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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 **KATIE A.**, by and through her next
friend Michael Ludin; **MARY B.**, by and
16 through her next friend Robert Jacobs;
JANET C., by and through her next
17 friend Dolores Johnson; **HENRY D.**, by
and through his next friend Gillian
18 Brown; AND **GARY E.**, by and through
his next friend Michael Ludin;
19 individually and on behalf of others
similarly situated,

20 Plaintiffs,

21 v.

22 **DIANA BONTÁ**, Director of California
Department of Health Services; **LOS**
23 **ANGELES COUNTY; LOS ANGELES**
COUNTY DEPARTMENT OF
24 **CHILDREN AND FAMILY**
SERVICES; ANITA BOCK, Director of
25 the Los Angeles County Department of
Children and Family Services; **RITA**
26 **SAENZ**, Director of the California
Department of Social Services, and
27 **DOES 1 through 100, inclusive,**

28 Defendants.

Case No.: CV-02-05662 AHM (SHx)

**PLAINTIFFS' REPLY IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

Date: April 7, 2008
Time: 10:00 a.m.
Courtroom: 14

The Hon. A. Howard Matz

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TABLE OF CONTENTS

	<u>Page</u>
I. This Case Meets the Requirements for Granting a Mandatory Preliminary Injunction.....	2
II. The Facts and Law Clearly Favor Plaintiffs on Their Medicaid Claim.....	2
A. Each Component of Wraparound Services and TFC Falls under One or More Provisions of 42 U.S.C. § 1396d(a).....	3
1. Defendants Do Not Argue That Any Specific Component of Wraparound Services Falls Outside the Protection of § 1396d(a).....	8
2. Defendants’ Reliance on the Case Management Regulations to Dispute Medicaid Coverage of TFC is Misplaced.....	9
B. Defendants Essentially Concede that They Do Not Effectively Provide Any Mandated Components of Wraparound Services or TFC.....	11
C. Defendants Do Not Dispute that All the Components of Wraparound Services and TFC Must Be Provided and Must Be Provided in a Coordinated Fashion.	15
III. The Facts and Law Clearly Favor Plaintiffs on Their Claims under the ADA and the Rehabilitation Act.....	17
IV. The Balance of Hardships Tips Totally in Plaintiffs’ Favor as Defendants Raise the Same Unpersuasive Arguments They Made in Opposition to Plaintiffs’ Prior Preliminary Injunction Motion.....	20

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25
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TABLE OF AUTHORITIES

Page

FEDERAL CASES

Block v. City of Los Angeles,
253 F.3d 410 (9th Cir. 2001)..... 12

Katie A. ex rel. Ludin v. Los Angeles County,
481 F.3d 1150 (9th Cir. 2007)..... 1, 3, 4, 15, 21

Katie A. v. Bontá,
433 F. Supp. 2d 1063 (C.D.Cal. 2006)..... 4, 15, 21

Kennedy v. Allied Mut. Ins. Co.,
952 F.2d 262 (9th Cir. 1991)..... 12, 13

Patsy v. Bd. of Regents of State of Fla.,
457 U.S. 496, 516, 102 S.Ct. 2557, 73 L.Ed. 2d 172 (1982)..... 21

Sanchez v. Johnson,
416 F.3d 1051 (9th Cir. 2005)..... 18

Shakur v. Schriro,
514 F.3d 878 (9th Cir. 2008)..... 13

Stanley v. Univ. of S. Cal.,
13 F.3d 1313 (9th Cir. 1994)..... 2

FEDERAL STATUTES

29 U.S.C. § 794 17

42 U.S.C. § 1396d(a).....*passim*

42 U.S.C. § 1396d(a)(9) 10

42 U.S.C. § 1396d(a)(13) 8, 9, 10, 12

42 U.S.C. § 1396d(a)(19) 8, 10, 11, 12

42 U.S.C. § 1396n(g)(2)..... 8, 10, 11, 12

ADA, Title II § 12102(2) 17

Fed.R.Civ.P. 52(a) 22

STATE STATUTES

Welf. & Inst. Code § 18987.72(d)(2)(G)..... 20

OTHER AUTHORITIES

H.R. 5613, The Protecting the Medicaid Safety Net Act of 2008..... 9

1 **INTRODUCTION**

2 Defendants Sandra Shewry, Director of the California Department of Health
3 Care Services (“DHCS”), and John Wagner, Director of the California Department
4 of Social Services (“DSS”), have remarkably little to say in opposition to Plaintiffs’
5 renewed motion for a preliminary injunction in this lawsuit.¹ “Defendants do not
6 dispute that wraparound and TFC [therapeutic foster care]” are among the
7 “successful practices and approaches to effectuate child and family well-being.”
8 State Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction
9 (“Opp.”) at 21.

10 The Ninth Circuit remanded this case as to three specific issues regarding
11 Plaintiffs’ Medicaid claims. *Katie A. ex rel Ludin v. Los Angeles County*, 481 F.3d
12 1150, 1162-63 (9th Cir. 2007). As to the first issue, Defendants *never* address the
13 detailed analysis by several nationwide experts in Medicaid funding (Linda Redman
14 in particular, but also Martha Knisley, Chris Koyanagi, Timothy Penrod and Tim
15 Westmoreland) which demonstrates how each component of wraparound services
16 and TFC falls within one or more of the 28 categories of services listed under 42
17 U.S.C. § 1396d(a).² As to the second issue, Defendants’ responses to discovery
18 prove that the State does not effectively provide the mandated components of
19 wraparound services and TFC to members of the class. As to the third issue,
20 Defendants have almost nothing to refute Plaintiffs’ extensive evidence that all
21 components of wraparound services and TFC must be provided in a coordinated
22 manner to be effective.

23 Apart from their Medicaid claims, Plaintiffs are also seeking a preliminary
24 _____

25 ¹ Defendants’ opposition brief mistakenly identifies Diana Bontá and Rita Saenz as
26 the current Defendants in this case. Both Ms. Bontá and Ms. Saenz were sued in
27 their official capacities and have since been replaced by respectively Ms. Shewry
28 and Mr. Wagner.

² Hereafter, all statutory citations are to Title 42 of the United States Code unless
indicated otherwise.

1 injunction on their claims under the Americans with Disabilities Act (“ADA”) and
2 Section 504 of the Rehabilitation Act. Here, too, Defendants have little to say
3 regarding the merits of these claims.

4 Without the facts or law on their side, Defendants regrettably resort to
5 unwarranted personal attacks. They contend that “Plaintiffs’ objective is to highjack
6 [sic] the operation of California’s system of governing its social programs.” Opp. at
7 2. The actual objective of this lawsuit is that California should provide two
8 desperately needed, cost effective mental health services, but only to those members
9 of the statewide class who are legally entitled to receive these services and only
10 when these services are medically necessary for their care. Cherise M., Christine
11 Worth and thousands of vulnerable children like them should be receiving
12 wraparound services and/or TFC. This lawsuit seeks only to vindicate the legal
13 rights of tens of thousands of children in or at risk of entry into the foster care
14 system for whom Defendants are ultimately responsible for their care. The Court
15 should grant Plaintiffs’ new motion for a preliminary injunction.

16 ARGUMENT

17 I. This Case Meets the Requirements for Granting a Mandatory 18 Preliminary Injunction.

19 The parties agree upon the appropriate standard for issuance of a mandatory
20 preliminary injunction in this case. Plaintiffs must show that the “the facts and law
21 clearly favor the moving party.” Opp. at 16, *citing Stanley v. University of Southern*
22 *California*, 13 F.3d 1313, 1320 (9th Cir. 1994). The facts and law clearly favor
23 Plaintiffs on both their Medicaid and ADA claims.

24 II. The Facts and Law Clearly Favor Plaintiffs on Their Medicaid 25 Claim.

26 According to a recent report which Defendants have submitted, there were
27 78,536 children in foster care on the first day of the 2006 fiscal year and 40,032
28 children were admitted to foster care during that fiscal year. Freitas Declaration

1 (“Decl.”), 544-45 at ¶ 7, Exhibit (“Exh.”) 3 at 618. Defendants admit that many of
2 these children are Medicaid-eligible. Opp. at 4; *see also Katie A.*, 481 F.3d at 1154
3 n. 9 (“A large subset of the plaintiffs are eligible for Medicaid as foster children
4 receiving federal assistance under Title IV-E of the Social Security Act, and others
5 may be eligible on other grounds”).

6 Plaintiffs are seeking a preliminary injunction based in part upon the Early
7 and Periodic Screening, Diagnosis and Treatment (“EPSDT”) provisions of the
8 Medicaid Act. “[U]nder the EPSDT provisions, states have an obligation to cover
9 every type of health care or services necessary for EPSDT corrective or ameliorative
10 purposes that is allowable under § 1396d(a).” *Katie A.*, 481 F.3d at 1158.

11 At one point Defendants acknowledge their obligations under EPSDT to
12 provide the “services needed to treat” Medicaid-eligible children “(if they are
13 Medicaid-eligible services), whether the service is covered by the state plan or not.”
14 Opp. at 5. However, just a few sentences later, Defendants refer to the “national
15 standard of 80% compliance.” *Id.* This percentage refers to the annual participation
16 goal that the Centers for Medicare and Medicaid Services (“CMS”) have set for the
17 initial and periodic screens of Medicaid-eligible children. CMS State Medicaid
18 Manual § 5360 (Further Supplemental (“Supp.”) Newman Decl., 1104 at ¶ 8, Exh.
19 177 at 1302-04). The goal on which Defendants rely, which relates to well-child
20 pediatric visits, has nothing to do with – and does not in any way limit – the state’s
21 obligation to treat eligible children who have a condition that requires covered
22 services. *Id.* at § 5124 (Exh. 177 at 1298-1301). As the Ninth Circuit held, states
23 have obligations under EPSDT not only to cover any service allowable under §
24 1396d(a) but also “to see that the services are provided when screening reveals that
25 they are medically necessary for a child.” *Katie A.*, 481 F.3d at 1158.

26 **A. Each Component of Wraparound Services and TFC Falls under**
27 **One or More Provisions of 42 U.S.C. § 1396d(a).**

28 The Ninth Circuit directed this Court to determine first whether the
components of wraparound services and TFC fall under the 28 categories of services

1 listed in § 1396d(a). *Katie A.*, 481 F.3d at 1163. Plaintiffs have proven, and
2 Defendants have failed to refute Plaintiffs' evidence, that each component of
3 wraparound and TFC is covered under § 1396d(a).

4 Just as with their opposition to Plaintiffs' earlier preliminary injunction
5 motion, Defendants once again insist that wraparound services and TFC are
6 "processes" or "approaches," not services. Opp. at 3 and 5. Plaintiffs will not
7 repeat here their prior rejoinder to what is mostly an argument over semantics.
8 Suffice it to say, this Court has already found that wraparound services and TFC are
9 services. *Katie A. v. Bontá*, 433 F.Supp.2d 1063, 1071-72 (C.D.Cal. 2006); *see also*
10 *Katie A.*, 481 F.3d at 1156 n. 14 ("Defendant's contention that the court committed
11 clear error in characterizing wraparound services and TFC as 'services' is similarly
12 misplaced, because that was not a pure factual finding, but an application of a
13 statutory term").

14 Defendants mischaracterize Plaintiffs' motion as one where they "rely heavily
15 on the opinion of Tim Westmoreland to support their argument that all of the
16 components of the wraparound and TFC. . .are covered by Medicaid." Opp. at 19.
17 Defendants then attack Mr. Westmoreland's declaration on the grounds that he was
18 the former Director of CMS' Center for Medicaid and State Operations and that the
19 current CMS policies on coverage of Medicaid services differ from those in effect
20 during his tenure. *Id.* At the outset, Mr. Westmoreland cannot be dismissed as
21 some relic from the past. He is the current consulting counsel to the U.S. House of
22 Representatives' Committee on Oversight and Government Reform and Georgetown
23 University Professor and Senior Scholar in Health Law. Westmoreland Decl., 768-
69 at ¶ 6.³

24
25 ³ Defendants emphasize that Mr. Westmoreland was a CMS official during the
26 Clinton administration (Opp. at 19), but they have introduced a declaration from a
27 CMS official during the current Bush administration who also supports Plaintiffs'
28 position in this lawsuit. Mary Jean Duckett has stated that "[s]ome states have
included in their approved state plans, coverage for services under the label of
therapeutic foster care that CMS believed to consist of component parts that are

1 Mr. Westmoreland is just one of several experts on Medicaid funding who
2 have submitted declarations in support of Plaintiffs' new motion. The other experts
3 include Linda Redman, the former deputy director of Arizona's Medicaid program
4 and current Medicaid consultant; Martha Knisley, the former Director of the
5 Departments of Mental Health in the District of Columbia and Ohio, former Deputy
6 Secretary for Mental Health in Pennsylvania and current Medicaid consultant; Chris
7 Koyanagi, a Medicaid expert with more than thirty years' experience in public
8 financing of Medicaid services; and Timothy Penrod, the president of a behavioral
9 health clinic in Arizona who helped that state to develop mechanisms to provide
10 wraparound services, TFC and other services as part of its Medicaid program.
11 Plaintiffs have relied just as much, if not more, on the declarations of these other
12 experts, especially Dr. Redman, than the declaration of Mr. Westmoreland.

13 Defendants can find no fault in the qualifications of any of these other
14 experts. Indeed, DHS' Director had previously proposed Ms. Knisley to be the
15 Special Master in the *Emily Q.* case, praising her "unique level of insight into the
16 complex and diverse administrative, legal, procurement, consumer and finance
17 issues of mental health programs." Further Supp. Newman Decl., 1103 at ¶ 2, Exh.
18 171 at 1115-16. More importantly, these experts have based their opinions in part
19 upon what have been CMS' regulations and policies up until the present day. *See,*
20 *e.g.,* Second Supp. Redman Decl., 483-84 at ¶¶ 13-14 (discussing the Deficit
21 Reduction Act and CMS' new regulations); Knisley Decl., 654-57 at ¶¶ 17-18
(same); Westmoreland Decl., 771-72 at ¶ 15, 774 at ¶ 20 (same).

22 These Medicaid funding experts describe how each component of wraparound
23 and TFC can be covered under one or more of the categories of services listed in §
24 1396d(a), including rehabilitative services, §1396d(a)(13), case management

26 Medicaid-covered services within the scope of the definitions listed in 42 U.S.C.
27 Section 1396d(a)." Duckett Decl., 539 at ¶ 5 (a copy of which has been attached to
28 the Second Supplemental Declaration of Linda Redman).

1 services, § 1396d(a)(13), clinic services, § 1396d(a)(9), and/or the catchall “any
 2 other type of remedial care recognized under State law, furnished by licensed
 3 practitioners within the scope of their practice as defined by State law,” §
 4 1396d(a)(6). *See, e.g.*, Second Supp. Redman Decl., 481-82 at ¶ 10; Koyanagi
 5 Decl., at ¶¶ 25, 28-30;⁴ Knisley Decl., 653 at ¶ 15; Westmoreland Decl., 770 at ¶ 12.
 6 For example, the wide range of activities that are covered under the category of
 7 rehabilitative services includes diagnosis, comprehensive assessments, team-based
 8 treatment planning, coordination of rehabilitative services, crisis services, family
 9 psychoeducation, life and social skills training, and medication management and
 10 education. *See, e.g.*, Second Supp. Redman Decl., 488-90 at ¶ 19; Knisley Decl.,
 11 654-55 at ¶ 17; *accord*, U.S. Department of Health and Human Services, CMS, A
 12 *Primer on How to Use Medicaid to Assist Persons Who are Homeless to Access*
 13 *Medical, Behavioral Health and Support Services* (January 2007), at 546-57
 14 (attached as Exh. 6 to Second Supp. Redman Decl.).

15 Defendants do not dispute any of this testimony. On the contrary, their own
 16 declarant, Rita McCabe, corroborates that the broad coverage under rehabilitative
 17 services includes assistance to individuals with “functional skills, daily living skills,
 18 social and leisure skills, grooming and personal hygiene skills, meal preparation
 19 skills, support resources, and medication management.” McCabe Decl., 64-65 at ¶
 20 9.⁵

21 Similarly, the category of case management services encompasses a wide
 22 scope of activities and services, such as “comprehensive assessments, development
 23 (and periodic revision) of a care plan with the active participation of the eligible

24 ⁴ Ms. Koyanagi’s declaration was filed in support of Plaintiffs’ prior preliminary
 injunction motion.

25 ⁵ Ms. McCabe has asserted that “[t]hose states that do provide rehabilitative services
 26 can define the scope of the benefit to include specific services and exclude others.”
 McCabe Decl., 65 at ¶ 9. This statement is incorrect with respect to Medicaid-
 27 eligible children. Defendants have themselves stated that in accordance with the
 28 EPSDT mandate “the services needed to treat the child must be provided” so long as

1 individual and others, referral and related activities, and monitoring and follow-up
2 activities.” Second Supp. Redman Decl., 484-85 at ¶ 14 (*citing* §
3 1396n(g)(2)(A)(ii); 72 Fed. Reg. 68092); *accord* Knisley Decl., 656-57 at ¶ 18.
4 Again, Defendants’ own declarant, Ms. McCabe, agrees with Plaintiffs’ experts
5 about the broad coverage under this Medicaid category of service: case management
6 services “may include, but are not limited to, communication, coordination, and
7 referral; monitoring service delivery to ensure beneficiary access to service;”
8 assessments; service plan development and periodic review; linkage and
9 consultation; assistance in accessing services; and crisis planning. McCabe Decl.,
10 65-66 at ¶¶ 11 and 13A.

11 Plaintiffs have also submitted substantial evidence that other states cover
12 components of wraparound services and TFC under their Medicaid programs.
13 Second Supp. Redman Decl., 482-83 at ¶ 12 and Exh. 7 at 548-618 (table of other
14 states’ coverage of the components of wraparound services and TFC based on
15 review of twelve states’ Medicaid documents and conversations with state Medicaid
16 officials); Penrod Decl., 415-17 at ¶¶ 10-13 (discussing coverage of the components
17 of wraparound services and TFC by Arizona’s Medicaid program); Knisley Decl.,
18 653-54 at ¶ 16 (discussing coverage of the services and activities that are the
19 components of wraparound services and TFC by the District of Columbia’s
20 Medicaid program); Koyanagi Decl. at ¶¶ 28-29 (attesting to other states’ coverage
21 of the components of wraparound and TFC based on the results of her 50-state
22 survey). Defendants do not submit a scintilla of evidence to the contrary. Nor do
23 they contest Plaintiffs’ experts’ opinion that the fact that the components of
24 wraparound services and TFC are covered by other states’ Medicaid programs
25 constitutes “strong evidence” that the components of wraparound services and TFC
26 “are covered by Medicaid.” Supp. Redman Decl., 482 at ¶ 11; *accord* Koyanagi
27 Decl. at ¶ 33 (“Because wraparound and therapeutic foster care are clearly covered
28 by Medicaid, as demonstrated by the states that cover those services under

the services are covered by Medicaid. *Opp.* at 5.

1 Medicaid, children in all states are entitled to those services under Medicaid’s
2 EPSDT mandate.”).

3 1. Defendants Do Not Argue That Any Specific Component of
4 Wraparound Services Falls Outside the Provisions of § 1396d(a).

5 On close inspection, neither Defendants nor their declarants assert that any
6 specific component of wraparound services falls outside the categories of service
7 under § 1396d(a). While Defendants do not expressly concede that any particular
8 component of wraparound services is covered by Medicaid, they come close:

9 If the medical necessity criteria is met and the services are properly
10 described, the service activities under the process called wraparound
11 could be Medicaid covered services under 42 U.S.C. § 1396d(a)(19)
12 and covered pursuant to 42 U.S.C. § 1396d(a)(13) as other diagnostic,
13 screening, preventative and rehabilitative services.

14 Opp. at 7; *see also* McCabe Decl., 64 at ¶ 8 (same).

15 Defendants’ only argument with respect to coverage of wraparound services
16 is that they claim CMS will no longer pay for bundles of services. Opp. at 19;
17 Rosenstein Decl., 1-2 at ¶ 3. However, as has been repeatedly stated, Plaintiffs do
18 not contend that California must provide wraparound services (or TFC) as a single
19 bundled service under Medi-Cal. Plaintiffs’ Memorandum of Points and Authorities
20 in Support of Motion for Preliminary Injunction (“Pl. Memo”) at 14, 18; *Katie A.*,
21 481 F.3d at 1161 n. 20. Further, the issue of bundling is a billing issue, not a
22 coverage issue. Second Supp. Redman Decl., 483 at ¶ 13.

23 Although Defendants have been somewhat coy about their position, the fact
24 remains that they have failed to offer *any* evidence or argument that a specific
25 component of wraparound services falls outside the provisions of § 1396d(a). This
26 Court should therefore find that each of the nine components of wraparound is
27 covered under § 1396d(a).

28 ///

1 2. Defendants’ Reliance on the Case Management Regulations to Dispute
2 Medicaid Coverage of TFC is Misplaced.

3 Defendants’ sole argument regarding coverage of the components of TFC is
4 that the new case management regulations prohibit coverage of TFC under this
5 category of services.⁶ Opp. at 5, 18-19. Recently proposed legislation would,
6 however, put a moratorium until April 9, 2009 on enforcement of the case
7 management regulations as well as the rehabilitative service regulations and other
8 regulations proposed by CMS. *See* H.R. 5613, The Protecting the Medicaid Safety
9 Net Act of 2008.

10 Yet, even if the new case management regulations remain in effect and
11 Defendants’ interpretation of these regulations is correct, which it is not (*see* page
12 10 *infra*), Plaintiffs have nonetheless shown that TFC can be covered under other
13 categories of § 1396d(a) than case management, including in particular
14 rehabilitative services. *See, e.g.*, Koyanagi Decl. at ¶ 28 (stating that TFC “is a
15 mental health service that is commonly billed under the Medicaid Rehabilitation
16 category” and describing how each component can be covered as a rehabilitative
17 service); *accord* Appendix B. While Defendants question whether one or two
18 specific components of TFC can be covered as case management services,
19 Defendants overlook Plaintiffs’ evidence that those components also qualify as
20 rehabilitative services under §1396d(a)(13). *Compare, e.g.*, Opp. at 17 (arguing that
21 TFC “Tracking and Adapting the Treatment Plan” cannot be covered as a case
22 management service) *with* Second Supp. Redman Decl., 497-98 at ¶ 22 (discussing
23 coverage of TFC “Tracking and Adapting the Treatment Plan” as a rehabilitative
24 service).

24 Defendants also misquote Mr. Westmoreland’s declaration, suggesting that he
25 has testified that every component of TFC is covered by case management services

26
27 ⁶ Defendants’ argument that CMS will no longer cover bundles of services relates to
28 billing and not to coverage of individual components of TFC.

1 and only by that category. Opp. at 17. In fact, what Mr. Westmoreland stated is that
 2 “most states generally cover the activities that are the components of wraparound
 3 services and therapeutic foster care under the categories of rehabilitative services, §
 4 1396d(a)(13), case management services, § 1396d(a)(19), *and/or* clinic services, §
 5 1396d(a)(9).” Westmoreland Decl., 770 at ¶ 12 (emphasis added).

6 Moreover, Defendants’ claim that the case management regulations prohibit
 7 coverage of TFC is untenable. Defendants rely on a sentence in the preamble to the
 8 regulations to support their position. Opp. at 18. However, the very next sentence
 9 in the preamble expressly states that “FFP [federal financial participation] for
 10 medical services to a Medicaid eligible child with medical care needs who resides in
 11 therapeutic foster care would still be available,” 72 Fed. Reg. at 68087, and the
 12 following paragraph makes clear that the regulations “do[] not in any way,
 13 compromise a Medicaid recipients’ eligibility for medically necessary services . . . ,
 14 including medically necessary case management (and targeted case management)
 15 services that are not used to administer other programs,” *id.* at 68088.⁷ As Dr.
 16 Redman explains, the components of TFC for class members fall well within this
 17 description of permissible case management services. TFC is a mental health
 18 service available to children both in and outside of the foster care system, and the
 19 case management regulations do not prohibit covering the components of TFC –
 20 when TFC is provided as a mental health intervention – under a state’s Medicaid
 21 program. Second Supp. Redman Decl., 492-509 at ¶ 22; *accord* 72 Fed. Reg. at
 22 68086 (“[A] Medicaid eligible child with a mental disorder receiving child

23
 24 ⁷ Given this language, the only tenable interpretation of this sentence is that TFC is
 25 subject to the same list of excluded activities that are the responsibility of the foster
 26 care system that are included in the Deficit Reduction Act (“DRA”) and the
 27 regulations, including “recruiting or interviewing *potential* foster parents,” §
 28 1396n(g)(2)(A)(iii) (emphasis added); 72 Fed. Reg. at 68093. Dr. Redman explains
 in detail that there is no inconsistency between Plaintiffs’ claims in this lawsuit and
 the DRA and these regulations. *See* Pl. Memo at 15; Second Supp. Redman Decl.,
 492-509 at ¶ 22 (discussing coverage of training of therapeutic foster parents).

1 protective services may also qualify to receive case management services targeted to
2 children with mental disorders.”).

3 Defendants’ argument against coverage of the components of TFC, based on
4 the new case management regulations, is not dispositive because other categories of
5 § 1396d(a) support coverage. In addition, Defendants’ argument misconceives the
6 import of these regulations. Based on this, and the ample evidence presented by
7 Plaintiffs, this Court should also find that each component of TFC is covered under
8 one or more provisions of § 1396d(a).

9 **B. Defendants Essentially Concede that They Do Not Effectively**
10 **Provide Any Mandated Components of Wraparound Services**
11 **or TFC.**

12 As the preceding argument demonstrated, all nine components of wraparound
13 services and seven components of TFC are covered by the Medicaid Act. The next
14 question before this Court is whether Defendants “have effectively provided each
15 mandated component service.” Opp. at 20, *quoting Katie A.*, 481 F.3d at 1163.

16 The simple answer to this question is “no” given Defendants’ own discovery
17 responses in this lawsuit. DHCS’ Director has stated in her interrogatory responses
18 that “[n]one of the components of wraparound services set forth in Appendix A” and
19 “[n]one of the components of TFC set forth in Appendix B” are “covered as such by
20 the Medi-Cal program.” Further Newman Decl., 833-84 at ¶ 4, Exh. 164 at 874-75.
21 Meanwhile, Ms. McCabe appeared on DMH’s behalf at a deposition last October
22 and testified that the Medi-Cal program should not be reimbursing providers for any
23 of the components of wraparound services listed in Appendix A or any of the
24 components of TFC listed in Appendix B.⁸ Further Newman Decl., Exh. 167 at

25
26 ⁸ Ms. McCabe had previously filed a declaration in opposition to Plaintiffs’ prior
27 preliminary injunction motion wherein she begrudgingly acknowledged that six and
28 possibly seven of the nine components of wraparound services and four of the seven
components of TFC could be covered Medicaid services. McCabe Decl., 5204-05
and 5208-20 at ¶¶ 12, 13, 22, 26, 30-43.

1 964-1029. More recently, in a letter dated February 14, 2008, opposing counsel
2 represented that “there is no one to testify” on Defendants’ behalf as to whether the
3 Medi-Cal program was effectively providing any of the mandated components of
4 wraparound services and TFC. Further Supp. Newman Decl., 1104 at ¶ 7, Exh. 176
5 at 1296.

6 As a general rule, a party cannot controvert its own discovery responses in a
7 lawsuit. *See, e.g., Block v. City of Los Angeles*, 253 F.3d 410, 419 n. 2 (9th Cir.
8 2001)(“A party cannot create a genuine issue of material fact to survive summary
9 judgment by contradicting his earlier version of the facts”). Thus, Defendants’ own
10 discovery responses offer conclusive evidence that they are not effectively providing
11 any of the mandated components of wraparound services and TFC.

12 Defendants make no pretense of effectively providing any of the mandated
13 components of TFC. But, in another flip-flop in her position in this lawsuit, Ms.
14 McCabe now claims that, if “medical necessity criteria are met and if services are
15 properly described, the service activities under the process called wraparound could
16 be Medicaid-covered case management services under 42 U.S.C. § 1396d(a)(19)”
17 and rehabilitative services pursuant to 42 U.S.C. § 1396d(a)(13). McCabe Decl., 64
18 at ¶ 8. Ms. McCabe also claims:

19 Service activities under this provision of Title XIX would be eligible
20 under Medi-Cal Specialty Mental Health ‘mental health services.’ As
21 such, they [are] currently available and there is no indication that
22 children in foster care are not getting these services when they are
23 needed and medical necessity criteria are met.

24 *Id.* (brackets in original). Ms. McCabe’s above-mentioned statements cannot be
25 reconciled with her deposition testimony just last October. This Court should
26 therefore be concerned with the possibility of “‘sham’ testimony that flatly
27 contradicts earlier testimony in an attempt to ‘create’ an issue of fact. . . .” *See*
28 *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991). Ms.
McCabe’s contradictory sworn statements might still be admissible if this Court

1 were to find that her “actions were the result of an honest discrepancy, a mistake, or
 2 the result of a newly discovered evidence.” *Id.* But Ms. McCabe offers no such
 3 explanation for this complete reversal in her position in less than four months, nor
 4 could she plausibly do so. Furthermore, to the extent that this State official makes
 5 any statement that the “service activities” under wraparound services “are currently
 6 available” to children in foster care, her declaration has not shown the requisite
 7 personal knowledge of the facts to support such a conclusory assertion. *See Shakur*
 8 *v. Schriro*, 514 F.3d 878, (9th Cir. 2008)(“[c]onclusory affidavits that do not
 9 affirmatively show personal knowledge of specific facts are insufficient”)(citation
 10 omitted).⁹

11 Apart from the deeply troublesome statements of Ms. McCabe, Defendants
 12 point to the “use of the wraparound approach in 39 of its 58 counties.” *Opp.* at 21.
 13 Defendants base this statement upon the declaration of Cheryl Treadwell, a DSS
 14 official, regarding the Senate Bill No. (“SB”) 163 wraparound programs in
 15 California. Treadwell Decl., 805-806 at ¶¶ 3-4. As Ms. Treadwell acknowledges,
 16 the SB 163 program “is not a Medi-Cal program.” *Id.* at ¶ 3. Neither Ms. Treadwell
 17 nor any other witness for Defendants offers a number of critical details about the SB
 18 163 wraparound programs in those 39 counties, such as which mandated
 19 components of wraparound services are supposedly being provided to which
 20 children.

21 Eligibility for wraparound services is limited to foster children who are

22 ⁹ DMH has repeatedly designated Ms. McCabe to testify on its behalf in both this
 23 case and the *Emily Q.* case. Plaintiffs in *Emily Q.* have previously lodged with the
 24 Court the February 6, 2006 deposition of Ms. McCabe in that case. The Court is
 25 asked to consider the February 6, 2006 deposition transcript in connection with the
 26 instant preliminary injunction motion. That deposition transcript reveals Ms.
 27 McCabe’s willingness to make a number of conclusory statements in a declaration
 28 even though she is not competent to make such statements due to a lack of personal
 knowledge and/or requisite expert qualifications. *See, e.g.*, McCabe Deposition at
 11:15-23, 13:7-15:5, 47:18-48:10, 50:4-11, 75:7-77:7, 107:3-24, 113:13-19, 140:24-
 141:10, 142:8-143:25, 147:12-22, 149:5-16, 185:15-19, 187:12-188:20.

1 currently residing in or at risk of being placed in Rate Classification Level facilities
 2 of 10 or above. Grayson Deposition (“Depo.”) at 38:14-39:16; Treadwell Depo. at
 3 22:7-10.¹⁰ It is undisputed that the counties have complete discretion on the number
 4 of wraparound “slots” they wish to provide. Treadwell Depo. at 21:22-22:1, 31:21-
 5 25, 102:20-23. There is no requirement that a county provide wraparound services to
 6 all children in the target population for whom these services would be medically
 7 necessary, helpful or otherwise appropriate. *Id.* at 27:1-28:10, 38:20-39:1. Hence,
 8 Ms. Treadwell previously admitted that the participating counties in the SB 163
 9 programs were not even providing wraparound to all children in the target
 10 population for whom such services would be appropriate. *Id.* at 9:1-10:25, 13:3-13,
 11 40:15-20. Certainly, Defendants have not offered any evidence demonstrating how
 12 the current system is effectively providing the mandated components of wraparound
 13 services to all class members who need these services. Defendants have even taken
 14 the position that the counties’ SB 163 programs are “totally irrelevant to the issues
 in the lawsuit. . . .” Further Supp. Newman Decl., 1104 at ¶ 7, Exh. 176 at 1296.

15 Without any defense as to the Ninth Circuit’s second question, Defendants try
 16 to divert the Court’s attention with false accusations against Plaintiffs. Plaintiffs are
 17 accused of attempting “to usurp the State’s discretion by imposing [their] preference
 18 for the wraparound and TFC approaches” and of even wanting “to impose one
 19 approach, one evidence-based practice, on all children in all counties. . . .” *Opp.* at
 20 20-21. In truth, Plaintiffs have never sought to interfere with Defendants’ discretion
 21 in providing any other service to children. Nor have Plaintiffs ever asserted the view
 22 that wraparound services and TFC should be provided to “all children in all
 23 counties.”

24 Defendants emphasize the “State’s discretion in meeting its EPSDT
 25 obligation.” *Opp.* at 20. The Ninth Circuit, however, stated that this discretion is

26
 27 ¹⁰ These excerpts from the deposition testimony of Ms. Grayson and Ms. Treadwell
 28 were introduced in support of Plaintiffs’ previous motion for a preliminary
 injunction. Citations are to the page and line numbers of the deposition testimony.

1 exercised in the context that “the states must meet the substantive obligations of the
2 Medicaid Act.” *Katie A.*, 481 F.3d at 1161. As Defendants themselves concede,
3 under the “EPSDT program, children are to receive all medically necessary services
4 that are coverable by Medicaid whether the state currently cover these services
5 under their state plan.” *Opp.* at 21.

6 This lawsuit only seeks to require Defendants to provide wraparound services
7 and TFC to those class members for whom these services are medically necessary.
8 Defendants have not introduced any evidence in opposition to either Plaintiffs’ prior
9 preliminary injunction motion or this new motion to dispute the medical necessity of
10 these two mental health services for at least some members of the class. *Katie A.*,
11 433 F.Supp.2d at 1076-77. On the contrary, Defendants admittedly “do not dispute
12 that wraparound and TFC” are among the “many successful practices and
13 approaches to effectuate child and family well-being.” *Opp.* at 21.

14 **C. Defendants Do Not Dispute that All the Components of**
15 **Wraparound Services and TFC Must Be Provided and Must Be**
16 **Provided in a Coordinated Fashion.**

17 This leads to the last question which the Ninth Circuit raised as to Plaintiffs’
18 Medicaid claim: “whether the State should be required to provide the required
19 services in another manner which will render such services effective, or proceed
20 directly to wraparound and TFC.” *Katie A.*, 481 F.3d at 1163. Noticeably,
21 Defendants never mention this last question in their opposition papers. *Opp.* at 3
22 and 20.

23 They instead speak about how the counties offer an “array of approaches” to
24 “meet the unique needs of children with complex and enduring problems” and the
25 “effectiveness” of these other programs “can be seen in several ways.” *Opp.* at 22.
26 Yet many of these other programs, such as Kinship Support Services and Family to
27 Family programs, are social services programs under DSS’ supervision. According
28 to Defendants’ own expert, Dr. John Landsverk, the research literature “suggests

1 that between one-half and three-fourths of the children entering foster care exhibit
2 behavior or social competency problems that warrant mental health care” and
3 “[t]here is also evidence that this high rate of need may be anticipated as well for
4 children who are served by child welfare while remaining in their biological
5 homes.” Landsverk Decl., 391-92 at ¶ 4; Exh. 2 at 417. Defendants have made no
6 showing that these other programs are adequately meeting the mental health needs
7 of members of the statewide class or, for that matter, that these other programs even
8 provide mental health services as opposed to social services.¹¹ Los Angeles County,
9 for example, has many, if not all, the services, interventions or pilot programs
10 described by Defendants (Opp. at 8-12), yet the Advisory Panel has concluded that
11 at least 2585 children (who are members of both the Countywide and statewide
12 classes) have unmet needs for “intensive mental health services” and the number
13 will be much higher if the County does not fulfill its planned expansion in services.
14 Katie A. Advisory Panel’s Seventh Report to the Court, previously filed on October
15 12, 2007 (Further Supp. Newman Decl., Exh. 175 at 1293-94).¹²

17
18 ¹¹ While Ms. McCabe makes the sweeping statement that “California ensures that
19 Medi-Cal EPSDT services are provided to Medi-Cal beneficiaries” (McCabe Decl.,
20 68 at ¶ 14), she admitted during her deposition that she knew of no recent studies,
21 investigations or reports regarding the outcomes of mental health services provided
22 to children in foster care or whether these children are receiving the mental health
23 services they need to receive. Further Supp. Newman Decl., 1103-04 at ¶ 5, Exh.
24 174 at 1269-74. Defendants’ expert, Dr. Landsverk, has warned that the widespread
25 use of mental health services by foster youth in California has not been
26 accompanied by any studies as to the quality of care being provided or as to the
27 outcomes of those services. Further Supp. Newman Decl., 1104-05 at ¶ 9, Ex. 178
28 at 1307-08.

¹² See also Exh. 179 at 1317 (Santa Clara County is providing some mental health
service to “less than half” the number of youth in foster care who need such services
and “many of these youth are provided only brief service” and “thus, are considered
to be significantly underserved”); Exh. 180 at 1323-24 (an estimated 280 children
and youth who are in child welfare services and probation and who have severe
emotional disturbances are “unserved” in Santa Cruz County).

1 More fundamentally, the alleged efficacy of these other programs is not
2 responsive to the last question raised by the Ninth Circuit. On remand this Court is
3 supposed to decide whether the individually required component services of
4 wraparound and TFC can be provided effectively in another manner or whether they
5 must be provided together. In their responses to discovery, Defendants admitted that
6 they had no persons to testify on their behalf on this issue. Further Newman Decl.,
7 833-34 at ¶ 4; Exh. 164 at 910-12; Further Supp. Newman Decl., 1104 at ¶ 7, Exh.
8 176 at 1296. Apart from their discovery responses, Defendants have offered no
9 evidence or argument to rebut Plaintiffs' extensive showing that all the mandated
10 components of wraparound services and TFC in Appendices A and B are necessary
11 and that all these components must be provided in a coordinated fashion to be
12 effective. *See, e.g.*, Supp. Bruns Decl., 209-23 at ¶¶ 8-10, 16, 24, 31, 33; Supp.
13 Huffine Decl., 380-88 at ¶¶ 6, 7, 10-12, 15, 21; Supp. Friedman Decl., 316-25 at ¶¶
14 6, 7, 10, 14-16, 19; Second Supp. Chamberlain Decl., 278-87 at ¶¶ 9-12, 17, 18, 23;
15 Supp. Kamradt Decl., 368-72 at ¶¶ 3, 4, 8-11; Supp. Penrod Decl., 414-27 at ¶¶ 4, 6,
16 7, 19, 22, 26-29; and Rauso Decl., 68-70 at ¶¶ 5, 12.

17 In short, the facts and law clearly favor Plaintiffs on the remaining three
18 issues as to their Medicaid claim.

19 **III. The Facts and Law Clearly Favor Plaintiffs on Their Claims under**
20 **the ADA and the Rehabilitation Act.**

21 Plaintiffs are seeking a preliminary injunction not only for their claims under
22 the Medicaid Act, but also for their claims under Title II of the ADA, § 12102(2),
23 and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.¹³ Defendants do not
24 dispute that they are subject to the requirements of the ADA and that members of
25 the class qualify as persons with disabilities under the ADA. There also is no
26 dispute that:

27 _____
28 ¹³ Plaintiffs' analysis of the ADA applies equally to Section 504.

- 1 ● Wraparound services and TFC prevent the unnecessary institutionalization of
- 2 class members;
- 3 ● Most class members would prefer wraparound services and TFC to the likely
- 4 alternatives, such as placement in a group home or a psychiatric facility; and
- 5 ● Wraparound services and TFC cost significantly less than these alternatives.
- 6 *Compare Sanchez v. Johnson*, 416 F.3d 1051, 1063 (9th Cir. 2005)(where the district
- 7 court found that plaintiffs had not shown that an increase in wage and benefits paid
- 8 to community-based workers would remedy the alleged ADA violations concerning
- 9 persons with developmental disabilities and the relief sought by plaintiffs would
- 10 cost the state an additional \$1.4 billion).

11 Defendants' own expert reports that the "benefit of care in group in

12 institutional settings is not well substantiated and may even be deleterious due to

13 close association with deviant peers, the risk of contagion, loss of contact with

14 family and peers, and other factors." Landsverk Decl., 391-92 at ¶ 4, Exh.2 at 420.

15 Dr. Landsverk accordingly recommends "intensive home and community-based

16 services" for youth with "complex combinations of mental health conditions and the

17 functional impairments associated with long-term risks, such as multiple episodes

18 and types of maltreatment, other trauma. . .and instability of placements. . . ." *Id.*

19 Wraparound services and TFC are two such intensive home and community-based

20 services as Defendants' own declarants attest. *See, e.g.*, Treadwell Decl., 807 at ¶ 5

21 (concurring with the opinions of Michael Rauso, Lyn Farr and Laura Champion that

22 "the impact of wraparound on children that would otherwise be placed in group care

23 has been effective"); Landsverk Decl., 392-93 at ¶¶ 6-7, Exh. 5 at 536-39 (gives

24 rating of "Well-Supported Effective Practice" to Multidimensional Treatment Foster

25 Care, which "aims to create opportunities for youths to successfully live in families

26 rather than in group or institutional settings").

27 Defendants' opposition to the ADA claims in this case boils down to two

28 arguments, each of which is devoid of merit. Defendants' first argument is that

1 wraparound services and TFC “are not Medicaid-covered services.” Opp. at 23.
2 Plaintiffs will set aside the inconsistencies in Defendants’ position as they
3 previously acknowledged in this same brief that the “services activities under the
4 process called wraparound” could be covered under § 1396d(a)(13) and (19). Opp.
5 at 7. As discussed above (*see* pages 3-11 *supra*), both wraparound services and TFC
6 fall well within the 28 categories of services under § 1396d(a). In addition,
7 Defendants never mention the fact that other states’ Medicaid programs cover
8 wraparound services and TFC, perhaps because the experience of these other states
9 belies any contention that wraparound services and TFC are not Medicaid covered
10 services.

11 Defendants’ other argument is that Plaintiffs are seeking “unreasonable”
12 changes in that they supposedly want to impose “one approach to delivering mental
13 health service on all children in all counties, . . . thereby fundamentally altering the
14 nature of California services and programs.” Opp. at 24-25. Not surprisingly,
15 Defendants cannot point to any statement by Plaintiffs or their counsel to support
16 these accusations concerning the objectives of this lawsuit. Plaintiffs have never
17 asked this Court to preclude either the State or the counties from providing any other
18 service to members of the class.¹⁴ As stated above, this lawsuit seeks only to require
19 Defendants to provide wraparound services and TFC to those members of the class
20 who are legally entitled to receive these services and for whom these services are
21 medically necessary. That does not constitute a fundamental alteration within the
22 meaning of the ADA especially since 39 counties already have SB 163 wraparound
23 programs in place and another 7 counties are actively planning to develop such
24 programs. Treadwell Decl., 806 at ¶ 4. In sum, the facts and law clearly favor

25
26 ¹⁴ Defendants have not argued (nor could they) that most of the services currently
27 being provided to foster children in California are evidence-based. While
28 Defendants assert that the counties “have built their child welfare systems using a
variety of evidence-based practices” (Opp. at 25), they do not point to a single

1 Plaintiffs on their ADA claim as well.

2 **IV. The Balance of Hardships Tips Totally in Plaintiffs' Favor as**
 3 **Defendants Raise the Same Unpersuasive Arguments They Made**
 4 **in Opposition to Plaintiffs' Prior Preliminary Injunction Motion.**

5 Turning to the balance of hardships, Defendants once again distinguish
 6 themselves by what they do not say. Defendants do not deny that wraparound
 7 services and TFC are medically necessary for many members of the class and that
 8 the deprivation of these mental health services inflicts irreparable harm. It is also
 9 undisputed that the State would save money by providing wraparound services and
 10 TFC to class members in lieu of the costly alternatives, such as placement in a high
 11 level group home. "Currently, although only 11 percent of the children in out of
 12 home care are placed in group care settings, California spends nearly 50 percent of
 13 its total foster care maintenance funds on these placements." Gunderson Decl., 14 at
 14 ¶ 10, Exh. 3 at 39. Just last year, the California Legislature found that "[t]here is
 15 general dissatisfaction with how foster care group homes are currently used in
 16 California's child welfare, juvenile justice, and mental health systems" and that the
 17 "outcomes to be achieved for children placed in group homes are poorly
 18 articulated." Assembly Bill No. 1453, Ch. 466, Stat. 2007 (attached as Exh. 3 at 55
 19 to Gunderson Decl.).¹⁵

20 According to Defendants, Plaintiffs have made no showing of irreparable
 21 harm in part because they waited three years to bring their prior preliminary

22
 23 county in California which meets this description.

24 ¹⁵ In recently enacting a pilot program of residentially based services, the
 25 Legislature encouraged DSS to approve alternative funding models which
 26 "maximize federal financial participation" and use a combination of various funding
 27 streams with "particular reference to funding for mental health treatments services
 28 through the Medi-Cal Early and Periodic Screening, Diagnosis and Treatment
 program." Welf. & Inst. Code § 18987.72(d)(2)(G) and (H). This lawsuit would
 fulfill the Legislature's goals as it would maximize the use of federal funds by using
 EPSDT funds to pay for the mental health services for these children.

1 injunction motion. Opp. at 16. Defendants made this identical argument in
2 opposition to the earlier motion and the Court rejected it, noting that Plaintiffs had
3 “initially focused much of their efforts and limited resources on their claims against
4 Los Angeles County” and that these efforts had resulted in a “pioneering, albeit still
5 problem-laden, settlement” in which the County had agreed to make a number of
6 important commitments for the care of members of the countywide subclass. *Katie*
7 *A.*, 433 F.Supp.2d at 1078. For the “remaining members of the statewide class, the
8 unmet mental health needs and the harms of unnecessary institutionalization are no
9 less grave now than three years ago.” *Id.* Significantly, the Ninth Circuit did not
10 fault this finding of irreparable harm. *Katie A.*, 481 F.3d at 1156-57.

11 As a variation on a theme, Defendants also fault Plaintiffs for supposedly
12 waiting another eight months after the Ninth Circuit remand to file this new motion
13 for preliminary injunction. Opp. at 16. Defendants conveniently skip over the
14 nearly five months of discovery which preceded the instant motion. They also
15 underestimate the time and effort needed to prepare this motion. Defendants
16 themselves needed an additional two months to file their opposition papers to this
17 motion. Above and beyond the proceedings in this lawsuit, the fact remains that the
18 unmet health needs of class members and the harms of unnecessary
19 institutionalization are no less grave now than when the Court issued the prior
20 preliminary injunction.

21 Defendants’ last argument regarding irreparable harm is that Plaintiffs have
22 an adequate remedy through the Medicaid appeals process. Opp. at 16. Here, too,
23 Defendants made this same argument in opposition to the prior preliminary
24 injunction motion and the Court previously found this argument to be
25 “unpersuasive.” *Katie A.*, 433 F.Supp.2d at 1078. “[E]xhaustion of state
26 administrative remedies should not be required as a prerequisite to bringing an
27 action pursuant to §1983.” *Id.*, citing *Patsy v. Board of Regents of State of Fla.*,
28 457 U.S. 496, 516, 102 S.Ct. 2557, 73 L.Ed. 2d 172 (1982). The balance of
hardships tips totally in Plaintiffs’ favor.

