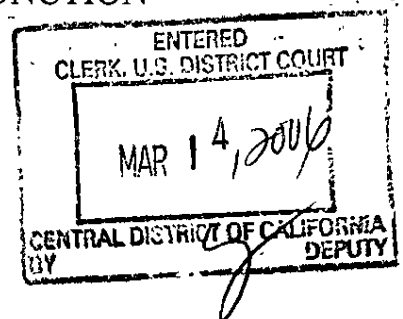


Priority ☒
Send ☒
Enter ☒
Closed ☐
JS-5/JS-6 ☐
JS-2/JS-3 ☐
Scan Only ☐

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KATIE A., *et al.*,
Plaintiffs,
v.
DIANA BONTÁ, *et al.*,
Defendants.

CASE NO. CV02-5662 AHM (SHx)
ORDER GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION



I. INTRODUCTION

Plaintiffs are five troubled children with unmet mental health needs who were, at the time this suit was filed, in the custody of the Los Angeles County Department of Children and Family Services ("DCFS").

Defendants are Sandra Shewry, the current Director of the California Department of Health Services ("DHS"), and Dennis Boyle, the current Director of the California Department of Social Services ("DSS") (collectively, the "State Defendants").¹

403

¹ Shewry's predecessor was Diana Bontá. Boyle's predecessor was Rita Saenz.

1 Plaintiffs in their First Amended Complaint ("FAC") allege that for foster
2 children with "behavioral, emotional or psychiatric impairment[s]," FAC ¶ 37,
3 adequate mental health services include, among other things, wraparound services
4 and therapeutic foster care. Plaintiffs allege, and State Defendants agree, that
5 virtually all foster children in California receive, or are eligible to receive, their
6 health care services through Medi-Cal, which is California's Medicaid program.
7 *Id.* ¶ 3; Answer ¶ 3. This means, according to Plaintiffs, that virtually all foster
8 children in California who have "behavioral, emotional or psychiatric
9 impairments" are entitled to wraparound services and/or therapeutic foster care
10 where such services are medically appropriate.

11 Over Defendants' opposition, on June 18, 2003, the Court certified the
12 following class:

13 [C]hildren in California who (a) are in foster care or are at imminent
14 risk of foster care placement; and (b) have a mental illness or
15 condition that has been documented or, had an assessment already
16 been conducted, would have been documented; and (c) who need
17 individualized mental health services, including but not limited to
professionally acceptable assessments, behavioral support and case
management services, family support, crisis support, therapeutic
foster care and other necessary services in the home or in a home-like
setting, to treat or ameliorate their illness or condition.

18 Order Re Class Certification [of Statewide Class].²

19
20
21 ² Plaintiffs' FAC also named the Los Angeles County DCFS and its Director,
22 Anita Block, as defendants (collectively, "the County Defendants"). On July 16,
23 2003, the Court conducted a fairness hearing on a tentative settlement agreement
24 reached between Plaintiffs and County Defendants on behalf of a subclass of children
25 who are in the custody of DCFS, or have been referred to or are subject to referral to
DCFS. The Court approved the settlement. *See* Stipulated Order Re Final Approval
of Class Settlement (July 16, 2003) and Stipulation Between Plaintiffs and County
Defendants Regarding Definition of Class Members (Feb. 23, 2004).

26 Although the present motion does not involve the County Defendants directly,
27 they have expressed their views on the issue by filing a "Statement of Position Re:
28 Plaintiffs' Motion for Preliminary Injunction." In short, the County states that it "is
committed and able to meet its obligations within the existing Medi-Cal structure but

1 On September 9, 2005, Plaintiffs filed a motion seeking a mandatory
2 preliminary injunction requiring the State Defendants to provide wraparound
3 services and therapeutic foster care to all members of the statewide class, within
4 60 days from the entry of an order granting the motion.³ The proposed injunction
5 would require Plaintiffs and the State Defendants to meet and confer to develop an
6 implementation plan and to submit a joint status report thereafter. The Court
7 conducted a hearing on October 31, 2005, and requested additional briefing. The
8 supplemental briefs have helped clarify the issues and very recent decisions have
9 reinforced the Court's initial view that Plaintiffs have satisfied the necessary
10 prerequisites for injunctive relief.

11 Given the passage of time and the competing demands of the Court's
12 caseload, in certain respects this Order necessarily will be streamlined. Thus, for
13 example, because the parties are fully familiar with their respective contentions,
14 the Court will not set forth in detail their arguments nor deal with all the
15 voluminous evidence they proffered. Nevertheless, I am compelled to precede
16 this analysis of the motion with relevant observations about this case.

17 First, at stake in this lawsuit is the health of thousands of children in
18 California who are already in, or are likely soon to wind up in, foster care.⁴
19 "[C]hildren with serious emotional disabilities are among the most fragile
20 members of our society; their medical needs frequently extend across a spectrum
21 of service providers and state agencies." *Rosie D. v. Romney*, --- F.Supp.2d ----,

22
23 _____
24 would benefit from the changes proposed by Plaintiffs Should Plaintiffs prevail
25 . . . the County will be able to meet its obligations more easily and this will necessarily
help to enure to the benefit of the children and family it serves."

26 ³ Defendants do not dispute that currently they are not providing these forms
27 of assistance, as such, to members of the plaintiff class.

28 ⁴ As of July 1, 2004, over 85,000 children were in child welfare-supervised
foster care in California. Pls.' Ex. 106.

1 No. CIV.A.01-30199-MAP, 2006 WL 181393, at *3 (D. Mass. Jan. 26, 2006).
2 The class of plaintiffs here, like the emotionally disturbed children in *Rosie D.*,
3 have “complex needs [and are] particularly vulnerable.” *Id.* at *33-34. Indeed,
4 Plaintiffs’ needs are so compelling that Congress afforded them “rights” embodied
5 in a federal statute. The statute is difficult to apply, however, which has led to this
6 complex, hard-fought litigation, with the usual attendant delays and diversion of
7 resources in determining the scope of assistance to which the class members are
8 entitled. Even though the Government has agreed to provide aid to these children
9 and has an interest in doing so, the adversary process risks swallowing up and
10 interfering with both sides’ mutual objectives.

11 In addition to the needs and rights of foster children, also at stake is the
12 impact on the State of California of complying with requirements of the Medicaid
13 Act when the State’s budgetary and administrative resources are badly strapped
14 and the range of Medicaid-mandated services continually become ever-costlier.⁵

15 Finally, also at issue here is the capacity of any court to enforce a decree
16 entailing the delivery of services to mentally-troubled youngsters caught up in a
17 complex social welfare system that is, to say the least, beleaguered. In California,
18 the foster care system has been widely acknowledged to be failing. Can “EPSDT”

19
20 ⁵ Because the Court need not deal directly with the claims asserted under the
21 Americans with Disabilities Act and Rehabilitation Act, *see infra*, the Court does not
22 analyze the State Defendants’ arguments that the State’s limited resources militate
23 against imposing wraparound and therapeutic foster care on a statewide basis. *See*
24 *Olmstead v. L.C. ex. rel. Zimring*, 527 U.S. 581, 603 (1999). This decision concerns
25 only the Medicaid Act, and as stated in *Ark. Med. Soc’y, Inc. v. Reynolds*, 6 F.3d 519,
26 531 (8th Cir. 1993), a state “may take . . . budget factors into consideration when
27 setting its reimbursement methodology,” but it “may not ignore the Medicaid Act’s
28 requirements in order to suit budgetary needs.” In any event, there is substantial
evidence that wraparound services and therapeutic foster care actually save the State
money, compared to alternatives involving institutionalization. *See, e.g.*, Bruns Decl.
¶ 22(b)-(c); Kamradt Decl. ¶¶ 16-17; Chamberlain Decl. ¶ 26; Farr Decl. ¶ 20; *see*
also Pls.’ Ex. 135 at 969, Ex. 136 at 971-72, Ex. 137 at 974.

1 (Early and Periodic, Screening, Diagnostic and Treatment Services) for children,
2 to which Plaintiffs have a right, really provide significant benefits through
3 wraparound services and therapeutic foster care? Perhaps the Court should not
4 ponder that question. Perhaps the Court should do nothing more than simply
5 recognize that these forms of treatment are part of Plaintiffs' EPSDT rights, and
6 enforce them. From the hard lessons this Court has learned in enforcing the
7 judgment in *Emily Q. v. Bonta*, 208 F.Supp.2d 1078 (C.D. Cal. 2001), however,
8 information about just how much the welfare of foster children will improve as a
9 result of the requested injunction cannot be considered superfluous.

10 **II. DISCUSSION**

11 **A. Legal Standard for Preliminary Injunctions**

12 The parties do not dispute the legal standard for issuance of a preliminary
13 injunction:

14 To obtain a preliminary injunction in the district court, plaintiffs [must]
15 demonstrate (1) a strong likelihood of success on the merits, (2) the
16 possibility of irreparable injury to plaintiffs if preliminary relief is not
17 granted, (3) a balance of hardships favoring the plaintiffs, and (4)
18 advancement of the public interest Alternatively, injunctive relief
could be granted if the plaintiffs demonstrate[] either a combination of
probable success on the merits and the possibility of irreparable injury or
that serious questions are raised and the balance of hardships tips sharply in
their favor

19 These two alternatives represent extremes of a single continuum, rather than
20 two separate tests As a result, the greater the relative hardship to the
21 party seeking the preliminary injunction, the less probability of success
must be established by the party

22 *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004) (citations, internal quotation
23 marks, and alterations omitted). In addition, "[m]andatory preliminary relief,
24 which goes well beyond simply maintaining the status quo Pendente lite, is
25 particularly disfavored, and should not be issued unless the facts and law clearly
26 favor the moving party." *Anderson v. United States*, 612 F.2d 1112, 1114 (9th
27 Cir. 1979).

1 **B. Standing**

2 As previously noted, Plaintiffs' substantive claims are based primarily on
3 the Medicaid Act. The key statutory provisions at issue are 42 U.S.C. §
4 §§ 1396a(a), 1396d(a) and 1396d(r). As a threshold matter, the State Defendants
5 contend that Plaintiffs do not have a private right of action to bring a suit under 42
6 U.S.C. § 1983 for violations of these provisions of the Medicaid Act.

7 The applicable test for standing is set forth in *Blessing v. Freestone*, 520
8 U.S. 329 (1997). As stated in *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 602
9 (5th Cir. 2004),

10 In *Blessing* . . . the Supreme Court reiterated the three factors that it
11 has traditionally considered when determining whether a particular
12 federal statute gives rise to a right enforceable by § 1983: (1) whether
13 Congress intended for the provision to benefit the plaintiff; (2)
14 whether the plaintiff can show that the right in question is not so
"vague and amorphous" that its enforcement would "strain judicial
competence"; and (3) whether the statute unambiguously imposes a
binding obligation on the states.

15 In *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), the Supreme Court held that
16 a former university student could not bring a § 1983 suit for alleged violations of
17 the Family Educational Rights and Privacy Act because that statute had an
18 "aggregate focus" and did not contain rights-creating language targeting a
19 specific, identifiable group of individuals:

20 We . . . reject the notion that our cases permit anything short of an
21 unambiguously conferred right to support a cause of action brought under
22 § 1983. Section 1983 provides a remedy only for the deprivation of "rights,
23 privileges, or immunities secured by the Constitution and laws" of the
United States. Accordingly, it is rights, not the broader or vaguer "benefits"
or "interests," that may be enforced under the authority of that section.
Id. at 283.

24 [Where a] provision focuse[s] on "the *aggregate services* provided by the
25 State," *rather than* "the needs of any particular person," it confer[s] no
individual rights and thus could not be enforced by § 1983.

26 *Id.* at 282 (quoting *Blessing*, 520 U.S. at 343) (emphasis added). Following
27 *Gonzaga*, in deciding whether a statute gives rise to an enforceable right under

28 ///

1 § 1983, courts have looked to whether Congress intended that a specific,
2 identifiable class of individuals benefit from the statute.

3 Some six weeks ago, the Ninth Circuit held that the main subsection of
4 section 1396a(a) on which Plaintiffs here rely—§ 1396a(a)(10)⁶—“creates an
5 individual right enforceable under section 1983.” *Watson v. Weeks*, 436 F.3d
6 1152, 1155 (9th Cir. 2006). The decision in *Watson* contains a useful review of
7 the “Medicaid Framework” and “of the applicable law for determining whether a
8 particular federal statute can be enforced through a private right of action under
9 section 1983.” *Id.* at 1157-62. It is unnecessary to set forth that review here, and
10 I will not do so. It is sufficient to note that in ruling that § 1396a(a)(10) creates a
11 private right of action enforceable under § 1983, the Ninth Circuit “join[ed] five
12 federal circuits that have already so held.” *Id.* at 1159. Also, the court
13 distinguished *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), the case on
14 which the State Defendants mainly rely, by contrasting the Medicaid Act
15 provision involved in that case (§ 1396a(a)(30)(A)) with the one involved in
16 *Watson* (and here)—§ 1396a(a)(10)(A). *Id.* at 1161. In short, under *Watson*
17 Plaintiffs do have standing.

18 C. Does the Medicaid Act Require That California Provide
19 Wraparound Services and Therapeutic Foster Care to Plaintiffs?

20 1. Are They Services?

21 Defendants do not dispute that by voluntarily participating in Medicaid
22 through its Medi-Cal program, California is required to “comply with certain
23 requirements imposed by the Act and regulations promulgated by the Secretary of
24 Health and Human Services” *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 502

25
26 ⁶ The precise provision is 42 U.S.C. § 1396a(a)(10)(A)(I), which in essence
27 provides that a Medicaid-funded “State plan for medical assistance must . . . provide
28 for making medical assistance available” to various recipients specified elsewhere.
Those recipients include “individuals . . . under the age of 21.” 42 U.S.C.
§ 1396d(a)(4)(B). “Medical assistance” includes payment for EPSDT. *Id.*

1 (1990). Nor do they dispute that the Medicaid Act requires the provision of
2 EPSDT to Medicaid-eligible children under the age of twenty-one, 42 U.S.C.
3 § 1396d(a)(4)(B); that EPSDT requires the State to screen eligible children “to
4 determine the existence of certain physical or mental illnesses or conditions,” 42
5 U.S.C. § 1396d(r)(1)(A)(ii); and that the Act requires the State “to correct or
6 ameliorate defects and physical and mental illnesses and conditions discovered by
7 the screening services, whether or not such services are covered under the State
8 plan.” 42 U.S.C. § 1396d(r)(5).

9 What the State Defendants do dispute is that “wraparound services” and
10 “therapeutic foster care” are EPSDT *services* and are “medically necessary.”
11 They contend that the Medicaid Act only applies to “services” and that
12 wraparound and therapeutic foster care are not “services” *per se*, but rather
13 “approaches” or “processes” or “philosophies” regarding the delivery of health
14 care. *See, e.g.*, Barthels Depo., Vol 1 at 82:14-18; Grayson Depo. at 30:7-14. In a
15 related vein, the State Defendants also complain that “Plaintiffs have not only
16 failed to define, but have obstreperously resisted defining, what they mean by the
17 terms ‘wraparound services’ and ‘therapeutic foster care.’”

18 Throughout much of this litigation this Court has pressed Plaintiffs to
19 specify, in as concrete a manner possible, the precise forms of assistance that
20 “wraparound services” and “therapeutic foster care” entail. Plaintiffs now have
21 done so, at least to the extent necessary to refute the State Defendants’ objections
22 that they cannot understand what such assistance consists of and should not be
23 ordered to do something that they cannot understand.

24 As to “wraparound services,” Plaintiffs have provided a statutory reference
25 point.⁷ Plaintiffs also have defined “wraparound” as follows:

26
27 ⁷ It is California Welfare and Institutions Code § 18251(d), which describes
28 “community based intervention services that emphasize the strengths of the child and
family and [that] include[] the delivery of coordinated, highly individualized

1 Providers of wraparound care services: (a) engage in a unique
2 assessment and treatment planning process that is characterized by
3 the formation of a child, family, and multi-agency team (b) marshal
4 community and natural supports through intensive case management
5 and (c) make available an array of therapeutic interventions, which
6 may include behavioral support services, crisis planning and
7 intervention, parent coaching and education, mobile therapy, and
8 medication monitoring.
9 McCabe Decl., Ex. D, App. A at 1. In addition, Plaintiffs have provided a nine
10 page chart breaking down each of the nine identified component services of
11 wraparound services. For each component service, they presented a detailed
12 definition of what that service entails, the qualifications of the rendering providers
13 (e.g., "Staff with BA/BS in MH-related field or with 2 years experience in Mental
14 Health"), and the specific provision(s) of the Medicaid Act under which, they
15 contend, California must provide that service. Plaintiffs set forth these detailed
16 definitions in an "Appendix A" to their answers to interrogatories.

17 As to "therapeutic foster care," Plaintiffs have described that component of
18 the requested mandatory injunction as "an intensive, individualized health service
19 provided to a child in a family setting, utilizing specially trained and intensively
20 supervised foster parents." These programs:

21 (a) place a child singly, or at most in pairs, with a foster parent who is
22 carefully selected, trained, and supervised and matched with the
23 child's needs; (b) create, through a team approach, an individualized
24 treatment plan that builds on the child's strengths; (c) empower the
25 therapeutic foster parent to act as a central agent in implementing the
26 child's treatment plan; (d) provide intensive oversight of the child's
27 treatment, often through daily contact with the foster parent; (e) make
28 available an array of therapeutic interventions to the child, the child's
family, and the foster family (interventions may include behavioral
support services for the child, crisis planning and intervention,
coaching and education for the foster parent and the child's family,
and medication monitoring); and (f) enable the child to successfully
transition from therapeutic foster care to placement with the child's
family or alternative family placement by continuing to provide
therapeutic interventions.

29 McCabe Decl., Ex. D, App. B at 1. In addition, Plaintiffs proffered a seven page
30 chart breaking down each of the seven component services of therapeutic foster
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900
1901
1902
1903
1904
1905
1906
1907
1908
1909
1910
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
2027
2028
2029
2030
2031
2032
2033
2034
2035
2036
2037
2038
2039
2040
2041
2042
2043
2044
2045
2046
2047
2048
2049
2050
2051
2052
2053
2054
2055
2056
2057
2058
2059
2060
2061
2062
2063
2064
2065
2066
2067
2068
2069
2070
2071
2072
2073
2074
2075
2076
2077
2078
2079
2080
2081
2082
2083
2084
2085
2086
2087
2088
2089
2090
2091
2092
2093
2094
2095
2096
2097
2098
2099
2100
2101
2102
2103
2104
2105
2106
2107
2108
2109
2110
2111
2112
2113
2114
2115
2116
2117
2118
2119
2120
2121
2122
2123
2124
2125
2126
2127
2128
2129
2130
2131
2132
2133
2134
2135
2136
2137
2138
2139
2140
2141
2142
2143
2144
2145

care, the requisite qualifications of the providers, and the statutory authorization. *Id.* Plaintiffs specified these aspects of therapeutic foster care as “Appendix B” to their answers to certain interrogatories.⁸

Are Appendices A and B mere words that provide only an illusion of medically necessary services? Are they highfalutin sentiments devoid of practical application? Is what Justice Cardozo once wrote applicable: “We seek to find peace of mind in the word, the formula, the ritual. The hope is an illusion.” Benjamin N. Cardozo, *The Growth of the Law*, pp. 66-67 (1924). Or do Appendices A and B merely reflect that “[t]he only tool [that] the lawyer [has] is words. We have no marvelous pills to prescribe for our patients Whether we are trying a case, writing a brief, drafting a contract, or negotiating with an adversary, words are the only things we have to work with.” Charles Alan Wright, Book Review, Townes Hall Notes, Spring 1988, at 5.

It is perhaps inevitable that in defining and describing these disputed means of treatment for mentally ill children (“wraparound services” and “therapeutic foster care”), Plaintiffs included imprecise terms, bordering on jargon. Nevertheless, I find that the physicians, therapists, social workers, teachers, counselors, parents and others who are necessary providers of EPSDT surely are able to convert these words into meaningful services.

And services they are. Defendants understandably prefer to characterize “wraparound” and “therapeutic foster care” as “processes” or “approaches” or “philosophies,” because those words are not in the Medicaid Act—only “services” are mandated.⁹ But to relegate “wraparound” and “therapeutic foster care” to

⁸ Henceforth, in this opinion the charts **that were** attached as the appendices to the McCabe Declaration shall be referred to as Appendix A and Appendix B.

⁹ The State Defendants argue that “[m]ost of Plaintiffs’ declarations do not state, or even suggest, that ‘wraparound services’ or ‘therapeutic foster care’ are Medicaid covered services as such.” Opp’n at 21. Defendants then review several of

1 some realm other than “services,” as the State Defendants seek to do, is akin to
2 limiting the classification of a criminal defense attorney’s “services” to only his
3 advice and in-court representation, while excluding his necessary efforts at
4 coordinating the professional work of others, such as an investigator, jury
5 consultant or sentencing consultant. Often the client is assisted by a team of
6 professionals, and a key, necessary “service” of the lawyer is to coordinate these
7 professionals’ respective services. To extend the analogy further, a criminal
8 defense attorney will also rely on (and help shape) the participation of the client
9 himself in his coordinated defense. So, too, in “wraparound” a core element of
10 that service is “family voice and choice,” *i.e.*, family participation in and
11 contribution to the array of treatment. *See* Bruns Decl. ¶ 26.¹⁰

12
13 the declarations submitted by Plaintiffs’ experts—*e.g.*, those of Eric Bruns, Ph.D.; Ira
14 Lourie, M.D.; Robert Friedman, Ph.D.; Patricia Chamberlain, Ph.D. With respect to
15 each, Defendants argue that: (1) the expert does not explicitly refer to “wraparound
16 services” and “therapeutic foster care” as “services” *per se* and (2) the expert has not
17 claimed that wraparound services and therapeutic foster care are covered by Medicaid.
18 These arguments are not persuasive.

19 First, that Defendants have combed through these declarations and have been
20 able to locate instances where the terms “wraparound” or “therapeutic foster care” are
21 found alongside the words “process,” “program,” or “practice” (instead of the word
22 “service”) does *not* mean that they are not services. Indeed, such games can be played
23 with the opposite effect. Plaintiffs have pointed out occasions where the State has
24 itself referred to wraparound as a “service”—*e.g.*, California’s “Wrap-Around
25 Services Pilot Project.” Opp’n at 13 (emphasis added). Also, California Welfare and
26 Institutions Code § 18250(d)—a statute—also refers to “Wrap-around *services*.”

27 Second, that Plaintiffs’ medical and behavioral experts do not also opine on
28 whether the EPSDT provisions of the Medicaid Act cover wraparound services and
29 foster care is of no consequence. Plaintiffs rely on different experts to establish that
30 point. *See below*.

31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

¹⁰ Defendants quote out of context and in a misleading manner this Court’s observation in *Emily Q.* that “[t]he wraparound process is not a program or a type of service.” *Emily Q.*, 208 F.Supp.2d at 1091. What the Court actually noted in that limited portion of a 28 page opinion dealing with Therapeutic Behavioral Services (“TBS”) was that “TBS is one type of a broad variety of individualized *services* that

2. Does EPSDT Require Wraparound and Therapeutic Foster Care?

The State Defendants proceed to argue that even if “wraparound” and “therapeutic foster care” are services, the Medicaid-mandated provision of EPSDT does not encompass them. Section 1396d(r) lists an array of services that states are required to provide to children under age twenty-one. Plaintiffs rely primarily on § 1396d(r)(5), a catch-all provision, which requires that states render “[s]uch other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services . . .” The State Defendants contend that this language means that such states need only provide those services expressly listed in § 1396(d)(a).

The Court disagrees. Section 1396d(a) identifies twenty-eight different services, including diagnostic services, psychiatric services, rehabilitative services and case management services. To be sure, the statute does not mention “wraparound services” and “therapeutic foster care,” but a specific service, although not expressly listed in § 1396d(a), may nevertheless fall under one of the other twenty-eight categories. *See, e.g., Pediatric Specialty Care, Inc. v. Ark. Dep’t. of Human Servs.*, 293 F.3d 472, 480-481 (8th Cir. 2002) (“early intervention day treatment” required under § 1396d(a)(13) (rehabilitative services)); *Collins v. Hamilton*, 349 F.3d 371, 376 (7th Cir. 2003) (“psychiatric

may be used in a ‘wraparound’ process. The wraparound process is not a program or a type of service. [It] can include any combination of services and support.” (emphasis added.) To infer from the middle sentence that something that consists of a combination of *services* and supports is not in itself a “service” within the meaning of the Medicaid Act makes no sense. *See* Farr Decl. ¶ 23 n. 1 (“[R]eferring to Wraparound as a process . . . do[es] not mean . . . that it is not a mental health service. Individual and group therapy and case management services, for instance, can all be described as processes, but they are unquestionably mental health services. The same is true for Wraparound.”)

1 residential treatment facilities” required under § 1396d(a)(16) (inpatient
2 psychiatric hospital services)); *Emily Q.*, 208 F.Supp.2d at 1090 (“therapeutic
3 behavioral services” required under EPSDT). “Congress did not grant or allow
4 states the discretion to define what types of health care and services would be
5 provided to EPSDT children” *S.D.*, 391 F.3d at 593. As stated in *Rosie D.*,
6 *supra*, “the *only* limit placed on the provision of EPSDT services is the
7 requirement that they be ‘medically necessary’” *Rosie D.*, 2006 WL 181393,
8 at *5 (emphasis added). “[I]f a licensed clinician finds a particular service to be
9 medically necessary to help a child improve his or her functional level, this
10 service must be paid for by a state’s Medicaid plan pursuant to the EPSDT
11 mandate.” *Id.*

12 Wraparound services has nine component services; therapeutic foster care
13 has seven. Each component service has numerous subcomponent services. Each
14 subcomponent may fall under any one or more of the twenty-eight different
15 categories of § 1396d(a). The three categories Plaintiffs claim to be most
16 frequently applicable are: “rehabilitative services,” 42 U.S.C. § 1396d(a)(13);
17 “case management services,” 42 U.S.C. § 1396d(a)(19); and “personal care
18 services,” 42 U.S.C. § 1396d(a)(24). Plaintiffs’ supplemental interrogatory
19 responses described above (Appendices A and B) link, in chart form, each
20 component of wraparound services and therapeutic foster care service to the
21 corresponding category or categories of § 1396d(a). The declaration of Chris
22 Koyanagi provides a similar breakdown. Koyanagi Decl. ¶¶ 23-31.¹¹ The Court
23

24 ¹¹ Ms. Koyanagi is the Policy Director of the Washington, D.C.-based Bazelon
25 Center for Mental Health Law, which is one of the counsel for Plaintiffs. She works
26 with the federal Center for Medicare and Medicaid Services and the federal Substance
27 Abuse and Mental Health Services Administration. She was the primary author of
28 “Making Sense of Medicaid for Children with Serious Emotional Disturbance.” *Id.*
¶ 10 and Ex. 2. That definitive study “demonstrated that wraparound and therapeutic
foster care can be covered by Medicaid,” *id.* ¶ 22, and that states “regularly” receive

1 finds it likely that virtually all of the corresponding categories of § 1396d(a)
2 identified by Plaintiffs do, in fact, encompass the linked-to service.¹²

3 The State Defendants do not directly rebut or even challenge Ms.
4 Koyanagi's categorizations. Instead, they merely point to a June 28, 2005 report
5 by the federal Government Accountability Office ("G.A.O.") that proposes
6 numerous legislative reforms to Medicaid, one of which aims to address the use of
7 categories such as "rehabilitation services" to improperly bill the federal
8 government for services "that are intrinsic elements of non-Medicaid programs."
9 See Defs.' Ex. 103 at 168. Even assuming that in principle the G.A.O. report
10 could be relevant, it is of no help to State Defendants. It does not discuss EPSDT
11 or wraparound services and therapeutic foster care. Moreover, it confirms that
12 "Medicaid payments will be available for appropriate rehabilitation services that
13 are intended for the maximum reduction of physical or mental disability and

14 _____
15 Medicaid funding for such services. *Id.* ¶ 26.

16 ¹² For example, the first component service of wraparound services is
17 "Engagement of the Child and Family." See Appendix A at 2. A subcomponent of
18 that service is to "organize[] an initial meeting with the child and family [to] explain[]
19 wraparound care services . . . and encourage[] the participation of additional family
20 members" *Id.* The Court finds that this likely falls under § 1396d(a)(19) (case
21 management services). As another example, the second component service of
22 wraparound services is "Immediate Crisis Stabilization." *Id.* at 2-3. A subcomponent
23 of that service is "to address safety issues related to medical needs, severe psychiatric
24 symptoms, behaviors of a child that might place others in jeopardy, or issues related
25 to a child living in an unsafe environment." *Id.* at 3. The Court finds that, depending
26 on the circumstances and severity of the crisis, these activities likely fall under
27 § 1396d(a)(5)(A) (physician services), § 1396d(a)(2)(A) (outpatient hospital
28 services), § 1396d(a)(9) (clinic services), § 1396d(a)(7) (home health care services),
or § 1396d(a)(13) (rehabilitative services).

Each component service of therapeutic foster care similarly falls within one or
more categories of § 1396d(a). For example, "Recruitment and Matching," which
includes "the recruitment of families to serve as therapeutic foster parents, and then
matching those families with children in need of a therapeutic foster home," See
Appendix B at 2, likely falls under § 1396d(a)(19) (case management services).

measurable restoration of an individual to the best possible functional level.” *Id.* (emphasis in original).

In short, wraparound services and therapeutic foster care fall within the EPSDT obligations of Medicaid-participating states. This conclusion is buttressed by the fact that in other states wraparound services and therapeutic foster care programs have been funded by Medicaid. For example, Linda Huff Redman, Ph.D., the former Deputy Director of Arizona’s Medicaid Program, states that Arizona uses Medicaid funding for EPSDT to pay for almost all of the component services of therapeutic foster care—the only exclusions being “room and board expenses and the one-time or occasional goods and/or services needed to support the child and their family (e.g., refrigerator, clothes).”¹³ Redman Decl. ¶¶ 3, 18-26. Nineteen other states¹⁴ also provide therapeutic foster care as a “mental health service paid for by Medicaid and billed using codes in the ‘Healthcare Common Procedure Coding System.’” *Id.* ¶ 19. Arizona also funds its wraparound services program with Medicaid dollars. *Id.* ¶¶ 4, 27-30. The Medicaid-covered components of Arizona’s therapeutic foster care program includes “group rehabilitative treatment, individual and family therapy, substance abuse/chemical dependency therapy, basic living skills redevelopment, social skills redevelopment and crisis/behavior management.” *Id.* ¶ 25. The Medicaid-covered components of its wraparound program include the engagement of the child and family; immediate crisis stabilization; strengths, needs and cultural discovery; formation of the child and family team; development and implementation of the behavioral health plan; on-going crisis and safety planning; tracking and adapting; and

¹³ These exclusions are not applicable here since Plaintiffs do not seek to compel California to provide them.

¹⁴Arkansas, Delaware, Florida, Georgia, Kansas, Kentucky, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, and Wyoming. *Id.* ¶ 19 n.2.

1 transition out of the formal wraparound program. *Id.* ¶ 29. Dr. Redman's detailed
2 description of Arizona's state-wide program is corroborated and supplemented by
3 Timothy Penrod, formerly a State of Arizona Child Protection Services Specialist
4 and now the CEO of a firm providing those kinds of services to children and
5 families in Arizona. Penrod Decl. ¶¶ 1-26.

6 Nebraska has used Medicaid funds to provide wraparound services,
7 Koyanagi Decl. ¶ 27, although the parties debate the extent to which Medicaid
8 dollars now contribute to that program. Koyanagi Supplemental Decl. ¶ 3b;
9 Defs.' Ex. 107.

10 Pennsylvania's wraparound services are "funded by Pennsylvania's
11 Medicaid program, as part of its EPSDT benefit." Nace Decl. ¶¶ 30-31.

12 In Milwaukee, Wisconsin, Medicaid funding is used for "Wraparound
13 Milwaukee" to cover "case management, team meetings, mobile crisis
14 intervention, psychiatric and psychological assessments, crisis stabilization teams,
15 medical day treatment, medication management, in-home therapy, office-based
16 therapy, group therapy, substance abuse treatment, and a comprehensive provider
17 system." Kamradt Decl. ¶ 18. Only "[n]on-medically necessary services—like
18 tutors and mentors—are not covered" *Id.*

19 Even the State Defendants' own expert, Mary Jean Duckett, of the United
20 States Department of Health and Human Services, acknowledges that "[s]ome
21 states have included in their approved state plans, coverage for services under the
22 label of therapeutic foster care that [the federal Center for Medicare and Medicaid
23 Services] believed to consist of component parts that are Medicaid-covered care
24 and services within the scope of the definitions listed in 42 U.S.C. § 1396d(a)."
25 Duckett Decl. ¶ 5.

26 Not only do wraparound services and therapeutic foster care fall within the
27 scope of Medicaid-mandated ESPDT services, but they may be "medically
28 necessary" within the meaning of the statute. The Medicaid Act does not define

when a service is “medically necessary.” Rather, the decision “rests with the individual recipient’s physician and not with clerical personnel or government officials.” *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980); *Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) (“The Medicaid statute and regulatory scheme create a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.”). Plaintiffs have proffered the declarations of numerous behavioral and mental health experts who attest to the medical necessity of providing these services to foster care children with emotional disturbances. Thus, Ira Lourie, a former psychiatrist at the National Institute for Mental Health for over two decades and currently Assistant Clinical Professor of Child Psychiatry at Georgetown University School of Medicine, states that “wraparound services are medically necessary for children with serious mental health needs.” Lourie Decl. ¶ 2. Dr. Lourie adds that “wraparound programs enable children with behavioral, psychiatric, or emotional impairments to function as well and as normally as possible.” Lourie Decl. ¶ 13. Dr. Patricia Chamberlain, an Oregon-based psychologist who developed a therapeutic foster care program lauded by the federal government, states that “a children’s mental health system that does not include Therapeutic Foster Care . . . as an available intervention is incomplete and inadequate because intense mental health interventions, provided in home-like settings are necessary for many children with serious behavioral or mental health needs.” Chamberlain Decl. ¶ 3. Dr. Eric Bruns, a psychologist and Assistant Professor at the University of Washington School of Medicine, states that “[a]long with therapeutic foster care, . . . wraparound is generally cited among the most effective integrated community-based interventions for children with emotional, behavioral, and mental health disorders. As such, both therapeutic foster care and wraparound are integral parts of any modern children’s mental health system.” Bruns Decl. ¶ 3. Dr. Charles Huffine, a psychiatrist who served as President of the American Association of

1 Community Psychiatrists, states that wraparound services “are essential mental
2 health services and medically necessary for some children with mental health
3 needs.” Huffine Decl. ¶ 7. Dr. Robert Friedman, the Chair of the Department of
4 Child and Family Studies at the University of South Florida, states that
5 “[t]herapeutic foster care is an evidence-based practice, the gold standard in
6 mental health interventions for youth [T]here are sufficient findings to
7 consider wraparound services a research validated evidence-based practice.”
8 Friedman Decl. ¶ 4. He adds that “a functioning children’s mental health system
9 would include both therapeutic foster and wraparound care services. Both
10 services are necessary for some children with serious emotional disturbance, many
11 of whom are in the foster care system.” *Id.* ¶ 5. Friedman also notes that
12 “wraparound services and therapeutic foster care are widely thought of as
13 essential to any modern children’s mental health system” *Id.* ¶ 31.

14 The State Defendants have not presented any declarations by mental health
15 experts contesting this evidence that wraparound services and therapeutic foster
16 care are medically necessary services for foster care children with mental health
17 care needs.¹⁵

18 For all the foregoing reasons, the Court concludes that Plaintiffs have
19 demonstrated a strong likelihood of succeeding on the merits of their substantive
20 claims concerning the Medicaid Act and EPSDT.

21
22 ¹⁵ In reference to the wraparound services provided via California’s Title IV-E
23 Waiver Child Demonstration Project, the State Defendants do contend that “a
24 federally required independent evaluation of the project showed that the project did
25 not demonstrate that provision of wraparound services was any more effective than
26 traditional services.” (citing Treadwell Decl. ¶ 11). This is misleading. Treadwell
27 went on to state that “[t]he evaluation . . . concluded that one of the likely reasons that
28 there was no statistically significant positive effect shown for the group of children
receiving wraparound services was that the [participating] ‘counties were more
successful at providing Wraparound-like services to the comparison [*i.e.*, control]
group than the evaluation was able [to] assess, resulting in similar outcomes between
the groups.” Treadwell Decl. ¶ 11.

1 Plaintiffs contend that the balance of hardships tips in their favor because
2 absent an order requiring the State of California to provide wraparound services
3 and therapeutic foster care, those foster children with mental health needs would
4 likely face unnecessary institutionalization. The State Defendants' one paragraph
5 opposition on this point argues (1) that Plaintiffs cannot be suffering irreparable
6 injury given that they waited three years since initiating this suit to file the present
7 motion and (2) that Plaintiffs have an adequate remedy via the Medicaid appeals
8 process. As to the first argument, Plaintiffs initially focused much of their efforts
9 and limited resources on their claims against Los Angeles County, which led to a
10 pioneering, albeit still problem-laden, settlement. The County agreed to ensure
11 that members of the countywide subclass "promptly receive necessary,
12 individualized mental health services in their home . . . or the most homelike
13 setting appropriate to their needs; receive the care and services needed to prevent
14 removal from their families . . . ; be afforded stability in their placements . . . ; and
15 receive care and services consistent with good child welfare and mental health
16 practice and the requirements of state and federal law." Katie A. Advisory Panel's
17 Fifth Report to the Court, June 16, 2005, at 3. As to the remaining members of the
18 statewide class, the unmet mental health needs and the harms of unnecessary
19 institutionalization are no less grave now than three years ago.

20 Defendants' argument that the Medicaid appeals process undermines the
21 showing of irreparable injury is also unpersuasive. "[E]xhaustion of state
22 administrative remedies should not be required as a prerequisite to bringing an
23 action pursuant to § 1983." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496,
24 516 (1982).

25 ///

26 ///

27 ///

28 ///

1 **III. CONCLUSION**

2 The Court GRANTS Plaintiffs' motion for preliminary injunction.¹⁶ The
3 component services of wraparound services and therapeutic foster care identified
4 in Plaintiffs' supplemental interrogatory responses likely fall within the EPSDT
5 provisions of the Medicaid Act. Therefore, California must screen members of
6 the statewide class and provide wraparound services and therapeutic foster care
7 where medically necessary "to correct or ameliorate defects and physical and
8 mental illnesses and conditions discovered by the screening services." 42 U.S.C.
9 § 1396d(r)(5).¹⁷

10 Accordingly, during the pendency of this lawsuit, Defendant Sandra
11 Shewry, in her official capacity as Director of the California Department of Health
12 Services, and Defendant Dennis Boyle, in his official capacity as Director of the
13 California Department of Social Services, as well as their respective successors in
14 office, agents, servants, employees, and all others acting in concert with them,
15 shall provide wraparound services and therapeutic foster care, as defined in
16 Appendices A and B. Such forms of treatment shall be provided to class members
17 on a consistent, statewide basis through the Medi-Cal program or other means,

18 _____
19 ¹⁶Docket No. 315.

20 ¹⁷ Given this conclusion, it is unnecessary to address Plaintiffs' alternative
21 claims that they are entitled to the same relief under the Americans with Disabilities
22 Act and the Rehabilitation Act. Similarly irrelevant is the State Defendants'
23 contention that Title IV-E of the Social Security Act, which is the primary funding
24 mechanism for children who have already been placed in foster care, does not permit
25 payment for social services for the child or the child's family when the child has not
26 yet been removed from the home. Plaintiffs do not claim that the State of California
27 must pay for wraparound and therapeutic foster care using Title IV-E funds (although
28 Title IV-E funds may, indeed, cover certain component services of wraparound
 services and therapeutic foster care). Rather, Plaintiffs claim that the Medicaid Act's
 independent funding provision, namely, Title XIX of the Social Security Act, will
 likely help cover those services. Thus, any restrictions on the use of Title IV-E funds
 are not relevant to Plaintiffs' Medicaid-based argument.

1 beginning not later than 120 days from entry of this Order. (The plan need not
2 necessarily include *all* of the aspects of wraparound services and therapeutic
3 foster care specified in Appendices A and B.) In order to effectuate this
4 requirement, counsel for the State Defendants and for Plaintiffs shall meet and
5 confer and develop a plan for implementing this preliminary injunction. Among
6 other things, the plan must identify the responsibilities of the different State
7 agencies, the need for additional providers, the eligibility criteria for wraparound
8 services and therapeutic foster care, methods and procedures to inform class
9 members of the availability of these services, and a timeline for accomplishing
10 needed tasks. In negotiating the plan, counsel shall diligently and in good faith
11 take into account and apply this Court's previous rulings and observations in this
12 case and in *Emily Q.*

13 Furthermore, the State Defendants and Plaintiffs shall also meet and confer
14 as to whether the Court should appoint a Special Master. (If the Court does so, the
15 individual may well be the same person who may be appointed Special Master in
16 *Emily Q.*)

17 Not later than 70 days from entry of this Order, the State Defendants and
18 Plaintiffs shall file a joint status report regarding the status of an implementation
19 plan and the possible appointment of a Special Master.

20 Because this action is brought by a class of indigent Plaintiffs, the Court
21 chooses to exercise its discretion by not requiring the posting of a bond. *People of*
22 *State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d
23 1319, 1325 (9th Cir. 1985).

24
25 IT IS SO ORDERED.

26
27 DATE: March 14, 2006

28

A. Howard Matz
United States District Judge