS are public entities, and all defendants receive federal funds. The cuts in services will exacerbate the risk of placement in a less integrated setting, and thus they violate the ADA and Rehabilitation Act's integration mandate.

The civil rights statutes prohibiting discrimination against people with disabilities includes this integration mandate for two fundamental reasons. First, centuries of government policy favoring confining people with developmental disabilities (as well as other disabilities) seriously hindered the ability of people with disabilities to exercise their fundamental constitutional rights: to vote, to form families, to go out into the community, and to exercise the basic liberties that others take for granted. *Olmstead*, 527 U.S. at 601. Second, the preference to keep people with disabilities locked away out of the sight of the community was rooted in deep animus against people with disabilities, as unsightly, undesirable, and otherwise not worthy of partaking in society. *Id.* at 600. In Oregon, this history of abuse and neglect of people with

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eligible individual may receive is determined exclusively by the individual's assessed service level. An individual's service level is determined by a functional needs assessment. OAR 411-450-0060(7)(d). . . . Accordingly, claimant can only qualify for additional attendant care hours if the preponderance of the evidence demonstrates that he meets the exception criteria set forth in OAR 411-450-0060(7)(d)(C) . . . ."). For any person who fails to file an exception, the administrative hearing process is totally meaningless.

developmental disabilities is recent history. The Fairview Training Center in Salem was the primary institution for people with developmental disabilities. There, the inmates were flogged, chained to concrete blocks, confined in straitjackets, and locked in cages.[10] Through 1983, more than 2,600 inmates were sterilized at Fairview.[11] Fairview was closed in 2000. Congress passed these antidiscrimination laws against the background of this grievous record of abuse by removal from the community, in Oregon as elsewhere. States that continue to favor putting people with disabilities into more restrictive settings—usually more expensive than keeping them in the community—are often emulating the same animus and the same willingness to restrict freedom inherent in these past abuses.

The cuts to C.S.'s services have seriously increased the risk of his removal from his home and placement in a less integrated setting. In an integration mandate claim, a plaintiff need not show she has "'no choice' but to submit to institutional care" but only that state action creates "a serious risk of institutionalization." *M.R.*, 697 F.3d at 734. C.S. is a nine-year-old boy who lives with his mother. He has severe autism, which causes emotional outbursts in which he may become violent, strike adults around him, throw items, and damage property. These behaviors, combined with his substantial size—at age nine, he weighs more than 190 pounds and is at least five feet, two inches tall—make it challenging for his mother to manage the outbursts safely by herself. C.S. needs assistance from his in-home care worker to keep him and the people around him safe and to maintain a placement in his family home.

In the fall of 2016, DHS cut C.S.'s hours of care from 129 hours per month during the school year and 162 hours per month during the summer months, to 96 hours per month during

[10] Sara Gelser, *Erasing Fairview's Horrors*, THE OREGONIAN, Jan. 30, 2010, *available at* http://www.oregonlive.com/opinion/index.ssf/2010/01/erasing_fairviews_horrors.html.

[11] *Id.*

the school year and 121 hours per month during the summer months. C.S.'s needs had actually increased modestly since his prior evaluation. His mother filed a request for an exception and an administrative appeal on his behalf, arguing in part that she would have to consider placing him in a more restrictive setting outside his home if the hours were not increased. DHS did not contest that the cuts to C.S.'s services might lead to his removal from his home, but stated that a group home or foster care placement would not count as an "institutionalization" under DHS's internal definition, that an "institutionalization" only counted as an inpatient psychiatric placement or something similarly restrictive. DHS provided no legal basis for this definition.

The relevant legal concept under the ADA and the Rehab Act is not whether a placement counts as an institution, but whether services are provided the "most integrated setting." 28 C.F.R. 41.51(d); 28 C.F.R. 35.130(d). Removing a nine-year-old boy from his family home and placing him in a group home reserved exclusively for other children with disabilities is obviously a less integrated setting. *Olmstead*, 527 U.S. at 592, *citing* 28 C.F.R. Pt. 35, App. A (most integrated setting is that which "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible"). The ADA does not divide placements into "community" and "institutional" placements; instead, its plain language requires an individual inquiry into the most integrated setting appropriate to each individual. *Steimel v. Wernert*, 823 F.3d 902, 910-14 (7th Cir. 2016) (rejecting claim that *Olmstead* addresses a binary choice between community and institutional placements); *A. H. R. v. Washington State Health Care Auth*., No. C15-5701JLR, 2016 WL 98513, at *15 (W.D. Wash. Jan. 7, 2016). Yet DHS's own processes and the testimony of its own staffers would prefer removing C.S. from his family home and placing him in a less integrated setting, even though such placement would still require paying someone to manage C.S.'s outbursts and protect him from self-injury. *Townsend v. Quasim*, 328 F.3d 511, 517 (9th

Cir. 2003) (holding that *Olmstead* controls in a case raising the question of the location—more or less integrated—where services will be provided). DHS violates the integration mandate by favoring removal of a boy from his family home and proposing his placement in a more expensive, less integrated group home as an alternative to restoring previous levels of service. *A.H.R.*, 2016 WL 98513, at *15 (placement in the family home was the most integrated option for a child compared to a community-based group home).

Since the aim of the integration mandate is to improve community integration, other plaintiffs at lesser risk of removal from the family home may state an *Olmstead* claim where the reduction in hours effectively confines them to the home and reduces their ability to go out into the community. When a state provides home and community-based care using Medicaid, it must provide that service in the most integrated setting, which a setting that is "integrated in and supports full access . . . to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community. . . ." 42 C.F.R. § 441.530(a)(1)(i). A reduction in services that leaves a person feeling "trapped in her own home and cut off from the world" because of inability to leave the home without adequate support states an *Olmstead* claim. *M.R.*, 697 F.3d at 732 (internal quotations omitted); *Steimel*, 823 F.3d at 914 (*Olmstead* implicated where state policies limiting funding for community activities to 12 hours a week would segregate people with disabilities in their own homes). Several of the plaintiffs will see severe cuts to the services that allow them to participate in the greater community under the new service levels.

T.C., for instance, cannot communicate with others or go out into the community without substantial support. She needs assistance to interpret her nonverbal vocalizations and body

language in order to express her needs and interests. When she goes out into the community, she needs someone to go with her to ensure she does not walk into traffic or leave with a stranger. Her needs assessment budgets only 2.45 hours a day (or roughly 17 hours a week) for community outings; comparably limited services have failed *Olmstead* review. *Steimel*, 823 F.3d at 914 (program that "in practice allow persons with disabilities to leave their homes only 12 hours each week, cooping them up the rest of the time" violates integration mandate). B.B. similarly needs substantial personal care hours to ensure that he can go out into the community safely, to prevent elopement and self-injury. The reductions in benefits have left these plaintiffs without adequate supports to communicate with others and to go out to shops, parks, and other basic elements of community life. The integration mandate is not satisfied by a level of care that turns people with disabilities into shut-ins in their own homes or that forces them into group homes or foster care placements in order to get adequate supports to go out into the community.

The plaintiffs have produced substantial evidence that they are likely to prevail on their integration mandate claim, meeting the first prong of the *Winter* test. DHS initiated sweeping cuts to the amount of service provided to individual consumers, with no individual inquiry as to whether those cuts would negatively affect the consumer's care or put them at risk of placement in a less integrated setting. For instance, DHS did not dispute at the administrative hearing that C.S. was at risk of placement outside his home as a result of his reduced services. DHS relied on the presumed adequacy of its arbitrary rulemaking to justify its service cuts. DHS cannot simply assume that every single recipient of in-home care will make do with less service.

III. Refusal to Grant Interim Relief Would Lead to Serious, Irreparable Harm

In-home attendants provide a wide variety of essential assistance to people with disabilities. Some people in the putative plaintiff class have serious respiratory problems that

require regular suctioning to prevent aspiration of mucus that could cause asphyxiation or a life-threatening lung infection. Some members of the class cannot communicate by speech well (or at all) and may need a person to help interpret body language or nonverbal sounds or may use an assistive technology device to communicate. Some members of the class lack the ability to go out into the community without assistance to ensure they are safe. Some members of the class need assistance in eating to ensure they do not choke, and others lack a sense of when to stop eating and need assistance to ensure they do not eat until they are sick.

Consumers facing cuts to needs in-home care hours would endure the irreparable harms of added risks to their health as stressed, overtired relatives and friends try to make up for paid personal care worker hours,[12] a loss of community involvement as the consumers have reduced or eliminated ability to leave their homes, and greater risk of removal from the home and placement in a less integrated setting. In the Ninth Circuit, reduction of or loss of medical care benefits generally constitutes irreparable harm. *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1171, 1176 (N.D. Cal. 2009) (collecting cases). Ninth Circuit case law is so strong on this point that a failure to find irreparable harm in service or payment cuts that impair access to Medicaid benefits is an abuse of discretion by a district court. *Arc of California v. Douglas*, 757 F.3d 975, 991 (9th Cir. 2014). "A lack of medical services is exactly the sort of irreparable harm that preliminary injunctions are designed to address." *Fishman v. Paolucci*, 628 F. App'x 797, 801 (2d Cir. 2015). Denial of a constitutional right, including the right to due process, is likewise an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 374 (1976); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012);

[12] Taking advantage of the familial bonds to shift state responsibilities imposed by Medicaid law onto parents and other loved ones to provide services is prohibited by federal law. 42 C.F.R. 441.540(b) (familial natural supports can only substitute for paid attendant care when and to the extent they "are provided voluntarily to the individual in lieu of an attendant").

Monterey Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir. 1997). The plaintiffs have shown that, absent action from this court, injury to the plaintiff class will be very grave indeed.

The individual plaintiffs would be seriously and irreversibly harmed by the reduction of their benefits. C.S. has violent emotional outbursts that put him at risk of removal from his family home. He needs services to ensure that his behavioral needs are addressed. K.C. is at serious risk of self-injury if not constantly attended for behavioral management, because she is prone to eating a wide variety of inedible objects, like buttons and paper clips. B.B., C.S., and K.C. all need substantial assistance from personal care workers while eating to ensure that they do not choke. T.C., K.C., and C.S. all need assistance from personal care workers to communicate any needs, since they do not speak, use sign language, and cannot use any communicative technology without assistance. Denial of these services will put consumers at risk of removal from their homes, at risk of choking, and at risk of isolation for long periods of time without the ability to communicate. These harms are typical of the kind of "irreparable harms" contemplated in preliminary injunctions. *See, e.g., Peter B. v. Sanford*, No. CIV.A. 6:10-767-JMC, 2010 WL 5912259, at *10 (D.S.C. Nov. 24, 2010) (endorsing specific plaintiff risks, including choking risks, as irreparable harm justifying preliminary injunction), *report and recommendation adopted*, No. 6:10-CV-00767-JMC, 2011 WL 824584 (D.S.C. Mar. 7, 2011).

IV. The Balance of Equities and the Public Interest Strongly Favor Restoring the Prior In-Home Service Hours to the Plaintiffs and the Class

For the final two *Winter* standards, the court must consider whether the balance of equities between the parties and the public interest would be best served by granting relief. *Winter*, 555 U.S. at 20. In litigation against the government, these two prongs merge in the analysis. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). The plaintiffs' interests would obviously be served by returning in-home care hours to their August 31, 2016

levels. No substantial state interest would be impaired by increasing those hours, and state interests in economy might be served by preventing removal from the home. Finally, the public's interest in the smooth, transparent, and fair operation of its system of Medicaid benefits would be ensured by granting the injunction. "[T]he balance of hardships favors beneficiaries of public assistance who may be forced to do without needed medical services over a state concerned with conserving scarce resources." *M.R.*, 697 F.3d at 731.

Public interests are presumed to be served by the clear and fair operation of systems of public creation, especially in the provision of social services to those in great need. "[T]here is a robust public interest in safeguarding access to health care for those eligible for Medicaid . . . ." *Indep. Living Ctr. of S. California, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009), *reversed on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.*, 132 S. Ct. 1204 (2012). The state's general interest in managing its own budget, even in times of financial crisis, do not outweigh the interest of poor and disabled people in obtaining adequate care. *Id.* Budgetary concerns, if considered, might well tip in favor of granting the injunction.[13]

Every similar case in this circuit reviewing the balance of equities and the public interest has come out in favor of the individuals accessing medical care and against the position of the

[13] *M.R.*, 697 F.3d at 738 (holding that consideration of risks of forcing people from home and community based care into less integrated, more expensive settings suggested service cuts "may have an adverse, rather than beneficial [budgetary] effect"); *V.L.*, 669 F. Supp. 2d at 1122 (finding compelling evidence that "in-home care is considerably less expensive than institutional care and [in-home] caregivers reduce the need for expensive emergency room visits and hospitalization"); *see also* Office of Developmental Disabilities, Presentation to Joint Ways and Means Subcommittee on Human Services, March 21-22, 2017, at 13 (showing per case costs of in-home care are projected to be roughly six times cheaper than group home care for children from 2017 to 2019) *available at* http://www.oregon.gov/DHS/ABOUTDHS/DHSBUDGET/20172019Budget/ODDS%20Ways%20and%20Means.pdf ; *id.* at 15 (showing per case costs of in-home care are projected to be roughly three times cheaper than group home care for adults from 2017 to 2019).

state cutting services. *K.W.*, 298 F.R.D. at 493; *M.R.*, 697 F.3d at 737-38; *Indep. Living Ctr.*, 572 F.3d at 657-58; *Brantley*, 656 F. Supp. 2d at 1177. The plaintiffs put forward a proven legal theory in favor of relief. "It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir.1983). Consideration of the balance of equities and the public interest in ensuring adequate care for people with disabilities in their homes and in the community, the last two *Winter* factors weigh heavily in favor of a preliminary injunction.

V. Formulated in the Alternative, the Plaintiffs Have Also Raised Serious Legal Questions Going to the Merits, and the Balance of Hardships Tilts Strongly in Their Favor

The plaintiffs have made out the primary case for a preliminary injunction under the four *Winter* factors. Given the wealth of case law in the Ninth Circuit unanimously approving preliminary injunctions maintaining in similar circumstances, plaintiffs have strongly stated their case for a likelihood of success on the merits. Even if the court finds that the plaintiffs have not shown that degree of likelihood of success, the court can still grant interim injunctive relief if the plaintiffs have shown serious legal questions going to the merits of the case, and a balance of hardships sharply tilted in the plaintiffs' favor. *Alliance for the Wild Rockies*, 632 F.3d at 1134-35. The "serious questions" test is not really an alternate theory of relief, but a different articulation of the four traditional factors of the *Winter* test, weighed on a sliding scale. *Id.; Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012). At least one of the major in-home care Medicaid benefits cases in the Ninth Circuit resulted in a preliminary injunction on this alternative formulation of the test. *M.R.*, 697 F.3d at 736 (plaintiffs raised serious questions as to

whether proposed changes to Washington state Medicaid system would constitute a fundamental alteration).

A party raises a "serious question going to the merits" of a case where he has "a fair chance of success on the merits." *California Pharmacists Ass'n v. Jolly*, 630 F. Supp. 2d 1154, 1158 (C.D. Cal. 2009) *quoting Sierra On–Line, Inc. v. Phoenix Software, Inc*., 739 F.2d 1415, 1421 (9th Cir.1984). Where a party has shown that the balance of equities tips sharply in its favor, the court need only find that the party has a fair chance of success, rather than likely success, along with finding the other two *Winter* factors. Although the plaintiffs have made a strong showing of likely success, the court should be aware of this alternative formulation of the balancing of the *Winter* factors, in case it weighs the various factors of the test differently.

VI. The Court Can and Should Waive the Requirement for a Bond

Civil Rule 65 permits a court discretion to set the amount of security, if any, at the time of issuing preliminary injunctive relief. Fed. R. Civ. Pro. 65(c). The rule and case law both explicitly authorize a court discretion to impose no bond on the parties. *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005). In general, courts have waived the bond in cases of substantial public interest where the state can better bear the cost and the financial means of the plaintiffs are "unremarkable." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999), *supplemented by*, 236 F.3d 1115 (9th Cir. 2001); *accord Diaz*, 656 F.3d. at 1015 (state-employed same-sex couples in equal protection suit arguing for equal spousal benefits not required to pay bond); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975). The exemption from a bond is particularly favored in cases vindicating Medicaid rights. *California Hosp. Ass'n v. Maxwell-Jolly*, 776 F. Supp. 2d 1129, 1160 (E.D. Cal. 2011). The named plaintiffs in this case are not wealthy, given

that they qualify for Medicaid benefits. They could certainly not personally afford to guarantee the cost of restoring benefits to all in-home care consumers with intellectual and developmental disabilities until this matter is resolved. It would be unfair and futile to require plaintiffs to post a bond covering the cost of all restored services throughout the state of Oregon.

VII. The Court Should Enter an Order Halting Further Reductions of In-Home Services by DHS and Restoring the Full Benefits of Any Consumer Whose Benefits DHS Reduced

The Court should enter an appropriate order, no broader than necessary but adequate to address the wrongs complained of. Since DHS has been cutting services for virtually all intellectually and developmentally disable consumers of in-home care services using an unconstitutional method of notice, assessment of need, and review processes since at least August 31, 2016, the Court should issue an order that stops DHS from issuing taking further steps to reduce or terminate in home care services to people with intellectual and developmental disabilities. The Court should further order DHS to rescind any notices issued since August 31, 2016 that reduce or terminate in-home care services for people with intellectual and developmental disabilities and prospectively restore the August 31, 2016 level of service. The plaintiffs do not at this time ask the Court to order DHS to reimburse class members for any lost service hours accruing between September 1, 2016 and the date the order is entered. Nor do the plaintiffs ask the Court to include in the scope of its order the rare consumer who saw continuing or increased benefits under a post-August 31, 2016 needs assessment. The plaintiffs seek only an order that would preserve the earlier status prior to these drastic cuts, taken without any individualized notice, adequate due process, or sufficient concern about whether the new cuts would harm consumers' ability to remain in the most integrated settings.

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DATED this 10th day of April, 2017.

DISABILITY RIGHTS OREGON

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 8379 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.