DEPARTMENT 85 LAW AND MOTION RULINGS

Case Number: BS170173 **Hearing Date:** January 14, 2020 **Dept:** 85

Patrick Kelley & Matthew Reed v. California Department of Health Care Services, et al., BS170173
Tentative decision on: (1) petition for writ of administrative mandate: denied; (2) petition for writ of traditional mandate: granted in part

Petitioners Patrick Kelley ("Kelley") and Matthew Reed ("Reed"), by and through his guardian *ad litem* Vicki Reed, petition the court for a writ of traditional mandate compelling Respondents Department of Health Care Services and Jennifer Kent, in her official capacity as Director (collectively, "DHCS"), comply with their legal duties to (1) ensure individuals receive correct Medi-Cal eligibility determinations based on the spousal impoverishment rule, (2) notify all potentially eligible beneficiaries of the new rule, (3) establish a retroactive eligibility process for in-home supportive services ("IHSS"), and (4) ensure payment or reimbursement for IHSS. Reed also seeks administrative mandamus reversing an administrative hearing decision by Respondent California Department of Social Services ("DSS") incorrectly denying his retroactive eligibility for IHSS. The court has read and considered the moving papers, opposition, and reply,[1] and renders the following tentative decision.

I. Statement of the Case

A. Petition

Petitioners commenced this proceeding on July 6, 2017. The operative pleading is the Fourth Amended Petition ("FAP") filed May 16, 2019, which alleges causes of action for administrative and traditional mandamus. The FAP alleges in pertinent part as follows.

The expanded spousal impoverishment protection, a special Medi-Cal income and asset counting methodology, enables individuals with disabilities who are married to qualify for Medi-Cal. Medi-Cal eligibility enables beneficiaries with disabilities to receive the home and community-based services they need to continue living in the community and with their spouse. Prior to this change in the law, the choice for the spouse requiring home and community-based services was institutionalization or impoverishment.

Effective January 1, 2014, the federal Patient Protection and Affordable Care Act requires all states to expand the definition of "institutional spouse" to include spouses who are eligible for a variety of Medi-Cal home and community-based programs. The practical effect of this change in definition is to increase the number of individuals who qualify for Medi-Cal using the spousal impoverishment protection methodology.

For more than five years, DHCS has failed to ensure that all potentially eligible individuals have received a correct Medi-Cal eligibility determination and that the harms caused by an incorrect Medi-Cal eligibility determination have been cured. Since January 1, 2014, thousands of persons with significant disabilities have been erroneously denied Medi-Cal or wrongly assessed a Medi-Cal share of cost, and consequently were either denied access to needed home and community-based services or forced to pay out-of-pocket for those services, often at a prohibitive cost. The effect of DHCS's failures placed Petitioners and other potentially eligible individuals at unnecessary risk of institutionalization and impoverishment.

Petitioner Kelley is a 68-year old veteran who lives with his wife. Kelley has primary progressive multiple sclerosis. He can only use his left hand for simple, limited motor tasks and he cannot walk unassisted. Because of his condition, Kelley must be monitored at all times, and requires nursing facility level of care. Kelley needs in-home supportive services ("IHSS") through Medi-Cal, but he cannot receive them until he is found to be eligible. Petitioner Kelley would have been eligible for Medi-Cal as of January 1, 2014 had the expanded spousal impoverishment protection been applied. Instead, Kelley's application for Medi-Cal was denied for exceeding the Medi-Cal asset limit. Although Kelley was eventually able to obtain Medi-Cal

coverage after an administrative fair hearing, he continues to have a beneficial interest in the consistent statewide administration and supervision of the expanded spousal impoverishment protection because he will need to renew his Medi-Cal eligibility annually and is at risk of losing eligibility at the time of redetermination. Because DHCS failed to ensure consistent statewide supervision of the counties' application of the expanded spousal impoverishment protection, the county may not apply the correct eligibility rules to his annual redetermination.

Reed is a 63 year-old man with multiple sclerosis, Bell's Palsy, and vascular dementia following a stroke. Because of the severity of his disabilities and medical condition, Reed is eligible for Medi-Cal home and community-based services at a nursing home level of care. At least as early as July 1, 2016, Reed would have been eligible for Medi-Cal without a share of cost had expanded spousal impoverishment protections been applied. Instead, he was erroneously required to pay a share of cost of more than $1,500 a month. Because Reed was not able to afford this share of cost, he was not able to access Medi-Cal benefits, including IHSS and other home and community-based services programs.

Reed has still not received all of the Medi-Cal benefits to which he is entitled under the expanded spousal impoverishment protection. Reed has been denied an IHSS assessment retroactive to the date of his Medi-Cal eligibility under the expanded spousal impoverishment protection.

DHCS's decision to deny his retroactive eligibility for IHSS constitutes a prejudicial abuse of discretion because the Administrative Law Judge misapplied the standard for equitable estoppel and did not proceed in the manner required by law. DHCS breached its ministerial duties: (1) to identify all potentially eligible individuals statewide; (2) to notify all potentially eligible individuals statewide of the expanded spousal impoverishment protection so that they have a reasonable opportunity to apply or seek a correct eligibility determination; (3) to supervise the counties and to enforce the expanded spousal impoverishment protection to ensure all potentially eligible individuals statewide receive correct and prompt Medi-Cal eligibility determinations; (4) to create a process to determine retroactive eligibility for IHSS; and (5) to provide retroactive reimbursement for Medi-Cal covered expenses that would have been covered if Medi-Cal had been properly assessed initially.

DHCS's failures to comply with its ministerial duties also resulted in violation of anti-discrimination laws, Welfare & Institutions ("W&I") Code sections 10000 and 10500, and procedural due process.

B. Course of Proceedings

On January 30, 2018, the court directed Petitioners to file a First Amended Petition within 21 days. Petitioners filed the First Amended Petition on February 20, 2018.

On April 3, 2018, the court approved Petitioners' request to dismiss the FAP's class action allegations and Petitioners filed the Second Amended Petition ("SAP") on April 10, 2018.

On June 14, 2018, the court sustained Respondents' demurrer to the SAP with leave to amend. Petitioners filed the Third Amended Petition ("TAP") on December 21, 2018. On January 24, 2019, the court severed the TAP's taxpayer claim.

The FAP was filed by stipulation on May 16, 2019, adding DSS and its director as Respondents.

II. Governing Law

A. Medi-Cal

The Medicaid Act, 42 USC sections 1396 *et seq*., authorizes federal financial support to states for medical assistance to low-income persons who are aged, blind, disabled, or members of families with dependent children. The Medicaid program is jointly financed by the federal and state governments and administered by the states. California has elected to participate in the Medicaid program through the Medi-Cal program. W&I §§ 14000 *et seq.*; 22 CCR §§ 50000 *et seq.* DHCS is the state agency that administers Medi-Cal.

A county shall (1) perform redeterminations of eligibility for Medi-Cal beneficiaries every 12 months and (2) promptly redetermine eligibility whenever the county receives information about changes in a beneficiary's circumstances that may affect eligibility for Medi-Cal benefits. W&I §14005.37(a). Medi-Cal eligibility shall continue during the redetermination process and a beneficiary's Medi-Cal eligibility shall not be terminated until the county makes a specific determination based on facts clearly demonstrating that the beneficiary is no longer eligible for Medi-Cal benefits under any basis. W&I Code §14005.37(d).

DHCS has ultimate responsibility for the Medi-Cal program. 42 U.S.C. §1396a(a)(5); 42 CFR § 431.10; W&I Code §10740. DHCS is responsible for ensuring that DSS and all local district offices that handle Medi-Cal

cases comply with state and federal laws. 42 CFR §431.10. DHCS must furnish Medicaid promptly to beneficiaries without any delay caused by the agency's administrative procedures, continue to furnish Medicaid regularly to all eligible persons until they are found to be ineligible, and make arrangement to assist applicants and beneficiaries to get emergency medical care when needed, 24 hours a day and seven days a week. 42 CFR §435.930.

Every person administering aid under any public assistance program shall conduct himself with courtesy, consideration, and respect toward applicants for and recipients of aid under that program, and shall endeavor at all times to perform his duties in such manner as to secure for every person the amount of aid to which he is entitled, without attempting to elicit any information not necessary to carry out the provisions of law applicable to the program, and without comment or criticism of any fact concerning applicants or recipients not directly related to the administration of the program. W&I Code §10500. This statute imposes a ministerial duty to give notification to individuals of their right to make an application for welfare benefits, regardless of the applicant's eligibility for aid. Diaz v. Quitoriano, (1969) 268 Cal. App. 2d 807, 810.

B. Conlan I and II

In Conlan v. Bonta, ("Conlan I") (2002) 102 Cal.App.4th 748 and Conlan v. Shewry, ("Conlan II") (2005) 131 Cal.App.4th 1354, the appellate courts directed DHCS to ensure that Medi-Cal recipients entitled to reimbursement for covered services receive notification and are promptly reimbursed. DHCS is required to provide recipients reimbursement for medically necessary services received and paid for during the following periods: (1) a retroactive period up to three months prior to the date of application for Medi-Cal; (2) the evaluation period, which is the period between the date of application for Medi-Cal eligibility and the date it was approved; and (3) the post-approval period covering excess co-payments and excess Medi-Cal Share of Cost expenses paid after the recipient was approved for Medi-Cal.

C. The Spousal Impoverishment Rule

Under federal law, married persons with significant disabilities who need home and community-based services are entitled to Medi-Cal eligibility determinations based on specialized eligibility rules known as the spousal impoverishment methodology. 42 U.S.C. §1396r-5(h)(1)(A)). In 2010, the Affordable Care Act ("ACA") expanded the definition of an "institutionalized spouse" to include persons who require an institutional level of care but can receive the necessary services through home and community-based Medicaid programs. Pub. L. No. 111-148, §2404 (2010) (amending 42 U.S.C. § 1396r5(h)(1)(A)).

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

D. IHSS

Once determined eligible for Medi-Cal, an institutionalized spouse has access to Medi-Cal covered services, including IHSS. DHCS has delegated to DSS the administration of IHSS. Ex. 26, ¶14.

The purpose of the IHSS program is to provide supportive services to persons who are unable to perform the services themselves and cannot safely remain in their homes or abodes of their own choosing unless these services are provided. W&I Code §12300(a). IHSS was developed to "enable aged, blind or disabled poor persons to avoid institutionalization by remaining in their homes with proper supportive services." Marshall v. McMahon, (1993) 17 Cal.App.4th 1841, 1844. IHSS services include: (1) preparation and cleanup of meals, routine laundry, shopping for food and errands; (2) personal care services such as bowel and bladder care, dressing, bathing, oral hygiene, grooming; (3) accompaniment to medical appointments; and (4) protective supervision. *See* W&I Code §12300 *et. seq.*

DSS is charged with administering the IHSS program in compliance with state and federal laws. W&I Code §§ 12301, 12302. DSS is required to adopt regulations establishing a range of services available to recipients based on their individual needs. W&I Code §12301.1.

County welfare departments administer the IHSS programs under DSS's supervision. Counties process applications for IHSS, determine the individual's eligibility and needs and authorize services. The total amount of services is limited by statute, depending on the severity of the impairment and a recipient's needs. W&I Code §12303.4; Marshall v. McMahon, (1993) 17 Cal.App.4th 1841, 1844.

Los Angeles County's (sometimes "County") Department of Public Social Services ("DPSS") administers IHSS in the County. A social worker does an annual in-home assessment to determine the level of financial benefits that are appropriate. When warranted, the social worker may recommend a reduction of the benefit payments. Periodically, a reduction in the level of benefits is mandated by the State. The assessments are reviewed and approved by a supervisor.

California has adopted a system for a fair hearing ("ASH hearing"), codified at W&I Code section 10950 *et seq*. and Government Code section 11500 *et seq.*, consistent with federal requirements. *See* 42 U.S.C. §671(a)(12). If an applicant's request for benefits is denied, the applicant may request an ASH hearing with DSS conducted by an administrative law judge or DSS's director. W&I Code §§ 10950, 10055, 10953.

DSS is represented at the ASH hearing by an appeal hearing specialist ("AHS"). Manual §22-073.13. The County is represented at the ASH hearing by a representative and DPSS's social worker may attend. When an AHS is assigned to a case, he or she must review the applicable law and the evidence in the case record, including contacting the eligibility worker if necessary. Manual §22-073.22. If the AHS determines that a hearing is appropriate, he or she must then contact the claimant to inquire if the claimant plans to attend the hearing and determine if there are any additional issues that the claimant intends to raise at the hearing. Manual §22-073.232(a)-(b). The AHS must provide the claimant with "any and all information which can be of assistance to the claimant in preparing for the hearing." Manual §22-073.232(c). This includes all regulations and evidence, including evidence favorable to the claimant's case. Id. The claimant must also be informed of the availability of free legal representation. Id.

III. Reed's Petition for Administrative Mandamus

Petitioner Reed seeks a writ administrative mandamus to reverse DSS's decision to deny his retroactive eligibility for IHSS.

A. Standard of Review

A party may seek to set aside an agency decision by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, (1974) 11 Cal.3d 506, 514-15.

CCP section 1094.5 does not in its face specify which cases are subject to independent review, leaving that issue to the courts. Fukuda v. City of Angels, (1999)20 Cal.4th 805, 811. In cases reviewing decisions which affect a vested, fundamental right the trial court exercises independent judgment on the evidence. Bixby v. Pierno, (1971) 4 Cal.3d 130, 143. See CCP §1094.5(c). In administrative mandamus actions to review decisions denying applications for public assistance, the trial court exercises independent judgment on the evidence. Ruth v. Kizer, (1992) 8 Cal.App.4th 380, 385; *see also* Frink v. Prod, (1982) 31 Cal.3d 166, 171 (applying independent judgment standard to decisions terminating welfare).

Under the independent judgment test, "the trial court not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo." Id. at 143. The court must draw its own reasonable inferences from the evidence and make its own credibility determinations. Morrison v. Housing Authority of the City of Los Angeles Board of Commissioners, (2003) 107 Cal.App.4th 860, 868. In short, the court substitutes its judgment for the agency's regarding the basic facts of what happened, when, why, and the credibility of witnesses. Guymon v. Board of Accountancy, (1976) 55 Cal.App.3d 1010, 1013-16.

"In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." Fukuda, *supra*, 20 Cal.4th at 817. Unless it can be demonstrated by petitioner that the agency's actions are not grounded upon any reasonable basis in law or any substantial basis in fact, the courts should not interfere with

the agency's discretion or substitute their wisdom for that of the agency. Bixby, *supra*, 4 Cal.3d 130, 150-151; Bank of America v. State Water Resources Control Board, (1974) 42 Cal.App.3d 198, 208.

The agency's decision must be based on a preponderance of the evidence presented at the hearing. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. The hearing officer is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, *supra*, 11 Cal.3d 506, 514-15. Implicit in section 1094.5 is a requirement that the agency set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. Id. at 115.

An agency is presumed to have regularly performed its official duties (Ev. Code §664), and the petitioner therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137. "[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion. Afford v. Pierno, (1972) 27 Cal.App.3d 682, 691.

B. Statement of Facts

1. Background

In 2014, Reed was determined to be eligible for Medi-Cal. AR 136. He also was approved for IHSS, but he could not afford to use it because his share of cost was so high. Id.

In July 2016, Reed applied for a waiver program that provides HCBS. AR 11, 125. He again applied for Medi-Cal and his monthly share of cost was determined to be $1,509, nearly 30% of his monthly income. AR 14. Reed could not afford to use his Medi-Cal benefits, so he did not apply for IHSS. AR 136, 121.

Reed appealed the determination and then conditionally withdrew his appeal because the County agreed to use the spousal improvement methodology to re-determine his Medi-Cal eligibility retroactive to the July 2016 date of his application for a waiver, and to reimburse him for retroactive IHSS contingent on approval of his Medi-Cal eligibility. AR 15-16.

In September 2017, the County's DPSS informed Reed that it was unable to process retroactive IHSS payments because he had not applied for IHSS between the 2014 termination of IHSS and his subsequent application in May 2017. AR 23. Reed appealed, arguing that his IHSS application and eligibility should both be retroactive to July 2016, the date of his Medi-Cal eligibility, based on equitable estoppel. AR 1-9.

2. DSS's Decision

DSS held an AHS hearing for Reed's appeal on July 18, 2018, with Administrative Law Judge Jonathan Huang ("ALJ") conducting the hearing. AR 98. A County representative was present. Reed was present and also represented by a law clerk from an attorney's office. AR 87, 89. The ALJ found that the sole issue was whether Reed was eligible to receive retroactive IHSS benefits from July 2016 through April 2017. AR 89.

The ALJ subsequently issued his decision sustaining the County's action denying Reed retroactive IHSS benefits. AR 87. The ALJ found in pertinent part as follows.

DSS regulations provide that the effective date of eligibility for IHSS is the actual date of determination unless the determination is made within 30 days of the date of application and the applicant is determined to have been eligible when services were initiated. AR 96. In no event shall the effective date of eligibility be prior to the date of application. AR 96.

It was undisputed that Reed did not submit an IHSS application, or orally apply for IHSS, between November 2014 and May 11, 2017. AR 96. Reed applied for IHSS on May 11, 2017. AR 96. Based on the applicable state regulations, the effective date of Reed's IHSS eligibility was May 11, 2017. AR 96.

Reed raised numerous arguments that he should have been issued IHSS benefits retroactive to July 2016, including the close relationship between the Medi-Cal and IHSS programs, the public policy in favor of granting retroactive IHSS benefits, the unfairness of denying Reed such benefits, and the futility of filing an IHSS application in 2016. AR 96. There is no authority in state regulations for retroactive coverage of a CFCO IHSS recipient who is a Medi-Cal beneficiary. Nor is there a rule that requires the County to apply the Medi-Cal retroactive coverage rules in the administration of the IHSS program. AR 96.

Reed referred to All County Letter 07-11 and ACWDL 17-25, but neither letter discusses the applicability of retroactive IHSS benefits or provides instructions directly contrary to the existing state regulations. AR 96. All County Letter 07-11 clarifies the rules pertaining to the implementation of Conlan II claims and ACWDL 17-25 provides the applicability of the spousal impoverishment rule to the recipients of HCBS. AR 96. Both

letters refer to IHSS recipients or persons who have requested IHSS services. AR 96. Reed conceded that ACWDL 17-25 is silent on how counties should process retroactive IHSS benefits. AR 96.

As neither the rules regarding Conlan II claims nor spousal impoverishment rule mandates that the County to determine Reed's IHSS eligibility without a written application or an oral request for service, it cannot be concluded that there were governmental delays in making IHSS eligibility determinations for Reed. A public policy-based argument was therefore not persuasive. AR 96. Reed applied for IHSS benefits on May 11, 2017. AR 97. Because he has no right for retroactive IHSS benefits, he was eligible for only IHSS benefits from May 11, 2017 onward. AR 97.

Reed argued that the doctrine of equitable estoppel must be applied against the County's reliance on the date of the IHSS application, and that an application submitted in 2016 would have been futile due to the high share of cost. AR 97. While counties are charged with certain responsibilities -- such as assisting IHSS recipients to establish their eligibility and need for service, processing the recipient's request for service in a timely manner, and obtaining a service provider when the recipient is unable to obtain one individually -- these responsibilities are not triggered unless a request for service has been made. AR 97. There is no rule or authority in pertinent statutes and regulations that requires the County to inform a claimant of his right to receive IHSS benefits or preserve his IHSS application date. AR 97.

As the County correctly authorized IHSS benefits for Reed effective May 11, 2017, and as the authorization date of the IHSS benefits was not due to the County's administrative error, the doctrine of equitable estoppel was not applicable. AR 97. The ALJ acknowledged Reed's contentions that it would be cost prohibitive for him to have applied for IHSS in 2016 and that the timing of ACWDL 17-25 may be a crucial reason why Reed did not submit his IHSS application earlier. AR 97. These facts do not show that the County was at fault for not providing Reed retroactive IHSS benefits as requested. AR 97.

DSS adopted the ALJ's decision on August 20, 2018. AR 87.

C. Analysis

1. Whether DHCS is a Proper Respondent

Respondents argue that only DSS, the agency issuing the AHS hearing decision, is the proper respondent for Reed's administrative mandamus claim. Opp. at 5.

Petitioners reply that DHCS is a proper party for Reed's administrative mandamus claim because DSS's incorrect decision was the result of DHCS's failure to timely implement the changes to the spousal impoverishment rule and inform DSS of the rule. Reply at 2. Reed seeks mandamus relief against DHCS because he relied on both DHCS and DSS to correctly administer Medi-Cal eligibility rules and IHSS benefits. Id. Finally, DHCS is a proper party because it has an interest in the subject matter and complete relief cannot be accorded in its absence. *See* CCP §389(a). Id.

As Respondents correctly note (Opp. at 5), the only proper respondent in a claim for administrative mandate is the agency that issued the decision because only the issuing agency can set aside the decision. State of California v. Superior Court (Veta), ("Veta") (1974) 12 Cal.3d 237, 255. In Veta, a party who had received an unfavorable decision from the Coastal Commission named the Commission, individual employees of the Commission, and the State of California as defendants. Id. The California Supreme Court ruled that the claims against Commission employees and the State of California should have been dismissed because "[i]nsofar as Veta seeks a review of the Commission's denial of its permit, only the Commission and its members may set aside the decision." Id.

Petitioners fail to cite any authority supporting their contention that DHCS is a proper respondent to the administrative mandamus claim because it is responsible for DSS's wrong decision. Although Petitioners attempt to distinguish Veta by arguing that the Supreme Court only barred the additional respondents because they were protected by a government immunity statute (Reply at 1-2), the immunity statute only shielded the parties from liability for damages and had no relevance to whether they were proper respondents. Veta, *supra*, 12 Cal.3d at 245.

DSS is the only proper respondent for Reed's administrative mandamus claim. DHCS may be a proper real party-in-interest under CCP section 389(a), but it is not a proper respondent.

2. Equitable Estoppel

Petitioners implicitly concede that (a) the ALJ correctly concluded that DSS regulations provide that the effective date of eligibility for IHSS shall in no event be prior to the date of IHSS application, (b) Reed

applied for IHSS on May 11, 2017, but did not submit any IHSS application between November 2014 and May 11, 2017, and (c) the effective date of Reed's IHSS eligibility was May 11, 2017 based on the applicable DSS regulations. AR 96.

Petitioners assert that the ALJ should have applied the doctrine of equitable estoppel in his decision, and his failure to do so constitutes a prejudicial abuse of discretion. Pet. Op. Br. at 6. Petitioners assert that Reed met all five elements of equitable estoppel against a government agency.

First, "Respondents" were apprised of the facts. At the time of Reed's 2016 Medi-Cal eligibility determination, Respondents and the County's DPSS were aware through ACWDL 17-25 that, effective January 1, 2014, the spousal impoverishment rule must be applied to eligible individuals when conducting Medi-Cal eligibility determinations. Reed AR 15-16, 41-53. Pet. Op. Br. at 6-7.

Second, Respondents intended that their conduct as officials administering the Medi-Cal and IHSS programs be acted upon. Respondents had multiple opportunities to apply the expanded spousal impoverishment methodology to Reed's Medi-Cal eligibility determination in 2014 and 2016, but failed to do so. Reed AR 14. Respondents intended Reed to accept their eligibility determinations, and he justifiably relied on their erroneous decisions. AR 14, 132. *See also* Lentz v. McMahon, (1989) 49 Cal. 3d 393, 401 (county workers who advise recipients "stand in a confidential relation to them," justifying reliance on their benefits determinations).

Third, Reed was ignorant of the true facts. Until 2017, Reed was not aware of the expanded spousal impoverishment rule, which, if applied to his case, would make him eligible for Medi-Cal with a reduced or eliminated share of cost, which would in turn have allowed him to access Medi-Cal covered benefits like IHSS (for which he otherwise would have applied). Reed AR 14, 135. He only learned of the spousal improvement rule when he obtained representation from Bet Tzedek Legal Services. Reed AR 122, 139.

Fourth, Reed relied upon Respondents' conduct to his detriment. He decided to forego applying for IHSS based upon Respondents' wrongful Medi-Cal determination. AR 136-37. DSS's decision acknowledged that "the timing of ACWDL 17-25 may be a crucial reason why the claimant did not submit his IHSS application at an earlier date." AR 97.

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

According to Reed, Respondents failed to apply the expanded spousal impoverishment rule to his case. Reed AR 89. If the expanded rule had been implemented on time, his 2016 application would have been correctly determined. AR 17. He would be eligible for free Medi-Cal and he then would have applied for IHSS. AR 138-39. Respondents should issue a new decision declaring Reed's IHSS eligibility date matches his retroactive Medi-Cal eligibility date of July 2016 and order retroactive payment of IHSS benefits with prejudgment interest. Pet. Op. Br. at 7-8.

Equitable estoppel applies in circumstances where a party has induced another into forbearing to act. Lantzy v. Centex Homes, (2003) 31 Cal..App.4th 363, 383. The elements of estoppel are: (1) the party to be estopped must be appraised of the facts; (2) he must intend that his conduct shall be acted upon; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, 305. The doctrine applies to a public entity in the same manner as a private party when the elements of equitable estoppel have been shown, and when the injustice which would result from a failure to estop the agency is sufficient to justify any adverse effect upon public interest or policy which would result. City of Long Beach v. Mansell, (1970) 3 Cal.3d 462, 496-97.

Reed is attempting to fit a square peg in a round hole because agency equitable estoppel does not apply to Reed's situation. In analyzing this issue, it is the County's DPSS, not DSS or DHCS, that must be subject to equitable estoppel.

As to the first element, there is no evidence that DPSS knew about the expanded spousal impoverishment rule. Opp. at 6. Petitioners' contend that actual knowledge is not necessary because DHCS's knowledge of the rule is imputed to DPSS, which was a party "in such a position that he ought to have known" the facts. Feduniak v. California Coastal Commission, (2007) 148 Cal.App.4th 1346, 1361. The court accepts that

DPSS should have known of the expanded impoverishment rule even if not informed by DSS or DHCS. As Reed argues, counties have an independent duty to know the laws, regulations, and guidance governing the programs they administer. 22 CCR §50101(a)(1)-(3).

As to the second element, there is no evidence that DPSS intended Reed to act on its failure to use the expanded spousal impoverishment rule. In 2014, DPSS determined Reed to be eligible for Medi-Cal and approved him for IHSS with a share of cost. Based on these numbers, Reed concluded that his share of cost was too high for him to use. In July 2016, Reed again applied for Medi-Cal and was approved. Again, he could not afford to use his Medi-Cal benefits because his monthly share of cost was too high, so this time he decided not to apply for IHSS.

There is nothing about DPSS's decisions finding Reed eligible for Medi-Cal and IHSS in 2014, and again finding Reed eligible for Medi-Cal in 2016, on which DPSS intended Reed to rely. Per element one, DPSS should have known about the expanded spousal impoverishment rule and probably erred in making the two Medi-Cal decisions without applying the rule. But DPSS only made eligibility decisions; it did not intend Reed to rely on representation or promise to Reed about its calculations or use of the expanded impoverishment rule.

While Reed meets the third element that he was ignorant of the expanded spousal impoverishment rule, he has not shown the fourth element that he relied on DPSS's conduct to his injury. DPSS merely made two Medi-Cal eligibility rulings. The rulings apparently were wrong in that Reed's share of Medi-Cal costs was calculated without application of the expanded spousal impoverishment rule. But Reed did not rely on that calculation of his share of costs; he merely accepted the decisions. Reed did not apply for IHSS benefits in 2016 because he thought it would be a waste of time. This was an independent decision and not a forbearance from applying for IHSS in reliance on a representation or promise made by DPSS. As DPSS's representative stated: "How is [Reed's high share of costs] the County's responsibility [when] he did not apply for benefits. [Reed] didn't even give a chance to the County to deny the [IHSS] application." AR 137.[2]

Reed argues that DHCS delayed implementation of the expanded spousal impoverishment rule and intended counties to use the pre-ACA spousal impoverishment rule to make Medi-Cal and IHSS determinations. According to Reed, he would not have been deprived of a correct and timely IHSS eligibility determination but for DHCS's failure. Reply at 3. DHCS's failures may partly explain DPSS's error (*see post*), but equitable estoppel does not apply to DPSS's conduct. DSS were entitled to rely on Reed's failure to apply for IHSS benefits in affirming the denial of retroactive IHSS payment.

DSS correctly declined to apply equitable estoppel to DPSS's conduct so as to provide Reed with retroactive IHSS benefits before he applied for them. Reed's petition for administrative mandamus must be denied.

IV. Traditional Mandamus

Petitioners allege that DHCS has a ministerial duty to use the expanded definition of "institutionalized spouse" to determine Medi-Cal eligibility. DCHS violated this duty by (a) failing to provide Medi-Cal benefits under the expanded spousal impoverishment rule with reasonable promptness, (b) failing to notify all potentially eligible persons, (c) failing to create a retroactive IHSS eligibility process, and (d) failing to reimburse eligible persons with retroactive IHSS benefits. Petitioners further argue that DHCS's actions constituted a risk of institutionalization and therefore violated the integration mandate of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq*., Section 504 or the Rehabilitation Act, 29 U.S.C. §794 *et seq*., and Government Code section 11135.

A. Standard of Review

A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Ibid.

A traditional writ of mandate under CCP section 1085 is the method of compelling the performance of a legal, ministerial duty. Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-584. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance. Id. at 584. Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

Where a duty is not ministerial and the agency has discretion, mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. Mandamus will not lie to compel the exercise of a public agency's discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, ("American Federation") (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angeles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its judgment for that of the agency, whose decision must be upheld if reasonable minds may disagree as to its wisdom. Id. at 371. An agency decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." Kahn v. Los Angeles City Employees' Retirement System, (2010) 187 Cal.App.4th 98, 106. A writ will lie where the agency's discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

No administrative record is required for traditional mandamus to compel performance of a ministerial duty or as an abuse of discretion.

B. Statement of Facts

1. Petitioners' Evidence[3]

a. Background

Without access to IHSS, many disabled persons would not be able to live safely at home because they cannot afford the care they need. *See* Pet. Ex.[4] 1, ¶¶ 8-9; Ex. 13, ¶4. DHCS administers several Medi-Cal HCBS programs to enable disabled persons to remain safely at home, some of which have a waitlist. *See* Pet. Ex. 34. Prior to the ACA, DHCS only applied the spousal impoverishment rule to married individuals who were enrolled in one of these programs. Since 2014, DHCS is required to apply the spousal impoverishment rule to all waitlisted individuals. Pet. Ex. 24, p.13. Despite this change, these waitlisted persons do not consistently receive the benefit of the new rules. *See* Pet. Ex. 2, ¶10; Ex. 6, ¶¶ 8, 10.

Between January 1, 2014 and the filing of this lawsuit on July 6, 2017, DHCS did nothing to put the expanded protections in place. Pet. Ex. 24; Ex. 26, ¶73; Ex. 17, p.52; Ex. 18, p.35. On July 19, 2017, DHCS released ACWDL 17-25 to inform counties of the definition change for "institutionalized spouse" and explain what it meant. Pet. Ex. 24.

Soon after release of ACWDL 17-25, DHCS realized that more guidance for the counties was necessary. Pet. Ex. 17, p.60; Ex. 18, p. 69; Ex. 22, p.31, 56; Ex. 31 ("DHCS understands that without this guidance, the counties are unable to implement changes in the way they determine eligibility.").

In August 2018, DHCS issued supplemental guidance to the counties in ACWDL 18-19. Pet. Ex. 17, p.60; Ex. 25. After ACWDL 18-19 was released, some counties took months longer to introduce the expanded spousal impoverishment rule to their eligibility staff. *See* Pet. Ex. 20, p.50 (Tulare County did not release local guidance until October 4, 2018); Ex. 21, p.44 (San Mateo County did not issue local guidance until November 2, 2018).

To this day, Medi-Cal applicants and beneficiaries experience frustration, delay, and ignorance about getting correct eligibility determinations using the expanded spousal impoverishment rule. *See* Pet. Ex. 4, ¶¶ 7, 9-10; Ex. 11, ¶¶ 4-6; Ex. 16, ¶¶ 12-14. The problem persists statewide. *See* Pet. Exs. 9, ¶¶ 8, 12 (Contra Costa County); Ex. 11, ¶¶ 3, 5 (Orange County). One advocate has intervened in 20 cases spanning ten counties. Pet. Ex. 14, ¶5. Another advocate worked for months to help their client. *See* Ex. 9, ¶12.

DHCS also failed to notify the majority of potentially eligible persons, issuing only one outreach letter to a small subset of people. *See* Pet. Ex. 35. No one who was denied or discontinued from Medi-Cal has been notified that they may have received an incorrect eligibility determination. Pet. Ex. 17, pp. 81, 95. At least one county has the ability to do so. Ex. 20, pp.38-39 (Tulare County). DHCS did not provide the County's DPSS with a list of potentially impacted beneficiaries. Pet. Ex. 22, p.52. DHCS also has not updated any of its public informational materials distributed to counties that would reflect the expansion of the spousal impoverishment rule. *See* Pet. Exs. 44, 46.

Because most people who would benefit from the expanded spousal impoverishment rule have never heard of it and do not know that being on a HCBS waitlist may allow Medi-Cal to use the rule when evaluating their case, and because many county Medi-Cal offices do not understand the rule and do not routinely screen Medi-Cal applicants for the spousal impoverishment program, the correct application of the rule to an individual

case often requires advocate intervention. Pet. Ex. 4, ¶10; Ex. 9, ¶13; Ex. 14, ¶8. The advocates' effort to get the expanded spousal impoverishment rule applied in their clients' cases is time and resource intensive. Pet. Ex. 4, ¶¶ 7, 16; Ex. 11, ¶5.

b. Petitioner Kelley

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

In 2014, Kelley applied for a waiver program that provides HCBS and was placed on the waitlist. Pet. Ex. 3, ¶7. In September 2016, Kelley again applied for Medi-Cal because his family was almost out of money to pay for home care services. Id. ¶9. In February 2017, DPSS denied Kelley's application because he and his wife had savings exceeding the Medi-Cal property limit of $3,000. Id. ¶10. DPSS did not apply the spousal impoverishment methodology when processing either of the 2014 or 2016 applications. Id. ¶¶ 8, 10.

After two administrative hearings and the help of an experienced advocate, Kelley obtained the benefit of the expanded spousal impoverishment rule. Pet. Ex. 3, ¶14. His first hearing was to correct his Medi-Cal eligibility, which did not occur until a year after his application. Id. After he was found eligible, Kelley applied for IHSS. Id. He was granted IHSS, but retroactive only to the date he applied for IHSS, not the January 1, 2014 retroactive date of Medi-Cal eligibility. Id., ¶15. After a second hearing decision in July 2018, Kelley approved for retroactive IHSS eligibility to January 1, 2014. Id. ¶17.

2. Respondents' Evidence[5]

CMS waited approximately 17 months to issue guidance on the change to the spousal impoverishment rule, sending an official State Medical Directors Letter on May 7, 2015. Byerts Decl., Ex. 2. The CMS guidance explained the change and directed the states to apply the spousal impoverishment rule to both institutionalized spouses and spouses who require nursing facility level of care but who receive their care in-home or in a community-based setting. Byerts Decl., Ex. 2, p.2.

Once CMS issued this guidance, in late 2105 or early 2016 DHCS began drafting an ACWDL directing the counties to implement the expanded spousal impoverishment rule. Shanen-Raya Decl. ¶2. In December 2016, DHCS circulated a draft ACWDL to a broad group of stakeholders, including County Welfare Directors Association ("CWDA"), Bet Tzedek, Justice in Aging, and Disability Rights California (the latter three are counsel for Petitioners in this action). Id., ¶3.

Beginning in late December 2016 and continuing into January 2017, DHCS received comments from CWDA and several consumer advocacy groups. Id. Several advocates, including Justice in Aging, Bet Tzedek, and Disability Rights California, provided comments and proposed changes to ACWDL 17-25 on January 4, 2017, some of which DHCS accepted. Id.

Because the spousal impoverishment rule is not a Medi-Cal benefit and instead a methodology for determining Medi-Cal eligibility, DHCS exercised its discretion to implement the new rule by focusing on getting the counties -- which do the eligibility determinations -- up to speed. To that end, DHCS issued ACWDL 17-25 to all 58 counties on July 19, 2017. Byerts Decl., Ex. 1. ACWDL 17-25 directed the counties to apply the spousal impoverishment rule to individuals who (1) request HCBS and meet target criteria for eligibility, (2) are married, and (3) would likely require nursing facility level of care for at least 30 consecutive days. Byerts Decl., Ex. 1, p.3. ACWDL 17-25 gave a detailed explanation of which programs were affected and the process for application of the expanded spousal impoverishment provisions, providing example calculations. Byerts Decl., Ex. 1, pp. 3-12.

ACWDL 17-25 also gave instructions to the counties regarding retroactive implementation of the spousal impoverishment rule. Byerts Decl., Ex. 1, pp. 12-13. ACWDL 17-25 identified three groups who were potentially impacted by the expansion of the spousal impoverishment rule: (1) persons receiving waiver services under DSS's Community First Choice Option ("CFCO") program. Since DSS's CFCO program did not apply spousal impoverishment provisions at implementation, retroactive eligibility determinations were required; (2) married persons who requested HCBS and who were denied or discontinued Medi-Cal; and (3) persons on waiting lists for waiver services. Hennessy Decl. ¶8; Byerts Decl., Ex. 1, pp. 12-13. ACWDL 17-25 directed the counties to use the Conlan process for reimbursements as necessary. Byerts Decl., Ex. 1, p.13.

Beginning in the fall of 2017 and continuing until March 2018, DHCS conducted a series of work groups with the counties and DSS to identify any issues with ACWDL 17-25's instructions. Hennessy Decl. ¶4. Several counties raised questions about how to apply the spousal impoverishment rule, and the participants discussed issues of retroactive eligibility and benefits. Id. Based on those discussions, on August 21, 2018 DHCS issued ACWDL 18-19, which further explained the new rules, provided examples and step-by-step instructions on how to apply the expanded spousal impoverishment rules and included a worksheet. Byerts Decl., Ex. 3; Hennessy Decl., ¶5.

DHCS attended meetings of the CWDA to inform its members of the new rule and answer questions. Hennessy Decl. ¶5. In addition, DHCS conducted in-person training on the spousal impoverishment rule for the counties in each of five regions. Hennessy Decl. ¶6. While counties were not mandated to attend the training, all counties were notified of it and of assistance that was available by telephone. Id. DHCS also designated a specialist within its Medi-Cal Eligibility Division to respond to questions from the counties about the new rule. Hennessy Decl. ¶7.

DHCS considered whether it could identify the potential beneficiaries in each of the three categories listed in ACWDL 17-25, and whether it would be cost effective to send notices to the persons in each category. Hennessy Decl. ¶8.

Persons in the CFCO program are already eligible for Medi-Cal and receive HCBS services at the nursing home level of care. Hennessy Decl. ¶9. CFCO participants have been determined eligible for Medi-Care and receive all medically necessary Medi-Cal covered services. Id. DHCS determined that the most cost-effective way to ensure that the spousal impoverishment rule was applied to CFCO participants was to instruct the counties to perform retroactive Medi-Cal eligibility determinations, which should occur no later than the annual renewals. Id.

As for married persons who requested HCBS and who were denied or discontinued Medi-Cal, DHCS does not maintain a database of all persons who apply for Medi-Cal. Hennessy Decl. ¶10. Instead, third parties maintain three different eligibility databases, which are combined into an umbrella called State Automated Welfare Systems ("SAWS"). Id. DHCS researched whether, using queries of the SAWS database, it could determine the identity of persons who are married, who applied for Medi-Cal after January 1, 2014 and requested HCBS services, and who were denied or discontinued Medi-Cal eligibility. Id. The information available from SAWS was not sufficient to provide the information necessary to create this list. Id. Accordingly, DHCS concluded that it could not cost effectively send notice to this group. Id.

DHCS was able to identify the group of persons on waiver waiting lists. Hennessy Decl. ¶11. These persons sought HCBS services and who may or may not have applied for Medi-Cal. Id. Because this group was known to have requested HCBS services and may not have known that they needed to apply for Medi-Cal to trigger the spousal impoverishment rule, DHCS sent notices directly to these persons through an outreach letter. Id.

DHCS provided the counties with notification of the mailer via Medi-Cal Eligibility Division Information Letter ("MEDIL") 18-03 on February 15, 2018, informing the counties that the mailer had been sent to the persons on the waiver waiting list. Hennessy Decl. ¶12. DHCS sent a second batch of outreach letters to persons on the waiver waitlist in December 2018. Id. DHCS provided the names of the persons receiving the outreach letter to those counties requesting it. Id.

Each of the counties from which Petitioners sought discovery -- Los Angeles County, Tulare County, and San Mateo County -- drafted their own guidance for county eligibility workers on the expanded spousal impoverishment rule following receipt of DHCS's ACWDL. Byerts Decl. Exs. D, E, F.

C. Analysis

1. DHCS's Duty to Provide Medi-Cal Benefits with Reasonable Promptness and All Aid to Which They are Entitled

DHCS has a duty to "furnish Medicaid promptly to beneficiaries without any delay caused by the agency's administrative procedures." 42 C.F.R. §435.930. State law similarly requires DHCS to "promptly" and "humanely" provide all Medi-Cal benefits to which applicants are entitled. W&I Code §§ 10000, 10500.

Under Marquez v. Department of Health Care Services, ("Marquez") (2015) 240 Cal.App.4th 87, 121, W&I Code section 10000's reference to "prompt and humane" provision of benefits is a "general statement of policy" which does not set forth any specific duty or course of conduct an agency must take, and leaves to the agency's discretion how to pursue the policy goal. Id. at 120. In Marquez, the appellant in Marquez sought to

compel DHCS to provide notice and an opportunity for a hearing whenever DHCS notified Medi-Cal providers that the beneficiaries had other health coverage. Marquez, *supra*, 240 Cal.App.4th at 92. Appellant argued that Respondents violated W&I Code section 10000 by subjecting Medi-Cal beneficiaries to unreasonable delays. Id. at 120. "[E]ven if there were other feasible procedures by which services might be delivered *more* promptly or *more* humanely, DHCS's methods accomplish the minimum requirements of the statutes' objectives, and the possibility of alternative procedures is not at issue for purposes of mandamus." Id. at 121. (Emphasis in original). "While a writ of mandate may issue to compel compliance with a ministerial duty — an act the law specifically requires — it may not issue to compel an agency to perform that legal duty in a particular manner, or control its exercise of discretion by forcing it to meet its legal obligations in a specific way." Marquez, *supra,* 240 Cal.App.4th at 118-19.

Marquez's statement that W&I Code section 10000 is a general statement of policy that does not set forth a specific duty, leaving to the agency's discretion how to pursue that policy goal -- does not necessarily mean that a cause of action may not be based on a violation of the statute. Two cases have found W&I Code section 10000 capable of violation. Robbins v. Superior Court, ("Robbins") (1985) 38 Cal.3d 199, 209 (county does not humanely promote self-reliance when it compels welfare recipients to accept in-kind benefits of food and shelter at county facility); Cooke v. Superior Court, ("Cooke") (1989) 213 Cal.App.3d 401 (county violated W&I Code section 10000 when it refused to provide any non-emergency dental care to indigent residents), *disapproved on other grounds by* County of San Diego v. State of California, (1997) 15 Cal.4th 68,.

Marquez demonstrates that W&I Code section 10000 is a general statement of a policy goal. If a cause of action may be based on its violation, any claim would have to be based on an arbitrary and capricious violation of that discretionary, but mandatory, policy goal under federal and state law. Cooke and Robins show that an agency's complete refusal to perform services for a class of beneficiaries -- payment of money instead of in-kind services (Robbins) and dental care (Cooke) -- can support a W&I Code section 10000 claim. As the court ruled on demurrer, ACDWL 17-25 deflects any possibility of a W&I Code section 10000 claim based on denial of spousal impoverishment rule benefits because DHCS has not refused, but rather agreed, to apply this methodology to a class of beneficiaries. As Marquez explained, the prospect that services may be provided by procedures that are more prompt or more humane is not an issue for mandamus. 240 Cal.App.4th at 121.[6]

W&I Code section 10500 requires DHCS to "endeavor at all times to perform [its] duties in such a manner as to secure for every person the amount of aid to which he is entitled." *See* Diaz v. Quitoriano, ("Diaz") (1969) 268 CalApp.2d 807, 809-12.

In Thornton v. Carlson, ("Thornton") (1992) 4 Cal. App. 4th 1249, the court addressed a preliminary injunction preventing DSS from enforcing regulations which implement a state program for emergency payments to Supplemental Security Income ("SSI") recipients. Id. at 1253. A group of SSI recipients without housing (now described as "homeless") filed a class action alleging that DSS had not provided them with "reasonable and effective notice of the benefits available" through a special program. Id. at 1254. The court reversed the portion of the injunction preventing DSS from denying special circumstances assistance on specific grounds, but affirmed the portion requiring DSS to give reasonable notice of the availability of the assistance under W&I Code section 10500. Id. at 1258-59. The court found implicit in DSS's duty under section 10500 "a requirement that [DSS] adequately advise SSI recipients of the rights and benefits to which they are entitled." Id. at 1258. Because the program was "not consistently publicized" statewide, the court upheld an order for DSS to "employ reasonable means of giving notice of the availability of special circumstances assistance to all SSI recipients, and to form a plan for doing so." Id. at 1258. Pet. Op. Br. at 10.

In sum, DHCS has a discretionary duty under W&I Code section 10000 Marquez to decide how and when to promptly and humanely provide Medi-Cal benefits (Marquez), and a ministerial duty under W&I Code section 10500 (Thornton and Diaz) to ensure that qualified beneficiaries receive retroactive relief so that they receive the "amount of aid" to which they are entitled.

a. Historical Facts

The ACA, enacted in 2010, mandated application of the expanded spousal impoverishment beginning January 1, 2014 for persons with disabilities allowing them to qualify for Medi-Cal and receive care in their home instead of being forced into institutions and impoverishing their spouses. DHCS began looking at the expanded spousal impoverishment rule even before the ACA was enacted in 2010. Pet. Ex. 18, p. 23.

In 2015, CMS issued a policy letter reminding the states that the ACA "amended section 1924(h)(1) to require" expanding the application of the spousal impoverishment rule. Pet. Ex. 23, p. 2. The CMS letter granted discretion to the states in implementing the expanded spousal impoverishment rule. In discussing how to evaluate whether a person applying for Medi-Cal requires HCBS, CMS noted: "States should permit applicants a method of requesting such HCBS coverage. This could be done through a supplemental form that asks applicants if they need HCBS, or a process whereby written or verbal requests for HCBS are acknowledged and used to determine whether spousal impoverishment rules should apply." Byerts Decl., Ex. 2, pp. 3-4. The CMS letter also stated: "This change affects initial eligibility determinations and in some circumstances redeterminations of eligibility. States that have not already done so should begin work on conforming their eligibility practices for married individuals potentially in need of HCBS as soon as possible." Id., p.6.

In 2015 and 2016 letters, consumer advocates asked DHCS to act swiftly to release guidance to the counties to protect recipients of HCBS against spousal impoverishment. Pet. Exs. 29, 30, 32, 40. A DHCS staff member also expressed concern to a supervisor that Medi-Cal beneficiaries were not able to access the expanded spousal impoverishment rule. Pet. Ex. 18, p. 36. In one September 16, 2015 letter, the advocate provided an example of a beneficiary who urgently needed the provision to access MediCal and IHSS benefits. Pet. Ex. 29, p.1. DHCS responded that it was aware of the advocates' concern for Medi-Cal members who are at risk of institutionalization because they were not yet able to utilize the spousal impoverishment rules. DHCS stated its commitment to work with counties on individual cases to determine eligibility for HCBS based on the spousal impoverishment rule until a formal ACWDL was issued. Ex. 31.

DHCS did not provide any guidance to the counties until it issued ACWDL 17-25 on July 19, 2017. Pet. Ex. 24. After issuing ACWDL 17-25, DHCS expected that it would have to issue additional All-County letters to address questions from the counties. Pet. Ex. 18, p. 69. This follow-up guidance, based on county questions raised in a work group forum, occurred in ACWDL 18-19, which was issued on August 21, 2018. Pet. Ex. 25; Ex. 17, p. 60. ACWDL 17-25 provided both further instructions on the spousal impoverishment rule methodology and gave examples.

DHCS attended meetings of the CWDA to inform county welfare directors of the new rules and answer their questions. DHCS also conducted training for the counties in five regions. Hennessy Decl., ¶¶ 3-12. Each of the counties from which Petitioners sought discovery – Los Angeles County, Tulare County, and San Mateo County – drafted their own guidance for county eligibility workers on the expanded spousal impoverishment rule following receipt of DHCS's two ACWDLs. Byerts Decl., Exs. D, E, F.

In February 2018, DHCS sent one informational notice to potential beneficiaries: the 17,142 persons on the waitlist for HCBS waiver programs. Pet. Exs. 35-36. This represented about 6% of Medi-Cal beneficiaries in the IHSS-CFCO Program. Pet. Ex. 47.

b. The Allegation That DHCS Is Guilty of Unreasonable Delay

From these facts, Petitioners argue that DHCS is guilty of years of delay. The ACA mandated that the expanded spousal impoverishment rule "shall be applied" beginning on January 1, 2014. DHCS had ample lead time to ensure compliance with the ACA, yet it did not begin drafting its policy guidance until 2014. Pub. L. No. 111-148, §2404 (2010); Ex. 24. Now, nearly a decade after the ACA was enacted and six years from the intended start date, many Medi-Cal applicants and beneficiaries still are unable to access the benefits of this protection. Petitioners argue that this is a violation of the ACA and the Medicaid Act's "reasonable promptness" provision. 42 U.S.C. §1396a(a)(8). *See* Blanco v. Anderson, 39 F.3d 969, 972 (9th Cir. 1994) (reasonable promptness provision prohibited DHCS from approving the weekday closure of county welfare departments). Pet. Op. Br. at 8. Petitioners note that DHCS's opposition does not deny that it failed to implement the expanded spousal impoverishment rule with "reasonable promptness". Reply at 4.

In evaluating the issue of unreasonable delay, DHCS wrongly focuses on CMS's May 2015 guidance. According to DHCS, CMS's guidance indicates that DHCS has discretion on how best to implement the expanded spousal impoverishment rule (and provides no ministerial rules for retroactive eligibility). DHCS relies on CMS letter's discussion on how to evaluate whether a person applying for Medi-Cal requires HCBS: "States should permit applicants a method of requesting such HCBS coverage. This could be done through a supplemental form that asks applicants if they need HCBS, or a process whereby written or verbal requests for HCBS are acknowledged and used to determine whether spousal impoverishment rules should apply." Baerts Decl., Ex. 2, pp. 3-4. The CMS letter also notes that "This change affects initial eligibility determinations and

in some circumstances redeterminations of eligibility. States that have not already done so should begin work on conforming their eligibility practices for married individuals potentially in need of HCBS as soon as possible." Id., p. 6. Petitioners correctly respond that nothing in CMS's May 2015 letter confers the discretion claimed by DHCS. The purpose of the letter was to provide states with additional guidance on the expanded spousal impoverishment rule. Id., p.1. The CMS letter did not expressly confer DHCS with any discretion.

Nonetheless, the expanded spousal impoverishment rule is a methodology for determining Medi-Cal eligibility, and as relevant, IHSS eligibility. As DHCS argues, because the spousal impoverishment rule is not a Medi-Cal benefit, and instead is a methodology for determining Medi-Cal eligibility, it can exercise discretion on how to implement it. Opp. at 9-10. Neither the ACA nor CMS purported to direct DHCS to implement the expanded spousal impoverishment rule "in a prescribed manner in obedience to the mandate of legal authority, without regard to his or her own judgment or opinion concerning the propriety of such act." *See* Ellena v. Department of Insurance, ("Ellena") (2014) 230 Cal.App.4th 198, 205. Under Marquez, *supra*, 240 Cal.App.4th at 121, DHCS has a discretionary duty under W&I Code section 10000 to decide how and when to promptly and humanely provide Medi-Cal benefits, and DHCS's manner of implementing the expanded spousal impoverishment rule therefore is discretionary.

While Petitioners argue that DHCS abused its discretion by unreasonable delay (Reply at 5), DHCS correctly responds that whether DHCS violated its discretionary duty on how to implement the expanded spousal impoverishment rule by delaying for more than three years is moot. ACWDL 17-25 directed the counties to do what 42 U.S.C. section 1396r5(h)(1)(A) required – expand the definition of "institutionalized spouse" for the purpose of applying the spousal impoverishment rule to include individuals who receive nursing home level of care in a home or community-based setting.[7] Petitioners do not argue that DHCS's guidance to the counties in ACWDL 17-25 or the follow-up ACWDL 18-19 was incorrect or that it did not properly state the expanded spousal impoverishment rule. Opp. at 8.[8]

DHCS has complied with its discretionary duty to guide the counties on the spousal impoverishment rule, and the issue of unreasonable delay is moot.

2. DHCS Violated W&I Code Section 10500 by Failing to Create a Retroactive IHSS Eligibility Process and to Ensure Payment/Reimbursement for IHSS Benefits

Petitioners argue that DHCS has a mandatory duty to establish a retroactive eligibility process for IHSS under W&I Code section 10500 and ensure payment or reimbursement for IHSS under the Medicaid Act.

DHCS has a mandatory duty under federal law to ensure that the Medicaid state plan provides assistance equal in amount, duration, and scope. 42 U.S.C. §1396a(a)(10)(B). Known as the comparability provision, this regulation creates an "equality principle" so that the medical assistance made available to any person shall not be less than the medical assistance made available to anyone else. *See* Sobky v. Smoley, (E.D. Cal. 1994) 855 F. Supp. 1123, 1139. This duty to provide comparable assistance extends to reimbursement claims. In Conlan I, *supra*, 102 Cal. App. 4th at 653-54 and Conlan II, *supra*, 131 Cal. App. 4th at 1379, the courts held that DHCS is required to create a process to ensure prompt reimbursement for covered services. Pet. Op. Br. at 13-14.

As Petitioners note, neither DHCS nor DSS has issued any guidance for the expanded spousal impoverishment rule's effect on retroactive IHSS eligibility to ensure that the retroactive date of IHSS eligibility coincides with the retroactive date of Medi-Cal eligibility. *See* Pet. Exs. 24-25, 35. The misalignment between Medi-Cal and IHSS application dates can lead to months and even years of lost IHSS benefits. One ALJ asked DHCS: "A lot of questions are coming up as to how [the expanded spousal impoverishment rule] is being implemented from the IHSS side. We haven't seen anything on this yet." Ex. 38. In response, DHCS staff candidly replied, "There is no implementation on the IHSS side." Id. Pet. Op. Br. at 12.

This is a significant problem and a breach of DHCS's mandatory duty to ensure receipt of all Medi-Cal aid to which the applicant or recipient is entitled. W&I Code §10500. "There is no question that the obligation to pay aid to which an applicant is entitled is a debt due from the county as of the date the applicant was first entitled to receive aid and that the right to receive benefits vests in the recipient on the first date of his entitlement thereto." Canfield v. Prod, (1977) 67 Cal. App. 3d 722, 728. Pet. Op. Br. at 12.

DHCS's failure to create a process for retroactive IHSS has resulted in eligible persons paying out-of-pocket for in-home care that otherwise would be covered by Medi-Cal. Because IHSS is a Medi-Cal covered service,

its costs are included in DHCS's Medi-Cal reimbursement scheme. Pet. Ex. 27, p.8. The linchpin in a successful reimbursement claim is eligibility for the program. DHCS's failure to ensure IHSS eligibility retroactive to the date of the Medi-Cal eligibility determination results in a denial of an IHSS reimbursement claim for that time gap. Pet. Op. Br. at 14.[9]

DHCS has failed to ensure individuals can access IHSS eligibility retroactive to the date of their Medi-Cal eligibility under the expanded spousal impoverishment rule. Petitioners correctly note that Kelley and Reed exemplify this harm. Both initially were denied IHSS retroactive to the date of their Medi-Cal eligibility because they had not made a separate IHSS application contemporaneously with their Medi-Cal application. Pet. Ex. 2, ¶¶ 8-23; Ex. 3, ¶¶ 7-18. Both appealed those decisions and their representative similar legal and equitable arguments at the AHS hearing. Id. Their results were exactly opposite: Kelley's request for retroactive IHSS benefits was granted and Reed's request was denied. Id. Pet. Op. Br. at 12.

DHCS is the "the single state agency approved by the Secretary of the Department of Health and Human Services to administer the Medi-Cal program." 22 CCR §50004(a). As the Medi-Cal program single state agency, DHCS is ultimately responsible for this failure. DHCS must adopt the DSS rule that IHSS eligibility may be found retroactive to the date of the individual's preceding Medi-Cal application. In response to the direction in Conlan I and Conlan II regarding Medi-Cal reimbursement, DSS informed counties that they should use the Medi-Cal, not the IHSS, application date when deciding the date for a recipient's eligibility for reimbursement for IHSS covered services. Ex. 27, p. 8. This rule was created because it is common that a Medi-Cal application can, and often does, pre-date an IHSS application because a person must be eligible for Medi-Cal in order to be eligible for IHSS. Id. Linking the Medi-Cal and IHSS application date ensures that beneficiaries receive reimbursement for all Medi-Cal covered services, including in-home care such as IHSS. Without DHCS action, DSS cannot apply this rule to the expanded spousal impoverishment rule for IHSS. Therefore, DHCS must comply with its mandatory duty to ensure that retroactive IHSS eligibility determinations align with retroactive Medi-Cal eligibility determinations in the spousal impoverishment context. Pet. Op. Br. at 13.

DHCS argues that it has not violated its mandatory duty because DSS operates the IHSS program. DHCS argues that its status as the Medi-Cal single state agency does not mean that it controls all aspects of the Medi-Cal program. IHSS is offered as a Medi-Cal program benefit through (a) the Personal Care Services Program ("PCSP"), (b) the IHSS Plus Option ("IPO"), and (c) CCFO, as set forth in W&I Code sections 14132.95, 14132.952 and 14132.956, respectively. IHSS is governed by W&I Code sections 12300 *et seq*., and DSS is responsible for administering the IHSS program in compliance with state and federal laws through its Manual of Policy and Procedures ("DSS Manual"). Calderon v. Anderson (1996) 45 Cal.App.4th 607, 613. Thus, DSS "promulgates regulations to implement the statutes while the county welfare departments administer the program under the state's general supervision. The county departments process applications for IHSS assistance, determine the individual's needs and authorize services." Id. (citations omitted). Opp. at 12-13. According to DHCS, it fulfilled its duties by contracting with DSS to administer IHSS Medi-Cal benefits. DHCS contracts with DSS to run IHSS for the PCSP, IPO, and CCFO programs covered by Medi-Cal. Billingsley Decl., Exs. A-C. The interagency agreements divide the responsibilities of DHCS and DSS with respect to IHSS. Under these agreements, DSS drafts and provides guidance to the counties concerning IHSS eligibility, IHSS assessments, and reimbursements for covered IHSS services. Billingsley Decl., Ex. A, pp. 12, 14. Opp. at 12-13. As discussed *ante*, DHCS has substantial discretion in implementing the expanded spousal impoverishment rule. Under the interagency agreements, DSS is responsible for drafting and implementing policy for the IHSS programs that it administers, and DHCS has a window to review and approve the policy drafted by DSS. DHCS concludes that it had the discretion to contract with DSS to administer IHSS benefits under the Medi-Cal program and that delegation was not arbitrary or capricious. Opp. at 13-14.

DHCS further argues that DSS does not need further instructions from DHCS to perform its responsibilities. DSS has primary responsibility for policy concerning IHSS programs in conformity with federal law, has independent statutory duties to do so, and no action from DHCS is needed. DHCS is not preventing DSS from applying a rule that uses the Medi-Cal application date in determining the retroactive IHSS eligibility date to the expanded spousal impoverishment rule. Therefore, DHCS has no ministerial duty to direct DSS to implement retroactive IHSS eligibility determinations. Opp. at 14.

DHCS specifically delegated the process of processing retroactive payments for IHSS services to DSS. Billingley Decl., ¶5. ACWDL 17-25 specifically directs that the counties "shall utilize Conlan v. Bonta and

Conlan v. Shewry processes for both Medi-Cal and IHSS reimbursements as necessary in accordance with ACWDL 07-01. Byerts Decl., Ex. 1, p.13. DHCS and DSS have agreed that DSS will adjudicate claims for retroactive reimbursement of IHSS expenses required by Conlan. Byerts Decl., Ex. 5. DSS policy provides that it will authorize retroactive reimbursement for IHSS expenses during the period for which a beneficiary is deemed retroactively eligible for IHSS services. DSS Manual §30-759.4. Opp. at 14.

DHCS argues that the evidence shows that, in fact, DSS has been paying retroactive reimbursements for IHSS services. Petitioner Kelley's spouse admits that Kelley received $20,612 for retroactive IHSS benefits. Melody Rogers Decl., ¶18. Additionally, Reed is eligible for retroactive IHSS reimbursement from the May 2017 date of his IHSS application. Thus, the process for which DHCS exercised its discretion has been implemented.

Finally, DHCS contends that the Conlan cases are distinguishable. Conlan I ruled that while DHS (now DHCS) had discretion in establishing a method for paying retroactive reimbursement, DHS should be compelled to actually exercise that discretion and set up procedures for reimbursement. 102 Cal.App.4th 745, 764. Conlan II ruled that just because the proposed reimbursement plan would not be funded or would cost too much did not justify failing to comply with the original court order. 131 Cal.App.4th at 1369-76. By contrast, DHCS has exercised its discretion by (a) delegating to DSS the adjudication of reimbursement claims; and (b) directing that the Conlan process be used. Opp. at 14-15.

These arguments are untenable. As the single state agency, DHCS is ultimately responsible for supervising and ensuring county compliance with the expanded spousal impoverishment rule. 42 C.F.R. §§ 431.10(c)(3)(ii), 435.903(a); W&I Code §10742. The purpose of the single state agency requirement is "both to avoid a diversity of operating standards within a state and to ensure that one agency would be accountable to the federal government for the operation of the Medicaid program and compliance with federal law." RCJ Medical Services Inc. v. Bonta, (2001) 91 Cal. App. 4th 986, 1007-08. DHCS is vested with "full power to supervise every phase of administration of health care services and medical assistance … in order to secure full compliance with the applicable provisions of state and federal laws." W&I Code §10740. DHCS has discretion in implementing the expanding spousal impoverishment rule, but it has a mandatory duty to ensure that that qualified beneficiaries receive retroactive relief so that they receive the "amount of aid" to which they are entitled, and this duty cannot be delegated. If counties fail to follow the Medi-Cal state plan and procedures for determining eligibility under the expanded spousal impoverishment rule, DHCS is obligated to take corrective action to ensure compliance. 42 C.F.R. § 435.903(b). Reply at 5-6.

Similarly, DHCS cannot rely on DSS's independent authority to administer the IHSS program. Although it has delegated to DSS the day-to-day administration of IHSS, DHCS cannot delegate is supervisory authority for the Medi-Cal plan. 42 C.F.R. §431.10(e). State law states that the IHSS-CFCO program must be rendered "in accordance with the Medi-Cal State Plan amendment and subject to [DHCS's] authority as the designated single state agency for the administration or supervision of the administration of the Medi-Cal program." W&I Code §14132.956(c). This means that DHCS must correct the process for retroactive IHSS benefits under Medi-Cal.

Nor can DHCS's inter-agency agreement with DSS permit DHCS to relinquish its statutory duty to supervise the Medi-Cal program and IHSS policies related to the expanded spousal impoverishment rule. In fact, the inter-agency agreement discusses DHCS's single state agency obligations, including the duties to notify DSS of any changes in law or policy that alter or establish new Medi-Cal eligibility and to provide instructions on how these changes should be applied. Billingsley Decl., Ex. A, pp. 17. The law does not permit DHCS to abdicate its duty to DSS. Reply at 6.

Thus, DHCS must supervise the counties and DSS in creating a retroactive IHSS benefits process under the expanded spousal impoverishment rule. ACWDLs 17-25 and 18-19 are entirely silent on how to retroactively assess IHSS eligibility or determine retroactive repayment of services received during that period. *See* Exs. 24-25. Although DHCS has directed the counties to use the Conlan process for payment of IHSS (Pet. Ex. 24, p.13; Ex. 25, pp.16-17), the Conlan process does not require payment without the correct underlying retroactive IHSS determination. Reed's administrative writ exemplifies this: he received in-home care between July 2016 and May 2017, but he cannot receive payment through the Conlan process without a retroactive IHSS eligibility determination to the date of his Medi-Cal application. Reed AR 96. A correct Medi-Cal eligibility determination would have allowed Petitioner Reed to make an informed choice about whether to apply for the IHSS program. Instead, the misalignment of his Medi-Cal and IHSS applications and

eligibility dates prevented him from recovering for uncompensated care. Pet. Ex. 2, ¶¶ 15-17; Ex. 15, ¶¶ 12-13. DHCS has a mandatory duty to remedy these violations. Reply at 7.

In sum, DHCS must issue guidance to DSS and the counties regarding the retroactive IHSS process, including the proper determination of the retroactive eligibility date concurrent with the Medi-Cal application date, and direct that impacted individuals receive retroactive payment or reimbursement.[10] Until DHCS takes this action, it fails in its mandatory duty to ensure that impacted persons receive all the aid to which they are entitled under W&I Code section 10500. Reply at 7.

3. DHCS Violated W&I Code Section 10500 by Failing to Notify All Potentially Eligible Persons

Petitioners argue that DHCS violated its ministerial duty under W&I Code section 10500 to ensure that all Medi-Cal beneficiaries receive all "the amount of aid to which" they are entitled by failing to notify all potentially eligible persons of their right to calculation of IHSS under the spousal impoverishment rule.

In ACWDL 17-25, DHCS identified three groups of married persons in need of HCBS who were potentially impacted by the expansion of the spousal impoverishment rule: (1) persons who were receiving waiver services under the CFCO program run by DSS and who requested HCBS; (2) persons who were denied or discontinued Medi-Cal and who requested HCBS; and (3) persons on waiting lists for waiver services. Petitioners accept the groups identified in ACWDL 17-25[11] and note that DHCS only contacted the third group (persons on waiver waitlists) in a letter dated February 15, 2018. Ex. 35, p. 1-5. DHCS did not to send a similar letter to the other two groups. Ex. 17, p. 95. DHCS admits that the "outreach mailer to the wait list individuals was the only formal outreach mailed to one of these groups" and "[t]here was never a decision made to send notice to all potentially impacted individuals." Id. at 98, 101. Pet. Op. Br. at 11.

In Diaz, *supra*, 268 Cal. App. 2d at 807, an applicant sought welfare at the county welfare office and was told he was not eligible. Id. at 808. The welfare office did not advise him of his right to submit a written application or of his right to appeal a denial. Id. In pertinent part, the court held that a county welfare office breached its ministerial duty under W&I Code section 10500 by not informing individuals of their right to make an application for welfare benefits and to appeal a denial. Id. at 810. Pet. Op. Br. at 10.

As discussed *ante,* the Thornton court addressed a preliminary injunction preventing DSS from enforcing regulations which implement a state program for emergency payments to SSI recipients. 4 Cal.App.4th at 1253. The court affirmed the portion of the injunction requiring DSS to give reasonable notice of the availability of assistance pursuant to W&I Code section 10500, reasoning that DSS had a duty to "adequately advise SSI recipients of the rights and benefits to which they are entitled." Id. at 1258. DSS was required to "employ reasonable means of giving notice of the availability of special circumstances assistance to all SSI recipients, and to form a plan for doing so." Id. at 1258. Pet. Op. Br. at 10.

Petitioners argue that, as in Diaz and Thornton, DHCS has failed to notify the thousands of Medi-Cal applicants and beneficiaries in groups one and two of the expanded spousal impoverishment rule or advise them of their right to have a correct eligibility determination. DHCS's failure to adequately publicize the expanded spousal impoverishment rule has resulted in thousands of potentially eligible individuals being unaware of its existence. Group one, the IHSS-CFCO group, has a 2019 enrollment of 268,738 and is the largest of the groups identified in ACWDL 17-25. *Compare* Pet. Ex. 47, p. 1 *with* Ex. 36, p. 5 (17,142 recipients received DHCS outreach letter, about 6% of the total IHSS-CFCO population). DHCS admitted that it had the access and ability to create a list of people in the IHSS-CFCO program. Id. at 77. Pet. Op. Br. at 11.[12]

DHCS argues that Petitioners' reliance on Thornton is misplaced for two reasons. First, the subject of the notification in Thornton was an actual benefit – payment of special circumstances assistance for social security recipients. 4 Cal.App.4th at 1258-59. In this case, the expanded spousal impoverishment rule is a Medi-Cal eligibility methodology, not a Medi-Cal benefit. Second, the county office in Thornton apparently failed to send any notice of the new benefit to the beneficiary population. Id. In contrast, DHCS sent a notice to the population it could reasonably identify. Opp. at 12.

Petitioners respond that Thornton and other cases have held that the duty to notify extends to both "rights and benefits." *See* 4 Cal. App. 4th at 1258. Reply at 8-9. Petitioners point out that DHCS's opposition never discusses Diaz, which found a mandatory duty under W&I Code section 10500 to advise welfare applicants of their right to make a written application for benefits and appeal in an administrative hearing. 268 Cal. App. 2d at 810-11. Petitioners conclude that both Diaz and Thornton recognize that an applicant or beneficiary cannot avail himself of a benefit or right they do not know exists, and nothing in Thornton suggests that a state

agency fulfills its obligation under W&I Code section 10500 by choosing to notify only some recipients of their rights and benefits. Reply at 7.

The court agrees. Application of the expanded spousal impoverishment rule to an IHSS eligibility determination is not a benefit, but it is a right. DHCS has a duty to inform all potentially impacted individuals of their right to Medi-Cal benefits using the more favorable expanded spousal impoverishment eligibility methodology.

DHCS argues that it had discretion in deciding who to notify and the manner of notification. Neither the ACA nor the CMS guidance directed DHCS to notify Medi-Cal beneficiaries of the expanded eligibility "in a prescribed manner in obedience to the mandate of legal authority, without regard to his or her own judgment or opinion concerning the propriety of such act." Ellena, *supra*, 230 Cal.App.4th at 205. Thus, DHCS contends that it had discretion on how best to go about that notification. Opp. at 10. DHCS contends that it did not abuse its discretion in electing to send notification only to persons on the waiting lists for waiver services. DHCS considered whether it could identify the list of potentially eligible beneficiaries in each of these three categories and whether it could cost effectively send notice to each category. Hennessy Decl., ¶8. Opp. at 11.

With respect to the first group -- persons receiving waiver services under the CFCO program and who requested HCBS – persons in the CFCO program are already eligible for Medi-Cal and receive HCBS services at the nursing home level of care. Hennessy Decl., ¶9. As such, they have been determined eligible and receive all medically necessary Medi-Cal covered services. Ibid. DHCS determined that the most cost-effective way to ensure that the spousal impoverishment rule was applied to these CFCO participants was to instruct the counties to perform retroactive Medi-Cal eligibility determinations, which should occur no later than the annual renewals. Ibid. Opp. at 10-11.

With respect to the second group -- persons who were denied or discontinued Medi-Cal and who requested HCBS -- DHCS does not maintain a database of all individuals who apply for Medi-Cal. Hennessy Decl., ¶10. Instead, third parties maintain three different welfare eligibility databases, which are combined into an umbrella called SAWS. Ibid. DHCS researched whether it could use the SAWS database to identify those persons who are married, applied for Medi-Cal after January 1, 2014, requested HCBS services, and were denied or discontinued Medi-Cal eligibility. Id. The information available from SAWS was not sufficient to provide the information necessary to create this list. Id. DHCS concluded that it could not cost effectively send notice to this group. Instead, DHCS directed the counties to have their eligibility workers perform retroactive eligibility determinations for married individuals who requested HCBS but were denied (ACWDL 17-25) Id. DHCS made the decision that this group was best identified by the counties and so gave the counties both instruction to locate this group and the tools to properly determine retroactive eligibility. Opp. at 11.

With respect to the third group – persons on the waiting list for waiver services -- DHCS was able to identify these persons. They are persons who sought HCBS services and who may or may not have applied for Medi-Cal. Hennessy Decl. ¶11. Because this group applied for HCBS services and may not have known that they needed to apply for Medi-Cal to trigger the spousal impoverishment rule, and because it could reasonably be identified, DHCS elected to send notices directly to these persons and inform the counties of that mailing through the use of a Medi-Cal Eligibility Division Information Letter (MEDIL). Id. After vetting the letter with various departments within DHCS and translating it into Spanish, DHCS sent the notification letter informing the waiver waiting list group about the new rule, and informed the counties of the mailing. Id. Opp. at 11-12.

The court agrees with DHCS that it has discretion about the manner in which it provides notice to potentially impacted individuals of their right to IHSS benefits using the more favorable expanded spousal impoverishment eligibility methodology, but the exercise of discretion may not ignore groups wholesale. If DHCS's discretion can be exercised only one way, it is an abuse of discretion and mandamus will lie. *See* Hurtado v. Superior Court, *supra,* 11 Cal.3d at 579. DHCS admitted that it does not know of any outreach to groups one and two. Pet. Ex. 17, p. 81; Ex. 22, p. 55. DHCS's argument that it has the discretion not to send notices to individuals in these groups ignores the fact that it is required to do so by W&I Code section 10500, Thornton, and Diaz. Notice is essential for all impacted populations because individuals cannot otherwise avail themselves of their remedies when the county makes an error.

For group one, DHCS determined that the most cost-effective approach was to instruct the counties to perform retroactive Medi-Cal eligibility determinations no later than the annual renewals. DHCS gave direction to the

counties regarding the expanded spousal impoverishment rule, but it did not inform these beneficiaries of their right to evaluation of IHSS benefits using that rule. Without this knowledge, the beneficiary is at the mercy of the county and may not receive from the county the aid to which they are entitled. Ex. 9, ¶ 8; Ex. 10, ¶¶ 6-8. Reply at 9.

DHCS has access to, and the ability to gather information about, persons in the IHSS-CFCO program, but it chose not to do so. Pet. Ex. 17, p. 77. DHCS does not have the discretion to rely on the most cost-effective approach. DHCS also does not show that the cost of providing notice would be prohibitive, offering only conclusory opinions about cost-effectiveness. Hennessy Decl., ¶¶ 9-10. DHCS provides no evidence of how many individuals are in the group, how much it would cost to send notice, and why this cost would be prohibitive. Id.; Pet. Ex. 17, p. 70.

In Conlan II, the court rejected the excuse that DHCS did not send a notice of a new procedure for obtaining reimbursement for covered expenses to former Medi-Cal recipients because it did not maintain addresses of past recipients. 131 Cal.App.4th at 1377. The court "encouraged" DHCS to locate a source for former Medi-Cal recipients, recognizing that it may not have current addresses for all. Ibid. The court directed DHCS to send notice to "all individuals who may have claims for reimbursement, including individuals who are no longer Medi-Cal recipients but whose potential claims are still viable." Ibid. Pursuant to Conlan II, DHCS sent notice to more than 11.5 million people. *See* Ex. 27, p. 2. Here, the entire IHSS-CFCO population is less than 270,000 individuals. Ex. 47. "In any event, an agency may not use lack of funding to excuse failure to comply with the law." Conlan II, *supra,* 131 Cal. App. 4th at 1374. Reply at 9.

With respect to the second group -- persons who were denied or discontinued Medi-Cal and who requested HCBS -- DHCS does not maintain a database of all individuals who apply for Medi-Cal, but third parties do so in the SAWS database. DHCS researched SAWS and concluded that the SAWS information was not sufficient to create this list. DHCS could have directed counties to track the missing information, such as marital status, but did not do so. Pet. Ex. 17, p. 71. In any event, DHCS's conclusory excuse is not sufficient because it fails to explain what information is missing, why it is necessary, whether it can be obtained from another source, and why DHCS cannot proceed with the SAWS information as limited. Conlan II found similar excuses unpersuasive. 131 Cal. App. 4th at 1377 ("We share the trial court's skepticism that there are no means of identifying any former recipients, and trust that reasonable good faith efforts will be made to do so."). Reply at 9.

DHCS is required to send notice to the remaining two impacted groups. Without notice, these persons may not receive all the Medi-Cal benefits to which they are entitled in violation of section 10500. As in Conlan II, the notice need not be perfect. It may be over-inclusive (*e.g.,* the addressee is not married), or the notice may not reach the addressee because the only available address is wrong. But DHCS must attempt the notice and cannot deny an entire group notice because the list is not completely accurate.

4. DHCS Has Not Violated Anti-Discrimination Laws

Petitioners argue that DHCS has placed Petitioners and numerous others at risk of unnecessary institutionalization by failing to implement the expanded spousal impoverishment rule. This failure violates the Americans with Disabilities Act ("ADA") (42 U.S.C. §12101 *et seq*.), Section 504 of the Rehabilitation Act ("Section 504") (29 U.S.C. §794 *et seq*.), and Government Code section 11135 (prohibiting discrimination in access to benefits based on disability), which require that states "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. §§ 35.130(d), 41.51(d). The ADA and Section 504 also prohibit methods of administration which have a discriminatory effect on people with disabilities. 28 C.F.R. §§ 35.130(b)(3), 41.51(b)(3), and 45 C.F.R. § 84.4(b)(4). Pet. Op. Br. at 15.

The integration mandate of these statutes requires that persons with disabilities be served in the community when (1) the state's treatment professionals have determined that community placement is appropriate, (2) community placement is not opposed by the individual, and (3) "the placement can be reasonably accommodated, taking into account the resources available" and the needs of others with disabilities. Olmstead v. L.C. ex rel. Zimring, ("Olmstead") (1999) 527 U.S. 581, 587. A person denied access need not wait until they are institutionalized to bring a claim. Fisher v. Okl. Health Care Auth., (10th Cir. 2003) 335 F.3d 1175, 1181-82; Brantley v. Douglas, (N.D. Cal. 2009) 656 F. Supp. 2d 1161, 1170. Individuals at risk of placement in nursing homes are protected under the ADA's integration mandate. Id.[13] Pet. Op. Br. at 14-15.

Petitioners contend that DHCS violated these statutes by, *inter alia*, its failures to ensure that eligible individuals receive the benefit of the expanded spousal impoverishment rule, thereby placing them at risk of unnecessary institutionalization. Petitioners Kelley and Reed argue that they and others similarly situated easily meet the first two prongs of the Olmstead test: they live at home and are fighting to remain there. Pet. Ex. 1, ¶¶ 6, 9, 10; Ex. 2, ¶¶ 9, 19-20, 23-24; Ex. 3, ¶¶ 6-8, 11, 23; *see also* Ex. 6, ¶¶ 6, 9, 11-12.

As for the third prong, it is indisputably reasonable to apply the federally-mandated spousal impoverishment methodology to ensure that eligible individuals are not forced into costly and unnecessary institutional care. The criteria for protection under the expanded spousal impoverishment rule is that an individual "meet nursing facility level of care for at least 30 consecutive days in the absence of HCBS." Pet. Ex. 24, p. 5. Petitioners argue that DHCS's violation of the discrimination laws lies in its failure to implement the expanded spousal impoverishment rule for several years and then implementing it in an inadequate way, thereby placing Petitioners at risk of institutionalization. Reply at 10.

DHCS responds that an Olmstead claim is beyond the scope of the issues that can be raised in mandamus because it requires some form of injunctive relief. Opp. at 15. DHCS is partly correct. A CCP section 1085 mandamus petition can be brought to enforce rights under federal law, but an injunction may not be imposed unless the petitioner suffers an injury to himself. CAL200, Inc. v. Apple Valley Unified School District, (2019) 41 Cal.App.5th 230, 243. Once that injury occurs, the petitioner can obtain injunctive relief benefiting others if a public right/public duty is involved. *See* Diaz, *supra,* 268 Cal.App.2d at 811. Thus, Petitioners can seek an injunction as part of their traditional mandamus claim so long as they personally suffered injury.

As DHCS argues (Opp. at 15), Petitioners have not demonstrated a need for injunction based on the risk of their unnecessary institutionalization. Petitioners have identified no errors in the instructions that DHCS gave to the counties on how to determine Medi-Cal eligibility under the expanded spousal impoverishment rule and instead have shown only that DHCS's compliance is incomplete. Whatever the discriminatory effect of DHCS's delay, DHCS has not placed Petitioners or anyone else at an ongoing risk of unnecessary institutionalization such that an injunction would be appropriate.

As discussed *ante*, DHCS's ongoing violation lies in its failure to create a retroactive IHSS eligibility process and ensure payment/reimbursement for IHSS benefits and in failing to notify all potentially eligible persons. The retroactive payment issue concerns payment of money only and has no bearing on a risk of institutionalization. DHCS's failure to provide notice creates a risk that a potentially eligible person may not apply for IHSS, but the risk of institutionalization is speculative based on the evidence presented. In support of this risk, Petitioners cite only the historical evidence concerning themselves and one other person who has had the expanded spousal impoverishment rule applied to her. *See* Catiis Decl., ¶8. More evidence would be required to show a risk of institutionalization without notice.

Petitioners have not met their burden to show that DHCS has unlawfully discriminated against them in violation of the ADA, Section 504, and Government Code section 11135 such that a remedy of injunctive relief is required.[14]

D. Conclusion

The Petition is granted in part. DSS correctly declined to apply equitable estoppel to DPSS's conduct so as to provide him with retroactive IHSS benefits before he applied for them. Reed's petition for administrative mandamus is denied.

DHCS complied with its duty to guide the counties on the spousal impoverishment rule and the issue of delay is moot. However, DHCS has arbitrarily failed to perform its discretionary duty under W&I Code section 10500 to issue guidance to DSS and the counties regarding the retroactive IHSS process, including the proper determination of the retroactive eligibility date concurrent with the Medi-Cal eligibility date, and direct that impacted individuals receive retroactive payment or reimbursement.

DHCS also has arbitrarily failed to perform its duty under W&I section 10500 to the remaining two impacted groups identified in ACWDL 17-25. As in Conlan II, the notice need not be perfect (*e.g.*, the only available address may be wrong) and should err on the side of being over-inclusive (*e.g.,* the addressee is not married). But DHCS must attempt to find a reasonable source for notice information and cannot deny an entire group notice because the available information is not totally accurate.

A writ will issue requiring DHCS's compliance on these issues. However, a writ can issue only in conjunction with a final judgment. The court severed the FAP's taxpayer claim, and the writ must be held in abeyance

until that claim is resolved. The case must be transferred to Department 1 for reassignment to an independent calendar court unless Petitioners dismiss the taxpayer claim.

If Petitioners do dismiss the remaining claim, their counsel will be ordered to prepare a proposed judgment and writ, serve them on DHCS's counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment will be set for February 18, 2020 at 1:30 p.m.

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[1] Petitioners 11-page reply exceeds the ten-page limit of CRC 3.1113(d). Petitioners' counsel is admonished that ten pages does not mean ten pages plus a signature page.

[2] The court need not decide the final element for agency estoppel: whether the injustice would result from a failure to estop DPSS is sufficient to justify any adverse effect upon public interest or policy. City of Long Beach v. Mansell, *supra,* 3 Cal.3d at 496-97.

[3] Petitioners request judicial notice of (1) All County Letter No. 07-11, "Implementation of Conlan II Court Order: Reimbursement of Covered Services for IHSS Recipients" dated February 20, 2007 (Ex. 27); (2) the Conlan Plan dated October 26, 2006 (Ex. 40); (3) All County Welfare Directors Letter ("ACWDL") 07-01, "Medi-Cal Mass Mailing Letter to all Medi-Cal Head-of-Household and Former Medi-Cal Beneficiaries Since June 27, 1997" dated January 12, 2007 (Ex. 41); (4) DHCS Form 7077, "Notice Regarding Standards for Medi-Cal Eligibility" dated January 2018 (Ex. 43); (5) ACWDL No. 18-28, "2019 Medicare Catastrophic Coverage Act Spousal Impoverishment Caps" dated January 14, 2019 (Ex. 44); (6) DHCS Conlan website (Ex. 45); (7) Medi-Cal Eligibility Division Information Letter No. I 19-15 "Updated Information Notice MC 007- Medi-Cal General Property Limitations" dated May 30, 2019 (Ex. 46); (8) CDSS Data dated September 2019 (Ex. 47); and (9) DSS Conlan website (Ex. 48).

The requests are granted for Exhibits 27, 41, 43, 44, and 46. Evid. Code §452(c). The requests also are granted as to the existence of Exhibits 40, 45, 47, and 48, but not for the truth of their contents. Evid. Code §452(d), (h). Although a court may take judicial notice of a website, it may not accept its contents as true. *See* Ragland v. U.S. Bank Nat. Assn., (2012) 209 Cal.App.4th 182, 193 ("When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable." [Citations omitted.]). *But see* Ampex Corp. v. Cargle, (2005) 128 Cal.App.4th 1569, 1573 n.2 (finding that documents published on Internet were amenable to judicial review to the extent the records were "...not reasonably subject to dispute and [were] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.").

[4] "Pet. Ex." refers to an exhibit in Petitioners' Compendium of Evidence.

[5] Respondents fail to provide exhibit tabs (or even exhibit title pages), making its citations difficult to find. Respondents' counsel is directed to provide exhibit tabs for all future courtesy or record hard copies.

Respondents request judicial notice of the following documents included as exhibits to the Byerts Declaration: (1) ACWDL 17-25, issued by DHCS on July 19, 2017 (Ex. 1); (2) The federal Centers for Medicare and Medicaid Services ("CMS")'s guidance on the expanded spousal impoverishment rele issued on May 7, 2015 (Ex. 2); (3) ACWDL No. 18-19 issued by DHCS on July 19, 2017 (Ex. 3); (4) Medi-Cal Eligibility Division Information Letter No. 18-03 issued by DHCS on February 15, 2018 (Ex. 4); and (5) All County Information Notice: I-03-10, issued by DSS on January 21, 2010 (Ex. 5). The requests are granted. Evid. Code §452(c).

[6] The California Supreme Court has granted review of the questions whether (1) W&I Code section 10000 creates a ministerial duty to complete Medi-Cal eligibility determinations for all applicants within 45 days, and (2) DCHS has a mandatory duty to ensure county compliance with this requirement. Rivera v. Kent, S257304 (Oct. 21, 2019).

[7] DHCS argues that the court ruled on demurrer that DHCS discharged its ministerial duty to implement the expanded spousal impoverishment rule in issuing ACWDL 17-25. Opp. at 8. This is incorrect. The court ruled that ACWDL implements the spousal impoverishment rule, but whether it did so adequately and fully for HCBS programs offered through Medi-Cal had not been pled. For this reason, the court granted Petitioners leave to amend. Demurrer ruling, pp. 5, 8.

[8] DHCS argues that the court's demurrer ruling informed Petitioners that they must join the counties if they wished to argue that the counties were not following DHCS guidance. Demurrer ruling, p.8. Petitioners have not added any counties to this action and DHCS argues that they are barred from arguing that the counties are

not following DHCS's guidance. Opp. at 8. The court agrees that Petitioners cannot claim that the counties are not following DHCS's guidance, but they can and do argue that DHCS's guidance is incomplete.

[9] Petitioners note that DHCS also generally limits retroactive IHSS reimbursement to the date of IHSS application and to certified IHSS providers. Ex. 25, p. 17. "A beneficiary may be reimbursed for services provided by an IHSS enrolled provider as far back as January 1, 2014, if eligible for IHSS back to January 1, 2014." Id. This creates an additional hurdle for those entitled to receive reimbursement or payment for uncompensated care. Ex. 15, ¶ 13. Pet. Op. Br. at 14.

[10] Whether this would corrective action would include Reed who -- unlike Kelley -- did not apply for IHSS, depends on how DHCS exercises its discretion in assessing Medi-Cal recipients who failed to file an IHSS application because they felt it would be futile. The court offers no opinion on how this discretion should be exercised.

[11] Although Petitioners mention an additional group of persons who are currently institutionalized (Pet. Op. Br. at 11), they make no further argument about such a group. Petitioners also initially contend that ACWDL 17-25 identified four groups, but in reply appear to accept DHCS's characterization of only three. Pet. Op. Br. at 11; Reply at 7

[12] Petitioners argue that DHCS also continues to disseminate incorrect information. DHCS Form 7077 (revised January 2018) erroneously implies that the spousal impoverishment rule is only applied where one spouse lives in a nursing facility and the other spouse lives at home. Pet. Ex. 44, p. 3. Additionally, a Medi-Cal Information Notice (revised July 2019) erroneously defines an "institutionalized spouse" as one who is in a "long-term care facility." Ex. 46, p. 4. This means that even those individuals seeking out official information will not learn about the expanded eligibility rules. Pet. Op. Br. at 11.

[13] Petitioners fail to provide copies of the federal statutes and case law cited by them. *See* CRC 3.1113(i).

[14] Petitioners do not seek any damages remedy for violation of the discrimination laws. Nor could they in writs and receivers.
