

ENDORSED
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ALAMEDA COUNTY

NOV 17 2010

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15 **SUPERIOR COURT OF CALIFORNIA**
16 **IN AND FOR THE COUNTY OF ALAMEDA**

18 PARENT VOICES OAKLAND, JENNIFER
19 JOHNSTON, TINA TERRAZAS, HAWA
20 MASSALEY and BRANDIE BROWNLEE,

Petitioners,

v.

22 JACK O'CONNELL, in his capacity as Chief
23 Executive Officer of the Department of
24 Education; CALIFORNIA DEPARTMENT
OF EDUCATION,

Respondents.

Case No. RG10544021


**STIPULATION AND [PROPOSED]
ORDER FOR IMPLEMENTATION OF
COURT'S NOVEMBER 5, 2010 ORDER**

**ASSIGNED FOR ALL PURPOSES TO
JUDGE WYNNE CARVILL
DEPARTMENT 21**

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BACKGROUND

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3 1. On October 8, 2010, the Governor of the State of California vetoed all funding
4 for "Stage 3" child care services for low-income, working families who had previously been
5 supported by California Work Opportunities and Responsibilities to Kids ("CalWORKs"). On
6 or about October 11, 2010, the California Department of Education (CDE) issued Management
7 Bulletin 10-10, directing its contractors to notify all families receiving CalWORKs Stage 3
8 program services, and all Stage 2 families that were exhausting their Stage 2 services and were
9 scheduled to transition into Stage 3 effective November 1, that their child care benefits would
10 be terminated effective November 1, 2010 due to the Governor's veto. On October 29, 2010,
11 Petitioners Parent Voices Oakland, Jennifer Johnston, Tina Terrazas, Hawa Massaley and
12 Brandie Brownlee (collectively "Petitioners") filed a Petition for Writ of Mandate pursuant to
13 Cal. Code Civ. Proc. § 1085 challenging the manner in which Respondents Jack O'Connell and
14 California Department of Education (collectively "Respondents" or "CDE") implemented the
15 Governor's line-item veto.

16 2. On October 29, 2010, the Court issued an Order staying any termination of
17 Stage 3 services until November 5, 2010, so as to preserve the status quo pending further hearing
18 set for November 4, 2010. On November 5, 2010, the Court issued an Order Granting In Part
19 And Denying In Part Application For Interim Relief (the "November 5 Order"). A copy of the
20 November 5, 2010 Order is attached hereto as Exhibit A.

21 3. In the interim, on November 4, the CDE issued Management Bulletin 10-14 to its
22 Stage 2 and Stage 3 contractors encouraging them to provide specific information to any family
23 who has or will be receiving a Notice of Action terminating their Stage 3 child care services due
24 to the Governor's veto of funding.

25 4. On November 5, the CDE issued Management Bulletin 10-15, informing Stage 2
26 and Stage 3 contractors of the November 5 Order and instructing these contractors to rescind the
27 prior Notices of Action terminating Stage 3 child care until new Notices of Action could be
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1 issued in compliance with the November 5 Order and to await further instructions regarding the
2 directive content of the new Notices of Action.

3 5. During discussions between Petitioners and Respondents on November 7, 8 and 9,
4 it became apparent that the parties significantly disagreed in their interpretations of the
5 November 5 Order, making clear that additional litigation over the scope of the Order could
6 ensue. This threat of further litigation prevented prompt implementation of the Order by the
7 CDE, with the risk of creating confusion for Stage 3 contractors and families. Petitioners
8 contend, among other things, that all Stage 3 families are entitled to individual eligibility
9 screenings prior to termination of the Stage 3 services even if a 19-day Notice of Action period
10 in Title 5 Section 18434 does not provide sufficient time to complete these screenings, while
11 Respondents contend that the November 5 Order permits the CDE to issue Notices of Action
12 with the intended date of termination occurring only 19 days after the notices are mailed to the
13 families pursuant to Section 18434, with contractors using their best efforts to do eligibility
14 screenings during that period of time.

15 6. At the November 15, 2010 scheduling conference, the CDE sought clarification
16 from the Court regarding the November 5 Order, including the type of screening required by the
17 Order. The Court informed the parties that the type of screening required pursuant to the
18 November 5 Order would entail some opportunity to be screened on an individual basis for
19 eligibility for other child care. The Court anticipated that at the next hearing, the parties would
20 introduce evidence regarding the amount of time needed to conduct these individualized
21 screenings. Petitioners maintain they intend to produce competent evidence in the form of
22 declarations from contractors and other persons knowledgeable about the process of screening
23 families for child care eligibility, that at a minimum, contractors will need an additional ninety
24 (90) days to complete the screening required under the November 5 Order. Respondents claim
25 that the screening required under the Court's November 5, 2010 Order can be accomplished in
26 much less time. After extensive discussions and in lieu of protracted litigation which might only
27 serve to further delay implementation of the Court's Order, and to avoid further uncertainty for
28 parents, their providers and CDE contractors, the parties have agreed to resolve their remaining

1 differences by stipulating to the terms of the implementation of the November 5 Order by
2 agreeing that all individualized screenings can be completed by December 31, 2010.

3
4 7. IT IS THEREFORE STIPULATED by and among Petitioners and Respondents,
5 through their respective Attorneys of Record, that an agreement has been reached and that an
6 order may be entered regarding implementation of this Court's November 5, 2010 Order on the
7 terms and conditions contained herein.

8 **STIPULATION OF THE TERMS AND CONDITONS FOR IMPLEMENTING**
9 **THE NOVEMBER 5, 2010 ORDER**

10 8. As soon as possible and no later than three (3) business days after the Court's
11 approval of this Stipulation and Proposed Order, the CDE will issue a Management Bulletin to
12 all of its Stage 2 and 3 contractors. This Management Bulletin will inform contractors that they
13 must, as soon as possible and in any event no more than 5 days after receipt of the Management
14 Bulletin, issue a notice entitled "Notice of Termination of Stage 3 and Right to Eligibility
15 Screening for Other Child Care" (hereafter "notice") to all families currently receiving Stage 3
16 services as well as any family in Stage 2 who "timed out" of Stage 2 effective October 31, 2010,
17 or who will time out November 30, that Stage 3 child care services will be terminated effective
18 midnight on December 31, 2010, due to the veto of the funding by the Governor on October 8,
19 2010¹. Notices need not be sent to those families who had been receiving Stage 2 or Stage 3
20 services prior to the date of this Stipulated Order, but for whom alternative funding or service
21 arrangements have already been made and confirmed for all their children, including families
22 where the contractor has determined that all of the children are receiving services funded through
23 a local First Five Commission or any other funding source.

24 9. The exact wording to be used for the notices will be included in the Management
25 Bulletin for the sake of efficiency and consistency. Counsel for Petitioners shall be given the
26

27 ¹ This Stipulation and Implementation Order does not address the interests or rights of Stage 2 families who "time
28 out" on or after December 31, 2010 to be screened for or transitioned to other subsidized child care services. This
Stipulation and Order also does not address the rights and interests of Stage 3 families who will not be placed in
other subsidized child care prior to January 1, 2011.

1 opportunity, at least 24 hours prior to issuance of the Management Bulletin, to review and
2 comment on the draft Management Bulletin, including the language of the proposed notice.
3 Counsel for Petitioners shall submit any comments to CDE within twenty four (24) hours of the
4 receipt of the draft Management Bulletin. The notices required by the Management Bulletin will
5 inform recipients that their Stage 3 child care services will terminate as of the end of December
6 31, 2010 and they will not have the opportunity to appeal that termination. The notice will
7 further provide that parents may request that they be screened by their contractor for eligibility
8 for any other subsidized child care programs in their zip code, and one additional zip code within
9 the county otherwise designated by the family. The notice shall state that the families should
10 make a request as soon as possible, and must request screening no later than Friday December
11 10, 2010 in order to ensure that they receive such screening before their Stage 3 services
12 terminate. The notice will further inform recipients that this request may be made to the
13 contractor(s) by telephone call, fax, U.S. mail, e-mail or in person, so long as the request is
14 received by the close of business on December 10. Contractors will designate a contact person(s)
15 and telephone number for the person(s) who will receive those requests. The notice from the
16 contractor(s) will include the contact person's name and telephone number, a fax number, postal
17 address and e-mail address for that contact person. The CDE will direct its contractors to work
18 with families to ensure that families may request screening in as easy and simple a manner as
19 possible.

20 10. Either contemporaneously or within two calendar days after issuance of the
21 above-mentioned Management Bulletin, CDE will issue instructions to Stage 3 contractors as to
22 the process for conducting eligibility screenings. These instructions will include the substance of
23 paragraphs 11 through 14, below. The Management Bulletin will remind contractors that they
24 previously have been instructed to screen all families for eligibility for Stages 1 and/or 2 without
25 the family having to make any request. In those counties where limited child care funded by the
26 First Five Commissions is available, contractors should work collaboratively to assist families in
27 moving into this funding source.

1 11. Each family who indicates to their contractor on or before December 10 that it
2 wishes to receive a screening shall be given one with an agency staff member. The contractor
3 will offer each family the opportunity for either a face-to-face meeting or a meeting by
4 telephone, depending on the staffing and ability of the contractors to hold face-to-face meetings
5 with all who request one. During this meeting, the family will be screened by the contractor to
6 determine if they have gone back on CalWORKs cash assistance or have been determined
7 eligible by the county welfare department for the county's Diversion program and shall be
8 promptly transferred into Stage 2 if the family is determined to be eligible. If the family is
9 determined to be ineligible for Stage 2, they will next be screened for eligibility and desire to
10 participate in other CDD (Child Development Division) subsidized child care programs that may
11 have openings available, either at that time or any time prior to December 31, in their zip code of
12 residence or one other zip code in the county as otherwise designated by the family. These
13 include openings in the California Alternative Payment Program (CAPP) that may be made
14 available by a CAPP contractor utilizing CAPP funding or openings in a CDD child care
15 program that a CDD contract provider has made available as set forth in this paragraph and
16 paragraph 15 below. Families will not be required to go onto the Centralized Eligibility List
17 (CEL) to access these programs. Contractors should review with the family each potential basis
18 for eligibility for all CDD-administered programs for which the family may qualify.

19 12. All screenings must be conducted by the Stage 2 or Stage 3 contractor no later
20 than close of business on December 28, 2010 in order for contractors to have an opportunity to
21 hold lottery drawings for any available openings and in order to have time to either transfer those
22 families that are chosen in the lottery into an available CAPP program or to enable the family to
23 enroll in the opening in a CDD child care program.

24 13. Families will be informed at this meeting with contractor staff of any alternative
25 subsidized child care program(s) for which they are eligible and for which they desire placement
26 located in their zip code of residence, and one additional zip code within the county as otherwise
27 designated by the family, and that their name will be included in a random lottery for those
28 openings that are available. They will also be informed that there are not enough openings to
STIPULATION AND [PROPOSED] ORDER FOR IMPLEMENTATION OF COURT'S NOVEMBER 5, 2010 ORDER
CASE NO. RG10544021

1 accommodate all of the families terminated from Stage 3 and there is no guarantee that they will
2 have subsidized child care services after December 31, 2010. The contractor will make its best
3 efforts, using any means practicable, to inform families regarding whether or not they are being
4 offered enrollment in another subsidized child care program, and that if they are not offered a
5 spot in another subsidized child care program, care will be terminated effective end of day on
6 December 31, 2010. Contractors are required to obtain the most current contact information for
7 the family including any available cell or work phone numbers and any pertinent e-mail
8 addresses that the family regularly checks.

9 14. For families that do not request a screening on or before December 10, 2010,
10 contractors will be informed that they are encouraged to assist those people who request a
11 screening after December 10, if they have the time and ability to do so.

12 15. At or about the time the CDE issues the Management Bulletin described in
13 paragraph 8, it will immediately issue instructions to both its CAPP contractors and its CDD
14 Title 5 contractors. The instructions to CAPP contractors will state that they must utilize any
15 available funding in their CAPP contract to serve Stage 3 families wishing to continue in a
16 voucher program and that, if the CAPP contractor is not also a Stage 3 contractor, it must
17 immediately inform the Stage 3 contractor in their county of the amount of funding available to
18 serve Stage 3 families and must do so no later than December 3, 2010. CDE will instruct the
19 CDD Title 5 contractors that they must determine what openings, if any, they have available, or
20 will have available by December 31, and they must offer those openings to Stage 3 families
21 before making them available to any non-Stage 3 family, unless the contractor reasonably
22 determines that it is not feasible due to program operations. The instructions will further advise
23 CDD Title 5 contractors that they must immediately contact the Stage 3 contractor in their
24 county with the number of openings, the hours of care for those openings, the ages of the
25 children eligible for those openings, and the zip code covering the area where the opening exists
26 no later than December 3, 2010. If there is more than one Stage 3 contractor in the county, any
27 non-CalWORKs contractors will be instructed that they must report this information to the Stage
28 3 contractor in the catchment/geographic area that the non-CalWORKs contractor serves.

1 16. The CAPP and CDD contractors referenced in paragraph 15 above will be
2 instructed by the CDE that they should have sufficient staff available during the week of
3 December 27-31 to ensure that any Stage 3 families chosen through the lottery process can be
4 enrolled and smoothly transitioned into the new program prior to close of business on December
5 31, 2010.

6 17. In addition to the Management Bulletin in paragraph 8 and the instructions to be
7 issued by the CDE to CAPP and CDD contractors in paragraph 15, the CDE will issue
8 instructions to all of its Stage 3 contractors as to how to conduct the lottery to determine which
9 Stage 3 families will be eligible to receive continued subsidized child care services either
10 through a CAPP voucher or through a CDD program for which a Stage 3 family is eligible and
11 has expressed an interest. Since there are no regulations as to how to choose which potentially
12 eligible and interested families receive any openings available, the parties suggest and agree to
13 the following guidelines:

14 a) If a family has indicated through the screening process that they only want
15 to continue with their existing provider using a voucher, the family's name will only be
16 placed in the lottery for any available CAPP openings.

17 b) For all other child care programs that have an opening, the name of any
18 family that is eligible for that program and has expressed a desire in that program should
19 be placed in a lottery for any and all openings in that program.

20 c) If a family has expressed interest in more than one child care program for
21 which it is eligible, the name of the family should be placed in a lottery for each such
22 program. The family will be offered subsidized child care from the lottery drawing in
23 which their name is first drawn.

24 d) The lottery must be completed by close of business on December 29, 2010
25 and by that same date, if possible, families who have been chosen in the lottery to receive
26 an opening in a CAPP voucher or CDD Title 5 program should be contacted by the Stage 3
27 contractor through any available means and immediately informed of the opening. When
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1 families are contacted about the opening and that they have been randomly chosen to
2 receive services, both the family and the Stage 3 contractor must work together to ensure
3 that services are transferred to the new contractor no later than December 31.

4 e) If the contractor cannot reach a family chosen through the lottery by close
5 of business on December 30 or the family chosen does not accept the opening offered to
6 them by the close of business on December 30, the family's name will be placed on the
7 CEL and that family's child care services will end as of December 31, 2010. The agency
8 will then make its best efforts to fill that opening with the name of the next Stage 3 family
9 drawn in the lottery.

10 18. For those Stage 3 families that are not transitioned into CalWORKs Stage 1 or
11 Stage 2 or another CDD subsidized child care program as of close of business on December 31,
12 2010, their names will be included on a separate CDE Stage 3 "hold" list to be maintained by the
13 CDE through each county's Centralized Eligibility List. In addition, the names of Stage 3
14 families will also be placed on the county's CEL in income/need order pursuant to state statutes
15 and regulations. In the event that legislation to restore Stage 3 funding is not enacted by January
16 31, 2011, those Stage 3 families on the "hold" list will be considered in "eligible for and
17 otherwise enrolled but waiting" status until March 20, 2011.

18 19. For those Stage 3 families that are transitioned into another CDD-subsidized child
19 care program, their names will be tracked by the CDE contractor in the program to which they
20 have been transferred. If the family's child care is funded through a local, county and/or First 5
21 Commission administered by a Stage 3 contractor, the Stage 3 contractor will track the family.
22 The tracking of both groups of families is necessary to ensure that they will have the ability to
23 transition back into the Stage 3 program if the program is again funded at a later point in time.
24 Should funding of Stage 3 program be restored for fiscal year 2010-2011, families transferred to
25 the CAPP program will automatically be transferred back into Stage 3 contracts and the CAPP
26 funding remaining could be utilized to serve non-CalWORKs low-income families. Families that
27 transferred into other CDE-funded child care and development services will be offered the option
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1 of transferring back to Stage 3. Should the family decide to transfer back to Stage 3, the
2 contractors would then be permitted to fill the slot with additional children.

3 **MISCELLANEOUS PROVISIONS**

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5 20. On or before December 20, 2010, the CDE will provide information to
6 Petitioners' counsel regarding the status of screening by contractors and the implementation of
7 this Order. This information should include the number of requests for screening that have been
8 received, and to the extent that it can feasibly be obtained, the number that has been completed,
9 and for those who have not been screened, the plan for completion. Shortly after sending the
10 information, CDE will meet with Counsel for Petitioners to discuss the status of the
11 implementation and any serious problems that have arisen.

12 21. In the event that disputes arise between Petitioners and Respondents with respect
13 to the interpretation, application, or implementation of this Implementation Order, the Attorneys
14 of Record for Petitioners and Respondents shall meet and confer in a good faith attempt to
15 resolve disputes. Neither Petitioners nor Respondents may seek redress from the Court prior to a
16 good faith attempt to resolve the dispute among themselves. If any dispute cannot be resolved
17 by meet-and-confer, any party may then seek redress from the Court *using the ex parte*
A procedures for D-21.

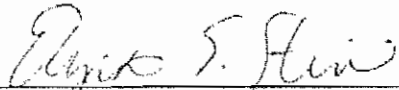
18 22. The Attorneys of Record warrant that they have fully advised their respective *(WSC)*
19 clients of the terms of this Stipulation and Proposed Order and that their clients have authorized
20 their Attorneys to execute it on their behalf.

21 23. Given this Stipulation, the parties believe there is no need at this time for a further
22 hearing on a preliminary injunction. The Court has scheduled the final hearing on the Writ of
23 Mandate for February 2, 2011.

24 24. If Stage 3 funding is sufficiently restored, petitioners will, absent enforcement
25 issues, dismiss this litigation as moot. If the funding is not restored, the parties may raise any
26 remaining issues at the final hearing on the writ of mandate presently scheduled for February 2,
27 2011. The parties shall first attempt to resolve any remaining issues through the meet and confer
28 process.

1 25. By entering into this Stipulation, the parties make no admission regarding any
2 alleged violation of law.
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1 AMY BISSON HOLLOWAY, GENERAL COUNSEL

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Dated: November 16, 2010

3 By: ELIZABETH STEIN
4 Deputy County Counsel
5 Attorneys for Respondents

6
7 THE PUBLIC INTEREST LAW PROJECT
8 THE CHILD CARE LAW CENTER
9 WESTERN CENTER ON LAW & POVERTY
10 NEIGHBORHOOD LEGAL SERVICES OF LA COUNTY
11 PUBLIC COUNSEL LAW CENTER
12 LEGAL AID FOUNDATION OF LOS ANGELES


11 

Dated: November 16, 2010

13 By: STEPHEN E. RONFELDT
14 Attorneys for Petitioners

15
16 HAVING REVIEWED THE STIPULATION OF THE PARTIES, IT IS SO ORDERED.
17

18
19 Date: November 17, 2010

20 
21 HONORABLE WYNNE CARVILL

EXHIBIT

A

Officer of the CDE; and Karin Schwartz appeared on behalf of the California Department of Social Services ("DSS"). Having considered all pleadings filed to date and the oral arguments presented on October 29 and November 4, 2010, the Court now rules.

A. Background

1. This case presents novel issues regarding the application of regulations drafted to implement a social benefits program to an agency's efforts to effectuate a line item veto that eliminates all funding for the program in question and whether those efforts violate the Due Process Clause of the Federal and State Constitutions. The Governor's line item veto occurred on October 8, 2010, and it terminated all funding for "Stage 3" child care services¹ previously offered by California Work Opportunities and Responsibilities to Kids ("CalWORKs"). The vetoed budget item provided all funding after October 31, 2010, and thus the agency action in question attempted to terminate such services effective November 1, 2010.

2. On Friday, October 29, 2010, Petitioners filed a Petition for Writ of Mandate (Code Civ. Proc. §1085) seeking an alternative writ of mandamus commanding Respondents Jack O'Connell and the CDE to direct their contractors to rescind all previous notices of action terminating "Stage 3" child care and continue such services unless and until an adequate notice of action and opportunity for hearing are afforded to recipients of these services as required by CDE regulations. (5 Cal. Code Reg. §§18119,

¹ Child care services are classified as Stage 1, 2 or 3. Generally, Stage 1 covers child care for parents who are on welfare but actively seeking work; Stage 2 provides child care subsidies to parents for 24 months after they have transitioned from welfare to stable employment; and Stage 3 provides continued subsidies to parents who have exhausted Stage 2 benefits but whose income is such that they still qualify for child care subsidies.

18120, 18434.²) Petitioners also sought a temporary restraining order and preliminary injunction granting the same relief. The CDE action challenged by Petitioners is Management Bulletin 10-10 issued on or about October 11, 2010, directing its contractors to notify immediately all families and children receiving CalWORKs Stage 3 program services that their child care benefits will be terminated effective November 1, 2010, due to the Governor's veto. Bulletin 10-10 instructed the contractors to advise recipients in the notice that, because all funding was terminated, they do not have a right to appeal.

3. Based on Petitioners showing of irreparable harm to thousands of families who would suffer an immediate loss of all child care services on short notice, the relative lack of hardship Respondents would suffer from a short stay to allow the Court to consider the merits of the Petition, the fact that the regulations in question facially require a certain notice period and right to hearing where a notice of action would terminate service, and the standards applicable to requests for temporary, interim relief (e.g., *Landmark Holding Group, Inc. v. Scully* (1987) 193 Cal.App.3rd 525, 528), the Court issued an order staying any termination of Stage 3 services until November 5, 2010, so as to preserve the status quo pending further hearing, ordered supplemental briefing on the issues presented and set the matter for further hearing at 2:00 p.m. on November 4, 2010. The Court has now received that supplemental briefing and heard the arguments of the parties concerning the propriety of interim relief and rules on Petitioner's application for such relief.³

² Unless otherwise indicated, all regulatory citations herein are to Title 5 of the California Code of Regulations.

³ At the beginning of the November 4th hearing the Court inquired as to whether the record was as complete as it was ever going to be and the case was ripe for a ruling on the merits of the writ of mandate. Both parties objected on various grounds. DSS, for example, questioned the adequacy of notice and its lack of a

B. Petitioners' Claims & Respondents' Rebuttal

4. The Petition alleges three different defects in Respondents' notice of action intended to implement the Governor's veto of funding for Stage 3 services. First, it is alleged that the notice was untimely, contained misleading information and provided insufficient information for recipients to understand and contest the adverse action. Second, CDE allegedly failed to afford recipients with an opportunity for a hearing and aid-paid-pending that hearing, and Petitioners argue that this failure violates CDE's own regulations and constitutional Due Process guarantees. Third, the CDE failed to determine the eligibility of terminated families for Stage 1 or Stage 2 child care services or other related programs so that there would be no break in child care services for otherwise eligible families as allegedly mandated by California law regarding continuity of such services. These three attacks are referred to in short-hand as the "notice," "hearing" and "continuity of service" issues.

(a) Timeliness and Adequacy of Notice

5. With respect to the timeliness and adequacy of the notice that Bulletin 10-10 directed CDE contractors to send to recipients, there are two distinct issues. On the question of *timing*, Petitioners argue that section 18434 requires 19 days notice of any action terminating services. The Bulletin was issued on October 11, 2010, and contractors who received it had to prepare and send out notices in conformity with the Bulletin's instructions. Although the Bulletin was apparently issued electronically to contractors on October 11th (see Maben Decl. at ¶7), the contractors obviously required some period of time to prepare a conforming notice of action and deliver it to the affected

sufficient opportunity to respond to the merits, and others indicated an interest in augmenting the evidentiary record. Accordingly, the only issue before the Court is the application for interim relief.

families. The record reflects that contractors mailed notices in compliance with the Bulletin at various times from October 12 to 15, 2010. (See Olenick Decl. at ¶5; Currie Decl. at ¶7; Mitchell Decl. at ¶5; Dennis Decl. at ¶4.) Thus for those notices mailed on or after October 13, the recipients of those notices did not have the 19 days specified in section 18434. Based on this chronology, Petitioners argue the notices were defective.

6. Assuming arguendo that section 18434 provides the relevant notice period, November 1, 2010, may indeed have been too soon to terminate Stage 3 child care services for all recipients. But while the Bulletin instructed that all notices state that services were to be terminated "effective November 1, 2010," this Court's October 29th stay extended that period to November 5, 2010 -- two days beyond the nineteen days required by section 18434 for those notices mailed as late as October 15, 2010. Thus whatever deficiency there may have been in the initial notice period, it is indisputable that at least 19 days have now elapsed from the mailing of the notices at issue. Thus any notice issue premised on the mandate of section 18434 is now moot because all families receiving Stage 3 benefits have now had 19 days notice prior to the termination of their child care subsidies.

7. With respect to the content of the notices sent, Petitioners argue the notices issued pursuant to Bulletin 10-10 were substantively inaccurate because they (a) stated that recipients had no right to appeal even though certain regulations on their face purport to afford one and (b) failed to advise recipients that under CDE regulations those who appeal are entitled to aid-paid-pending that hearing. The issue of whether the notices contractors were directed to issue were inaccurate or misleading depends in turn on Petitioners' second challenge. If that fails, then the notices were in fact accurate,

while if Petitioners are correct regarding the right to hearing and aid-paid-pending, then the notices were inaccurate. Given the derivative nature of this issue, the Court turns to Petitioners' second line of attack.

(b) Regulatory Right to Hearing & Aid-Paid-Pending

8. Petitioners claim that recipients have a regulatory right to a hearing for two distinct reasons. First, they argue that under CDE's own regulations (e.g., 5 Cal. Code Reg. §§18094(c)(2), 18095(k), 18119(a) and 18120) Respondents cannot terminate Stage 3 benefits without affording recipients the opportunity for an individualized hearing and aid-paid-pending. The first of these sections (§18094) governs contractor decisions to "approve or deny" services initially; the second (§18095) applies where the contractor acts "upon recertification or update of the [recipient's] application;" the third section (§18119) applies to changes made to "the service agreement," including "termination of service;" and the fourth (§18120) details a parent's hearing rights when he or she "disagrees with an action." Petitioners argue that the current CDE directed action is indisputably a "termination of services" within the meaning of section 18119(a), and that the regulations on their face thus contemplate a hearing in conformity with section 18120, including the right to aid-paid-pending as provided in section 18120(b). While this is certainly not an implausible argument, several factors weigh against it.

9. First, all of the four sections appear on their face to address individualized circumstances that may affect the initial or continuing eligibility of individual families for Stage 3 services. Sections 18094 and 18118 expressly address an individual's application and status; section 18095 addresses a recertification or update of an application; and section 18119 as a whole also is drafted in a manner indicating it covers various

individualized determinations a contractor may be called upon to make on a case-by-case basis. None of these sections are written in terms that are easily applied to broad programmatic developments such as a complete termination of Stage 3 funding.

10. Second, considering the regulations as a whole, some are drafted to address broader funding issues. Thus Respondent points to section 18424 entitled "Enrollment into CalWORKs Stage 3 by Transfer from Another CalWORKs Agency." This section addresses how transfers from Stage 1 or 2 or another contractor's Stage 3 program are to be handled, and subsection 18424(e) through (h) govern how those transfers should be processed in the face of various fiscal constraints. The last of these subsections (§18424(h)) expressly addresses the problem of inadequate funds. It states that "[t]he contractor shall mail or personally deliver a completed notice of action to the parent(s) pursuant to 18434 *when services are to be terminated due to insufficient funds.*" (Emphasis added.) Nowhere in the regulations concerning a right to hearing or aid-paid-pending is there any reference to a right to hearing or aid-paid-pending on an action taken pursuant to this latter subsection (§18424(h)). Rather this subsection simply states that contractors "shall mail or personally deliver a completed notice of action" pursuant to section 18434, and this language arguable only requires that the calendar day notice provisions of that section be observed. Respondents claim it is unreasonable to interpret the reference to section 18434 as indicating an intent to incorporate the cross-references to sections 18094, 18095, 18118 and 18119(a) and then use those sections to trigger the hearing rights in section 18120 together with the latter's aid-paid-pending provision.

11. Third, Respondent would further argue that it is a complete non-sequitur to find that the drafters of the regulations intended to afford individualized hearings and

aid-paid-pending in circumstances where funding for the entire program has been either exhausted or completely eliminated by a line item veto. Under such a scenario there would be no individualized factors to adjudicate and no funds available for aid-paid-pending. Further, as reflected in the filings in this case that recount the immediate lay-offs at the contractors triggered by the line item veto, the entities that might otherwise afford recipients the hearings contemplated in the regulations are the same entities forced to lay-off the personnel who would provide such hearings. It makes no sense in the face of these factors to rule as a matter of regulatory construction that the regulations were drafted to afford individualized hearings and aid-paid-pending to all Stage 3 recipients in a case where all funding is terminated.

12. Petitioners respond that the foregoing analysis fails to consider an important legislative directive in the CalWORKs child care program -- namely, the continuity in service mandate. Pursuant to various provisions of the Education Code, the CDE is mandated to provide subsidized services to eligible recipients in a manner that ensures "no break in service" and to move families from one program to the next, successive program prior to termination of services. (E.g., Educ. Code §§8350(b), 8263(c).) Thus CDE is directed under the Code to move families "as quickly as feasible" from Stage 2 to Stage 3, and even Stage 1 recipients may be accelerated in this fashion. (*Id.* at §§8353(a), 8350.5, 8354.) Further Stage 3 recipients may become "re-eligible" for Stage 1 due to various developments such as a loss of employment and return to welfare.⁴

⁴ CDE disputes Petitioners' contention that families are transitioned from Stage 2 to Stage 3 before their Stage 2 eligibility expires and points to regulations ostensibly requiring that Stage 2 eligibility be exhausted before families are moved to Stage 3. (5 Cal. Code Reg. §§18400(p), (r), 18421(3); Remley Decl. at ¶¶3, 12.) But CDE agrees that various circumstances may cause a recipient who was appropriately transitioned to Stage 3 to become "re-eligible" for Stage 1. CDE further claims that contractors are required by law to

(See Terrazas Decl.) Petitioners argue that a hearing process would afford a significant number of Stage 3 recipients an opportunity to establish their eligibility for child care under Stage 1 or 2 or other CDE-administered child care programs and that, given the legislative mandate to avoid to the extent feasible any break in service, it is unreasonable to interpret the regulations in a way that excuses CDE from the obligation to implement funding cuts so as to ensure the transfer of Stage 3 recipients eligible for other programs to those child care alternatives. The only way to ensure such transitions is to afford recipients the opportunity to be heard, and thus the regulations – including the reference in section 18424(h) to a notice of action pursuant to section 18434 – should be read to include the hearing process together with aid-paid-pending.

13. When considering the parties' competing contentions on the above regulatory issues, the Court notes that the general rules for statutory construction apply as well to interpretation of regulations (e.g., *Donley v. Davi* (2009) 180 Cal.App.4th 447, 465) and that in either exercise one of the objectives is to avoid a construction that might render the enactment unconstitutional. (E.g., *In re Timothy R.* (1988) 202 Cal.App.3d 593, 601.) The Court thus turns to Petitioners' constitutional arguments as they may bear on how best to resolve the competing views on the appropriate construction of the regulations. Alternatively, if one were to construe the regulations as silent on the issue of how to implement a complete termination of Stage 3 funding, then the constitutional analysis is necessary because it proscribes the minimum procedures the CDE must observe when implementing the termination of funding. In either case, the regulatory issues cannot be resolved without considering the constitutional overlay.

transition these people to the appropriate program regardless of whether they have any appeal rights or whether individual screening is ordered by a court.

(c) Constitutional Due Process Issues

14. Relying on a venerable line of authority dating back to *Goldberg v. Kelly* (1970) 397 U.S. 254, Petitioners argue that Stage 3 recipients have a property interest in the continuation of Stage 3 benefits that cannot be terminated without the minimal procedural protections guaranteed by the Due Process Clause and that these include *inter alia* notice and an opportunity to be heard. There is no serious dispute that welfare benefits – in this case child care services – are a species of property enjoying such Due Process protections. (E.g., *Atkins v. Parker* (1984) 472 U.S. 115, 128.) Respondents argue, though, that where Congress or the legislature makes a mass, programmatic change that has an across the board impact no individualized notice is required to implement such a change. As explained in *Atkins*, “[t]he claim that petitioners had a constitutional right to better notice of the consequences of the statutory amendment is without merit. All citizens are presumptively charged with knowledge of the law.” (472 U.S. at 130.) Applied to this case, where the Governor eliminates all funding for a program through his line item veto power, Due Process notice requirements are met by a generic notice sent to all recipients of aid in that program advising them of the elimination of funding and resulting termination of service.

15. Petitioners’ rejoinder is that *Atkins* only addressed the notice issue and did “not concern the procedural fairness of individual eligibility determinations.” (*Id.* at 128.) Indeed, the notice sent out by the agency in *Atkins* “plainly informed each household of the opportunity to request a fair hearing and the right to have its benefit level frozen if a hearing was requested.” (*Id.*) Here, by contrast, the CDE notice advised recipients that they had *no* right to a hearing and was silent on the aid-paid-pending issue.

Petitioners thus argue that this case is more similar to *Youakim v. McDonald* (7th Cir. 1995) 71 F.3d 1274, where Illinois' implementation of new foster care requirements was held to be deficient because it terminated benefits without affording recipients a pre-termination opportunity to show that they could meet the new requirements. (See also *Greene v. Babbitt* (9th Cir. 1995) 64 F.3rd 1266 (due process requires meaningful hearing to determine whether tribe members previously receiving benefits could satisfy new criteria).) In both *Youakim* and *Greene*, individuals "were receiving government benefits prior to a legislative change that imposed a new eligibility requirement. The effect of that change ... was to eliminate (at least temporarily) the benefits of current recipients while they attempted to satisfy the new requirement." (*Youakim, supra*, 71 F.3rd at 1291.) Although in both cases the legislature (like Congress) was free to alter a benefit program by adding new requirements, "the Due Process Clause does not permit the State to withhold benefits without determining whether current recipients can meet the new requirement." (*Id.*)

16. Under the foregoing analysis, Petitioners argue, the problem with Bulletin 10-10 is not the generic nature of its advisement but its failure to address the circumstances of those Stage 3 recipients who may qualify for Stage 1 or 2 benefits or some other CDE child care program. All the Bulletin states is that "[i]f you believe that you are not receiving child care services through the CalWORKs Stage 3 program and are entitled to services under Stage 2 or a different program, please notify this contractor immediately." This language covers only those who are not receiving Stage 3 services at all and fails to address those who are but also may be eligible for Stage 1 or 2 or some other program, and nowhere is there any mention of a hearing or the aid-paid-pending

issue. Petitioners maintain that *Youakim* and *Greene* require more.

17. Respondents argue that *Youakim* and *Greene* are inapposite. The underlying legislation in those cases changed program requirements, while the veto in this case eliminated all funding. Where the former circumstance admits the possibility of current recipients continuing to qualify for program benefits, the latter by definition eliminates that possibility and, with that, the utility of an individualized hearing or Due Process right to such a hearing. To the extent Petitioners rely on continuity of service policies reflected in the underlying legislation, those policies do not create any entitlement that could be vindicated in a hearing. Rather the scope of any such hearing on an appeal from the notice sent out would simply be whether Stage 3 services are still available and the outcome of any such hearing is foreordained. While the hearing might afford an opportunity to discuss a recipient's eligibility for other child care programs, no hearing is required to explore such options. This is not a case where the CDE or its contractors are allegedly refusing to screen recipients for alternative placement; both sides agree that they are. Indeed Bulletin 10-10 states in relevant part that "[t]he CDE is requesting that contractors work with their Stage 2 and Stage 3 families whose child care will end to look for alternatives to allow parents to continue to work and work activities without placing children in potentially dangerous situations."

18. Alternatively, Petitioners rely on a California constitutional analysis. While the California Constitution also has a Due Process Clause, it differs from the federal guarantee in that the claimant does not have to establish a property or liberty interest as a prerequisite to invoking the clause (e.g., *People v. Ramirez* (1979) 25 Cal.3rd 260, 263-64) and the procedural protections are "much more inclusive" and protect a

broader range of interests. (*San Jose Police Officers Assn. v. City of San Jose* (1988) 199 Cal.App.3rd 1471, 1478; see generally *Ryan v. California Interscholastic Federation – San Diego* (2001) 94 Cal.App.4th 1048, 1069.) Under this approach, one does not start with an assessment of whether there is an “entitlement” at stake but rather an assessment of the appropriate procedural protections in light of the governmental and private interests at issue. (*Ramirez, supra*, 25 Cal.3rd at 263-64; *Ryan, supra*, 94 Cal.App.4th at 1069-1070.) While one need not establish a protected property interest, “the claimant must nevertheless identify a statutorily conferred benefit or interest of which he or she has been deprived.” (*Id.* at 1071.) The State analysis parallels the federal but also uniquely recognizes “the dignity interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible government official.” (*Id.*)

19. This state constitutional analysis may be linked to Petitioners’ claims based on the continuity of care policies found in the underlying statutory framework. While those policies may not create a property interest sufficient to trigger federal protection, they may bear on the balancing of the governmental and private interests at stake, the burden on the CDE to advise recipients in the initial notice of the alternatives available to replace Stage 3 services and the hearing or other processes the CDE may need to observe to implement the continuity of care interest the Legislature has enunciated and recipients relied upon. To the extent recipients may be eligible for child care services in programs other than Stages 1 and 2, the California constitutional analysis may also weigh on the CDE’s directive in Bulletin 10-10 that “the provisions of California Education Code Section 8263(c) regarding continuity of care do not apply for

the families being terminated” and that families thus need to “understand that they can be placed on each county’s Centralized Eligibility List (CEL).”⁵

C. Conclusion & Order

20. At this juncture, the only issue properly before the Court is whether Petitioners’ showing is sufficient to support a temporary restraining order, and that, in turn, requires the Court “to determine whether there is a sufficiency of evidence to support the issuance of an interlocutory order to keep the subject of litigation in status quo pending a full hearing to determine whether the applicant is entitled to a preliminary injunction.” (*Gray v. Bybee* (1943) 60 Cal.App.2nd 564, 571; see generally *Biasca v. Superior Court* (1924) 194 Cal. 366, 367.) In considering that question, two interrelated factors must be considered: the likelihood that the plaintiff or petitioner will prevail on the merits at trial and the interim harm that the plaintiff or petitioner is likely to sustain if the injunction were denied as compared to the harm that the defendant or respondent is likely to suffer if the preliminary injunction were issued. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3rd 277, 286.)⁶

21. Turning first to Petitioners’ likelihood of success on the merits, in Part B above the Court has reviewed in detail the parties’ respective positions and concluded that the regulations are ambiguous and that that ambiguity must be resolved either by construing the regulations to be consistent with the governing constitutional requirements or as not addressing the current circumstances, in which case Respondents’ actions must

⁵ The CEL is, in short, a waiting list. Thus by this directive the CDE is advising contractors that, despite the legislative directive, terminated Stage 3 recipients are not to be given any priority for admission to the child care programs (other than Stages 1 and 2) administered by the CDE.

⁶ This is a writ of mandate proceeding but, as explained in *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 354-357, temporary and injunctive relief may be sought as an ancillary remedy in such a proceeding.

still be assessed against the minimum constitutional requirements. Petitioners' federal constitutional claims appear weak for the reasons detailed by Respondents; however, the State constitutional analysis is different in ways that may be relevant to this case. When considering whether these latter issues are substantial enough to justify maintenance of the status quo, the Court turns to the second factor – the balance of hardships – and notes that the greater a movant's showing of irreparable harm the less must be shown as to the probability of success on the merits, especially in the context of simply preserving the status quo. (*Butte v. State of California* (1992) 4 Cal.4th 668, 677-678.)

22. On the issue of irreparable harm, Petitioners have presented numerous declarations from families receiving Stage 3 benefits, contractors servicing those families, experts and others clearly documenting the devastating impact that CDE's mode of implementing the line item veto will have on thousands of families and their children and also demonstrating the collateral costs to the State of California in the form of higher unemployment, welfare and other expenditures that the veto will likely trigger. (E.g., Lightbourne Decl. at ¶¶1, 4, 7; Howes Decl. at ¶¶1-10, 14, 20; Kowalewski Decl. at ¶14; Todd Decl. at ¶¶12, 15-16, 20, 21; McDowell Decl. at ¶5; Geddes Decl. at ¶4; Terrazas Decl. at ¶¶1, 2, 7; Manganto Decl. at ¶4; James Decl. at ¶5; O'Leary Decl. at ¶¶4, 6, 10; Currie Decl. at ¶16.) None of the harm recited by Petitioners is disputed by Respondents, who in fact disagree with the Governor's decision to exercise his line item veto authority in this instance but argue that their mode of implementing the veto is legally required. In their filings, Respondents argue that in light of the budget cut the State will also suffer harm in incurring unfunded costs. While the latter is true, it may be mitigated by the evidence of interim funding from First Five and the fact that the State may also suffer

negative fiscal impact from recipients who do not have child care turning to unemployment or returning to welfare.

23. Considering all of the foregoing, the Court concludes that Petitioners have made a sufficient showing to entitled them to some interim relief; however, the scope of that relief may not be as broad as they seek. Given the termination of funding and the fact that their strongest showing on the merits is limited to the inadequacy of the notice to satisfy the State Due Process requirements, an indefinite stay of the CDE action and order mandating continued aid-pending-hearing may be inappropriate. At best, Petitioners may be entitled to require CDE to send out new notices advising Stage 3 recipients of the possibility that the contractors may be able to identify alternative child care services, that on request the contractors will screen Stage 3 recipients for eligibility for such alternatives and that the contractors will facilitate such transitions where alternatives may be found. Preservation of the status quo (and perhaps the CDE's own regulations) may also require aid-paid-pending until such notice is provided and a reasonable time for recipients to come in and be screened for such alternatives. Note that such relief is different from a right to appeal the decision to terminate Stage 3 funding; rather the issue is whether the notice was sufficient to satisfy the "dignity interest" unique to the California Due Process analysis that requires individuals to be informed of the nature, grounds and consequences of the action and, in this instance, Respondents' availability and efforts to effectuate the continuity of care interest embedded in the statutory scheme.

24. Based on the above analysis and for good cause shown, IT IS HEREBY ORDERED:

a. That pending further order of this Court, Respondent CDE shall direct its

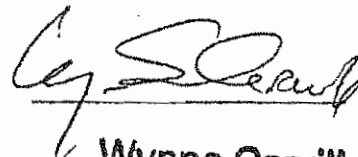
contractors to notify recipients that the effective date(s) set forth in prior notices terminating Stage 3 child care services is/are stayed until a new notice is issued consistent with this Order;

b. That any new notice terminating Stage 3 child care services shall advise recipients that contractors are available to screen them for eligibility for child care services in Stages 1 and 2 or other programs and will use their best efforts to place them in a manner consistent with the provisions of California Education Code section 8263(c);

c. That Respondents shall appear in Department 21 of this Court at 1:30 p.m. on November 23, 2010, or at such other date and time as the parties may stipulate consistent with the Court's calendar and show cause why a preliminary injunction and/or writ of mandate should not issue directing them to afford Petitioners the relief sought in the Petition; and

d. That counsel shall appear in person or by CourtCall at 8:45 a.m. on November 15, 2010, for a Case Management Conference (no CM statements need be filed), the sole purpose of which will be to maintain, advance or continue the November 23rd hearing to accommodate any scheduling or other issues posed by that date.

Dated: November 5, 2010


Wynne Carvill

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Parent Voices Oakland v. O'Connell, et al.,

ACTION NO.: RG10-544021

I certify that, I am not a party to the within action. I served the foregoing

ORDER GRANTING IN PART AND DENYING IN PART APPLICATION FOR INTERIM

RELIEF by depositing a true copy thereof in the United States mail in Oakland, California on

November 5, 2010 in a sealed envelope with postage fully prepaid thereon addressed to:

Steve Ronfeldt
Judith Gold
The Public Interest Law Project
449 15th Street, Suite 301
Oakland, CA 94612

Elizabeth S. Stein
Department of Education
1430 N Street, Suite 5319
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Child Care Law Center
100 McAllister Street, Suite 360
San Francisco, CA 94102

Karin Schwartz
Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

I declare under penalty of perjury that the following is true and correct

Executed on November 5, 2010 at Oakland, California.

Pat Sweeten
Executive Officer/Clerk

by _____
Deputy

