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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

PATRICK KELLEY and MATTHEW REED, by and through his guardian ad litem, VICKI REED,

Petitioners/Plaintiffs,

v.

JENNIFER KENT, in her official capacity as Director of the California Department of Health Care Services and the CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES; KIMBERLEY JOHNSON, in her official capacity as the Director of the California Department of Social Services; and the CALIFORNIA DEPARTMENT OF SOCIAL SERVICES,

Respondents/Defendants.

CASE NO. BS170173

(Assigned to Hon. James C. Chalfant)

PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS AND WRIT OF MANDATE (CODE CIV. PROC. §§ 1094.5 AND 1085)

[COMPENDIUM OF SUPPORTING EVIDENCE AND REQUEST FOR JUDICIAL NOTICE FILED CONCURRENTLY HEREWITH]

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I. INTRODUCTION

The Affordable Care Act ("ACA"), enacted in 2010, expanded special Medicaid eligibility rules for persons with disabilities allowing them to qualify for Medi-Cal and receive care in their homes instead of being forced into institutions and impoverishing their spouses. This change in Medi-Cal eligibility should have taken effect on January 1, 2014. However, respondent California Department of Health Care Services ("DHCS") did not even begin to roll out the new eligibility rules until July 19, 2017 – 1,295 days late. As a result of DHCS's patent and ongoing violations of the ACA as well as other federal and state laws, thousands of individuals with disabilities statewide have been denied correct Medi-Cal eligibility determinations and, by extension, access to Medi-Cal covered benefits including home and community-based services.

Petitioners Kelley and Reed bring this action to compel DHCS to comply with its legal duties to: (1) ensure individuals receive correct Medi-Cal eligibility determinations based on the spousal impoverishment rule; (2) notify all potentially eligible beneficiaries of the new rule; (3) establish a retroactive eligibility process for in-home supportive services ("IHSS"); and (4) ensure payment or reimbursement for IHSS. Mr. Reed also seeks administrative mandamus to reverse an administrative hearing decision by Respondent California Department of Social Services ("CDSS") that incorrectly denied his retroactive eligibility for IHSS.

II. STATEMENT OF FACTS

A. The Spousal Impoverishment Methodology Under The ACA

Married individuals with significant disabilities who need home and community-based services are entitled to Medi-Cal eligibility determinations based on specialized eligibility rules known as the spousal impoverishment methodology. 42 U.S.C. § 1396r-5(h)(1)(A)). In 2010, the ACA expanded the definition of an "institutionalized spouse" to include individuals who require an institutional level of care but can receive the necessary services through home and community-based Medicaid programs. Pub. L. No. 111-148, § 2404 (2010) (amending 42 U.S.C. § 1396r-5(h)(1)(A)). This change was enacted to allow married individuals to remain living at home and avoid going into a nursing facility, without impoverishing their spouses. Ex. 23. The ACA gave states four years to plan and implement this change, making the effective date January 1, 2014. *Id.*

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The spousal impoverishment rule is an income and resource counting methodology to determine Medi-Cal eligibility. It evaluates the income and resources of an "institutionalized spouse" separately from their "community spouse." 42 U.S.C. § 1396r-5(a)(1). The protection increases the amount of income and resources a "community spouse" can keep while allowing the "institutionalized spouse" to qualify for Medi-Cal benefits. *Id*. § 1396r-5. If a person's income is above a certain limit, they are assessed a "share of cost," which functions like a monthly deductible. *See* Welf. & Inst. Code § 14005.7. Medi-Cal will not pay for benefits until a beneficiary has met their share of cost. *Id*. If a person's resources exceed the limit, they are denied Medi-Cal altogether.

Once determined eligible for Medi-Cal, an institutionalized spouse has access to Medi-Cal covered services, including IHSS. IHSS allows them to hire a caregiver to help with personal care and other daily living activities. *See* Welf. & Inst. Code § 12300 *et seq*.; Ex. 6, ¶ 6. Family members can be hired as IHSS caregivers and earn wages. *Id*. § 12300.4. Without access to IHSS, many disabled individuals would not be able to live safely at home because they cannot afford the care they need. *See* Ex. 1, ¶¶ 8-9; Ex. 13, ¶ 4. DHCS also administers several other Medi-Cal programs to enable disabled individuals to remain safely at home, some of which have a waitlist. Ex. 34. Prior to the ACA, DHCS only applied the spousal impoverishment rule to married individuals who were enrolled in one of these programs, but since 2014, DHCS is required to apply it to all waitlisted individuals. Ex. 24, p. 13. Despite this change, these individuals do not consistently receive the benefit of the new rules. *See* Ex. 3, ¶ 7; Ex. 2, ¶ 10; Ex. 6, ¶¶ 8, 10.

B. DHCS Has Failed To Ensure That All "Institutionalized Spouses" Are Correctly Determined Eligible For The Medi-Cal Program

As the "single State agency," DHCS has ultimate responsibility for the Medi-Cal program, including Medi-Cal benefits such as IHSS. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10; Welf. & Inst. Code § 10740. DHCS has delegated administration of the IHSS program to Respondent CDSS. Ex. 26, ¶ 14. However, DHCS remains responsible for ensuring that CDSS and all local district offices that handle Medi-Cal cases comply with state and federal laws. 42 C.F.R. § 431.10.

Between January 1, 2014 and the filing of this petition on July 6, 2017, DHCS did nothing to put the expanded protections in place. Ex. 24; Ex. 26, ¶ 73; Ex. 17, p. 52:11-22; Ex. 18, p. 35:5-

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10. After Petitioners brought this lawsuit, DHCS released All County Welfare Directors Letter ("ACWDL") 17-25 to inform counties of the definitional change to "institutionalized spouse" and explain what the change meant after three and a half years of non-compliance. Ex. 24. Soon after its release, DHCS realized that its guidance was insufficient, as it did not provide counties with the clarity and tools they needed. Ex. 17, p. 60:1-17; Ex. 18, p. 69:10-23; Ex. 22, p. 31:5-32:8, 56:11-15 (listing deficiencies requiring further guidance); Ex. 31 ("DHCS understands that without this guidance, the counties are unable to implement changes in the way they determine eligibility.").

DHCS took *another year* to issue that supplemental guidance, ACWDL 18-19, in August 2018. Ex. 25; Ex. 17, p. 60:1-17. Even after ACWDL 18-19 was released, some counties took months longer to introduce the expanded spousal impoverishment rule to their eligibility staff. *See, e.g.*, Ex. 20, p. 50:11-16 (Tulare County did not release local guidance until October 2018); Ex. 21, p. 44:5-9 (San Mateo County did not issue local guidance until November 2018).

Issuing two policy letters was not enough to correct years of inaction. To this day, Medi-Cal applicants and beneficiaries experience frustration, delay, and ignorance about getting correct eligibility determinations using the expanded spousal impoverishment rule. *See* Ex. 4, ¶¶ 7, 9-10; Ex. 14, ¶ 11; Ex. 11, ¶¶ 4-5, 7-8; Ex. 16, ¶¶ 12-14. The problem persists statewide. *See* Ex. 9, ¶¶ 8, 12 (Contra Costa County); Ex. 11, ¶¶ 3, 5 (Orange County). One advocate alone has intervened in 20 cases spanning 10 counties. Ex. 14, ¶ 5. Another advocate worked for months to help their client. *See* Ex. 9, ¶ 12 ("Only after nine months of extensive advocacy and independent research on my and other advocates' parts were the clients finally approved for no-share of cost Medi-Cal.").

DHCS has also failed to notify the majority of potentially eligible individuals, issuing only one outreach letter and only to a small subset of people. *See* Ex. 35; Ex. 24, p. 3-4. None of the individuals who have been incorrectly denied or discontinued from Medi-Cal because of DHCS's flawed process has been notified that they may have received an incorrect eligibility determination. Ex. 17, p. 81:1-11, 95:6-11; *see also* Ex. 20, p. 38:15-39:11. DHCS promised counties that it would provide a list of potentially impacted beneficiaries, but it never did. Ex. 22, p. 52:15-18. Furthermore, DHCS has not updated any of its public informational materials to reflect the expansion of the spousal impoverishment rule. *See* Exs. 44, 46.

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Because most people who would benefit from the expanded spousal impoverishment rule have never even heard about it and many local Medi-Cal offices do not understand it, getting it correctly applied in an individual case often requires advocate intervention. Ex. 4, ¶ 10; Ex. 9, ¶ 13; Ex. 14, ¶ 8. Fighting to get the expanded spousal impoverishment rule applied in their clients' cases is time and resource intensive for advocates. Ex. 4, ¶¶ 7, 16; Ex. 11, ¶ 5.

C. Thousands Of Married Individuals Have Been Harmed By DHCS's Inaction

The delays and problems with making correct eligibility determinations places a heavy burden on the people who should bear it the least. Ex. 2, ¶¶ 9, 19, 21, 23-24; Ex. 3, ¶¶ 6-8, 19-23; Ex. 4, ¶¶ 7, 15; Ex. 14, ¶ 9; Ex. 9, ¶ 9-10. This harm is especially acute because Medi-Cal is the main public program that pays for in-home care, and IHSS is the program providing that care. Ex. 7, ¶¶ 3-4; Ex. 8, ¶¶ 3-4. Many families would not be able to keep their loved ones at home without the critical care and income the IHSS program provides. *See* Ex. 6, ¶¶ 8, 10; Ex. 12, ¶ 10.

Fighting for years to get Medi-Cal benefits has been "incredibly stressful and demoralizing" for Petitioner Kelley. Ex. 1, ¶ 10. It also has exacted a costly toll on his wife: "Watching Melody fight for me and drain her strength has compounded my feelings of helplessness, a truly awful position for a husband and former army man to find himself in." *Id.* For their own part, community spouses also experience intense emotional hardship. Ex. 6, ¶ 9; Ex. 15, ¶ 14; Ex. 16, ¶¶ 16-17; Ex. 9, ¶¶ 9-10. For Petitioner Reed, his wife "struggled to juggle, work, life, and caregiving. The stress was so great that in our darkest moments, we feared we would be forced to institutionalize [Mr. Reed]." Ex. 2, ¶ 9. Because Medi-Cal eligibility must be re-determined yearly, families are constantly at risk that the protections will be mistakenly taken away. Ex. 15, ¶ 12; Ex. 4, ¶¶ 14-15.

D. Petitioner Kelley Was Harmed By DHCS's Failure To Follow The Law

Patrick Kelley is a married 69-year-old veteran who has primary progressive multiple sclerosis. Ex. 1, ¶¶ 3-5; Ex. 3, ¶ 3. Because of his serious medical condition, Mr. Kelley is eligible for home and community-based services at a nursing facility level of care. Ex. 1, ¶ 5; Ex. 3, ¶¶ 4-5. His wife, Melody Rogers, who is 77-years old, spent a significant amount of the couple's savings and retirement funds paying for in home care while they waited for correct Medi-Cal eligibility and IHSS determinations. Ex. 3, ¶¶ 6, 8, 12; Ex. 1, ¶ 8.

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In 2014, Mr. Kelley applied for a waiver program that provides home and community-based services. Ex. 3, ¶ 7. In September 2016, Mr. Kelley again applied for Medi-Cal because his family was "almost completely out of money to pay for home care services." *Id.* ¶ 9. In February 2017, Mr. Kelley's application was denied on the ground that he and his wife together had savings that exceeded the Medi-Cal property limit of $3,000. *Id.* ¶ 10. Los Angeles County did not apply the spousal impoverishment methodology when processing either of his 2014 or 2016 applications. *Id.* ¶¶ 8, 10. This took an enormous toll on Mr. Kelley and his wife, as "[they] were going broke at a rate that would eventually force [Mr. Kelley] into a nursing facility." *Id.* ¶ 11.

It took two separate administrative hearings and the help of an experienced advocate for Mr. Kelley to obtain the benefit of the expanded spousal impoverishment rule. Ex. 3, ¶ 14. His first hearing was to correct his Medi-Cal eligibility, which did not occur until a year after his application. *Id.* It was not until a second hearing decision was issued in July 2018 that Mr. Kelley was approved for retroactive IHSS eligibility and payment for his out of pocket expenses. *Id.* ¶ 17.

E. Petitioner Reed Was Harmed By Respondents' Failure To Follow The Law

Matthew Reed is a married 63-year-old man who has been diagnosed with multiple sclerosis, Bell's Palsy, partial paralysis, and vascular dementia following a stroke. Reed Administrative Record ("AR") 000011. Because of his disabilities, Mr. Reed is eligible for home and community-based services at a nursing facility level of care. Reed AR 000089.

In 2014, Mr. Reed was found eligible for Medi-Cal with a high monthly share of cost. Reed AR 000136: 5-13. He also applied for and was approved for IHSS, but because his share of cost was so high, he could not afford to use it. *Id.* In July 2016, Mr. Reed applied for a waiver program that provides home and community-based services. Reed AR 000011, 125:21-22. In August 2016, he again applied for Medi-Cal, but Los Angeles County failed to apply the spousal impoverishment rule. As a result, his monthly share of cost was determined to be $1,509, nearly 30% of his monthly income. Reed AR 000014. This amount was so high, he could not afford to use his Medi-Cal benefits, so did not apply for IHSS, which he desperately needed. Reed AR 000136:5-13, 121:16-24.

Mr. Reed appealed and then conditionally withdrew his appeal because Los Angeles County

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agreed to use the spousal improvement methodology to re-determine his Medi-Cal eligibility back to July 2016, when he applied for the waiver, and to reimburse him for retroactive IHSS contingent on approval of his Medi-Cal eligibility. Reed AR 000015-16.

In September 2017, Los Angeles County informed Mr. Reed that it was unable to process retroactive IHSS payments because there was no IHSS application between the termination of IHSS in 2014 and his subsequent application in May 2017. Reed AR 000023. Mr. Reed appealed, arguing that his IHSS application and eligibility should both be retroactive to July 2016, the date of his Medi-Cal eligibility, based on equitable estoppel. Reed AR 000005-09. The Administrative Law Judge ("ALJ") rejected the equitable estoppel argument and upheld the denial of Mr. Reed's IHSS eligibility back to July 2016 (the "Decision"). Reed AR 000097. The Decision was adopted by CDSS. Reed AR 000087.

III. PETITIONER REED IS ENTITLED TO AN ADMINISTRATIVE WRIT OF MANDAMUS UNDER CODE OF CIVIL PROCEDURE SECTION 1094.5

Mr. Reed is entitled to a writ of administrative mandamus pursuant to Code of Civil Procedure § 1094.5 to reverse the Decision denying him IHSS eligibility retroactive to July 2016, the date of his approved Medi-Cal eligibility determination. Respondents CDSS and DHCS did not proceed in the manner required by law. The Decision's failure to apply equitable estoppel and award Mr. Reed retroactive IHSS is a prejudicial abuse of discretion. Respondents CDSS and DHCS should be estopped from relying on Mr. Reed's IHSS application date rather than his Medi-Cal eligibility date to determine the start date of his retroactive IHSS eligibility.

The Decision was wrong because Mr. Reed met all five elements of equitable estoppel against a government actor: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended that his conduct be acted upon; (3) the party asserting estoppel was ignorant of the true facts; (4) the party asserting estoppel relied upon the conduct of the other party to his injury; and (5) estoppel will not frustrate public policy and is required by justice. *See Lentz v. McMahon*, 49 Cal. 3d 393, 401 (1989); *Canfield v. Prod*, 67 Cal. App. 3d 722, 730-32 (1977).

First, Respondents were apprised of the facts. At the time of Mr. Reed's Medi-Cal eligibility determination in 2016, Respondents and their delegated county agents were aware that

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effective January 1, 2014, the spousal impoverishment rule must be applied to eligible individuals when conducting Medi-Cal eligibility determinations. Reed AR 000015-16, 41-53.

Second, Respondents intended that their conduct as officials administering the Medi-Cal and IHSS programs be acted upon. Respondents had multiple opportunities to apply the expanded spousal impoverishment methodology to Mr. Reed's Medi-Cal eligibility determination (in 2014 and 2016), but failed to do so. Reed AR 000014, 88-90. Still, Respondents intended Mr. Reed to accept their eligibility determinations, and he justifiably relied on their erroneous decisions. Reed AR 000014, 132:8-21. *See also Lentz*, 49 Cal. 3d at 401 (county workers who advise recipients "stand in a confidential relation to them," justifying reliance on their benefits determinations).

Third, Mr. Reed was ignorant of the true facts. Until 2017, Mr. Reed was not aware of the expanded spousal impoverishment rule, which, if applied to his case, would make him eligible for Medi-Cal with a reduced or eliminated share of cost, which would in turn have allowed him to access Medi-Cal covered benefits like IHSS (for which he otherwise would have applied). Reed AR 000014, 135:11-15. He only learned of the spousal improvement rule when he obtained representation from Bet Tzedek Legal Services. Reed AR 000122, 139:11-15.

Fourth, Mr. Reed relied upon Respondents' conduct to his detriment. He decided to forego applying for IHSS based upon Respondents' wrongful Medi-Cal determination. Reed AR 000136:5-137:17. The Decision acknowledges that "the timing of ACWDL 17-25 may be a crucial reason why the claimant did not submit his IHSS application at an earlier date." Reed AR 000097.

Fifth, retroactive IHSS eligibility will not frustrate public policy and is required by justice. Public policy is promoted, not frustrated, when an individual harmed by Respondents' failures receives benefits to which he is entitled. A retroactive IHSS eligibility determination is required to make Mr. Reed whole after an erroneous Medi-Cal eligibility determination. Respondents failed to correctly apply the spousal impoverishment rule, and applying equitable estoppel here is required by justice to achieve the purpose of the law, *i.e.*, to ensure married individuals who need Medi-Cal and its covered services are properly determined to be eligible and provided with services.

Respondents failed to apply the expanded spousal impoverishment rule to Mr. Reed's case when he applied in 2016. Reed AR 000089. If the expanded rule had been implemented on time,

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Mr. Reed's 2016 application would have been correctly determined. Reed AR 000017. If it had been correctly applied, Mr. Reed would be eligible for free Medi-Cal. *Id*., Reed AR 000089. If he had known he was eligible for free Medi-Cal, he would have applied for IHSS at that time, because such an application would not have been futile. Reed AR 000138:23-25, 139:1-2.

For these reasons, the Court should issue a writ of administrative mandamus directing Respondents to set aside the Decision, issue a new decision declaring Mr. Reed's IHSS eligibility date matches his retroactive Medi-Cal eligibility date of July 2016, order IHSS services retroactive to that date, and order payment of retroactive IHSS wages with prejudgment interest from July 2016 through May 11, 2017 (his current date of IHSS eligibility).

IV. PETITIONERS ARE ENTITLED TO A WRIT OF MANDATE UNDER CODE OF CIVIL PROCEDURE SECTION 1085

Mr. Reed's case exemplifies statewide systemic failures. Many other potentially eligible individuals are also unable to access all of the Medi-Cal and IHSS benefits to which they are entitled. DHCS has a nondiscretionary obligation to adhere to all federal laws and regulations. 42 U.S.C. § 1396a(a)(1); Welf. & Inst. Code §§ 10721, 10740. As such, DHCS has a clear, present, and ministerial duty to use the expanded definition of "institutionalized spouse" to determine Medi-Cal eligibility. Thus, Petitioners seek an order granting a writ of mandate pursuant to Code Civil Procedure § 1085 requiring DHCS to perform its ministerial duty as described below.

A. DHCS Violated The Medicaid Act By Failing To Perform Its Ministerial Duty To Provide Medi-Cal Benefits With Reasonable Promptness

Contrary to the ACA's mandate that the expanded spousal impoverishment rule "shall be applied" beginning on January 1, 2014, DHCS took three and a half years to begin rolling out the provision. Pub. L. No. 111-148, § 2404 (2010); Ex. 24. Now, nearly a decade after the ACA was enacted and six years from the intended start date, many Medi-Cal applicants and beneficiaries are still unable to access the benefits of this protection. This is a violation of the ACA and the Medicaid Act's "reasonable promptness" provision. 42 U.S.C. § 1396a(a)(8).

DHCS has a ministerial duty to "furnish Medicaid promptly to beneficiaries without any delay caused by the agency's administrative procedures." 42 C.F.R. § 435.930. State law similarly requires DHCS to "promptly" and "humanely" provide all of the Medi-Cal benefits to which

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applicants are entitled. Welf. & Inst. Code §§ 10000, 10500. DHCS's rollout of the expanded spousal impoverishment rule was anything but reasonable, prompt, or humane.

In *Blanco v. Anderson*, 39 F.3d 969 (9th Cir. 1994), the Ninth Circuit held that the reasonable promptness provision prohibited DHCS from approving the weekday closure of county welfare departments. *Id* at 972. Because the closure delayed the receipt of Medi-Cal applications, it could result in eligible individuals losing access to benefits to which they were entitled. *Id*. The court held that even though the delay might only be a few days or a month of retroactive benefits, that was a significant enough delay to violate Medicaid's reasonable promptness requirement. *Id*.

In this case, DHCS is guilty of years of delay. This is true despite DHCS having had ample lead time to ensure compliance with the ACA. Indeed, DHCS began looking at the expanded spousal impoverishment rule even before the ACA was enacted in 2010. Ex. 18, p. 23:13-17, 26:11-15. Yet, DHCS did not begin drafting its policy guidance until 2014 and then delayed issuing that guidance for another three years. *Id.*

Even in the face of scrutiny and pressure for its inexcusable delay, DHCS still failed to act. In 2015, the Centers for Medicare and Medicaid Services ("CMS") issued a policy letter reminding states that the ACA "amended section 1924(h)(1) to *require*" expanding the application of the spousal impoverishment rule. Ex. 23, p. 2 (emphasis in the original). CMS directed "[s]tates that have not already done so should begin work on conforming their eligibility practices for married individuals potentially in need of [home and community-based services] *as soon as possible*." *Id.* at 6 (emphasis added).

Throughout 2015 and 2016, consumer advocates implored DHCS to release guidance so that potentially eligible individuals could access critical care. Ex. 29; Ex. 42; Ex. 30; Ex. 32. As early as September 16, 2015, the advocate community raised multiple examples of beneficiaries who were being harmed by DHCS's delay and who urgently needed the provision to access Medi-Cal and IHSS benefits. Ex. 29, p. 1; Ex. 31. Internally, DHCS's staff also expressed concerns about the delay, including escalating concerns to supervisors that Medi-Cal beneficiaries were not able to access the expanded spousal impoverishment rule. Ex. 18, p. 36:11-21. The concerns of DHCS's staff were justified. DHCS did not provide any guidance to the counties until July 2017,

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after Petitioners filed this action. Ex. 24. DHCS knew that its initial guidance was insufficient and incomplete. Ex. 18, p. 69:10-23. Its follow-up guidance in August 2018 was both delayed by a year and also insufficient and incomplete. Ex. 25; Ex. 17, p. 60:1-17.

In all of this time, DHCS has sent only one informational notice to potential beneficiaries, which was issued in February 2018 and only to the 17,142 individuals on the waitlist for home and community-based waiver programs. Exs. 35-36. This represents a mere fraction (about 6%) of the number of Medi-Cal beneficiaries in the IHSS-CFCO ("Community First Choice Option") Program. Ex. 47. Nearly six years after the federal law indisputably mandated the significant expansion of the spousal impoverishment rule, DHCS has still failed to provide with reasonable promptness the benefits of the expanded protection.

B. DHCS Violated Welfare & Institutions Code § 10500 By Failing To Perform Its Ministerial Duty To Notify All Potentially Eligible Individuals

DHCS has a ministerial duty to ensure that all Medi-Cal beneficiaries receive all "the amount of aid to which he [or she] is entitled." Welf. & Inst. Code § 10500. In *Diaz v. Quitoriano*, 268 Cal. App. 2d 807 (1969), the court held that a county welfare office breached its ministerial duty under Section 10500 by not informing individuals of their right to make an application for welfare benefits. *Id.* at 810. *Diaz* instructs that Section 10500 clearly imposes a ministerial duty to give such notification, regardless of the particular applicant's eligibility for aid. *Id*.

Section 10500's notification duty has been acknowledged by other courts. In *Thornton v. Carlson*, 4 Cal. App. 4th 1249 (1992), the court found that implicit in the Section 10500 duty is "a requirement that [CDSS] adequately advise SSI recipients of the rights and benefits to which they are entitled." *Id.* at 1258. In that case, a group of Supplemental Security Income ("SSI") recipients experiencing homelessness filed a class action alleging that CDSS had not provided them with "reasonable and effective notice of the benefits available" through a special program. *Id.* at 1254. Because the program was "not consistently publicized" statewide and many of the impacted aid recipients were unaware of the program, the court upheld an order for CDSS to "employ reasonable means of giving notice of the availability of special circumstances assistance to all SSI recipients, and to form a plan for doing go." *Id.* at 1258.

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Here, as in *Diaz* and *Thornton*, DHCS has failed to notify thousands of Medi-Cal applicants and beneficiaries of the expanded spousal impoverishment rule or advise them of their right to have a correct eligibility determination. In ACWDL 17-25, DHCS identified four groups whose eligibility was negatively impacted by its failure to promptly implement the expanded spousal impoverishment rule. Ex. 24, p. 12-13. These include married individuals in need of home and community-based services that were: (1) previously or currently on the IHSS-CFCO program; (2) denied or discontinued from Medi-Cal for excess resources, like Mr. Kelley; (3) had a share of cost, like Mr. Reed; and (4) were on waiver waiting lists. *Id*. at 12-13. However, DHCS has only contacted one of these groups (individuals on waiver waitlists), and it only sent one letter to them in February 2018, stating that they may qualify for a lower share of cost if they request an eligibility redetermination using the expanded spousal impoverishment rule. Ex. 35, p. 1-5.

DHCS did not to send a similar letter to the other three identified groups or to individuals who are currently institutionalized. Ex. 17, p. 95:6-11. And it never intended to, as DHCS admits that the "outreach mailer to the wait list individuals was the only formal outreach mailed to one of these groups" and "[t]here was never a decision made to send notice to all potentially impacted individuals." *Id.* at 101:12-14, 98:15-16. DHCS had the access and ability to create a list of people, such as those in the IHSS-CFCO program. *Id*. at 77:10-22. With a 2019 enrollment of 268,738 individuals, the IHSS-CFCO group is the largest of the three groups DHCS identified in ACWDL 17-25 but did not notify. *Compare* Ex. 47, p. 1, *with* Ex. 36, p. 5 (identifying 17,142 recipients that received DHCS outreach letter, which is about 6% of the total IHSS-CFCO population).

DHCS's failure to adequately publicize the expanded spousal impoverishment rule has predictably resulted in thousands of potentially eligible individuals being unaware of its existence. Not only has DHCS failed to notify impacted individuals, it also continues to disseminate incorrect information statewide. For example, DHCS Form 7077 (revised January 2018) erroneously states that the spousal impoverishment rule is only applied where one spouse lives in a nursing facility and the other spouse lives at home. Ex. 44, p. 3. Likewise, a Medi-Cal Information Notice (revised July 2019) still erroneously restricts an "institutionalized spouse" to only those who "are admitted

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to long-term care." Ex. 46, p. 4. This means that even those individuals seeking out official information will not learn about the expanded eligibility rules.

C. DHCS Violated Welfare & Institutions Code § 10500 By Failing To Create A Retroactive IHSS Eligibility Process

To date, neither DHCS nor CDSS has issued guidance related to the expanded spousal impoverishment rule or its effect on retroactive IHSS eligibility to ensure that the retroactive date of IHSS eligibility coincides with the retroactive date of Medi-Cal eligibility. *See* Exs. 24-25, 35. This is a significant problem and a breach of DHCS's ministerial duty to ensure all of the aid to which the impacted groups are entitled. Welf. & Inst. Code § 10500. "There is no question that the obligation to pay aid to which an applicant is entitled is a debt due from the county as of the date the applicant was first entitled to receive aid and that the right to receive benefits vests in the recipient on the first date of his entitlement thereto." *Canfield*, 67 Cal. App. at 728. Here, DHCS has unlawfully withheld benefits by failing to ensure individuals can access IHSS eligibility back to the date of their Medi-Cal eligibility under the spousal impoverishment rule. The misalignment between Medi-Cal and IHSS application dates can lead to months and even years of lost IHSS benefits for individuals harmed by DHCS's failure to promptly implement the spousal impoverishment rule.

As the single state agency, DHCS is ultimately responsible for this failure. One state ALJ reached out to DHCS directly searching for answers: "A lot of questions are coming up as to how [the expanded spousal impoverishment rule] is being implemented from the IHSS side. We haven't seen anything on this yet." Ex. 38. In response, DHCS staff candidly replied, "There is no implementation on the IHSS side." *Id.*

This lack of implementation means that neither the counties that conduct the initial IHSS eligibility determinations, nor the ALJs who review these IHSS determinations, know how to correctly process retroactive IHSS eligibility determinations. Petitioners exemplify the harms to impacted individuals. Both were originally denied IHSS retroactive to the date of their Medi-Cal eligibility because they had not made separate IHSS applications contemporaneously with their Medi-Cal applications. Ex. 2, ¶¶ 8-23; Ex. 3, ¶¶ 7-18. Both appealed those decisions and were represented at their hearings by Bet Tzedek Legal Services who made similar legal and equitable

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arguments. *Id*. Their results were exactly opposite. *Id.* Mr. Kelley's request was granted, and Mr. Reed's request was denied. *Id*. Mr. Kelley was able to receive reimbursement for out of pocket in-home care costs, but Mr. Reed was not. *Id*.

DHCS should adopt the longstanding CDSS rule that IHSS eligibility may be found retroactive to the date of the individual's preceding Medi-Cal application. Ex. 27, p. 8. In response to two court decisions regarding Medi-Cal reimbursement claims, current CDSS guidance states that counties should use the Medi-Cal, not the IHSS, application date when deciding which application date to use to establish a recipient's eligibility for reimbursement for IHSS covered services. Ex. 27, p. 8; *see Conlan v. Bontá,* 102 Cal. App. 4th 748 (2002) ("*Conlan I*"); *Conlan v. Shewry*, 131 Cal. App. 4th 1354 (2005) ("*Conlan II*"). This rule was created because it is common that a Medi-Cal application can, and often does, pre-date an IHSS application, inasmuch as an individual must be eligible for Medi-Cal to be eligible for IHSS. Ex. 27, p. 8. Here, too, linking the Medi-Cal and IHSS application date ensures that beneficiaries can receive reimbursement for all Medi-Cal covered services, including in-home care such as IHSS. However, without DHCS action, CDSS cannot apply this rule to the spousal impoverishment context. Therefore, DHCS must act to ensure that retroactive IHSS eligibility determinations align with retroactive Medi-Cal eligibility determinations in the spousal impoverishment context.

D. DHCS Violated The Medicaid Act By Failing To Perform Its Ministerial Duty To Reimburse Eligible Individuals For Medi-Cal Covered Expenses

DHCS has a duty under federal law to ensure that the Medicaid state plan provides assistance that is equal in amount, duration, and scope. 42 U.S.C. § 1396a(a)(10)(B). This requirement, known as the comparability provision, creates an "equality principle" so that medical assistance made available to any individual shall not be less than the medical assistance made available to any other individual. *See Sobky v. Smoley*, 855 F. Supp. 1123, 1139 (E.D. Cal. 1994); *Conlan I*, 102 Cal. App. 4th at 754 (2002). This duty to provide comparable assistance extends to reimbursement claims. In the *Conlan* decisions, the courts held that DHCS was required to create a process to ensure prompt reimbursement for covered services. 102 Cal. App. 4th at 763-64; 131

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Cal. App. 4 at 1379. Reimbursement must be made for a three-month period before an application, after an erroneous denial of services, and while the county is processing the application. *Id.*

Conlan I and *Conlan II* are directly applicable here. DHCS's failure to create a process for retroactive IHSS resulted in eligible individuals paying out pocket for in-home care that otherwise would be covered by Medi-Cal. Because IHSS is a Medi-Cal covered service, its costs are explicitly included in DHCS's Medi-Cal reimbursement scheme. Ex. 27, p. 8. The linchpin in making a successful IHSS reimbursement claim is eligibility for the IHSS program. This creates cascading harms: DHCS's failure to ensure retroactive IHSS back to the date of the Medi-Cal eligibility determination results in a denial of an IHSS reimbursement claim for that gap in time.

Worse, as a general rule, DHCS limits retroactive IHSS reimbursement (back to the date of IHSS application) to certified IHSS providers. Ex. 25, p. 17. "A beneficiary may be reimbursed for services provided by *an IHSS enrolled provider* as far back as January 1, 2014, if eligible for IHSS back to January 1, 2014." *Id.* (emphasis added). This creates an additional hurdle for those who are entitled to receive reimbursement or payment for uncompensated care. Ex. 15, ¶ 13.

Mr. Kelley and Mr. Reed's cases demonstrate DHCS's failure to provide comparable services: Mr. Kelley was properly evaluated for retroactive IHSS and received retroactive payment of more than $20,000 for incurred costs. Ex. 1, ¶ 18. In contrast, Mr. Reed was improperly denied IHSS, and therefore, his family members could not have been certified as IHSS providers and thus cannot receive reimbursement for his needed in-home care. Ex. 2, ¶ 23. Mr. Reed's wife, Vicki Reed, estimates "even just looking at the time between August 2016 and May 2017, assuming Matthew's current assessment of 241 IHSS hours, that's over $30,000 in lost IHSS wages. *Id*.

E. DHCS Has Violated Anti-Discrimination Laws

By failing to implement expanded spousal impoverishment rule, DHCS has placed Petitioners and numerous others at risk of unnecessary institutionalization in violation of the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12101 *et seq*.), Section 504 of the Rehabilitation Act ("Section 504") (29 U.S.C. § 794 *et seq*.), and Government Code § 11135. These laws require that states "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),

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41.51(d). The integration mandate requires that persons with disabilities be served in the community when: (1) the state's treatment professionals have determined that community placement is appropriate; (2) community placement is not opposed by the individual; and (3) "the placement can be reasonably accommodated, taking into account the resources available" and the needs of others with disabilities. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999). Plaintiffs do not need to wait until they are institutionalized to bring a claim. *Fisher v. Okl. Health Care Auth*., 335 F.3d 1175, 1181-82 (10th Cir. 2003); *Brantley v. Douglas*, 656 F. Supp. 2d 1161, 1170 (N.D. Cal. 2009). Individuals at risk of placement in nursing homes are also protected. *Id*.

Petitioners Kelley and Reed, and others similarly situated, easily meet the first two prongs of the *Olmstead* test: they live at home and are fighting to remain there. Ex. 1, ¶¶ 6, 9, 10; Ex. 2, ¶¶ 9, 19-20, 23-24; Ex. 3, ¶¶ 6-8, 11, 23; *see also* Ex. 6, ¶¶ 6, 9, 11-12. As to the third prong, applying the federally-mandated spousal impoverishment methodology to ensure that eligible individuals are not forced into costly and unnecessary institutional care is indisputably reasonable. DHCS's actions has placed Petitioners and others at risk of unnecessary institutionalization in violation of the ADA, Section 504, and Government Code Section 11135. *Id.*

The ADA and Section 504 also prohibit methods of administration which have a discriminatory effect on people with disabilities. 28 C.F.R. § 35.130(b)(3), 28 C.F.R. § 41.51(b)(3), and 45 C.F.R. § 84.4(b)(4). DHCS violated this provision by, *inter alia*, its failures as described above to ensure that eligible individuals receive the benefit of spousal impoverishment rule, thereby placing them at risk of unnecessary institutionalization.

V. CONCLUSION

For the reasons above, Petitioners respectfully request that the Court grant the relief requested in the Fourth Amended Petition.

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