CASE NO.: 06-55559

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

DIANA BONTÁ, Director of California Department of Health Services; LOS ANGELES COUNTY; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES; ANITA BOCK, Director of the Los Angeles County Department of Children and Family Services; RITA SAENZ, Director of the California Department of Social Services, and Does 1 through 100, inclusive,

Defendants-Appellants.

APPELLEES' BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
U.S.D.C. No. CV-02-05662-AHM
THE HONORABLE A. HOWARD MATZ

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONTINUED)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (CONTINUED)

Page

TABLE OF AUTHORITIES (CONTINUED)

Page

STATUTES

TABLE OF AUTHORITIES (CONTINUED)

Page

RULES

TABLE OF AUTHORITIES (CONTINUED)

Page

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court granted a preliminary injunction in this case because thousands of foster children in California are not provided necessary mental health services and thus are needlessly placed in locked hospital wards, other institutional facilities or large group homes. Yet many of these children could remain in their own homes and communities if only they received two mental health services they are entitled to receive under the Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") provisions of the Medicaid Act. Wraparound services and therapeutic foster care ("TFC") are "among the most effective integrated community-based interventions for children with emotional, behavioral, and mental health disorders." Bruns Declaration ("Decl."), Excerpts of Record ("ER") 6207, ¶3. Indeed, California's leading mental health research institute has identified wraparound services and TFC as the "[o]nly two intervention models [that] have demonstrated effectiveness in the treatment of foster children."[1]

Defendants – Directors of the California Department of Health Services and Department of Social Services – have appealed the preliminary injunction which requires California to provide wraparound services and TFC to eligible foster children. Appellants' Opening Brief ("AOB") distinguishes itself for what it does

[1] California Institute for Mental Health, *Evidence-Based Practices in Mental Health Services for Foster Youth* (March 2002) ("CIMH Report"), ER 4813, 4818-20.

not say. Defendants make *no* claim to be meeting the mental health needs of most, some or even a few foster children in California. Forgotten by Defendants are the tens of thousands of abused and neglected children within governmental custody, children such as "Charlie," an emotionally disturbed eight-year old subjected to prenatal drug exposure and early parental abuse. Lowe Decl., ER 6809. A court-appointed expert had recommended wraparound services and TFC for Charlie so that this boy could eventually be placed with his loving and committed grandmother. *Id.*, ER 6811-12, ¶¶3-5. However, because wraparound services and TFC were not available in his county, Charlie only deteriorated in foster care, "bounc[ing] from placement to placement for the next four years," each more restrictive and costly, only to end up in Metropolitan State Hospital, which even State officials describe as the "end of the line." *Id.*, ER 6089-90, ¶¶8-11; Barthels Deposition ("Depo."), ER 8492.

Defendants do *not* contest most of the material facts which justify issuance of the preliminary injunction. They do not, for example, dispute that: the majority of foster children in California have unmet mental health needs; thousands of foster children are placed in group homes; and the treatment of foster children in group homes is both ineffective and expensive. There also is little, if any, dispute that:

- wraparound services and TFC are medically necessary for many foster children with mental health needs,
- wraparound services and TFC prevent the unnecessary institutionalization of these children and youth; and
- both these mental health services are cost effective.

Whereas several other states' Medicaid programs cover wraparound services and TFC for children and youth under the age of 21, California's Medicaid program (known as Medi-Cal) does not. Why not?

In the face of all these undisputed facts, Defendants profess ignorance of what Plaintiffs and Appellees ("Plaintiffs") mean by wraparound services even though the California Legislature adopted a law in 1997 to encourage counties to provide wraparound services to children at risk of placement in high-level group homes. Senate Bill No. 163, Stats. 1997, Ch. 795, §§1-10. Defendants similarly claim they don't know what TFC is even though 19 other state Medicaid programs provide TFC. Order Granting Plaintiffs' Motion for Preliminary Injunction ("Order"), ER 14684. In one breath, Defendants argue that Medicaid does not cover most components of wraparound services and TFC, but in the next breath they argue that many of these components are already covered by Medi-Cal.

Defendants show little respect for the district court (Honorable A. Howard Matz), describing the Order as "rambling and disjointed," "replete with platitudes

and significant inaccuracies and omissions." AOB 37. Contrary to Defendants' unfounded beliefs, the court below applied the proper standards for granting a mandatory preliminary injunction. Meanwhile, Defendants are unable to demonstrate that any of the lower court's findings of fact was clearly erroneous or that the court applied any erroneous legal standards.

Defendants' principal argument in this appeal is procedural: the Order does not comply in every respect with the requirements of Rule 52(a). The Order contains all the mandatory findings of fact and conclusions of law that Medicaid-eligible members of the Plaintiff class are entitled to receive wraparound services and TFC from the Medi-Cal program pursuant to the EPSDT provisions. The district court also made the requisite findings that these children with intense mental health needs would suffer irreparable harm from the continuing denial of the two medically necessary services and that the balance of hardships sharply favors the Plaintiffs. Even assuming *arguendo* that the Order does not fully comply with Rule 52(a), the findings of fact and conclusions of law are sufficiently comprehensive to provide a basis for the district court's decision and there are no genuine disputes about the omitted findings.

The facts and law clearly favor Plaintiffs on their Medicaid claim. To prevent the illegal and unnecessary suffering of thousands of foster children, the district court granted a mandatory preliminary injunction. The lower court did not

abuse its discretion. This Court should affirm the preliminary injunction in all respects.

STATEMENT OF JURISDICTION

Plaintiffs agree with Defendants' Statement of Jurisdiction.

STATEMENT OF ISSUES

1. Did the district court apply the correct standards for issuing a mandatory preliminary injunction?

2. Did the order granting the preliminary injunction contain the requisite findings of fact and conclusions of law, or at the very least, are the findings of fact and conclusions of law sufficiently comprehensive to provide a basis for the district court's decision and are there any genuine disputes about the omitted findings?

3. Are the challenged findings of fact by the district court clearly erroneous?

4. Did the district court apply erroneous legal standards in granting the preliminary injunction motion?

5. Is the preliminary injunction sufficiently specific to comply with the requirements of Rule 65?

STATEMENT OF THE CASE

As Defendants have devoted nearly half their brief to the procedural history of this lawsuit [AOB 6-30], Plaintiffs will only amplify on a few matters. Plaintiffs "are five troubled children with unmet mental health needs." Order, ER 14670. When this lawsuit was filed, Plaintiff Katie A. had been in foster care since she was age four and had been subjected to 37-out-of-home placements during the preceding ten years. Complaint, ER 5-6. Another Plaintiff, Mary B., was a 16-year-old, legally blind girl who had been in 28 placements during her three years in foster care. *Id.*, ER 6-7.

Besides Defendants, the other defendants were Los Angeles County, its Department of Children and Family Services ("DCFS"), and Anita Bock, then DCFS' Director ("County Defendants"). Complaint, ER 10. Plaintiffs subsequently reached a settlement with the County Defendants and, following a fairness hearing on July 16, 2003, the district court approved the proposed settlement on behalf of a Countywide subclass. ER 221-247, 854-859.

Meanwhile, the district court granted Plaintiffs' motion for class certification on behalf of "[c]hildren in California who (a) are in foster care or are at imminent risk of foster care placement; and (b) have a mental illness or condition that has been documented or, had an assessment already been conducted, would have been documented; and (c) who need individualized mental health services. . . ." Order

re Class Certification, ER 511-532. The district court specified what was meant by "imminent risk of foster care placement" in the class definition. *Id.*, ER 532. Defendants appealed the class certification order, and this Court denied the appeal on July 24, 2003.

Plaintiffs filed their preliminary injunction motion on September 9, 2005. ER 4443-4445. Although Defendants mostly discuss the declaration of Chris Koyanagi [AOB 16-17], Plaintiffs filed 37 declarations, 43 exhibits and excerpts from 8 depositions in support of their motion. ER 4486-7304.

The district court did not rule on the preliminary injunction motion at the October 31 hearing. ER 13499. During the hearing, counsel for Defendants said that the "real issue here is whether wraparound and therapeutic foster care [are] Medicaid covered services." ER 13518. At the hearing's conclusion, the trial court said that "I will just take the matter under submission." ER 13519. The accompanying minute order likewise said that the motion was "under submission." ER 13418. The district court did, however, invite the parties to submit a document, not more than three pages in length, "identifying the most important exhibits, declarations and depositions upon which they rely." *Id.* Both sides filed such submissions on November 7, 2005. ER 13419-25, 13480-83.

Four months later, the district court granted the preliminary injunction motion. Order, ER 14670-90. The Order gave Defendants 120 days to provide

wraparound services and TFC to class members on a consistent, statewide basis through the Medi-Cal program or other means. *Id.*, 14689-90.

Defendants thereafter filed motions for reconsideration, correction and/or clarification and for stay of the Order pending a hearing on the other two motions. ER 14726-14760. The district court denied all three motions [ER 15004-05], but issued an Addendum to its Order addressing the twelve questions for which Defendants had sought correction and/or clarification. ER 15311-40.

STATEMENT OF FACTS

A. The Majority of Foster Children Have Significant Mental Health Needs.

As of July 1, 2004, 85,268 children were in child welfare-supervised foster care in California.[2] California's Little Hoover Commission, a "watchdog" agency created by the state legislature, has stated that nearly 70% of California foster children will experience a mental health problem.[3] The California Health and Human Services ("CHHS") Agency has given even higher estimates, citing one study which found that 84% of a sample of 213 foster children had developmental, emotional, and/or behavioral problems.[4]

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[2] B. Needell, *et al*., 1998-2004 July 1 Caseload Children in Child Welfare Supervised Foster Care by Placement Type in California, ER 4888-4889.
[3] *Young Hearts & Minds: Making a Commitment to Children's Mental Health* (October 2001) (hereafter "*Young Hearts*"), ER 4624.
[4] CHHS Foster Care Slide Presentation, ER 5463-64. *See also Code Blue: Health Services for Children in Foster Care* (March 1998), ER 4944 (50 to 60% of foster

The California Institute for Mental Health ("CIMH") has summarized the reasons why foster children are at risk: first, their entry into the child welfare system resulted from a family breakdown due to abuse, neglect, or both; second, the children suffer disruptions in their relationships when they are separated from family, friends and teachers to enter foster care; third, children who suffer the chronic stresses of living in poverty are over-represented in the child welfare system; and fourth, the "foster care experience itself may actually exacerbate emotional and behavioral problems" since multiple placements are common and the length of placement is often indeterminate.[5]

B. The Medi-Cal Program Has Failed to Meet the Mental Health Needs of Many Foster Children.

Nearly all foster children are eligible to receive medical services, including mental health services, from Medi-Cal.[6] Order, ER 14671. Medicaid is a joint federal and state program designed to provide medical and remedial services to low-income people. 42 U.S.C §1396 *et seq*.[7] The Department of Health Services ("DHS") is the single state agency responsible for supervising the administration

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children in California have "moderate to severe mental health problems").

[5] CIMH Report, ER 4826.

[6] Foster children are automatically eligible for Medicaid if they receive Title IV-E foster care assistance. 42 U.S.C. §1396a(a)(10)(A)(i)(I). Other foster care children can still qualify for Medicaid through one of the other mandatory eligibility categories, such as receiving supplemental security income [*id.*, §1396a(A)(10)(A)(i)(II)], or one of the optional categories, such as being "medically needy" [*id.*, §1396a(A)(10)(A)(ii)].

[7] Hereafter, all statutory references are to Title 42 unless indicated otherwise.

and operation of Medi-Cal. *San Lazaro Ass'n, Inc. v. Connell*, 286 F.3d 1088, 1091 (9th Cir. 2002). DHS has, however, entered into an interagency contract so that the Department of Mental Health ("DMH") supervises the administration of mental health services to Medi-Cal recipients and other indigent persons. *Emily Q. v. Bontá*, 208 F. Supp. 2d 1078, 1089 (C.D. Cal. 2001). On a county level, the Mental Health Plans are responsible for providing mental health services to Medi-Cal recipients. *Id.*

In past years California has ranked last among the 50 states on average Medicaid expenditures on foster children.[8] The Little Hoover Commission has warned that "[m]ore than 50,000 children in the foster care system who may need mental health services do not get them."[9] A DMH official confirms that "we are unable to provide adequate services to all foster kids." Neilsen Depo., ER 10147-48. An official with Los Angeles County admits that only 14% of the foster children in that County are receiving mental health services whereas "research tells us . . . that anywhere between 40 and 80 percent of the kids in foster care would need mental health services." Hatekayama Depo., ER 9644-45, 9679-81.

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[8] U.S. Department of Health and Human Services, *Health Conditions, Utilization and Expenditures of Children in Foster Care* (September 2005), ER 5090 and 5095.

[9] *Young Hearts*, ER 4577*; see also* Little Hoover Commission*, Still in Our Hands: A Review of Efforts to Reform Foster Care in California* (February 2003) (hereafter *"Still in Our Hands"*), ER 4540.

The experiences of many class members reflect these profound problems in the foster care and mental health systems. One mother describes in excruciatingly painful detail the experiences of her 15-year old daughter, Kayla. Centobie Decl., ER 6278-86, ¶¶1-39. During 18 months in Merced County's foster care system, Kayla was shunted through 9 different residential placements and 11 psychiatric hospitalizations, including a group home in Redding, which was six hours away from her mother. *Id.,* ER 6278, 6280, ¶¶1, 2. Rather than helping Kayla, each new placement contributed to her distress: in one she was beaten by older girls and in another she ran away and was raped while she wandered the streets. *Id*., ER 6280-81, ¶¶8, 13. She continually attempted suicide and cut her arms with a knife and a razor. *Id.*, ER 6279-82, ¶¶6, 8, 15 and 22. Despite a diagnosis of severe depression and other serious mental disorders, the local child welfare agency eventually told Kayla's mother that "there was nothing they could do for" her daughter and that "the only way Kayla would get the services she needed was through the probation department." *Id.*, ER 6279-82, 6284, ¶¶6, 8, 15, 17, 22, 33. Kayla ended up in jail. *Id*., ER 6285, ¶37.

Kayla's story is all too typical. A minimum of 9,000 foster children are placed in group homes each year.[10] A significant percentage of these foster children, perhaps more than 50%, are in high level group homes, namely Rate

[10] DSS, *Reexamination of the Role of Group Care in a Family-Based System of Care* (June 2001), ER 4766 and 4769 (60% of 15,000 children).

Classification Level ("RCL") facilities of 12 and above.[11] As of February 2004, Los Angeles County alone had 2,160 foster children in group homes, including 405 children under age 12 and a "shocking" 122 children ages 8 and below.[12] Another 2900 foster children in California are placed outside the state.[13]

By all accounts, the "delivery of treatment" is not "the primary purpose of group homes for foster children." Barthels Depo., ER 8456. A top DMH official admits that residential care is not an "evidence-based" practice with the exception of TFC. Neilsen Depo., ER 10222. On the contrary, "the evidence is negative, mixed, or shows no effect for institutionally-based interventions – in hospital, residential or group home settings"[14] "Children in group care almost certainly also experience fewer interpersonal experiences that support their well-being, including the chance to develop [a] close relationship with a significant individual who will make a lasting, legal commitment to them."[15]

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[11] Group homes in California are classified into RCLs of 1-14, using a point system designed to reflect the level of care and services they provide. DSS, *Reexamination of the Role of Group Care in a Family-Based System of Care*, ER 4772. *Katie A.* Advisory Panel, *Third Panel Report to the Court* (hereafter "*Third Panel Report)*, ER 5498 (nearly 60% of foster children in Los Angeles County in RCL facilities are in RCL facilities of 12 and above)

[12] *Third Panel Report*, ER 5498-5500.

[13] DSS, *Child Welfare Services/Case Management System: Total Children in Supervised Out of Home Placements by Placement - June 2003*, ER 4939.

[14] CIMH Report, ER 4851; *see also* Bruns Decl., ER 6210, ¶15 ("near absence of outcome data" to support residential treatment and psychiatric hospitalization).

[15] Richard P. Barth, *Institutions vs. Foster Homes: The Empirical Base for the Second Century of Debate* (February 2002), ER 5291; *see also* Farr Decl., ER

The Department of Social Services ("DSS"), which is responsible for administering the foster care system, has acknowledged that "many children have been caught in a revolving door of inappropriate placements."[16] DMH recently conducted a series of case reviews which confirmed how foster children have experienced multiple group home placements and repeated hospitalizations.[17] When children do not receive appropriate mental health services at home, crises and hospitalization are inevitable.[18]

Kayla's eventual involvement in the delinquency system is all too common. The Children's Services Inspector General for Los Angeles County warned that a "disproportionate number of Juvenile Court actions are presently being filed based upon the failure of relative placements resulting from a child's behavioral problems."[19] San Diego County estimated that in one year alone 200 children were placed in the juvenile justice system to obtain mental health services.[20] Thus,

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6432-33, ¶22 ("severe risks associated with residential treatment").

[16] DSS, *Reexamination of the Role of Group Care in a Family-Based System of Care*, ER 4771.

[17] These case reviews were part of DMH's Focused Reviews of the services provided to class members in *Emily Q. v. Bontá. See*, *e.g.*, San Bernardino Review, cases 5, 7, 8, ER 6123-24, 6127-30; Yolo County Review, ER 6090-91.

[18] *See, e.g.*, Decls. of Beckman, ER 5996-97, ¶¶6, 9; Brumbach, ER 6200-01, ¶9; Lowe., ER 6809, ¶2.

[19] *Children with Behavioral Problems: High Incidence of Failed Relative Placements*, ER 5257.

[20] GAO, *Child Welfare and Juvenile Justice: Federal Agencies Could Play a Stronger Role in Helping States Reduce the Number of Children Placed Solely to Obtain Mental Health Services"* (April 2003), ER 5363.

the Little Hoover Commission found that some "children in California have needs beyond the capacity of existing treatment programs" and are "sent to out-of-state programs;" others "end up in the juvenile justice system . . . on the streets, or cycling through inappropriate programs."[21]

C. Through Wraparound, Foster Children Can Avoid Group Homes and Multiple Placements.

Wraparound services are individualized, community-based services and supports that are provided to children with mental health needs as an alternative to removing them from their homes and communities and placing them in restrictive institutional settings. Grealish Decl., ER 6501-05, ¶¶21, 25, 27. A panel of nationwide experts has agreed that the core elements of wraparound services are that they be "family-driven, team-based, collaborative, community-based, culturally competent, individualized, strength based, natural support focused, unconditional, and outcome based." Bruns Decl., ER 6213, 6215-16, ¶¶22 and 33.[22] DSS has given much the same description of the core elements of wraparound.[23]

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[21] *Young Hearts*, ER 4629.

[22] *See also* CIMH Report, ER 4835 (giving similar description of wraparound). Explanations of these terms, such as "strength based" and culturally competent" can be found in "Wraparound Principles." Bruns Decl., ER 6215-16, ¶33, and ER 6238-45.

[23] DSS' All-County Information Notice No. I-28-99 (April 7, 1999), ER 4497.

DMH has identified wraparound as one of the measures that has "been working to improve services/supports to our foster care populations and their families."[24] DSS officials believe that wraparound programs have enabled foster children to live at home or in a home-like setting. Grayson Depo., ER 9266-67.

Wraparound is one of the few mental health interventions for which there is "strong" evidence of efficacy, with significant expert support and many scholarly articles describing its benefits.[25] For example, in one of the first programs, Wraparound Milwaukee, the level of dysfunction and impairment significantly decreased for children and youth during their enrollment according to three nationally accepted research instruments on child behavior, while simultaneously, the cost of serving these children declined by one-third. Decls of Kamradt, ER 6600-01, ¶15; Bruns, ER 6212-13, ¶22. One wraparound provider in Sacramento County has attained the following results with children whom the County describes as the "most challenging to the system of care": the percentage of children living in RCL facilities of 12 and above has declined from 45% at the time of admission to 11% at time of discharge; 89% are attending school four or five days a week; and 74% of the children are discharged to family settings. Farr Decl., ER 6419-20,

[24] DMH, "Talking Points, Responses to Little Hoover Commission Report," ER 4745-49. *See also* DMH *Chapter 26.5 1997 Out-Of-Home Care Report*, ER 4925 (wraparound services are among the "intensive efforts [that] are critical to the successful treatment of youth" with severe emotional disturbances).

[25] CIMH Report, ER 4834, 4850; Bruns Decl., ER 6212-14, ¶¶21-29; Friedman Decl., ER 6455-59, ¶¶19-29.

6429-3, ¶¶7-8, 15.[26] Moreover, the United States Surgeon General has repeatedly recognized wraparound services as a promising practice for children with mental health needs and their families. Bruns Decl., ER 6212, ¶21.[27] In comparison, institutional treatments, such as in-patient hospitalization and residential treatment centers, have few proven long-term benefits to children and have almost no outcome data to support their effectiveness. Friedman Decl., ER 6459, ¶30; Bruns Decl, ER 6210, ¶15.

Statistics do not tell the whole story. With wraparound services, one teenage boy in Alameda County progressed from living in a foster home, wetting his bed, fighting and having difficulties in school to living again with his mother and planning to attend a local community college followed by a four-year school. Charles-Heathers Decl., ER 6310-12, ¶18. A fifteen-year old boy in Sacramento County who was severely depressed and enrolled in a school for severely emotionally disturbed children made such incredible improvements with wraparound services that he transferred to a large mainstream school where he was

[26] Sacramento County compiled additional data on the outcomes after discharge of children who Child Protective Services ("CPS") had referred for wraparound services versus children who CPS had referred for the usual services. Farr Decl., ER 6429, 6431, ¶¶14, 19. The County found, among other things that, 52% of the children in wraparound services were no longer in CPS versus 29% of the control group; and only 9% of wraparound youth were still in CPS and living in RCL of 12 and above versus 25% of the control group. *Id*., ER 6431, ¶19.

[27] *See also* Friedman Decl., ER 6455-59, ¶19-30 (discussing development of evidence base for wraparound services).

an honor roll student and captain of a championship bowling team, and subsequently became a student at a local community college. Farr Decl., ER 6427-29, ¶13. These stories are typical of the result of quality wraparound services.[28]

D. Fewer Than Half of California's Counties Even Offer Wraparound, and Even These Fail To Serve All Those In Need.

Despite its remarkable effectiveness, wraparound had been implemented in only 24 out of 58 counties in California as of February 2004 and only through two pilot programs initiated by DSS. Treadwell Depo., ER 10855, 10857-58, 10909-27. One is a state-only funded program created by Senate Bill No. ("SB") 163, while the other is a special foster care demonstration program with the federal government known as the IV-E waiver. Treadwell Depo., ER 10855-57.[29] Each county can choose whether it wants to provide wraparound services to foster

[28] *See, e.g.*, Dennis Decl., ER 6397-98, ¶21 (with wraparound services, older teenager who had been suicidal and struggling with substance abuse and who had a borderline personality disorder went on to graduate from college and receive a Masters of Social Work).

[29] Funding for the two programs is quite different: SB 163 – 40% from the state and 60% from the counties; Title IV-E waiver – 50% from the federal government with approximately 20% from the state and 30% from the counties. Treadwell Depo., ER 10884-85. There are, however, more limitations on the Title IV-E waiver programs in that a county must divide children into an experimental and control groups, must measure certain outcomes, and must attempt to be "cost neutral." *Id.,* ER 10943-49. Children in the control group are precluded from receiving wraparound services. *Id*., ER 10875.

children through these pilot programs. Grayson Depo., ER 9327-28. For more than a year, admissions to the Title IV-E wraparound have been frozen.[30]

It is bad enough that wraparound services essentially are "an elective service to be offered at the discretion of each county." Burgess Decl., ER 6266, ¶11. To make matters worse, eligibility for wraparound services is limited to foster children who are currently residing in or at risk of being placed in RCL facilities of 10 or above for the SB 163 counties and RCL facilities of 12 or above for the Title IV-E waiver counties. Grayson Depo., ER 9258-59; Treadwell Depo., ER 10862.

There is no requirement that a county provide wraparound services to all children in the target population for whom these services would be medically necessary or otherwise appropriate. Treadwell Depo., ER 10867-68, 10878-79. On the contrary, counties have complete discretion on the number of wraparound "slots" they wish to provide. *Id.,* ER 10861-62, 10871, 10942. Hence, the DSS official who is responsible for all of California's wraparound programs admitted that the participating counties were not even providing wraparound to all children in the target population for whom such services would be appropriate. *Id*., ER 10849-50, 10853, 10880.

The 24 participating counties combined had the capacity to provide wraparound services to slightly more than 1500 children as of February 2004. *Id*.,

[30] Notice from Patricia Aguiar, ER 4902-03 (no new children as of June 30, 2004).

ER 10909-27. Plaintiffs' declarations documented the great need for and limited access to wraparound around the state.[31] DMH itself recently concluded that providing only 30 wraparound slots in a county with more than 6000 clients under age 21 was "insufficient given the number of potential eligibles."[32]

Los Angeles County is a case in point. Long after entering into the settlement agreement in this case, this County only had the capacity to provide wraparound services to 466 children and their families and, as a consequence, "many class members that need Wraparound support cannot access it," and the "quality of Wraparound services is not adequate to meet the needs" of the County-wide class.[33] One County official has testified that Los Angeles County should have "1500 or more slots in wraparound" given the need. Hatekayama Depo., ER 9661-62. DSS has given even higher estimates – Los Angeles County should expand capacity to "address the needs of the more than 3,000 children who are eligible" for the Title IV-E wraparound program.[34]

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[31] *See, e.g.*, Crary Decl., ER 6318-21, ¶¶3-10 ("Wraparound services would accelerate . . . return home" of a boy, age 16, and would transition the return to a "less restrictive setting" for three other children, ages 5, 7 and 8, but such services have been denied because all these children receive federal foster care funds); Waxler Decl., ER 7302-03, ¶¶3-5 ("In January 2005, the court ordered Wraparound services for James, and his social worker referred James to Wraparound," but, as of June 2005, Los Angeles County had still not provided such services to this 17-year old boy in foster care).

[32] San Bernardino Review, ER 6106-07, 6109.

[33] *Third Panel Report*, ER 5484, 5525.

[34] Letter dated March 28, 2003, from Sylvia Pizzini, ER 4892.

E. Medi-Cal Policies Significantly Limit Access to Wraparound.

DHS and DMH have not taken any steps to ensure that wraparound is available to all foster children on Medi-Cal, and have erected multiple barriers to its use. DMH officials state that their agency does not provide a wraparound program. Neilsen Depo., ER 10178. While Medi-Cal can cover some components of wraparound, agency staff did not know precisely what could be covered or whether these components include all services that a child may need.[35] One indication that wraparound is not covered is the absence of a billing code for providers to claim Medi-Cal reimbursement.[36] Health procedure billing codes in use across the nation include "Community Wraparound Services,"[37] but these codes are not covered by the Medi-Cal program. Barthels Depo., ER 8715-16.

In the counties which have chosen to offer wraparound services, providers can attempt to bill portions of their services to Medi-Cal, but they risk not being paid "even though these services are medically necessary and appropriate for the children." Charles-Heathers Decl., ER 6314. Auditors recently issued 19

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[35] Barthels Depo., ER 8457, 8463-64, 8647, 8729-30, 8739-40, 8752-53, 8757-59.

[36] Wraparound services are identified by name and code on the Medi-Cal fee schedule, but are clearly designated as "inactive" and therefore inaccessible; this is but one of a number of barriers to effective provision of wraparound services identified by plaintiffs experts in the Medi-Cal regulations. Nace Decl., ER 6847-48, ¶35.

[37] The primary coding system for health insurance billing is called Health Care Procedures Coding System ("HCPCS"). Barthels Depo., ER 8668-69. HCPCS has a number of codes whereby mental health providers can bill for wraparound services, such as H2021 and H2022.

disallowances to Lincoln Child Center, which will cost that wraparound provider hundreds of thousands of dollars. *Id*. As this provider explained, the auditors "did not appreciate the acuity of the mental health needs of our children" or "the importance of starting with a high level of services and then reducing the level of services to ensure that the child does not experience another failure." *Id.*

Aside from the risks, billing Medi-Cal for the components of wraparound on a piecemeal basis is quite difficult.[38] DMH has permitted each county to set its own claims policies, procedures, contracts and practices regarding the extent of Medi-Cal reimbursement for different components of wraparound services. Barthels Depo., ER 8661-62. This creates an administrative nightmare for providers which attempt to serve children in different counties. Watrous Decl., ER 7201-03. It also means that the availability of federal Medicaid reimbursement differs markedly from county to county.[39] In turn, the state's failure to maximize

[38] "[O]nly the most sophisticated and dedicated behavioral health specialists, who are familiar and experienced with each of the programs and their specific administrative and eligibility requirements can attempt to create a patchwork quilt of various funding streams to address as much of the needs of the children as possible." Nace Decl., ER 6846-47, ¶33. For anyone else "trying to gain access to effective medically necessary wraparound services, these barriers are most likely completely insurmountable." *Id.*

[39] For example, one wraparound provider in Alameda County bills less than 40% of all costs to Medi-Cal program, whereas another provider in Sacramento County bills approximately 65% of all costs to the Medi-Cal program. Charles-Heathers Decl., ER 6313, ¶20; *see also* Burgess Decl., ER 6266, ¶10.

federal matching funds also prevents service expansion.[40] In sum, California's "myriad [of] categorical programs, policy statements, and fee schedule categories" has "resulted in a situation in which access to medically necessary wraparound services is inhibited rather than promoted." Nace Decl., ER 6846, ¶33.

F. TFC Is Another Medically Necessary Mental Health Service for Many Foster Children.

Therapeutic foster care[41] has been described as a "service for children with serious behavioral and emotional needs who cannot be cared for in their own homes." Friedman Decl., ER 6456, ¶25. Like wraparound services, TFC "is a flexible intervention approach that emphasizes building upon positive family strengths, and provides crisis intervention, family counseling, assistance with child management and skills to enhance family functioning, and provides access to other community support programs." *Id*., ER 6456-57, ¶ 26. TFC is an alternative to group and residential care, institutionalization and incarceration, and "is widely considered to be the least restrictive and most integrating form of out-of-home placement for children with severe emotional and behavioral disorders." Chamberlain Decl., ER 6291, ¶9. TFC is provided by foster parents who are specially trained to work with children with mental health needs; these foster parents are an integral part of implementing a child's treatment plan and the child

[40] *Katie A.* Advisory Panel, Fifth Panel Report to the Court (hereafter "*Fifth Panel Report*"), ER 5547-48.
[41] TFC is also called treatment foster care or specialized foster care.

and foster parents are given ongoing supervision and support in these efforts. *Id.*, ER 6292-96, ¶12.

By all accounts, TFC is one of the very few mental health interventions for which there is a strong evidence of effectiveness. *Id.*, ER 6300, ¶26; Neilsen Depo., ER 10222; CIMH Report, ER 4813-14, 4836-38. Based upon the results of a number of studies, [42] the Surgeon General found that youth in TFC "showed more improvements in behavior and lower rates of reinstitutionalization and the costs were lower than those in other settings."[43] Other improved outcomes for children receiving TFC include decreased arrests, days incarcerated, violent offenses, hard drug use, and running away. Chamberlain Decl., ER 6297-98, ¶18. In addition, TFC has been found to lead to thousands of dollars of savings per child through decreased hospitalization costs and savings to other systems, including the criminal justice system. Suppl. Chamberlain Decl., ER 15104, ¶6. TFC is the best and sometimes only appropriate option for many class members who cannot function in large congregate facilities such as group homes, often because they do

[42] Chamberlain Decl., ER 6288-89, ¶¶1, 3 (one form of TFC, known as multi-systemic therapeutic foster care or "MTFC", has been the subject of extensive evaluation, including eight randomized experimental clinical trials, and, based on research and program evaluation); Watrous Decl., ER 7199-7200, ¶¶5-6 (new MTFC program in San Diego County documented a nearly 200% decrease in aggregate negative behaviors).

[43] *Mental Health, A Report of the Surgeon General*, ER 4886.

not have the skills to interact with peers, especially those who also have mental health and behavior problems.[44]

G. TFC Is Not Available on a Consistent Statewide Basis When Children Need It.

Medi-Cal does not cover TFC. Barthels Depo., ER 8475. Although there are standardized national codes for billing TFC on a daily and monthly basis,[45] Medi-Cal does not include either code. Barthels Depo, ER 8714-15. Medi-Cal also does not cover many components of TFC. *Id.*, ER 8766, 8768-70, 8773, 8775-76.

Twenty of the 58 California counties offer a service called Intensive Treatment Foster Care ("ITFC)" for children who might otherwise go into "high-end group care." Dupay Depo., ER 9123. By state statute, ITFC programs are required to provide a wide range of services to "emotionally disturbed children in certified family homes," including "individualized needs and services plans, "education and mental health services, " and "therapeutic after-school programs." Welf. & Inst. Code §18358.15(a)(1)-(5). However, the state officials most knowledgeable about the ITFC programs did not know what services are actually available or whether those services differ from those in other forms of foster care.[46]

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[44] *See, e.g.*, Dennis Decl., ER 6391, ¶5; Dembrowsky Decl., ER 6330-31, ¶16.
[45] Redman Decl., ER 6978, ¶¶19, 20 and ER 7153, 7157.
[46] Markell Depo., ER 9945-46; *see also* Dupay Depo., ER 9108-09, 9111-12 (State only reimburses for "board and care services," which pays for food, clothing,

Only 500 children up to age 19 were served through ITFC during the quarter October -December 2002.[47] Several factors have kept ITFC participation low. The regulations regarding the ITFC program are so restrictive that few providers are willing to participate. Hatekayama Depo., ER 9612-13 (no LA providers were interested in ITFC). In addition, the State reimburses ITFC at a rate significantly lower than the rates for comparable group home care in RCL facilities of 12 or 14.[48]

STANDARD OF APPELLATE REVIEW

Plaintiffs generally agree with Defendants' discussion of the standards of appellate review. AOB 35-36. This Court's review of a decision regarding a preliminary injunction "is limited and deferential." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003)(en banc). "Review of an order granting or denying a preliminary injunction is much more limited than review of an order involving a permanent injunction, where all conclusions of law

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utilities, and housing).

[47] DSS, *Intensive Treatment Foster Care Program: Quarterly Statistical Report*, ER 5466.

[48] Dupay Depo., ER 9113-15. The maximum ITFC rate of $4476 per month is also significantly less than the $5613 per month for a RCL 12 group home and $6371 for a RCL 14 facility. *Compare* DSS, *Intensive Treatment Foster Care Programs, Authorized Rates* (August 5, 2005), ER 5097-98, *with* DSS, *Foster Care Rates Group Home Facility Listing* (August 5, 2005), ER 5099, 5105.

are freely reviewable." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999).

The abuse of discretion standard applies; an order will be reversed only if a district court bases its decision on either an erroneous legal standard or clearly erroneous findings of fact. *Id.* This Court "'typically will not reach the merits of a case when reviewing a preliminary injunction. . . . As long as the district got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006) (citation omitted).

Defendants contend that injunctions against state agencies are subject to a "more exacting standard" of appellate review. AOB 36. Yet this Court has repeatedly affirmed preliminary injunctions against both state and local agencies. *See, e.g., Gregorio T. v. Wilson*, 59 F.3d 1002 (9th Cir. 1995) (Governor and other State officers enjoined from implementing various sections of Proposition 187); *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004) (county sheriff enjoined from using a world-wide web camera in jail); *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754 (9th Cir. 2004) (county officials enjoined from closing rehabilitation hospital and eliminating 100 beds at another county hospital).

Applying the appropriate standards of appellate review, the Court should affirm the preliminary injunction in this case.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE CORRECT STANDARDS FOR GRANTING A MANDATORY PRELIMINARY INJUNCTION.

Defendants discuss in great detail the standards for issuance of a preliminary injunction in this case.[49] AOB 31-34. The district court adhered to these standards. Order, ER 14674.

As the lower court observed, mandatory preliminary injunctions are "particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Id.*, *citing Anderson v. United* States, 612 F.2d 1112, 1114 (9th Cir. 1979). Courts have, however, granted such relief in appropriate circumstances. *See, e.g.*, *Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1401-05 (9th Cir. 1993) (drug company required to provide experimental new medication to patients with chronic fatigue syndrome); *Cupolo v. Bay Area Rapid Transit*, 5 F.Supp. 2d 1078, 1080-86 (N.D. Cal. 1997) (BART ordered to improve and repair its elevators to make them accessible to individuals with mobility

[49] This case should be contrasted with many of Defendants' citations, where there was not widespread violation of the law by governmental officials. *See, e.g.*, *Rizzo v. Goode,* 423 U.S. 362, 375-76 (1975); *Lewis v. Casey*, 518 U.S. 343, 356 (1996).

disabilities).[50] Moreover, "[g]overnment inaction despite a statutory mandate may support a mandatory injunction issued by the court." *Firebaugh Canal Co. v. U.S.*, 203 F.3d 568, 577 (9th Cir. 2000).

A mandatory preliminary injunction is appropriate in this case. Both the facts and the law clearly favor Plaintiffs. The district court also was confronted with Defendants' inaction despite the mandates of federal law.

II. THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE SUFFICIENTLY COMPREHENSIVE TO PROVIDE A BASIS FOR ITS DECISION.

In this appeal, Defendants spend little time discussing the facts or the law. Instead, they advance a hyper-technical argument that the district court failed to make the requisite findings of fact and conclusions of law to justify the preliminary injunction. AOB 36-40. Yet the 21- page Order contains the necessary findings of fact and conclusions of law, which are sufficiently comprehensive to provide a basis for the district court's decision.

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[50] *See also Wyandotte Nation v. Sebelius,* 443 F.3d 1247, 1255-57 (10th Cir. 2006)(preliminary injunction mandated that state return proceeds, files and equipment seized in earlier raid on casino); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 347, 364 (6th Cir. 1998) (preliminary injunction forced state agency to accept union's advertisement on its buses).

A. The Preliminary Injunction Should Be Affirmed Unless it is Not Possible for this Court to Have a Full Understanding of the Relevant Issues Without Additional Findings by the District Court.

Under Rule 52(a), a district court must set forth findings of fact and conclusions of law to support an order granting an interlocutory injunction. Fed.R.Civ.P. 52(a). One purpose behind Rule 52(a) is to assist the appellate court to understand the basis for the trial court's decision. *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790, 792 (9th Cir. 1986).

Defendants never discuss the consequences when a district court does not make adequate findings of fact and conclusion of law. A "[f]ailure to comply with Rule 52(a) does not require reversal unless a full understanding of the question by the appellate court is not possible without the aid of separate findings." *Vance*, 789 F.2d at 792; *accord Federal Trade Comm'n v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1212 (9th Cir. 2004). This Court may still affirm a preliminary injunction "if the findings are sufficiently comprehensive and pertinent to the issues to provide a basis for decision or if there can be no genuine dispute about the omitted findings." *Federal Trade Comm'n*, 362 F.3d at 1212.

B. The District Court Made the Necessary Findings that Members of the Plaintiff Class Are Entitled to Receive Wraparound Services and TFC under the EPSDT Statutes.

According to Defendants, the findings "necessary to support the mandatory preliminary injunction" in this case would include that the Medi-Cal program

"does not cover" wraparound services and TFC and that these two mental health services "are Medicaid-covered services." AOB 38. The district court made findings on both those issues.

As for the first issue, the district court found that "Defendants do not dispute that currently they are not providing these forms of assistance, as such, to members of the plaintiff class." Order, ER 14672 n.3. Defendants do not quarrel with this finding. On the contrary, they openly acknowledge that wraparound services and TFC are "not covered as such under the Medi-Cal program." AOB 41.

As for the second issue, the district court began its analysis by summarizing a series of "undisputed" points regarding the State's legal obligations as to the Medi-Cal program. By "voluntarily participating in Medicaid through its Medi-Cal program, California is required to 'comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." Order, ER 14676, *citing Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). The Medicaid Act "requires the provision of EPSDT to Medicaid-eligible children under the age of twenty-one." Order, ER 14677. "EPSDT requires the State to screen eligible children 'to determine the existence of certain physical or mental illnesses or conditions.'" *Id.*, *citing* §1396d(r)(1)(A)(ii). EPSDT also "requires the State 'to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or

not such services are covered under the State plan.'" Order, ER 14677, *citing* §1396d(r)(5).[51]

The Order later discussed how "Section 1396d(r) lists an array of services that states are required to provide children under age twenty-one." ER 14681.

> 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. . . ."

Id. The Order noted that subsection (a) "identifies twenty-eight different services, including diagnostic services, psychiatric services, rehabilitative services and case management services." *Id*.

Referring to Plaintiffs' proposed definitions of the two mental health services at issue, the court below found that "[w]raparound services has nine component services" and TFC "has seven" component services. Order, ER 14682. "Each component service has numerous subcomponent services," which "may fall under any one or more of the twenty-eight different categories of §1396d(a)." *Id.* The district court found "it likely that virtually all of the corresponding categories

[51] Prior to 1989, state EPSDT programs were only required to pay for medically necessary treatment for hearing, vision, and dental problems. *Cf. Rosie D v. Swift*, 310 F.3d 230, 232 (1st Cir. 2002). With the amendments in 1989, states are required "to provide Medicaid coverage for any service 'identified as medically necessary through the EPSDT program.'" *Id*.

of §1396d(a) identified by Plaintiffs do, in fact, encompass the linked-to-service" of wraparound services and TFC. Order, ER 14682-83.

Defendants criticize the district court for not providing "any analysis of why the components of 'wraparound services' and 'therapeutic foster care' listed in Appendices A and B are Medicaid-covered services under 42 U.S.C. §1396d(a)." AOB 39. The criticism is totally unwarranted. The lower court discussed how Appendices A and B "link, in chart form, each component of wraparound services and therapeutic foster care service to the corresponding category or categories of §1396d(a)" and that the declaration of Chris Koyanagi provided "a similar breakdown." Order, ER 14682.

Next, Defendants fault the district court for not making "factual finding[s]" as to whether each component of these two mental health services is currently "covered by Medi-Cal." AOB 39. What would be the point of such findings? Defendants concede that wraparound services or TFC "are not covered as such under the Medi-Cal program." AOB 41. It is irrelevant that some, but not all the essential components may be covered. Under Defendants' strained reasoning, the Medi-Cal program would not have to cover the second half of an operation for brain cancer so long as it covered the first half. Moreover, Defendants never specify which of the nine components of wraparound services and seven

components of TFC are supposedly covered by the current Medi-Cal program so as to merit a finding by the district court.

Not surprisingly, Defendants are unable to cite any authorities to support their belief that Rule 52(a) requires findings of fact at such a minute level of detail.[52] Nor do Defendants marshal any factual or legal arguments to refute the findings that all the components of wraparound services and TFC qualify as rehabilitation services, case management services, personal care service or other categories of §1396d(a), as discussed in the following section.

C. The District Court Correctly Found that Plaintiffs Have a Strong Likelihood of Success on Their EPSDT Claims.

Defendants object that the district court did not make an express "determination that the law and the facts clearly favored Plaintiffs on the merits, which is required for a mandatory preliminary injunction." AOB 44. The district court "conclude[d] that Plaintiffs have demonstrated a strong likelihood of succeeding on the merits of their substantive claims." Order, ER 14687. Nonetheless, Defendants argue that that "there is no legal analysis whatsoever as to why [the services in Appendices A and B] are Medicaid-covered services." AOB

[52] The instant case should be contrasted with the citations by Defendants. AOB 36-37. *See, e.g., LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F3d 1150, 1155 (9th Cir. 2006) (district court's "only explanation" for denying a preliminary injunction "was the statement that it did not consider" plaintiff "to have a likelihood of success on the merits"); and *Rosen v. Siegel*, 106 F.3d 28, 32 (2nd Cir. 1997) ("complete dearth of findings of fact and conclusion of law to support its injunction").

39. In fact, the district court analyzed both the federal law and its application in other states in reaching its conclusion.

First, the district court noted that Plaintiffs relied on several categories of services in federal law, including "'rehabilitative services," §1396d(a)(13), "case management services," §1396d(a)(19), and "personal care services," §1396d(a)(24). Order, ER 14682. Federal law defines these services broadly. Rehabilitative services include "any medical or remedial services recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under State law." 42 C.F.R. §440.130(d). Case management consists of services to "assist individuals under the [Medicaid] plan in gaining access to needed medical, social, educational, and other services." §§1396d(a)(19), 1396n(g)(2). The district court ruled that "virtually all of the corresponding categories of §1396d(a) identified by Plaintiffs do, in fact, encompass the linked-to service." Order, ER 14683.

The court below concluded that wraparound services and TFC "fall within the EPSDT obligations of Medicaid-participating states," and that this "conclusion is buttressed by the fact" that these two services have been funded by Medicaid in other states. Order, ER 14684.

The district court also addressed the issue of medical necessity. The Health Care Financing Administration ("HCFA")[53] *State Medicaid Manual* advises states that they must provide "any service which [they] are permitted to cover under Medicaid" so long as it meets the EPSDT medical necessity definition. *State Medicaid Manual*, §5110 (April 1990). As one high ranking DHS official admitted, "[s]tates must provide all needed services whether the service is covered by the state's state plan or whether the provider type is normally enrolled in the Medicaid program."[54]

The court below correctly observed that the Medicaid Act does not itself define when a service is "medically necessary." Order, ER 14685-86. "Rather, the decision 'rests with the individual recipient's physician and not with clerical personnel or government officials." *Id.*, ER 14686, *citing Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980), and *Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989).

The district court found that both wraparound services and TFC are medically necessary for members of the Plaintiff class. Order, ER 14686-87. In this regard, the district court pointed to "the declarations of numerous behavioral

[53] HCFA has since changed its name to the Centers for Medicare and Medicaid Services ("CMS").
[54] E-mail message from Stan Rosenstein (February 23, 2003), ER 5193.

and mental health experts who attest to the medical necessity of providing these services to foster care children with emotional disturbances." *Id.*[55]

Dr. Lourie, for instance, has been a practicing psychiatrist for over 30 years with a specialty in children and adolescents and is the former Director of the Child and Adolescent Service System Program at the National Institute of Mental Health. Lourie Decl., ER 6788-89, ¶¶1, 4, 5. Based on his many years of studying children's mental health interventions, Dr. Lourie stated that "wraparound services are medically necessary for children with serious mental health needs." Order, ER 14686.

Similarly, Dr. Patricia Chamberlain, a national expert in TFC, opined that a children's mental health system without TFC "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

[55] According to three nationally accepted research instruments – the Child Adolescent Functional Assessment Scale ("CAFAS"), the Child Behavior Checklist, and the Youth Self Report – the level of dysfunction and impairment significantly decreased for children and youth during their enrollment in Wraparound Milwaukee. Kamradt Decl., ER 6600-01, ¶15; *see also* Farr Decl., ER 6419, ¶8 (for youth enrolled in Wraparound Sacramento, "[o]verall levels of behavioral dysfunction, as assessed by clinical measures, significantly decreased from admission to discharge"). MTFC, in turn, "is widely accepted as an evidence-based practice for controlling and allaying delinquency and anti-social behavior caused by psychological, behavioral, or emotional impairments." Chamberlain Decl., ER 6288-89, 6297, ¶¶1, 3, 16.

mental health needs. *Id*. *See also* Friedman Decl., ER 6459, ¶ 30 (TFC is "widely thought of as essential to any modern children's mental health system").

The district court also considered the lack of evidence from Defendants on the medical necessity issue. "Defendants have not presented any declarations by mental health experts contesting this evidence that wraparound services and therapeutic foster care are medically necessary services for foster care children with mental health care needs." Order, ER 14754.[56] It is worth noting that Defendants have not contested the medical necessity of these two mental health services on this appeal.

District Judge Matz is an experienced judge who understood that Plaintiffs were seeking a "mandatory preliminary injunction" and the stringent standards for granting such an injunction. Order, ER 14672 and 14674. That Judge Matz may not have used the exact words for granting a mandatory preliminary injunction is of little consequence. The Order contains all the requisite findings of fact and conclusions of law to establish the merits of Plaintiffs' Medicaid claim. Hence, the district court did not abuse its discretion in issuing a mandatory preliminary injunction that California provide both wraparound services and TFC to Medicaid-

[56] On the contrary, one of the Defendants' own declarants, Greg Rose, singled out TFC for praise as an "evidence based practice." Rose Decl., ER 11453-55, ¶¶1-5, and ER 11467-87.

eligible members of the Plaintiff class when those services are medically necessary.

D. For the Other Factors Governing a Mandatory Preliminary Injunction, the District Court Made All the Requisite Findings or Alternatively the Findings Are Sufficiently Comprehensive and There Is No Genuine Dispute about the Omitted Findings.

Defendants assert without further discussion that the court below "made no actual findings as to the other factors governing preliminary injunctive relief." AOB 39. The other factors are the possibility of irreparable injury to Plaintiffs if preliminary relief is not granted, whether the balance of hardships favors the plaintiffs, and the public interest. Order, ER 14674, *citing Rodde v. Bontá*, 357 F.3d 988, 994 (9th Cir. 2004). The district court made sufficient findings on these points to support its decision.

As discussed previously, the district court found that wraparound services and TFC are medically necessary services for foster children with mental health needs. Order, ER 14685-87. Generally, in Medicaid cases, "[t]he nature of [plaintiffs] claim – a claim against the state for medical services – makes it impossible to say that any remedy at law could compensate them." *McMillan v. McCrimon,* 807 F. Supp. 475, 479 (C.D. Ill. 1992). A sufficient showing of irreparable injury is made when a state may deny "needed medical care" to Medicaid recipients. *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982); *see also Rodde*, 357 F.3d at 999 (irreparable harm "includes delayed and/or complete

lack of necessary treatment, and increased pain and medical complications"). The Supreme Court has stated that "[t]o allow a serious illness to be untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health." *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 261 (1974). "The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment." *Id.*

The Order fully addressed Defendants' two arguments regarding irreparable harm. As to their first argument that Plaintiffs waited three years to bring the preliminary injunction motion, the district court found that Plaintiffs had "initially focused much of their efforts and limited resources on their claims against Los Angeles County" and that these efforts had resulted in a "pioneering, albeit still problem-laden, settlement" in which the County had agreed to make a number of important commitments for the care of members of the countywide subclass. Order, ER 14688. For the "remaining members of the statewide class, the unmet mental health needs and the harms of unnecessary institutionalization are no less grave now than three years ago." *Id.*

The district court found equally "unpersuasive" Defendants' second argument that Plaintiffs have an adequate remedy through the Medicaid appeals process. *Id.* "'[E]xhaustion of state administrative remedies should not be

required as a prerequisite to bringing an action pursuant to §1983.'" *Id.*, *citing Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 516 (1982).

The district court did not make additional findings about the irreparable harm to class members because this issue was not in serious dispute. As the court itself noted, Defendants' "opposition on this point" consisted of just "one paragraph." Order, ER 14688, referring to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, ER 7457.

Above and beyond the trial court's findings, Plaintiffs presented extensive evidence that the Medi-Cal program was not currently meeting the mental health needs of foster children in California and that the denial of wraparound services and TFC was inflicting immediate irreparable harm on these children. For example, Dusty is a class member in Humboldt County, a "smart young man who is capable of going to college and making something of his life, if given wraparound or therapeutic foster care services." Magnatta Decl., ER 6717-18, 6824-25, ¶¶1, 4, 23. When, however, Dusty did not receive the wraparound services he "desperately needed," this 15-year old boy was eventually removed from the home of a caring foster parent and placed in a high-level group home in another county. *Id*., ER 6822-24, ¶¶17, 19-22.[57] As a Butte County official

[57] *See also* Bialik Decl., ER 6000-05, ¶¶3, 4, 14, 16, 20 and 21(foster youth who "enjoys reading, math, and sports" and "wants to go to college" became "increasingly depressed and desperate" when Contra Costa County refused to

warned, the "consequences of youth needing mental health services and not receiving them are great."[58] Six youths committed suicides in that county alone during one year.[59]

Turning to the balance of hardships, the district court found that "there is substantial evidence that wraparound services and therapeutic foster care actually save the State money, compared to alternatives involving institutionalization." Order, ER 14673 n. 5 (citing four expert declarations and three exhibits).

Ample evidence supported this finding. The cost of institutional care often exceeds $100,000 per year.[60] The State's monthly foster care payments per child are $5613 for a RCL 12 facility and $6371 for a RCL 14 facility.[61] On top of these expenses, the monthly costs of providing mental health services are approximately

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move him into a foster home with therapeutic foster care and so he is "currently detained in Juvenile Hall"); Frakes Decl., ER 6440-48, ¶¶2, 3, 5, 10-23 (class member who has a "quick wit," "is very good at arts and crafts," and was at least "fully capable" at one time "of performing at grade level in school," was unable to receive a majority of the wraparound services that the county had promised and so his difficult behaviors escalated to the point that his foster mother eventually had to ask for his removal from her home).

[58] Letter dated July 13, 2000, from Michael W. Clarke, Assistant Director of Butte County Department of Behavioral Health, ER 5076-77.

[59] *Id.*

[60] One county official estimated that the costs of group home placement was "approximately $100,000 per youth per year" and that did not include "the non-public school costs, the medication costs, or the mental health costs usually associated with group home placements." Letter from Assistant Director of Butte County Department of Behavioral Health, July 13, 2000, ER 5076-77.

[61] DSS, *Foster Care Rates Group Home Facility Listing*, ER 5105.

$3600 for a child in an RCL facility of 12 and $4800 for a child in an RCL facility of 14. Hatekayama Depo., ER 9656.[62]

Although the costs vary, county after county has found that wraparound services and TFC are cheaper than group home care. It costs Mono County approximately $167,800 per year to keep one youth in a RCL 14 facility, while the average child in the wraparound program costs $4638 per month (or $56,196 per year).[63] In Mendocino County, the monthly cost of out of home placement and specialty mental health services averaged $9495 per child, whereas providing wraparound services averaged $6065 per child.[64] For Humboldt County, the average monthly cost was $3334 for a child without wraparound services versus $2438 for a child with wraparound services.[65]

Just as in the proceedings below, Defendants present virtually no factual or legal argument to counter Plaintiffs' powerful showing that class members are suffering immediate, irreparable harm from the denial of wraparound services and

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[62] Another type of locked ground home, "Community Treatment Facilities," can cost $9,000 to $20,000 per month per child. DMH, *Status of the Implementation of the Community Treatment Facilities* (April 2001), ER 4912. If a foster child ends ups in the delinquency system, incarceration alone can cost more than $3000 per month. *Young Hearts*, ER 4581.

[63] SB 163 Wraparound Final Evaluation, Mono County, ER 5469.

[64] Mendocino County's SB 163 Children's Wraparound Services Pilot Project Final Report, ER 5471.

[65] Report to the Legislature on Humboldt County's Wraparound Services Program, ER 5474.

TFC and that the balance of hardships tips totally in Plaintiffs' favor. The silence of Defendants on these two factors speaks volumes.

In another case involving low-income people with disabilities, this Court stated:

> [T]he physical and emotional suffering shown by plaintiffs in the record before us is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government. . . Faced with such a conflict between the financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.

Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir.), *rev'd in part on other grounds*, *Heckler v. Lopez*, 463 U.S. 1328 (1983). In *Lopez,* 713 F.2d at 1436-37, this Court refused to stay a preliminary injunction even though it cost the federal government more than $20 million *per month* in 1980, a figure that would be much higher in current dollars. More recently, this Court in *Rodde*, 357 F.3d at 999, affirmed a preliminary injunction despite Los Angeles County's estimates that it would be losing $58 million annually. Thus, even if Defendants might lose some money from the granting of the preliminary injunction in this case, such financial losses still pale by comparison to the preventable human suffering that class members will endure if the preliminary injunction had been denied.

The last factor in granting or denying a preliminary injunction is the public interest. This Court cautioned years ago that the "government must be concerned not only with the public fisc but also with the public weal," adding that "[o]ur society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges." *Lopez*, 713 F.2d at 1437. From the standpoint of society, it would be "tragic" if "poor, elderly, disabled people" were "wrongfully deprived of essential benefits for any period of time." *Id*. "It would be unfortunate, but far less harmful to society, were the government to succeed in overturning the preliminary injunction but be unable to recoup all or portion of the funds." *Id.* at 1437-38.

The reasoning of *Lopez* applies equally to the case at bar. The district court observed that "at stake in this lawsuit is the health of thousands of children in California who are already in, or are likely soon to wind up in, foster care," and that "'[c]hildren with serious emotional disabilities are among the most fragile members of our society'" whose "'medical needs frequently extend across a spectrum of service providers and state agencies.'" Order, ER 14672 (citation omitted). The court below found that "[i]n California, the foster care system has been widely acknowledged to be failing" [*id.* at 14673], a finding which Defendants do not dispute in this appeal.

It is in the public interest to protect the legal rights of foster children who are both poor and disabled, since it would be tragic to wrongfully deprive them of necessary mental health services for any period of time. Significantly, Defendants have presented no argument to the contrary. In sum, this Court should affirm the preliminary injunction regardless of any alleged deficiencies in the findings by the court below.

III. NONE OF THE FINDINGS OF FACT BY THE COURT BELOW ARE CLEARLY ERRONEOUS.

While Defendants insist that there are no "explicit findings of fact" in the Order [AOB 38-39], they nonetheless argue that some "implicit factual findings" in the Order are clearly erroneous. *Id.* at 40-43. Findings of fact "are reviewed for clear error." *Id.* at 35. "Clear error review is deferential to the district court, requiring a 'definite and firm conviction that a mistake has been made.'" *Husan v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002)(citation omitted). "Thus, if the district court's findings are plausible in light of the record viewed in its entirety, the appellate court cannot reverse even if it is convinced it would have found differently." *Id.* *None* of the district court's findings of fact are clearly erroneous.

Defendants initially attack the Order for saying that "'Defendants do not dispute that currently they are not providing these forms of assistance, as such, to members of the plaintiff class.'" AOB 40-41, *citing* Order, ER 14672 n.3. But

Defendants then admit in the next sentence that "'[w]raparound services' and 'therapeutic foster care' are not Medicaid-covered services as such and are therefore not covered as such under the Medi-Cal program.'" AOB 41. Where is the error by the court below? Defendants baldly assert that "all required Medicaid-covered services are covered as EPSDT services under the Medi-Cal program." AOB 41. Apparently, they have forgotten the undisputed fact that Medi-Cal does not cover either wraparound services or TFC.

Defendants make much of one sentence in the Order that "Defendants do not directly rebut or even challenge [Ms. Koyanagi's] categorizations" of these two mental health services. AOB 41, *citing* Order, ER 14683. According to Defendants, the declaration of Rita McCabe "directly rebuts and challenges" how the components of wraparound services and TFC fall within the different categories of services under §1396d(a). AOB 41. In fact, Ms. McCabe begrudgingly acknowledged that Medicaid could cover six and possibly seven of the nine components of wraparound services [McCabe Decl., ER 12458-59, 12462-70, ¶¶12, 13, 22, 26, 30-35] and four of the seven components of TFC [*id.*, ER 12470-74, ¶¶36-43]. More fundamentally, the trial court acted well within its discretion in not giving any credence to Ms. McCabe's unfounded assertions that the remaining components of wraparound services and TFC are not covered Medicaid services. This DMH official has no demonstrated expertise regarding

wraparound services and TFC. Ms. McCabe also did not corroborate her conclusory statements with citations to any written communications from the federal government or any reports on other state Medicaid programs. Nor did this witness offer any explanation as to why the Medicaid programs in several states cover wraparound services and TFC.

Defendants next fault the Order for mischaracterizing their "contentions with respect to Medicaid-covered services" under §1396d(a). AOB 41. The Order attributed to them the contention that "states need only provide those services expressly listed in §1396(d)(a)." Order, ER 14681. While Defendants did make such contentions in the court below [ER 7453, 7445], the description of a party's legal contentions is not a finding of fact. In any event, Defendants now agree with the lower court that Medicaid covered services for EPSDT beneficiaries are not limited to those services listed expressly by name in §1396d(a). AOB 42.

Leaving no stone unturned, Defendants challenge the district court's finding that "in other states wraparound services and therapeutic foster care programs have been funded by Medicaid." AOB 42, *quoting* Order, ER 14684. The Order found that wraparound services were covered by Medicaid programs in four other states and that TFC was covered by Medicaid programs in 19 other states. Order, ER 14684-85.

While Defendants protest that the "Order completely ignores" their evidence about other states' Medicaid programs [AOB 42], their evidence consisted of quibbles about two states, Arizona and Nebraska. There was no dispute that the remaining two states covered wraparound services and that 19 states covered TFC. Moreover, the district court was presented with evidence from the former Deputy Director of Arizona's Medicaid Program, corroborated by a wraparound provider in Arizona, that Arizona's Medicaid program covers both TFC and wraparound services for Medicaid beneficiaries. Redman Decl., ER 6978-81, ¶¶19-30; Supp. Redman Decl., ER 13198-99, ¶¶3-6; Penrod Decl., ER 6864-67, ¶¶14-19, 26. As for Nebraska, that state previously had a Medicaid managed care plan – approved by CMS – that covered wraparound services as a bundled package of services. Supp. Koyanagi Decl., ER 13125-26, ¶3.b. Although Nebraska subsequently changed its managed care contract, the fact remains that CMS had given its approval to placing these wraparound services on Nebraska's "Medicaid menu." *Id*. There was no clear error in this finding either.

According to Defendants, another "clearly erroneous" finding of fact by the district court is that wraparound services and TFC "are services." AOB 42, *citing* Order, ER 14676-80. The Medicaid Act covers both services and care. §1396d(a)(1)-(27). Defendants maintain that "wraparound" and TFC "are processes or approaches and are not Medicaid-covered services as such." AOB 42.

They are just playing semantic games. Defendants themselves refer to California's existing wraparound program as the "Wrap-Around *Services* Pilot Project." AOB 45 (italics added); *see also* Order, ER 14680 at n. 9. For purposes of that pilot project, Welfare and Institutions Code §18250 supplies a definition of "wrap-around services." As for TFC, its very name is therapeutic foster *care.*

Defendants never explain exactly what they mean by a "process" or an "approach." One definition of "process" is "a series of actions or operations conducing to an end." *Webster's Ninth New Collegiate Dictionary* (Merriam Webster 1991) at 937. Under this definition, all different types of medical treatment – a series of actions or operations designed to improve a patient's condition – are "processes." No one disputes that these "processes" are Medicaid-covered services. *See, e.g.,* §1396d(a)(1)(inpatient hospital services) and §1396d(a)(11)(physical therapy). By the same token, an "approach" has been defined as "the taking of preliminary steps towards a particular purpose" or "a particular manner of taking such steps." *Webster's Ninth New Collegiate Dictionary* at 98. Under this definition, all different types of medical treatment could also be described as "approaches," which once again are Medicaid-covered services.

Discharge planning, service plan development, cognitive behavioral therapy, assertive community treatment and other mental health services can all be

described as processes or approaches. Supp. Koyanagi Decl., ER 13128, ¶9. All these mental health services are covered by Medicaid. *Id.* Indeed, Defendants' principal witness, Rita McCabe, has stated that "[a]ssessment is a 'mental health service' under Medi-Cal Specialty Mental Health Services" [McCabe Decl., ER 12475, ¶45], and yet she has also stated that "[a]ssessment is frequently described in the health care industry as the *process* of gathering information for the purpose of making a decision." *Id.*, ER 12970, ¶21 (italics added). As one wraparound provider explained:

> [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.

Order, ER 14681 n. 10, *quoting* Farr Decl., ER 6433, ¶23 n. 1.

Defendants have not cited any law or case that draws the distinction they do between care and services versus processes and approaches. In short, there was no clear error in the lower court's finding that wraparound services and TFC are services.

For their last argument about the findings of facts, Defendants protest 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." AOB 43. This argument misses the mark. As the district court noted, Plaintiffs relied on "different experts" to establish that wraparound services and TFC are Medicaid covered services. Order, ER 14680 at n. 9. In their discussion of the findings of facts, Defendants say nothing about the declarations from Chris Koyanagi, Timothy Penrod, Linda Redman and Bruce Kamradt even though these witnesses all discussed how other states' Medicaid programs cover wraparound services and TFC. *See, e.g.*, Redman Decl., ER 6978-81, ¶¶19-29 (describing experiences in Arizona and other states). Nor do Defendants mention the declaration that they had obtained from Mary Jean Duckett, wherein this CMS official acknowledged 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 Medicaid-covered care and services" and that "some of the component parts included in plaintiffs' conception of 'wraparound services' may be covered by Medicaid." Duckett Decl., ER 11445-46, ¶¶4, 5. Consistent with Ms. Duckett's declaration, Ms. Koyanagi reported that "nearly half of the states' Medicaid programs cover TFC and several states' Medicaid programs cover wraparound services." Koyanagi Decl., ER 6645, 6652-53, 6657-58, ¶¶3, 27 and 29. Thus, there was ample evidence to support the district court's finding that wraparound services and TFC are Medicaid covered services.

IV. THE DISTRICT COURT CORRECTLY APPLIED THE LAW IN GRANTING THE PRELIMINARY INJUNCTION.

With this appeal, Defendants are just as unsuccessful in challenging the district court's conclusions of law as they are in challenging its findings of fact. AOB 44-47. The lower court applied the correct standards of law.

Defendants contend that the court below "failed to employ the appropriate legal standards governing the issuance of the mandatory preliminary injunction" against them. AOB 44. Yet Defendants then reverse themselves and concede that the "Order sets forth the legal standard for issuance of a preliminary injunction and the legal standard governing the issuance of a mandatory preliminary injunction." *Id.* The Order does set forth the correct legal standards. Order, ER 14674.

Defendants next argue that "there is no legal basis whatsoever for enjoining DSS" because "DHS has not delegated any authority to DSS to administer the Medi-Cal program." AOB 38, 44. Delegation is not the proper test for the scope of an injunction. Under Fed.R.Civ.P. 65(d), an injunction binds "the parties to the action" as well as "their officers, agents, servants, employees and attorneys" plus "those persons in active concert or participation with them who receive actual notice of the order." This rule "'is derived from the common law doctrine that a decree of injunction not only binds the parties, but also those identified with them in interest, in privity with them, represented by them or subject to their control.'"

Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1280 (9th Cir. 1992), *quoting Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945).

Here, because DHS decides how to operate the Medi-Cal program, DSS "must comply with any decision of DHS," and is "subject to the 'control' of DHS in the administration of Medicaid." *Emily Q.*, 208 F.Supp. at 1093. DSS already oversees a number of wraparound programs in California. The Order ensures that DHS' decisions about EPSDT funding will be implemented in those programs as well as those administered by DMH. Moreover, because DSS has supervisory responsibilities for foster children throughout California, it also acts in concert with DHS in providing (or denying) wraparound to class members. And the due process concerns that arise when an injunction binds a non-party do not apply here, since DSS already is a party. *Compare Emily Q.*, 208 F.Supp. at 1093 (order bound agencies which were non-parties).

The Order mostly discussed the merits of Plaintiffs' Medicaid claims. ER 14676-88. Defendants can find *no* fault in the district court's legal analysis of the Medicaid Act and its EPSDT provisions. AOB 44-47. Instead, they cite *Alexander v. Choate*, 469 U.S. 287, 303 (1985), and *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003), for the proposition that "Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs." AOB 46-47. Both those cases do not apply here.

Alexander involved claims under §504 of the Rehabilitation Act, 29 U.S.C. §794; *Townsend* involved claims under the Americans with Disabilities Act, 29 U.S.C. §12132. In contrast, this lawsuit presents claims under the EPSDT statutes, which provide, in pertinent part, that a state must furnish "[s]uch other necessary health care, diagnostic services, treatment, and other measures" to "correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." §§1396a(a)(10)(A)(i), 1396d(r)(5). As one court explained, states have a "mandatory duty" to "provide EPSDT-eligible children with all the health care, services, treatments and other measures described in § 1396d(a) of the [Medicaid] Act, when necessary to correct health problems. . . ." *S.D. ex rel Dickson v. Hood,* 391 F.3d 581, 589-90 (5th Cir. 2004).

Citing the Deficit Reduction Act of 2005 ("DRA"), Defendants stress that "Medicaid does not cover case management services covered by a third party." AOB 46. DRA did not, however, change the law on which either Plaintiffs' preliminary injunction motion or the Order is based. Defendants concede that DRA merely "codified" "CMS' longstanding interpretation" of the requirements for case management in §§1396d(a)(19) and 1396n(g)(2). AOB 46. DRA permits federal financial participation for case management services and targeted case management services whenever "there are no other third parties liable to pay for

such services. . . ." §1396n(g)(4)(A). But this has always been the case as Plaintiffs' experts previously testified. Exhibit 2 to Supplemental Decl. of Chris Koyanagi, ER 13158 ("[P]ayment [for case management] may not be made for services for which another payer is liable").

The gravamen of this lawsuit is that Medicaid-eligible members of the class are entitled to receive wraparound services and TFC from Medi-Cal when those services are medically necessary. That statutory entitlement does not suddenly disappear because some California counties have exercised their discretion to provide wraparound services to some class members. Both Appendix A (definition of wraparound services) and Appendix B (definition of TFC) do not contemplate that any type of case management services will be provided when a third party is otherwise liable to pay for these services. Hence, the enactment of DRA was no reason for the Court to issue a different ruling on the preliminary injunction motion.

Finally, Defendants argue that the district court committed "legal error" by ordering them "to provide screening and services to all class members." AOB 47. The Order is not that sweeping. It only states that "California must screen members of the statewide class and provide wraparound services and therapeutic foster care where medically necessary 'to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening

services.'" Order, ER 14689, *quoting* §1396d(r)(5). Defendants nevertheless insist that the "Medicaid statute only requires availability of 'medical assistance' and not the provision of services." AOB 47. Yet the very Medicaid provisions cited by Defendants – §§1396a(a) and 1396d(a) – make clear that "medical assistance" includes the provision of services. A state must provide "for making medical assistance available, including at least the care and *services* listed in . . . §1396d(a)" to eligible children. §1396a(a)(10)(A)(i)(III) (emphasis added). "Medical assistance" is defined as payment for the more than a dozen specific "care and services" listed in that section, including EPSDT "services." §1396d(a)(4)(B). EPSDT services are, in turn, defined to include several "items and services," such as "screening services," "vision services," "hearing services," and any other necessary care, service, treatment or other measure identified in subsection (a). §1396d(r). Thus, the requirement that Defendants provide screening and services to class members is completely consistent with the Medicaid statutes.

V. THE ORDER GRANTING THE PRELIMINARY INJUNCTION MOTION COMPLIES WITH RULE 65.

In conclusory fashion, Defendants contend that the Order "fails dismally" to comply with Rule 65(d) since it "is profoundly unclear" as to what they are required to do. AOB 47. Not true.

The Order specifies that Defendants shall provide wraparound services and TFC, "as defined in Appendices A and B" to "class members on a consistent, statewide basis through the Medi-Cal program or other means beginning not later than 120 days from entry of the Order." ER 14689-90.[66] The Order also directed the parties to develop a plan for implementing the preliminary injunction and that this plan must, among other things, "identify the responsibilities of the different State agencies, the need for additional providers, the eligibility criteria for wraparound services and therapeutic foster care, methods and procedures to inform class members of the availability of these services, and a timeline for accomplishing needed tasks." *Id.* at 1460.

Every order granting an injunction "shall be specific in terms" and "shall describe in reasonable detail" the acts to be performed. Fed.R.Civ.P. 65(d). The Order in this case meets these requirements.

VI. DEFENDANTS' MISCELLANEOUS OBJECTIONS TO THE PROCEEDINGS BELOW ARE DEVOID OF MERIT.

Scattered throughout Appellants' Opening Brief are their miscellaneous grievances with the proceedings below. At one point, Defendants contend that

[66] The district court indicated that the Order "should not be construed to mean that every component and/or subcomponent of wraparound services and TFC, as described in Appendices A and B, must be funded, monitored, reported on, etc." Addendum, ER 15315. In doing this, the district court tried to give Defendants some flexibility in administering the Medi-Cal program, but Defendants then criticize the lower court for not complying with Rule 65. AOB 47. Damned if you, damned if you don't.

"Plaintiffs have obstreperously resisted defining what they mean by the terms 'wraparound services' and therapeutic [foster] care." [67] AOB 3. In fact, Plaintiffs' supplemental responses to interrogatories included a one-page definition of wraparound services followed by an eight-page chart that breaks wraparound services into nine different components and, for each such component, provides a definition, a listing of the rendering providers and a listing of the relevant federal statutory authorization. Goldsmith Decl., ER 12535-36, ¶20; ER 12627-36. Plaintiffs' supplemental responses similarly included a one-page definition of TFC followed by a seven-page chart setting forth the different components of TFC, the definition of these components, as well as the corresponding list of rendering providers and statutory authorization for these components. *Id*., ER 12637-44. The district court adopted these detailed responses as Appendices A and B to the Addendum to the Order. ER 1530-38.

Another grievance of Defendants is that the district court supposedly did not hold a "hearing on the merits" of Plaintiffs' preliminary injunction motion. AOB 20, 24. On closer inspection, Defendants' complaint is that they did not have much of an opportunity to present oral argument at the October 31 hearing. A district court may, however, determine motions without oral hearing upon brief written

[67] Defendants did not even ask Plaintiffs for definitions of these terms until April 28, 2004. Supplemental Decl. of Robert D. Newman, ER 13191, ¶2. Plaintiff Henry D. served timely responses to the relevant interrogatories on May 28, 2004. *Id.*, ¶3.

statement of reasons in support and opposition. Fed.R.Civ.P. 78. *See, e.g., Spradlin v. Lear Siegler Management Services Co., Inc.*, 926 F.2d 865, 869 (9th Cir. 1991) (appellant failed to demonstrate that he was prejudiced by being denied opportunity to present oral argument since '[a]rgument by counsel serves only to elucidate the legal principles and their application to the facts at hand; it cannot create the factual predicate"). Here, Defendants have made no showing of any prejudice because they were not allowed to present a more extensive oral argument regarding the preliminary injunction motion.

Defendants make passing references to California's Mental Health Waiver, Plaintiffs' alleged noncompliance with an April 19, 2005, discovery order, the district court's discovery rulings and, the denial of a joinder motion. AOB 47. "A 'bare assertion' of an issue 'does not preserve a claim, particularly when, as here, a host of other issues are presented for review.'" *D.A.R.E. America v. Rolling Stone Magazine*, 270 F.3d 793, 793 (9th Cir. 2001) (citation omitted). "'Issues raised in brief which are not supported by argument are deemed abandoned.'" *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992)(citation omitted). Defendants have advanced no arguments regarding any of these issues. They are all waived.

CONCLUSION

For the foregoing reasons, the Court should affirm the Order granting the preliminary injunction motion in its entirety.

Dated: August 10, 2006

Respectfully submitted,

By _____
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STATEMENT OF RELATED CASES

Emily Q., et al. v. Sandra Shrewy, Case Nos. 06-55339 and 06-55489, is a related case to the instant case in that it too is before District Judge Matz and it involves the obligations of California's Medicaid program to provide a medically necessary, mental health service – therapeutic behavioral services – to a statewide class of Medicaid eligible beneficiaries (albeit a different class than the class in *Katie A.*). Plaintiffs agree with Defendants that *Emily Q.* is *not* related to the instant appeal.

REQUEST FOR ORAL ARGUMENT

Plaintiffs hereby request that this appeal be set for oral argument.

Dated: August 10, 2006

Respectfully submitted,

By _____
Robert D. Newman
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this Brief of Plaintiff-Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,941 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated: August 10, 2006

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