



CDSS

WILL LIGHTBOURNE
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES

744 P Street, Sacramento, CA 95814 www.cdss.ca.gov



EDMUND G. BROWN JR.
GOVERNOR

December 7, 2011

ALL-COUNTY LETTER NO.: 11-84

TO: ALL COUNTY WELFARE DIRECTORS
IHSS PROGRAM MANAGERS

SUBJECT: DAVID OSTER, et al., v. WILL LIGHTBOURNE, et al., TEMPORARY
RESTRAINING ORDER HALTING IMPLEMENTATION OF THE
20-PERCENT REDUCTION IN IHSS RECIPIENTS' AUTHORIZED
HOURS

REFERENCE: ACL NO. 11-81, DATED NOVEMBER 29, 2011

This All-County Letter (ACL) provides information regarding a temporary restraining order (TRO) issued in DAVID OSTER, et al. v. WILL LIGHTBOURNE, et al., a lawsuit filed in the United States District Court for the Northern District Of California, San Francisco/Oakland Division, challenging the 20-percent reduction in In-Home Supportive Services (IHSS) recipients' authorized service hours scheduled to take effect on January 1, 2012, pursuant to Welfare and Institutions Code (W&IC) section 12301.07. On December 1, 2011, the court issued a TRO directing the California Department of Social Services (CDSS) to immediately halt implementation of the 20-percent reduction. A copy of the TRO is attached.

For the reasons described below, ACL 11-81 is hereby rescinded. The information contained in this ACL supersedes and replaces ACL 11-81.

BACKGROUND

Senate Bill (SB) 73 (Chapter 34, Statutes of 2011) added section 12301.07 to the W&IC, which requires CDSS to implement a 20-percent reduction in each IHSS recipient's authorized service hours effective January 1, 2012, in the event that the state budget revenue forecast in December 2011 is less than approximately \$87.5 billion (as specified in Section 3.94 of the Budget Act of 2011).

REASON FOR THIS TRANSMITTAL

- State Law Change
- Federal Law or Regulation Change
- Court Order
- Clarification Requested by One or More Counties
- Initiated by CDSS

In anticipation that the budget reduction trigger provision would become operative, CDSS, on November 29, 2011, released ACL No. 11-81 which provided counties with instructions for implementing the 20-percent reduction in authorized service hours.

On December 1, 2011, plaintiffs sought a TRO in federal district court claiming that CDSS' efforts to implement SB 73, and the legislation itself, were potentially in violation of federal law. The court granted a TRO prohibiting CDSS from taking any actions to implement the reduction in IHSS recipients' service hours mandated by SB 73. Specifically, the TRO directs CDSS to take the following steps:

- Take all actions necessary to ensure that no IHSS recipient' hours are reduced because of SB 73;
- Refrain from making any changes to the Case Management, Information, and Payrolling System (CMIPS) to implement SB 73 and reverse any changes to CMIPS that have already been made;
- Rescind ACL No. 11-81 and inform all counties that it has been rescinded and that the reductions in IHSS recipients' service hours mandated by SB 73 have been temporarily enjoined; and
- Halt issuance of any notices (including but not limited to Notices of Action), letters, time sheets, e-mails, web postings, or any other written materials to IHSS recipients or providers in any way suggesting that their authorized hours have been or will be reduced, and rescind any notices, etc. already issued.

STATE RESPONSIBILITIES

The ACL No. 11-81 stated that in November 2011, programming changes would be made to CMIPS to calculate the 20-percent reduction in each IHSS recipient's total monthly authorized service hours. The CMIPS implementation of the 20-percent reduction did not occur.

The ACL 11-81 also stated that, by December 15, 2011, CDSS would mail out Notices of Action to inform recipients that, as a result of a new state law, their authorized service hours will be reduced by 20-percent, effective January 1, 2012. Aforementioned notices have not, and will not be issued pending further authorization from the court.

COUNTY RESPONSIBILITIES

Counties are instructed to immediately cease any and all actions being taken pursuant to ACL 11-81, or to otherwise implement SB 73.

CDSS is aware that some recipients already have completed and submitted Applications for IHSS Supplemental Care (SOC 877). Counties are instructed to retain any SOC 877 forms received pending the final resolution of this litigation.

Should you have questions regarding any information in this ACL, please contact the Adult Programs Policy and Operations Bureau at (916) 651-5350.

Sincerely,

Original Document Signed By:

EILEEN CARROLL
Deputy Director
Adult Programs Division

Attachment

c: CWDA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

DAVID OSTER, *et al.*,

Plaintiffs

v.

WILL LIGHTBOURNE, Director of the
California Department of Social Services;
TOBY DOUGLAS, Director of the California
Department of Health Care Services;
CALIFORNIA DEPARTMENT OF HEALTH
CARE SERVICES; and CALIFORNIA
DEPARTMENT OF SOCIAL SERVICES,

Defendants

) Case No.: CV 09-04668 CW

) **ORDER GRANTING APPLICATION**
) **FOR TEMPORARY RESTRAINING**
) **ORDER AND ORDER TO SHOW CAUSE**
) **WHY A PRELIMINARY INJUNCTION**
) **SHOULD NOT ISSUE**

1 Plaintiffs' application for a temporary restraining order and order to show cause why a
2 preliminary injunction should not issue came before this Court for consideration on December 1,
3 2011. Upon consideration, and for good cause shown, IT IS HEREBY ORDERED that the TRO
4 application is GRANTED.

5 "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
6 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
7 balance of equities tips in his favor, and that an injunction is in the public interest." Winter v.
8 Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008). Alternatively, "a preliminary
9 injunction could issue where the likelihood of success is such that serious questions going to the
10 merits were raised and the balance of hardships tips sharply in plaintiff's favor," so long as the
11 plaintiff demonstrates irreparable harm and shows that the injunction is in the public interest.
12 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation and
13 internal quotation and editing marks omitted).

14 A court employs a sliding scale when considering a plaintiff's showing as to the likelihood
15 of success on the merits and the likelihood of irreparable harm. Id. "Under this approach, the
16 elements of the preliminary injunction test are balanced, so that a stronger showing of one element
17 may offset a weaker showing of another." Id.

18 In support of this Order, the Court makes the following findings. Defendants' proposed
19 notices regarding the reduction in most In Home Supportive Services ("IHSS") recipients' service
20 hours and regarding Care Supplements raise serious questions of violations of the federal Due
21 Process Clause. In addition, SB 73 also raises serious questions of violations of Title XIX of the
22 Social Security Act, 42 U.S.C. § 1396a ("the Medicaid Act"), the Americans with Disabilities Act
23 of 1990, 42 U.S.C. § 12312 ("ADA") or Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.
24 § 794 ("Section 504"), by placing IHSS recipients at imminent risk of unnecessary and unwanted
25 out-of-home placement, including in institutions such as nursing homes, board and care facilities,
26 and psychiatric hospitals; by discriminating on the basis of type of disability; and by using
27 methods of administration that will exclude individuals with disabilities from IHSS. The potential
28

1 for IHSS recipients to apply for relief from the reductions mandated by SB 73 does not cure these
2 defects.

3 The planned IHSS reductions, unless enjoined, will cause immediate and irreparable harm
4 by placing members of the plaintiff class at imminent and serious risk of harm to their health and
5 safety, as well as of unnecessary and unwanted out-of-home placement including
6 institutionalization.

7 Plaintiffs have no adequate remedy at law.

8 Thus, serious questions going to the merits are raised and the balance of hardships tips
9 sharply in Plaintiffs' favor. The balance of equities strongly favors Plaintiffs because Defendants'
10 only interest is fiscal, whereas the plaintiff class faces life or death consequences. Plaintiffs have
11 demonstrated irreparable harm and that the injunction is in the public interest.

12 The Court finds that no bond is necessary. *Temple Univ. v. White*, 941 F.2d 201, 220 (3d
13 Cir. 1991); *Sherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972); *see also* Preliminary Injunction
14 Order (Dkt. 198) at 29 (waiving bond requirement in this action because Plaintiffs "are indigent
15 and to ensure their ability to access the courts on behalf of themselves and other class members").

16 Accordingly, IT IS HEREBY ORDERED that, pending an order by this Court as to
17 whether a preliminary injunction should issue, Defendants, their officers, agents, servants,
18 employees, and attorneys, and all persons acting by, through, under, or in concert with Defendants
19 (referred to collectively hereinafter as "Defendants") are enjoined from taking any actions to
20 implement the reduction in IHSS recipients' service hours mandated by SB 73.

21 IT IS FURTHER ORDERED that Defendants take all actions necessary to ensure that no
22 IHSS consumers' hours are reduced because of SB 73 during the pendency of this injunction.

23 IT IS FURTHER ORDERED that Defendants refrain from making any changes to the
24 Case Management, Information and Payrolling System ("CMIPS") to implement the reductions
25 contemplated by SB 73.

26 IT IS FURTHER ORDERED that, to the extent Defendants have already taken any actions
27 to implement those reductions, Defendants immediately undo any such actions. This includes, but
28

1 is not limited to, immediately undoing any changes to the Case Management, Information and
2 Payrolling System ("CMIPS") made to implement the reductions contemplated by SB 73.

3 IT IS FURTHER ORDERED that Defendants immediately rescind All-County Letter
4 (ACL) No. 11-81 and inform all counties that it has been rescinded and that the reductions in
5 IHSS recipients' service hours mandated by SB 73 have been enjoined.

6 IT IS FURTHER ORDERED that Defendants immediately halt issuance of any notices
7 (including but not limited to Notices of Action), letters, time sheets, e-mails, web postings, or any
8 other written materials to IHSS recipients or providers in any way suggesting that their authorized
9 hours have been or will be reduced as a result of SB 73, or as a result of any actions undertaken to
10 implement SB 73.

11 IT IS FURTHER ORDERED that, if Defendants have already issued any notices
12 (including but not limited to Notices of Action), letters, time sheets, e-mails, web postings, or any
13 other written materials to IHSS recipients or providers in any way suggesting that their authorized
14 hours have been or will be reduced as a result of SB 73, or as a result of any actions undertaken to
15 implement SB 73, Defendants immediately issue notices to those IHSS recipients or providers,
16 informing them that their authorized hours will not be reduced as a result of SB 73, or as a result
17 of any actions undertaken to implement SB 73, due to this injunction. Any such notice shall be
18 accessible to recipients and/or providers whose primary language is not English, and/or who have
19 vision impairments.

20 IT IS FURTHER ORDERED that, within five business days from the date of this order,
21 Defendants shall serve and file a declaration verifying that they have complied with this order and
22 detailing what steps, if any, they have taken to do so.

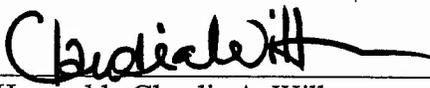
23 IT IS FURTHER ORDERED that Plaintiffs' papers filed in support of their application for
24 a temporary restraining order shall be treated as Plaintiffs' moving papers for a preliminary
25 injunction. Defendants may file and serve their opposition to Plaintiffs' request for a preliminary
26 injunction on or before December 7, 2011. In the event that Defendants file their opposition by
27 that date, Plaintiffs may file a reply brief in support of their motion for preliminary injunction no
28

1 later than December 9, 2011, and a hearing on Plaintiffs' request will be held on December 15,
2 2011 at 2:00 pm.

3 Alternatively, Defendants may file and serve their opposition to Plaintiffs' request for a
4 preliminary injunction at their convenience. Plaintiffs shall file a reply brief in support of their
5 motion no later than two full court days thereafter. A hearing on Plaintiffs' request for a
6 preliminary injunction will be scheduled for the first or second Thursday after Plaintiffs' reply is
7 filed, at 2:00 pm. The temporary restraining order shall remain in effect until the day the hearing
8 is held.

9
10 IT IS SO ORDERED.

11
12
13 Dated: December 1, 2011


14 Honorable Claudia A. Wilken
15 United States District Court Judge
16
17
18
19
20
21
22
23
24
25
26
27
28