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16 **UNITED STATES DISTRICT COURT**

17 **NORTHERN DISTRICT OF CALIFORNIA**

18 I. N., a minor, by and through her mother
 19 and *Guardian ad Litem*, Z. F.; J. B., a
 20 minor by and through his mother and
 21 *Guardian ad Litem*, A. B.,

22 Plaintiffs,

23 v.

24 JENNIFER KENT, Director, Department
 25 of Health Care Services; State of
 26 California DEPARTMENT OF
 27 HEALTH CARE SERVICES,

28 Defendants.

Case No.: 3:18-cv-3099 WHA

CLASS ACTION

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Date: October 4, 2018

Time: 8:00 a.m.

Courtroom: 12

Judge: Hon. William Alsup

Action Filed: May 24, 2018

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Cases

A.H.R. v. Wash. State Health Care Auth.
No. C15-5701JLR, 2016 WL 98513 (W.D. Wash. Jan. 7, 2016)..... 15,16, 18

Armstrong v. Excep. Child Center, Inc.
135 S. Ct. 1378 (2015)..... 16

Boardman v. C.I.R.
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Boardman v. Shulman, No. 12-00639
2012 WL 6088309 (E.D.Cal. Dec. 6, 2012) 10

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Cetacean Cmty. v. Bush
386 F.3d 1174 (9th Cir. 2004) 10

Clark v. Richman
339 F. Supp. 2d 631 (M.D. Pa. 2004)..... 16

Cota v. Maxwell-Jolly
688 F. Supp. 2d 980 (N.D. Cal. 2010)..... 13

Douglas v. Indep. Living Ctr. of So. Cal.
565 U.S. 606 (2012)..... 16

Hillburn v. Maher
795 F.2d 252 (2d Cir. 1986) 13

J.K. v. Dillenberg
836 F. Supp. 694 (D. Ariz. 1993) 13

K.C. ex rel. Africa H. v. Shipman
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Katie A. ex rel. Ludin v. County of Los Angeles
481 F.3d 1150 (9th Cir. 2007) 4, 10, 12, 18

Levine v. Vilsack
587 F.3d 986 (9th Cir. 2009) 10

McCartney v. Cansler
608 F. Supp. 2d 694 (E.D. N.C. 2009) 13

1 *Memosovski v. Maram*
 No. 92 C 1982, 2004 WL 1878332 at *50 (N.D. Ill. Aug. 23, 2004)..... 16

2 *Monsanto Co. v. Geertson Seed Farms*
 3 561 U.S. 139 (2010)..... 10

4 *O.B. v. Norwood,*
 5 170 F. Supp. 3d 1186 (N.D. Ill. 2016)..... 15, 16, 17, 18

6 *O.B. v. Norwood,*
 7 838 F.3d 837 (7th Cir. 2016) 15

8 *RCJ Medical Services Inc. v. Bonta,*
 9 91 Cal.App.4th 986 (Ct. App. 2001) 13

10 **Regulations**

11 42 C.F.R. § 431.10 11

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15 42 U.S.C. § 1396a(a)(43)(C) 4, 11, 12

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17 42 U.S.C. § 1396d(a)(19)..... 11

18 42 U.S.C. § 1396d(a)(4)(B) 11

19 42 U.S.C. § 1396d(a)(8)..... 11

20 42 U.S.C. § 1396d(r)(5)..... 11

21 Cal. Welf. & Inst. Code § 14100.1 11

22 **Other Authorities**

23 CMS, EPSDT-A Guide for States: Coverage in the Medicaid Benefit for Children and
 24 Adolescents (June 2014)..... 11, 12

25 *Centers for Medicare & Medicaid Servs., State Medicaid Manual, CMS Pub. 45, Ch. 5,*
 26 *Sec. 5310*..... 12

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28

I. INTRODUCTION

This class action lawsuit seeks to enforce the rights of children and youth with complicated, often life-threatening medical conditions, to receive the Medi-Cal funded in-home nursing services Defendants have determined they need but have not provided. Plaintiffs I.N, a seven-year-old girl, and J.B., a five-year-old boy, are Medi-Cal-beneficiaries with significant physical disabilities who are entitled to receive nursing care in their homes. Defendants approved and authorized Plaintiffs' in-home nursing services as medically necessary. Yet, because Defendants are violating the Medicaid Act, Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act, these children and hundreds, if not thousands, of Medi-Cal beneficiaries like them are not receiving the in-home nursing services they need to remain safely at home with their families.

Defendants California Department of Health Care Services ("DHCS") and DHCS' Director, Jennifer Kent, are moving to dismiss Plaintiffs' First Amended Complaint on standing grounds. The instant motion is not, however, directed at the specific circumstances of the two named Plaintiffs. Defendants instead disavow any responsibility for the shortfall of nursing services of Plaintiffs and other similarly situated Medi-Cal beneficiaries, placing blame on the home health agencies and independent nurses with which Defendants contract to provide these services. But, as the Ninth Circuit has held in another suit involving DHCS, "[e]ven if a state delegates the responsibility to provide treatment to other entities such as local agencies or managed care organizations, the ultimate responsibility to ensure treatment remains with the state." *Katie A. ex rel. Ludin v. County of Los Angeles*, 481 F.3d 1150, 1159 (9th Cir. 2007).

As explained below, Plaintiffs' (and class members') dispute is with Defendants, not the health care providers. States "have an obligation to see that the services are provided when screening reveals that they are medically necessary for a child." *Katie A.*, 481 F.3d at 1159, citing 42 U.S.C. § 1396a(a)(43)(C). Defendants' obligations under the law are clear, and their failures, set forth in detail in the First Amended Complaint, have

1 directly led to Plaintiffs' injury. Correcting these failures will end the ongoing injury. This
 2 Court should deny the motion to dismiss Plaintiffs' First Amended Complaint.¹

3 II. FACTS

4 A. Who are Plaintiffs and Class Members

5 Plaintiffs I.N. and J.B. represent hundreds of children like them who rely on in-
 6 home nursing authorized by Defendants to live safely at home with their families. First
 7 Amended Complaint ("FAC") (ECF No. 45) ¶¶ 1-2. These are children who have
 8 relationships with their family members, interests, and unique personalities, just like any
 9 other child. Because of their high level of medical needs, receiving in-home nursing allows
 10 these children to remain at home and experience as close to a typical childhood as possible.
 11 Without in-home nursing services, I.N. and J.B., and children like them, face the serious
 12 risk of catastrophic and potentially life-threatening health crises, and/or being separated
 13 from their families and communities and placed instead in an institutional setting so they
 14 can receive all of the medically necessary nursing services they require. *Id.* ¶¶ 104-106,
 15 125-127.

16 Plaintiff I.N. is a seven-year-old girl who lives with her adoptive family. FAC ¶ 84.
 17 I.N. has numerous serious disabilities including spastic quadriplegic cerebral palsy,
 18 epilepsy, and brain damage due to oxygen deprivation. *Id.* She is non-verbal and
 19 incontinent, and has difficulties with feeding and swallowing. *Id.* She uses a wheelchair,
 20 and receives nutrition, hydration, and medication through her gastrostomy tube. *Id.* ¶ 86.
 21 She experiences unpredictable pain and requires medication, sometimes administered on
 22 an as needed basis, based on a skilled assessment from a licensed vocational nurse. *Id.* ¶
 23 88.

24 //

26 ¹ Defendants fail to even acknowledge or address Plaintiffs' standing as to their claims
 27 under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. First
 28 Amended Complaint (ECF No. 45) ¶¶ 136-153. At a minimum, the Court should deny
 Defendants' motion as to those claims.

1 I.N. has resided with her adoptive family since she was an infant, initially as a foster
2 child. FAC ¶ 84. The State was unable to locate a home for I.N. due to her extensive
3 medical needs, and considered placing her in a facility when she was less than one year
4 old, but I.N.'s parents accepted her into their family and later adopted her. *Id.* I.N. lives
5 with her two adoptive siblings, two foster-siblings who also have disabilities, and her
6 adoptive parents. *Id.* ¶ 85. Her father is a firefighter who works long hours, and her
7 mother, who is the primary caregiver for all five children, has Lupus, an autoimmune
8 disease that causes chronic fatigue and pain. *Id.*

9 Plaintiff J.B. is a five-year-old boy. FAC ¶ 107. Weighing around 26 pounds, J.B.
10 has complicated medical needs, including Hereditary Motor and Sensory Neuropathy and
11 Neuromuscular Scoliosis. *Id.* He has difficulty with feeding, swallowing, constipation, and
12 is incontinent. *Id.* He is unable to breathe on his own, is ventilator-dependent, and must
13 receive nutrition and medication through his gastrostomy tube. *Id.* ¶ 108.

14 J.B. lives at home with his mother, father, seven-year-old brother who may have a
15 learning disability, and three-year-old sister. FAC ¶ 107. His father works full-time, and
16 his mother, who is the primary caregiver for all three children, was an Engineer Corps
17 officer in the Navy before she was forced to stay home and care for J.B. due to him not
18 having all of the nursing support he needs. *Id.*

19 **B. DHCS' Failure to Arrange for In Home Shift Nursing for Plaintiffs and**
20 **Class Members**

21 Defendant has authorized I.N. to receive 56 hours per week of in-home shift
22 nursing services, and authorized J.B. to receive 135 hours per week. FAC ¶¶ 91, 110. Yet,
23 both Plaintiffs are receiving fewer hours than Defendants have authorized, including
24 because of missed shifts that go unfilled. FAC ¶¶ 93, 112. As set forth in the First
25 Amended Complaint, for the past one-and-one-half years, I.N. has experienced a shortfall
26 of approximately six hours, or 10 percent, per week because of missed shifts due to illness,
27 vacation, or because nurses are assigned to multiple cases at one time. FAC ¶ 93. The
28

1 First Amended Complaint describes the more than 50 percent shortfall that J.B. has
2 experienced for most of his life. *Id.* ¶ 112.²

3 I.N. and J.B. are not alone. According to a study the DHCS conducted in 2016 to
4 evaluate access to in-home shift nursing for children, only 71 percent of the hours
5 authorized by DHCS for more than 3,500 Medi-Cal beneficiaries under age 21 were
6 actually filled. In other words, DHCS is aware of at least a 29 percent state-wide gap
7 between the number of hours of in-home nursing services authorized and actually
8 provided. FAC ¶ 75 (citing DHCS, *Access Study to Private Duty Nursing* (Dec. 15, 2016)
9 (“DHCS Access Study”)).

10 The First Amended Complaint alleges in detail that DHCS fails to arrange for in-
11 home nursing for Plaintiffs and class members, in part, by not providing case management
12 services or other assistance to families seeking in-home nursing services. FAC ¶¶ 7, 69-83,
13 93-105, 114-124. In general, Defendants merely provide families with referral lists of
14 home health agencies and independent nurse providers and these lists often include
15 outdated information on providers outside the relevant geographic area and some of whom
16 do not even accept Medi-Cal. As set forth below, *infra* section III. A.Z., I.N. and J.B.’s
17 families attempted to use lists and other information provided by Defendant DHCS, but
18 found them worthless. Both families conducted their own searches and attempts to find
19 services, to no avail. FAC ¶¶ 95, 102-103, 114, 123-124.

21 In October and November 2017, both Plaintiffs sent letters to Defendant Kent
22 asking for DHCS’ help in finding nursing. FAC ¶¶ 98, 118. In response, Plaintiffs’
23 families received several calls from Georgina “Mimie” Silver, a DHCS representative.
24 FAC ¶¶ 99, 119. Ms. Silver inquired about the families’ efforts to find nursing but
25

26 ² Since the filing of the First Amended Complaint on August 8, 2018, Plaintiffs’ Counsel
27 have been informed that Plaintiffs have recently experienced less of a shortfall than
28 previously, although by report, Plaintiff J.B. continues to experience a significant shortfall
between 20 or more hours per week.

1 thereafter failed to provide any assistance aside from providing I.N.'s mother with a list of
2 independent nurse providers that did not yield additional nursing. FAC ¶¶ 99-101, 119-
3 122.

4 As alleged in the First Amended Complaint, Defendants have failed to provide
5 meaningful access to services, oversee the implementation of services, or assist with
6 locating, coordinating, and monitoring services for Plaintiffs and class members. FAC ¶¶
7 103, 124. Despite their knowledge of the widespread and serious problem, Defendants also
8 fail to effectively monitor and track shortfalls in the provision of medically necessary
9 hours of in-home nursing care, including children who may be hospitalized or
10 institutionalized as a result of lack of access to in-home nursing. FAC ¶¶ 77-79.

11 While Defendants now disclaim any legal responsibility to do more than authorize
12 in-home nursing hours, their actions belie this position. Tasking Ms. Silver to contact
13 Plaintiffs is a tacit admission that DHCS cannot just rely on home health agencies to
14 ensure the actual provision of services. And DHCS has claimed it takes a number of
15 approaches to recruit nurses and arrange for needed care. FAC ¶ 81. Unfortunately for
16 Plaintiffs, these methods have not been offered to them and to the extent that they have
17 been offered to others, these steps fall short of mitigating or addressing the problem. FAC
18 ¶¶ 82-83. Thus, while DHCS' Motion purports to shift responsibility for actual provision
19 of nursing care to third parties, DHCS has failed to demonstrate that it has met its own
20 legal obligations to arrange for needed in-home nursing care.

21 **C. The Impact of Defendants' Failure to Arrange for Nursing on Plaintiffs and** 22 **their Families**

23 Defendants' failure to arrange for in-home shift nursing causes Plaintiffs to be at
24 risk of health crises and out-of-home placement, and it also interferes with their families'
25 ability to work, form relationships with one another, and engage in activities together. FAC
26 ¶¶ 96-97, 105, 116-117, 126. I.N.'s mother works tirelessly for I.N. caring for I.N. day and
27 night when she does not receive enough nursing services. *Id.* ¶ 96. Because of I.N.'s
28 family's circumstances, which include I.N.'s father working long hours, her mother's

1 health issues, the special needs of the children and the general responsibilities that come
2 with caring for children and a home, the shortfall in nursing hours puts I.N.'s health and
3 safety at risk and creates a great deal of stress on I.N.'s family. *Id.* ¶ 97. The shortage in
4 reliable nursing has also impeded the family's ability to take a vacation or more fully enjoy
5 their time together. *Id.*

6 Similarly, when J.B. does not have nursing services, his parents must do their best
7 to provide all of his medically necessary care, without which he could die. FAC ¶ 116. His
8 parents must take turns caring for J.B. at night, and at least one parent must remain in the
9 room with him. *Id.* The parent who cares for J.B. at night must wake up approximately
10 every three hours to empty the water build-up in his ventilator, or ventilate his gastronomy
11 tube so that gas does not build up, which could cause him to vomit in his tracheostomy and
12 suffocate. *Id.* The shortage of staffed nursing hours has taken a toll on J.B. and his family.
13 *Id.* ¶¶ 116-117. J.B.'s mother is no longer able to work because she must care for J.B.
14 when he does not have all of the nursing services he needs. *Id.* ¶ 107. J.B.'s mother also
15 takes depression and anxiety medication due to the stress of caring for a child with high
16 medical needs. *Id.* ¶ 117. His parents' relationships with their other children has also
17 suffered. *Id.* ¶ 117. In addition to their extraordinary caregiving responsibilities, Plaintiffs'
18 families have also been forced to take on the added responsibility of spending precious
19 time and energy trying to find nursing due to Defendants' failure to adequately assist them.
20 *Id.* ¶¶ 95, 114-115.

21 Defendants' failure to arrange for authorized in-home shift nursing services places
22 Plaintiffs and class members at serious risk of out of home placement. FAC ¶¶ 105-106,
23 126-127. If Plaintiffs and class members remain at home receiving less in-home shift
24 nursing than needed, they face a strong possibility of a life-threatening episode. *Id.* ¶¶ 105,
25 126. By failing to meet their legal obligations and arrange for all in-home nursing services,
26 Defendants force Plaintiffs and families into a perilous situation. *Id.* Families must choose
27 between keeping their children at home while receiving less nursing than needed thereby
28 facing a strong possibility of a life-threatening episode or placing them in a hospital or

1 institutional setting where they can receive all of the nursing services they need but where
2 they must live removed from their families, school, and community.

3 **III. ARGUMENT**

4 **A. Plaintiffs' Injuries are Traceable to Defendants and will be Redressed by** 5 **the Relief Requested in the First Amended Complaint.**

6 Defendants argue that they not are responsible for the Plaintiffs' injuries and that
7 the relief Plaintiffs request will not remedy the problems. Defendants' Motion to Dismiss
8 First Amended Complaint (ECF No. 51) at 4 ("Def. Motion"). Defendants also ignore the
9 legal requirements and structure of the Medi-Cal program and the allegations of the First
10 Amended Complaint, which set forth in detail ongoing, concrete injuries that are fairly
11 traceable to Defendants' failures to arrange for nursing services that Defendants have
12 themselves determined the Plaintiffs need.³ *See Monsanto Co. v. Geertson Seed Farms*,
13 561 U.S. 139, 140 (2010) (setting forth requirements for standing).

14 **1. The Structure and Requirements of the Medicaid Act Place**

15 **Responsibility for Arranging the Necessary Services on Defendants.**

16 States participating in the Medicaid program must designate a single state agency to
17 administer and supervise the program and ensure compliance with the law. *See* 42 U.S.C.
18 § 1396a(a)(5); 42 C.F.R. § 431.10. Defendant DHCS is the single state agency responsible
19 for administration of the Medi-Cal program, and Defendant Kent, DHCS' Director, is
20

21 _____
22 ³ Notably, Defendants fail to cite a single case, like *Katie A.*, 481 F.3d 1150, which discuss
23 their obligations under the relevant provisions of the Medicaid Act. Moreover, the cases
24 they do cite bear little resemblance to the facts of this case and are easily distinguishable.
25 *See, e.g., Boardman v. Shulman*, No. 12-00639, 2012 WL 6088309 (E.D.Cal. Dec. 6,
26 2012), *aff'd sub nom. Boardman v. C.I.R.*, 597 F. App'x 413 (9th Cir. 2015) (peace activist
27 does not have standing to challenge payment of portion of federal income tax directed
28 towards war); *Cetacean Cmty. v. Bush*, 386 F.3d 1174 (9th Cir. 2004) (whales, porpoises
and dolphins do not have standing to bring suit under Endangered Species Act and other
federal laws); *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009) (individuals and organization
lack standing to pursue claim that chickens, turkey and other domestic fowl are excluded
from humane slaughter provisions of the Humane Method of Slaughter Act of 1958).

1 responsible for ensuring that DHCS complies with federal laws. *See* Cal. Welf. & Inst.
2 Code § 14100.1 (designating DHCS as the single state agency).

3 Medi-Cal, like every state’s Medicaid program, does not provide health services
4 directly to beneficiaries. Instead, it is a vendor payment program wherein DHCS contracts
5 with and reimburses participating providers – including home health agencies and
6 independent nursing providers – for the services they provide to recipients. These services
7 include not only in-home nursing services, 42 U.S.C. § 1396d(a)(8), 42 C.F.R. § 440.80,
8 but also case management services, 42 U.S.C. § 1396d(a)(19), which include developing
9 plans of care, referral services, appointment scheduling, and monitoring and follow up. 42
10 C.F.R. § 440.169(d).

11 The services also include Early and Periodic Screening, Diagnostic, and Treatment
12 (EPSDT). Children, like I.N. and J.B., who are under age 21 and eligible for Medicaid, are
13 entitled to EPSDT services. 42 U.S.C. § 1396d(a)(4)(B). The EPSDT requires the single
14 state Medicaid agency to ensure that children receive any services described in section
15 1396d(a) of the Medicaid Act when “necessary . . . to correct or ameliorate” illnesses or
16 conditions. 42 U.S.C. § 1396d(r)(5). The EPSDT provisions also require states to “provide
17 for . . . arranging for (directly or through referral to appropriate agencies, organizations, or
18 individuals) corrective treatment the need for which is disclosed by such child health
19 screening services.” 42 U.S.C. § 1396a(a)(43)(C); *see also* CMS, *EPSDT-A Guide for*
20 *States: Coverage in the Medicaid Benefit for Children and Adolescents* at 1 (June 2014)
21 (“The goal of EPSDT is to assure that individual children get the health care they need
22 when they need it—the right care to the right child at the right time in the right setting.”);
23 *id.* at 5 (noting that the “affirmative obligation to connect children with necessary
24 treatment makes EPSDT different from Medicaid for adults” and is “a crucial component
25 of a quality child health benefit”).⁴ State Medicaid agencies are also required to provide
26 covered services in a reasonably prompt manner. *See* 42 U.S.C. § 1396a(a)(8).

27 _____
28 ⁴ *Id.*, https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT_Coverage_Guide.pdf. *See* CMS, *EPSDT Guide* at 2

1 The federal Centers for Medicare & Medicaid Services (CMS), the federal agency
 2 in charge of Medicaid, have instructed states to “[d]esign and employ methods to assure
 3 that children receive . . . treatment for all conditions identified as a result of examination or
 4 diagnosis . . .” Centers for Medicare & Medicaid Servs., *State Medicaid Manual*, CMS
 5 Pub. 45, Ch. 5, Sec. 5310, [https://www.cms.gov/Regulations-and-](https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html)
 6 [Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html](https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html).

7 The Ninth Circuit has recognized that:

8 under the EPSDT provision, states have an obligation to see that the services are
 9 provided when . . . medically necessary for a child. The obligation is created by 42
 10 U.S.C. § 1396a(a)(43)(C) which states that a state [Medicaid] plan must provide for
 11 arranging, directly or referral, necessary corrective treatment. [citations omitted].
 12 States must also ensure that EPSDT must be sufficient to achieve their purpose.
 [citations omitted].

13 *Katie A.*, 481 F.3d at 1159. Defendants have failed to even cite to the operative statute, and
 14 have ignored the clear requirements of the Medicaid Act which place responsibility for
 15 arranging the necessary services directly on them.

16 **2. The Harms Plaintiffs Allege are Clearly Traceable to Defendants’**
 17 **Conduct and Would be Remedied by the Relief Sought.**

18 As the single state Medicaid agency and director thereof, Defendants have the
 19 ultimate responsibility for arranging for and ensuring that Plaintiffs receive the nursing
 20 services that Defendants have found to be medically necessary. The fact that Defendants
 21 contract with private providers to deliver those services does not relieve them of their
 22 responsibility to ensure against problems that result in systemic disruptions in the
 23 provision of medically necessary in-home nursing services for medically fragile children
 24 who depend on Medi-Cal for their care.⁵

25 _____
 26 (“[T]his Guide serves the important purpose of compiling into a single document the
 various EPSDT policy guidance that CMS has issued over the years.”).

27 ⁵ Because of the vendor payment nature of Medicaid and the contractual relationship
 28 Defendant DHCS has with providers, the cases Defendant cites are inapposite. Def.
 Motion at 9-10. None of the cases cited relate to claims against a state agency that is

1 Numerous courts, including this district court, have held that the single state agency
2 cannot disclaim responsibility for compliance with federal law simply because it contracts
3 with outside entities to provide services. *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 997
4 (N.D. Cal. 2010) (holding that DHCS remains ultimately responsible for compliance with
5 due process rights of Medi-Cal beneficiaries even though it contracts with private Adult
6 Day Health Care providers); *see also Catanzano by Catanzano v. Dowling*, 60 F.3d 113,
7 118 (2d Cir. 1995) (noting that it would be “patently unreasonable to presume that
8 Congress would permit a state to disclaim federal responsibilities by contracting away its
9 obligations to a private entity.”) (quoting *J.K. v. Dillenberg*, 836 F. Supp. 694, 699 (D.
10 Ariz. 1993)); *McCartney v. Cansler*, 608 F. Supp. 2d 694, 701 (E.D. N.C. 2009) (same).
11 Indeed, the “reason for the requirement that a state designate a ‘single State agency’ to
12 administer its Medicaid program . . . was to avoid a lack of accountability for the
13 appropriate operation of the program.” *Hillburn v. Maher*, 795 F.2d 252, 261 (2d Cir.
14 1986); *see also RCJ Medical Services Inc. v. Bonta*, 91 Cal.App.4th 986, 1007-1008 (Ct.
15 App. 2001) (The Medicaid Act’s single state agency provision “requires a Medicaid
16 agency to administer or supervise the administration of the state program . . . , thereby
17 ensuring consistent operating standards and accountability to the federal government”).
18 *See generally K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 119 (4th Cir. 2013)
19 (holding the single state agency requirement exists because “one head chef in the Medicaid
20 kitchen is enough.”)

21 Moreover, the First Amended Complaint alleges in detail how Defendants’ specific
22 failures to comply with the Medicaid Act, ADA, and Section 504 of the Rehabilitation Act
23 are causing injuries to Plaintiff and the proposed class. The First Amended Complaint
24 alleges that DHCS fails to provide case management services or other assistance to
25 families seeking in-home nursing services, providing only inaccurate referral lists or
26 _____
27 contracting with entities that carry out the functions of the program. In contrast, the
28 agencies and nurses here are “agents acting in privity with Defendant in providing Medi-
Cal funded services.” *Emily Q v. Bonta*, 208 F. Supp. 2d 1078, 1093 (C.D. Cal. 2001).

1 advice to search the internet for potential nurses. FAC ¶¶ 70-72. It further alleges that
 2 Defendants fail to monitor and track shortfalls in the provision of medically necessary
 3 hours of in-home nursing care. *Id.* ¶¶ 77-79. It alleges that Defendants are well aware of
 4 the lack of in-home nursing. For example, in 2016, Defendant DHCS issued a study
 5 evaluating access to nursing for children under 21, which concluded that only 71 percent
 6 of the hours authorized by DHCS for nearly 3,600 beneficiaries under 21 were actually
 7 filled. *Id.* ¶ 75 (citing DHCS Access Study).

8 The First Amended Complaint details how Defendants' actions (or lack thereof)
 9 cause Plaintiffs' harm and that DHCS is aware of the harm. For example, Defendant
 10 DHCS gave I.N.'s mother useless referral lists for agencies and independent nurses that
 11 did not provide services in the family's geographic area and also provided wrong
 12 telephone numbers. FAC ¶ 95. I.N.'s mother informed DHCS in writing that she was
 13 unable to find nurses and asked for assistance from DHCS in arranging necessary care. *Id.*
 14 ¶ 98. In response, a DHCS representative called I.N.'s mother several times to ask about
 15 the lack of nursing but provided no other help besides giving her another useless referral
 16 list with no case management. *Id.* ¶¶ 99-101.

17 Similarly, J.B.'s family informed DHCS that his nursing hours were not fully
 18 staffed and only received lists of agencies and nurses that would not accept J.B. as a
 19 patient. *Id.* ¶ 114. The family advertised for nursing on several occasions since 2013 but
 20 was unable to find the necessary care. *Id.* ¶ 115. When the family requested assistance
 21 from DHCS in arranging for services, a DHCS representative contacted the family but
 22 provided no assistance. *Id.* ¶ 118-120. Nor has the family received any meaningful case
 23 management. *Id.* ¶ 102-103, 123-124.⁶

24 //

25 _____
 26 ⁶ While it is true that Plaintiffs allege that nurses missed assigned shifts or agencies would
 27 not accept cases, they did not allege that these providers violated any legal or contractual
 28 obligation. FAC ¶¶ 91, 93, 114. Instead, the First Amended Complaint clearly alleges that
 the legal obligation to ensure a system that promptly arranges for necessary in-home care
 for children like I.N. and J.B. lies with Defendants. FAC ¶¶ 3, 36-39, 45-49.

1 Numerous courts have recognized that Medicaid requirements impose
2 responsibilities on Defendants beyond merely authorizing and paying for services. For
3 example, in *O.B. v. Norwood*, as in the instant case, the plaintiff children were receiving
4 fewer hours of in-home nursing services than the single state Medicaid agency had
5 authorized. 170 F. Supp. 3d 1186 (N.D. Ill. 2016). The *O.B.* complaint described a
6 situation similar to the one here—the Medicaid agency worked through a contractor to
7 arrange for in-home services; yet, families’ requests for help were met with little to no
8 assistance, leaving families to attempt to recruit nurses on their own. Complaint for
9 Declaratory and Injunctive Relief ¶¶ 5, 6, 7, 8, *id.* (No. 1:15-cv-10463). In addition to
10 their claims under the ADA and Section 504, the children alleged a violation of EPSDT for
11 failing to arrange for the services the children needed. *O.B.*, 170 F. Supp. 3d 1190. The
12 district court held that the Medicaid agency had likely violated EPSDT, given that the
13 agency had authorized services but they had not been delivered. *Id.* at 1196. The court
14 issued a preliminary injunction ordering the Medicaid agency to “take immediate and
15 affirmative steps to arrange directly or through referral to appropriate agencies,
16 organizations, or individuals, corrective treatment of in-home shift nursing services to the
17 Plaintiffs and Class at the level approved by the Defendant, as required by the Medicaid
18 Act.” *Id.* at 1197-98 (emphasis added). The Seventh Circuit affirmed. *O.B. v. Norwood*,
19 838 F.3d 837 (7th Cir. 2016).

20 In a similar Washington case, infants and toddlers who needed at least 16 hours of
21 in-home nursing per day alleged that the state agency had violated the Medicaid Act and
22 the ADA because they were not receiving all the services they had been authorized to
23 receive in the most integrated setting appropriate. *A.H.R. v. Wash. State Health Care*
24 *Auth.*, No. C15-5701JLR, 2016 WL 98513 (W.D. Wash. Jan. 7, 2016). The court rejected
25 the Medicaid agency’s contention that managed care plans responsible for providing some
26 of the services plaintiffs needed were necessary parties, because plaintiffs sued to enforce
27 the state Medicaid agency’s ultimate obligation to provide services. *Id.* at *8. Ultimately,
28 despite the agency’s contentions that it had made significant efforts to find nurses, the

1 court held that plaintiffs were likely to succeed on their Medicaid claims, because the state
 2 agency failed to provide or arrange for services with reasonable promptness as required by
 3 the Medicaid Act, issuing a preliminary injunction. *Id.* at *14. *See also Memosovski v.*
 4 *Maram*, No. 92 C 1982, 2004 WL 1878332 at *50 (N.D. Ill. Aug. 23, 2004) (holding
 5 Medicaid “places affirmative obligations on states to assure that services *are actually*
 6 *provided* to children on Medicaid in a timely and effective manner.”) (emphasis added);
 7 *Clark v. Richman*, 339 F. Supp. 2d 631, 646-47 (M.D. Pa. 2004) (holding state’s
 8 “obligations with respect to EPSDT services require more proactive steps, such as *actual*
 9 *provision of services. . .*”) (emphasis added).⁷

10 Defendants’ Motion to Dismiss never addresses, much less mentions, cases directly
 11 on point, such as *O.B.* and *A.H.R.* Inasmuch as those cases have granted injunctive relief to
 12 Medicaid beneficiaries on much the same claims alleged in this lawsuit, Defendants’
 13 arguments that Plaintiffs and members of the class lack standing are unavailing.

14 **3. A Favorable Decision Would Alleviate Plaintiffs’ Harm.**

15 Defendants nonetheless argue that the requested relief would not actually redress
 16 Plaintiffs injuries and that they therefore they lack standing. Defendants are wrong. As
 17 explained above, Plaintiffs ask this Court to order Defendants to “arrange directly or
 18 through referral to appropriate agencies, organizations, or individuals, corrective treatment
 19 (in-home shift nursing services) to Plaintiffs. . . .” FAC ¶ 159. Essentially, Plaintiffs seek
 20 an order requiring Defendants to fulfill their legal responsibilities and *actually* arrange for
 21 services to be provided, which would alleviate Plaintiffs’ harm. Defendants suggest that

22 ⁷ Defendants’ assertion that Plaintiffs are precluded from alleging that
 23 reimbursement rates are insufficient is off the mark. Def. Motion at 7-8. First, while
 24 Defendants’ citations question the enforceability of the Medicaid provision governing
 25 adequacy of rates, Plaintiffs do not allege a violation of that provision. *See Douglas v.*
 26 *Indep. Living Ctr. of So. Cal.*, 565 U.S. 606, 611 (2012) (claim based on 42 U.S.C. §
 27 1396a(a)(30)(A)); *Armstrong v. Excep. Child Center, Inc.*, 135 S. Ct. 1378, 1382 (2015)
 28 (same). Rather, their complaint focuses on violations of the EPSDT and the reasonable
 promptness provisions, as well as the ADA and Section 504. *See O.B.*, 170 F. Supp. 3d at
 1192-93.

1 they have done all that they can to secure nursing services for Plaintiffs. As set forth
2 above, however, Plaintiffs dispute this and have alleged detailed facts in support of their
3 contentions. While Defendants may argue differently, that is a dispute about the merits of
4 Plaintiffs' claims.⁸

5 Defendants contend that that only way they could alleviate Plaintiffs' harm is to
6 intervene in the "day-to-day operations of third party employers" and require the home
7 health agencies with which Defendant DHCS contracts to "change their operations." Def.
8 Motion at 9. Plaintiffs request no such thing; rather, they ask for DHCS to fulfill its
9 obligations as the single state agency. In that capacity, there are numerous steps that
10 Defendants could take to secure nursing for Plaintiffs. While these are decisions for
11 Defendants to make in the first instance, they could, for example, provide effective case
12 management, as the law requires. Defendants could also provide accurate and up to date
13 referral lists. They could take steps to recruit additional nurses, including independent
14 nurse providers, and home health agencies as Medicaid providers. *See O.B.*, 838 F.3d at
15 842-43 (upholding decision that state agency likely violated requirement to arrange for
16 services and observing that the state agency failed to show it took any steps to find or
17 recruit nurses).

18 There are likely other steps Defendants could take to arrange for nurses, and they
19 are in the best position to determine what those would be. In *O.B.*, the plaintiff children
20 requested substantially the same relief that Plaintiffs request here. 170 F. Supp. 3d at 1197.
21 Though the agency complained that an order to provide this relief would be too vague, the
22 district court disagreed and ordered the relief sought. Among other things, the court
23 reasoned that the order would preserve the agency's "discretion to fashion the most
24

25 ⁸ Defendants claim that they provide case managers and home visits, offer referral
26 lists, and issue policies and studies. Def. Motion at 6. While this may be true, Plaintiffs
27 also allege that the case management, home visits, and referral lists are woefully
28 inadequate. FAC ¶¶ 7, 71-72, 95-97. 100-102, 114-116. Indeed, the policies and studies
have not provided any relief for Plaintiffs.

