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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

RULON COTTRELL AND JOELYNN COTTRELL, Conservators on behalf of ALICIA COTTRELL, Petitioners, v. WILL LIGHTBOURNE, Director, California Department of Social Services, Respondent.	Case No. 34-2016-80002332 POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF ADMINISTRATIVE MANDATE Date: September 14, 2018 Time: 10:00 A.M. Dept: 17 Date of Filing of Action: April 13, 2016

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INTRODUCTION

This case challenges the hearing decision *In Re Alicia C.*, DSS State Hearings Decision #2015054005 that on *jurisdictional grounds only*, Petitioner was not entitled to proceed with her request for an administrative hearing on the merits on six separate Notices of Action (hereinafter "NOA") that were issued by the Sonoma County Welfare Department between November 14, 2008 through December 24, 2013. Respondent determined that each of the six Notices of Action were adequate as written. The decision found that since the request for hearing had not been filed until February 20, 2015, more than 180 days after the Notices of Action were issued, the request for hearing was not timely as no good cause existed to extend the time for filing a request for hearing.

Petitioner contests Respondent's decision that the six NOAs constituted legally adequate notices of action for purposes of In-Home Supportive Services (IHSS). Ms. Cottrell contends that each Notice of Action ("NOA") is defective in one or more ways. The defects include

(a) not containing any information about how the county calculated the amount of services the Petitioner was authorized to receive;

(b) no explanation as to the reason that Protective Supervision services (PS) were not authorized in the NOA date July 24, 2012;

(c) the July 5, 2011 NOA did not explain why the county retroactively authorized PS effective April 2011;

Some of the Notices contain generalized regulatory citations without identifying the specific regulations that apply to Ms. Cottrell.[1] The lack of specific, individualized details to support the county's intended actions in the NOAs can, and in this matter did, prevent the beneficiary/program

[1] The Sonoma County Statement of Position by contrast includes the relevant regulations in detail describing and explaining IHSS services. (AR 40-58.) None of the NOAs reference these specific rules.

participant from determining whether the county-proposed action were correct or whether it should be challenged through the request of an administrative hearing.

The refusal to find that each of the NOAs were legally inadequate as written deprived the Petitioner of the opportunity to challenge the county's actions on each of these six NOAs on the merits. Ms. Cottrell asks for a writ of administrative mandate to reverse the Decision determining that the NOAs were legally adequate and direct that the matter be remanded for a hearing on the merits.

STATEMENT OF FACTS

Alicia Cottrell, at all pertinent times is an adult with Down Syndrome, Developmental Delay and Speech and Language Delay. (Decision, *In the Matter of Alicia Cottrell*, Hearing No. 2015054005, Administrative Record (AR) 9, 16, 38, 86; Transcript (TR) 107:27-28; 111:25.) Per the record, Ms. Cottrell has been diagnosed with moderate or intermittent memory deficits; moderate disorientation/confusion; and mildly impaired judgment. (AR 87.) Ms. Cottrell is the subject of a probate conservatorship. Her parents serve as their daughter's conservators. (AR 78.) Ms. Cottrell has received IHSS since 2007. (AR 38.) In July 2011, Sonoma County retroactively authorized Protective Supervision (PS), effective April 1, 2011, without explanation, for the Petitioner. However in late July 2012 PS was discontinued effective August 1, 2012 as a result of a mid-year reassessment, again without any explanation. AR: 8, 69; TR 103:12;104:7.)

The NOA dated November 11, 2008 issued by Sonoma County (NOA "A") proposed to increase Ms. Cottrell's IHSS hours to 81.3 effective December 1, 2008. (AR 7, AR 37, AR 61; TR 102:12-14.) The County reduced the authorized time for shopping for food by the amount of 3.2 hours per month. (AR 61.) However, the county worker who issued the NOA in a handwritten note

wrote that the 81.3 total hours a month was actually an increase since the hours had been 8.6 instead of 81.3. (AR 61.)

The NOA dated August 25, 2009 (NOA "B") reaffirmed that Ms. Cottrell was entitled to receive 81.3 service hours per month. (AR 7, 37, 63; TR 102: 15-20.) Although the hours remained the same, the authorized hours were changed by increasing the bowel, bladder care by 0.45 per week; decreasing menstrual care by 0.08 per week and reducing baths, oral hygiene/grooming by 0.35 per week. (*Id.*)

The NOA dated July 5, 2011 (NOA "C") providing services retroactive to April 1, 2011 increased Ms. Cottrell's IHSS hours from 81.3 to 248.2 hours primarily by granting the Petitioner 45 hours per week in Protective Supervision (PS) services. (AR 7, 37, 65; TR 103:5-12.)

The February 28, 2012 NOA (NOA "D") stated that the IHSS hours were reduced from 248.2 hours per month to 239.2 hours effective April 1, 2012. (AR 7, 37, 67; TR 103:17-20.)

The July 24, 2012 NOA (NOA "E") terminated the Petitioner's eligibility for PS and reduced her total monthly IHSS hours from 239.2 hours to 79.2 hours. (AR 7, 37, 69; TR 103:25-28.) This NOA increased Petitioner's service hours in all other categories except for meal cleanup, where the hours were reduced by 0.79 hours.

The NOA dated December 24, 2013 (NOA "F") notified Petitioner that her IHSS hours were increased from 79.2 to 81:48 hours retroactive from November 15, 2013. (AR 7, 37, 71; TR 104:11-13.) This notice provided additional information about what IHSS hours were changed, that a state law mandated an 8 percent reduction in all IHSS hours, that some services were prorated and cited to the IHSS regulations. (AR 7, 73-75.) This is the only NOA issued in the NA 1253-IHSS Change (04/09) format that substantially changed the appearance and readability of the original format. (AR 71.) The new notice includes slightly larger font, a substantial area for individualized comments by

the county as well as a "Description of Services" which consists of a partial recitation to the IHSS regulations. (AR 71–75.)

PROCEDURAL HISTORY

On February 20, 2015 Ms. Cottrell's authorized representative (AR) requested an in-person hearing to challenge the six NOAs. (AR 3, 7-11; TR 102:8-11.) In response, Sonoma County filed a request to bifurcate the hearing to determine whether there was jurisdiction to hear the claims prior to considering the merits of the substantive issues. (AR 3, 38, 59; TR 100:27-101:5.) In a letter dated March 30, 2015, DSS notified Ms. Cottrell that the administrative hearing would be bifurcated to discuss whether DSS has jurisdiction to hear the case since the request for a state hearing on the six notices were filed more than 90 and 180 days after the issuance of the NOAs. (AR 3, 76; TR 99:26-27; 104:25-27.)

The jurisdictional hearing was held on April 13, 2015 with the authorized representative, county appeals representative and the IHSS Supervision appearing at the hearing. (AR 3, 97.)

The County presented a Statement of Position (SOP) with attachments contending that the request for a hearing was not timely filed since the request for hearing was made February 20, 2015. (AR 37-88.) During the hearing the County noted that Ms. Cottrell's address had not changed and that she had resided at the same address throughout the pertinent time period. (AR 4, 38; TR102:20-27; 103:15-24; 104:6-7; 104:22-24; 105:4-9.) None of the notices had been returned to the county as undeliverable. (AR 4.) The County SOP included with its evidence the IHSS needs assessment completed on Ms. Cottrell on November 15, 2013. This included Ms. Cottrell's functional ranks for each service type and a total of assessed hourly needs based on an individualized assessment. (AR 38-39.)

On Petitioner's behalf, her AR submitted a written SOP that focused on the issue of jurisdiction. (AR 13-36.) The Claimant argued that the County did not assess Ms. Cottrell for PS until April 2011 but it was taken away without explanation in August 2012. (AR 13.) The AR argued that the county did not document the reason for terminating Protective Supervision. (AR 14; TR 110:7-16.) The AR argued that PS is a complicated idea that was not explained in writing to Ms. Cottrell in the NOAs, especially NOAs "C", "D" and "E". (TR 111:6-9.) The AR contended that NOA E was not adequate because it did not explain why the claimant was not eligible to receive protective supervision. (AR: 14; TR 107:2-8.) As none of the NOAs meet the requirements of a legally adequate notice of action per CDSS regulations and interpretative authority, i.e. All County Information Notice ("ACIN") I-02-14 and ACIN I-151-82, the time limit for filing a timely hearing request never begins to run pursuant to MPP section 22-009.11. (AR 14.)

Ms. Cottrell's AR argued that the notices must contain information needed to challenge the action taken, must be specific to the claimant/beneficiary and must specifically discuss the needs of the recipient of benefits. (AR 14-15.) Fundamentally, none of the NOAs met these standards. (AR 20.) The in-person hearing on jurisdiction ended on April 13, 2015. (AR 2). DSS issued its unfavorable hearing decision on April 15, 2015 Decision. (AR 2-6.) The Decision held that the request for hearing on all notices must be dismissed for lack of jurisdiction as the NOAs and each of them were legally adequate and hearings were not requested within 90 days of the issuance of each of the NOAs. (AR 3, 6.) The Decision found that the Claimant had received the six NOAs but taken no timely action to challenge any of them. (AR 4.) The ALJ noted that legally adequate notice is defined as

- written notice informing the claimant of the action that the county intends to take,
- the reasons for the intended action,

- the specific regulations supporting such action,
- an explanation of the claimant's right to request a state hearing and, if appropriate,
- the circumstances under which aid will be continued if a hearing is requested. (AR 5.)

The Decision held that no "good cause" exception existed for disregarding the 90-day requirement for requesting a hearing on any of the NOAs. (AR 6.)

Petitioner by her AR requested an in-person rehearing on the issue of jurisdiction on the grounds that none of the NOAs ever properly addressed PS. (AR 89-92.) The AR contended that none of the notices complied with the requirements an adequate notice so that the jurisdictional time limit for requesting a hearing had not run. (MPP § 22-009.11, ACIN I-151-82 and ACIN I-02-14.) (AR 91.) The rehearing request was denied in writing on August 11, 2015. (AR 93.) Petitioner has no other plain, speedy remedy to challenge the CDSS hearing decision other than the prosecution of this writ petition which was timely filed on April 13, 2016.

STANDARD OF REVIEW

Courts review administrative decisions pertaining to fundamental vested rights using the independent judgment test. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-144; See also *Unterthiner v. Desert Hosp. Dist.* (1983) 33 Cal. 3d. 225.) The purpose of IHSS benefits is to ensure that individuals with significant impairments can remain safely in their home and avoid institutionalization. (*Welf. & Inst.* § 12300(a).) As explained in *Frink v. Prod* (1982) 31 Cal.3d 166, 178: "it is apparent that the right of the needy disabled to public assistance is of such significance as to require independent judgment review." (*accord Cooper v. Kizer* (1990) 230 Cal.App.3d 1291, 1299-300 [finding disability based Medi-Cal is a fundamental vested right because "the disabled applicant for medical benefits is in need because of deterioration in his or her life situation."]; *Calderon v. Anderson* (1996) 45 Cal.App.4th 607, 612 [noting with approval that trial court used

independent judgment standard in IHSS PS case]; *see also Reilly v. Marin Housing Authority* (2018) 22 Cal.App. 5th 425.) The independent judgment test therefore applies.

The independent judgment test mandates that the court review the entire record and weigh the evidence to determine whether the decision of the administrative agency was correct. (*Interstate Brands v. California Unemployment Insurance Appeals Board* (1980) 26 Cal.3d 770, 775 n.2.) Although the independent judgment test requires an initial presumption of the correctness of the agency's factual findings, the presumption is only a starting point for review and can be overcome. (*Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 817-818; *see also Mason v. OAH* (2001) 89 Cal. App. 4th 1119.) The trial court ultimately must exercise its own judgment and is free to substitute its own findings of both law and fact after first giving due respect to the agency's findings. (*Fukuda, supra*, 20 Cal.4th at p. 818 [emphasis added].)

STATUTORY AND REGULATORY FRAMEWORK

A. The In-Home Supportive Services Program

The purpose of the IHSS program is to enable aged, blind or disabled individuals with physical and/or mental impairments who are unable to perform routine daily tasks which are vital for themselves and who cannot safely remain in their homes of their choosing unless these services are provided for them by others. (*Welf. & Inst. Code* § 12300(a); MPP § 30-700.1.)

The Legislature authorized a broad range of support services to eligible persons. Welfare and Institutions Code Section 12300 authorizes supportive services for:

> "Domestic services and services related to domestic services, heavy cleaning, personal care services, accompaniment by a provider when needed during necessary travel to health related appointments or to alternative resource sites and other essential transportation as determined by the director, yard hazard abatement, protective supervision, teaching and demonstration directed at reducing the need for other supportive services, paramedical services, and other services as determined by the director which make it possible for the recipient to live in comfort and safety under an independent living arrangement."

PS services authorized by Welfare & Institutions Code Section 12300 includes the monitoring of the behavior of non-self-directing, confused, mentally impaired, or mentally ill persons. (MPP §30-757.17.) PS is available for "observing recipient behavior in order to safeguard the recipient against injury, hazard, or accident." (MPP §30-757.171.) To be eligible for such services, an individual must show "that twenty-four hour need exists ... and that the recipient can live at home safely if protective supervision is provided." (MPP §30-757.173.)

Whenever there is an IHSS assessment or reassessment or any other action taken regarding the amount of IHSS services the County must issue a notice of action to each recipient. (Welf. & Inst. Code § 12300.2) The County must also send a description of each specific task authorized and the numbers of hours allotted. (*Id.*) In the case of reassessment, the County must identify the hours for tasks increased or reduced and the difference from previous hours authorized. (*Id.*) If the individual objects to the County's proposed action, the individual can file a request for an administrative hearing with the State Hearings Division of the Department of Social Services. (Welf. & Inst. Code § 10950; MPP § 22-003.1). Any applicant or recipient of public social services is entitled to adequate written notice of any action that the county welfare agency proposes to take with respect to an individual IHSS beneficiary's claims for services. (MPP §§ 10-116; 22-071.13; 30-759.7 and 30-763.8.)

B. Medi-Cal Due Process Requires The Use Of Legally Adequate Written Notices Of Action.

The IHSS program involves Medi-Cal (Medi-Caid) eligibility and receives some funding from the federal health care program. This connection requires that IHSS NOAs must also meet the requirements of 42 Code of Federal Regulations ("CFR") Section 431.210 which states in relevant part that a Medi-Caid required notice of action must include

> 1. A statement of what action the agency ... intends to take and the effective date of such action;

2. A clear statement of the specific reasons supporting the intended action;

3. The specific regulations that support, or the change in Federal or State law that requires, the action;

4. An explanation of ...

> 1. The individual's right to request a local evidentiary hearing if one is available, or a State agency hearing; or ...
>
> 2. An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

This CFR section is the basic guidance on adequacy of notice for federally funded health care programs including IHSS[2]. NOAs that meet the requirement of due process must be sufficiently detailed and specific to enable a meaningful response. (*Buckhannon v. Percy,* (E.D. Wisc. 1982), 533 F. Supp 822, 833-834 aff'd in part, modified in part, 708 F.2d 1209 (7th Cir, 1983) [requiring that notices implementing Medicaid and cash assistance rules changes include individual information to allow individual to assess correctness of decision].) Vague and generic reasons for adverse agency action, rather than specific individualized facts supporting the agency's conclusion do not meet due process standards. (*Rodriquez v. Chen*, 985 F. Supp. 1189, 1194 (D. Az. 1996) [invalidating Medicaid termination notices stating, for example, that "net income exceeds maximum allowable" because these reasons were "so vague in as much as they fail to provide any basis upon which to test the accuracy of the decision."].)

C. A Legally Adequate Written Notice of Action Is A Due Process Requirement Under the California State Constitution

The California Constitution Article 1, Section 7(a) provides that a person may not be denied due process of the law and requires that the NOA provide adequate explanation for its reasons in

[2] *David v. Heckler,* (E.D.N.Y. 1984) 591 F.Supp. 1033 established the requirement that MediCaid funded programs must issue adequate notices of action.

order to avoid arbitrary actions by government agencies. "The very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation for its reasons for doing so." (*People v. Ramirez* (1979) 25 Cal.3d 260, 266-267.)

Petitioner need only identify a statutorily conferred interest to trigger due process in California. (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1071.) In this case, the statutorily conferred interest is IHSS services pursuant to Welfare and Institutions Code Sections 12300, et. seq.

D. Notices of Action and the Administrative Hearing Process

The Department of Social Services adopted formal regulations, Division 22 of the Manual of Policies and Procedures, which govern the state administrative hearing process for all public social services programs, including the In-Home Supportive Services Program. (Welf. & Inst. Code 10554.) The DSS developed the Adequate Notice regulations and policies as the result of the Consent Decree in *Turner v. McMahon* (U.S. District Court, Northern District, CA filed on June 20, 1983). A true and correct copy of the *Turner* Consent Decree is attached to the request for judicial notice. *Turner* challenged the adequacy of the notices being sent to Aid to Families With Dependent Children (now CalWORKs) recipients and applicants. ACIN I-151-82 was developed as part of the *Turner* settlement to provide guidance to counties on what constitutes an adequate notice of action. (A true and correct copy of ACIN I -151-82 is found at AR 27-30.) On January 3, 2014, DSS issued ACIN I-02-14[3] which reiterates the need for the counties to issue adequate notices of action in CalWORKs cases. While ACIN 02-14 focuses on the CalWORKs cash assistance program, MPP Division 22 applies to all California public social programs including IHSS.

[3] A true and correct copy of ACIN I-02-14 is included in the request for judicial notice.

The purpose of a notice of action is to provide sufficient information to allow the individual to determine what the issue is, understand the action to be taken and if the individual does not agree, the individual has a right to request an administrative hearing to review the county's determination. (California Constitution Article I, Section 7(a) and MPP § 22-001(a)(1).)

An adequate notice is defined as

> "[A] written notice informing the claimant of the action the county intends to take, the reasons for the intended action, the specific regulations supporting such action, an explanation of the claimant's right to request a state hearing, and if appropriate, the circumstances under which aid will be continued if a hearing is requested...". (MPP § 22-001(a)(1).)

An adequate notice must be prepared in clear, nontechnical language, and when appropriate also inform the claimant regarding what information or action, if any, is needed to reestablish eligibility or determine a correct amount of aid. (MPP §§ 10-116.42; 22-071.4; 22-071.6.)

When the notice of action is adequate, the claimant or recipient, per DSS regulations, generally has 90 days to request an administrative hearing if she believes that the agency's action or proposed action is incorrect. (Welf. & Inst. Code §10951(a)(1); MPP §§22-071 et seq.)

Welfare and Institutions Code section 10951(a)(2) allows for an administrative fair hearing to be requested after more than 90 days at the discretion of the CDSS director if he or she makes a finding of "good cause" for the late filing of the request. (See ACIN I-66-08 [A true and correct copy of ACIN I-66-08 is found at AR 22-29].) Although Welfare and Institutions Code section 10951(b)(2) states that a hearing may not be granted for a request that is more than 180 days after the issuance of the order or the action complained of by the applicant or beneficiary, subsection (b)(3) states:

> "This section shall not preclude the application of principles of equity jurisdiction as otherwise provided by law."

The above referenced statutes and regulations limiting the time for when a CDSS administrative hearing may be requested only apply when the county NOA qualifies as adequate written notice per the terms of the program for which the notice has been issued. (MPP § 22-009.1) When an adequate NOA is required but not provided any hearing request (including an otherwise untimely hearing request) shall be deemed to be a timely hearing request. (MPP § 22-009.11.)

I. THE ALJ LIMITED HIS EVALUATION OF THE SIX NOTICES OF ACTION TO THE DEFINITION OF "ADEQUATE NOTICE" AND DID NOT CONSIDER WHETHER THE NOTICES OF ACTION MEET ADDITIONAL REQUIREMENTS.

Although the ALJ correctly identified that each of the six IHSS NOAs had to meet the requirements of an adequate notice, the ALJ impermissibly limited the scope of his inquiry to the definition of adequate notice. (MPP § 22-001(a).) (AR 6.) The ALJ's failure constitutes a prejudicial abuse of discretion and contrary to law in that the NOAs do not meet the requirements of an adequately written notice of action. The ALJ failed to consider whether the six notices adequately included sufficient information explaining the decision in each NOA how the county calculated the hours for each service so that Ms. Cottrell could reasonably decide whether or not to appeal the county's action. Without this information, Petitioner could not decide whether to appeal any of or all of the NOAs. The ALJ also ignored the requirement that each NOA which denies, reduces, discontinues or suspends a service, or which increases a fee, shall include the information concerning the recipient's circumstances which have been used to make the determination and shall cite the regulations which support the action. (MPP § 10-116.42.)

First, each of the six NOAs which the ALJ deemed to be "legally adequate" suffer from the same two principal defects: none of the NOAs meet the second and third criteria for a legally adequate notice. (MPP § 22-001(a).):

2. A clear statement of the specific reasons supporting the intended action;

3. The specific regulations that support, or the change in Federal or State law that requires, the action.

The ALJ disregarded that it is essential to a claimant/recipient's ability to determine not only what action the county has taken but also the rationale that supports the change. In the context of the NOA "C", the NOA shows that the county decreased routine laundry 0.33 per week. However, this NOA fails to explain the specific reason(s) supporting the intended action in a simple, easily understood language. (AR 65.) The change may be, for example, a decrease in hours needed for doing laundry because the household acquires a washer and dryer and no longer needs to travel to the local laundromat. Similarly, NOA "A" reduces weekly food shopping 0.75 with the only explanation is that "Your In Home Service Hours have been reduced." (AR 61.) This explanation does not explain why or how the county determined that Ms. Cottrell's caretaker no longer needed 45 minutes in order to provide proper nutrition for her daughter.

Specific to this case is the substantial change that occurred with NOA "C" that *retroactively* granted Ms. Cottrell IHSS PS hours at the rate of 45 hours per week, the maximum level, effective April 2011, three years after Ms. Cottrell was found eligible for IHSS benefits. This NOA is signed off on by the same county worker, Zoe Neely, whose name is on the original NOA "A" that granted IHSS benefits but not PS. No explanation for such a significant change in the rate of benefits paid and in a key type of IHSS service is included in writing on NOA "C". Only guesses and conjecture might suggest what changes in Ms. Cottrell's living circumstances support such a significant change. Of course it is also possible that the rationale for this change is reflected in the caseworker's notes. Critically that information is not on the NOA and is unavailable for the Petitioner to understand and appreciate the "what" and the "whys" of the change.

The same logic and the mistakes are key to NOA "E", issued on July 24, 2012, which summarily terminates Ms. Cottrell's IHSS PS eligibility giving the recipient less than a week to adjust to the loss of IHSS PS services effective August 1, 2012. (AR 69.) What is unstated is the reason for the change and does not reference which of the PS eligibility or ineligibility criteria either apply or no longer apply to Ms. Cottrell as an individual IHSS PS recipient. Again, without some detail based on a county employee's observations, there is no explanation of the rationale for the county's actions.

Second, the ALJ failed to consider whether the regulations cited on the six NOAs specific regulations support, or the change in Federal or State law that requires, the action. NOA "A" only cites MPP section 30-763, Service Authorization, which runs from page 82 to page 92 of Respondent's DSS regulations. (AR 61.) The specific regulation that explains food shopping activities is MPP section 30-757.135. NOA "B" fails to reference the regulations for bowel/bladder care (MPP § 30-757.14(a)), menstrual care (MPP § 30-757.14(j)), and bathe, oral hygiene and grooming (MPP § 30-757.14(e).) NOAs "C", "D" and "E" change the weekly PS hours but fail to cite the PS regulations which provide specific reasons for the changes. (MPP § 30-757.17.) (AR 65, 67, 69.)

Third, the ALJ ignored Respondent's own regulations that require that an adequate notice shall be prepared in clear, nontechnical language per MPP section 22-071.4. None of the notices explain the concept of "Protective Supervision" in clear, nontechnical language. Most notably, the three NOAs which authorized Protective Supervision do not explain what activities are covered as Protective Supervision. (AR 65, 67, 69.) NOAs "B", "C", "D" and "E" inform Ms. Cottrell that "your service assessment includes consideration of "alternate resources"…". (AR 63, 65, 67, 69.) However, none of the notices explain what an alternate resource is or identifies the alternate resource.

Similarly, NOAs "E" and "F" inform Ms. Cottrell that certain of her IHSS services were prorated without explaining what constitutes proration or how the county calculated the proration. (AR 69, 73.)

The defects to NOA "F" include a general explanation of the term "proration" without a specific explanation as to how this rule is being applied to the Petitioner. There is also a long boiler-plate paragraph addressing an issue of service reassessments that were based on litigation arising out of statewide IHSS reductions which would not qualify as language compliant.

Fourth, the ALJ failed to consider that NOA"E" which reduced Protective Supervision, did not inform the claimant regarding what information or action, if any, is needed to reestablish eligibility or determine a correct amount of aid. (MPP §§ 22-071.4; 22-071.6.) (AR 69.)

A. A Federal Court Has Opined That The IHSS Notice Forms Are Legally Inadequate.

In an 2009 opinion by the federal District Court for the Northern District of California in *V.L. v. Wagner* (2009) 669 F. Supp.2d 1106, the decision in support of a class of disabled and elderly IHSS recipients granted a preliminary injunction on the showing that the plaintiffs were likely to prevail on the merits of their complaints against the institution of an IHSS evaluation system. One of the causes of action included in the federal case challenged the legal adequacy of the same type of IHSS notices of action[4] format as the five NOAs that are the subject of this action, NOAs "A"-"E".

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[4] Commenting on problems with the IHSS CMIPS notice, *Wagner* describes them as follows:

" The notice is also difficult to read. The print is small, single spaced and in all capital letters. It contains unexplained acronyms and the description of numerical ranks and FI Scores if virtually unintelligible. The elderly and disabled individuals reading these notices will have a difficult time understanding them, let alone taking the affirmative action required. Many IHSS recipients cannot easily leave their homes due to their disabilities, the notice does not inform them of their right to have a hearing at home to dispute the service cuts." *V.L. v. Wagner, supra.*, at p. 1121.

In her discussion of the deficits of the IHSS NOA, the judge in *Wagner* cited *Mullane v. Hanover Bank and Trust Co* ((1950) 339 U.S. 306), *Goldberg v. Kelly* ((1970) 397 U.S.254) and a tax case *Jones v. Flowers* (2006) 547 U.S. 220. On the issue of individually tailored informing notices, the authorities cited are applied to IHSS recipients

> ...must receive "timely and adequate notice detailing the reasons for termination and an effective opportunity to defend" themselves. *Goldberg v. Kelly* [citation omitted] To comport with due process, notice must be "tailored to the capacities and circumstances" of the recipients who must decide whether to request a hearing, [emphasis added] *Id. at* 268 " The government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *[emphasis added] Jones v. Flowers*, supra., at 230.

The six NOAs that are the subjects of this writ petition are all defective in the ways noted by the Court in *Wagner*. The first five NOAs were produced in the CMIPS I format that was specified in *Wagner*. The guidance in Wagner focuses on the importance of a complete, individually tailored NOA as opposed to a cursory, jargon-filled, informing document. The latter does not meet federal standards of due process that requires:

> ...notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane* at 314.

The preceding discussion identifies the sources of law that define and describe legally adequate written notices of action. Respondent's Decision that the NOAs issued by Sonoma County were "adequate notices of action" did not meet these standards. As such the Respondent's Decision finding that all of the NOAs were adequate is unsupported by the relevant law and therefore constitutes a prejudicial abuse of discretion.

II. RESPONDENT'S AFFIRMATIVE DEFENSES SHOULD BE OVERRULED

Respondent raises four affirmative defenses to the Petition for Writ of Administrative Mandamus, none contain any factual allegations to support them. (Respondent's Answer to Verified

Petition For Administrative Writ Of Mandate ["Answer"], at 11.) Each of the four affirmative defenses, consists of legal conclusions rather than presenting facts with as much detail as to constitute a cause of action. Respondent's pleading burden is identical to the petitioner's burden to plead the ultimate facts constituting the cause of action. (*FPI Dev., Inc. v. Nakashima*, (1991) 231 Cal.App.3d 367, 384 [answer must aver facts "as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint."].)

A. Respondent's First Affirmative Defense "Petition Fails to State Facts Sufficient to Constitute A Cause of Action."

Gressley v Williams (1961) 193 Cal.App.2d 636, 639 holds that all that is necessary to sustain a claim alleging a failure to state a cause of action is this: it appears that the petitioner is entitled to any relief at the hands of the court, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts. Those other facts may be irrelevant to the cause of action or the defense shown. This is also true when a plaintiff in his complaint or a defendant in her answer, demand relief for which the party is not entitled under the facts alleged.

In this matter, Petitioner is entitled to relief from this Court, namely the vacating and remanding of the final administrative hearing decision, *In Re Alicia Cottrell*, State Hearing # 2015054005. The decision denies Petitioner the right to proceed to a hearing on six separate defective NOAs issued between 2008 and 2013 on the grounds that there is no jurisdiction for a DSS hearing. Petitioner avers that the Respondent's decision cannot be sustained as a matter of law as the six IHSS NOAs lack the factual and other specificity needed to constitute legally adequate written notices of action. The Petition contains six causes of action-one for each IHSS NOA. Each cause of action challenges the validity of Respondent's decision on the basis of not being legally valid., (Verified Petition For Administrative Writ of Mandate ["Petition"], ¶¶ 43; 51; 57; 64; 69 and 73.)

Abuse of discretion is established if the Respondent did not proceed in the manner required by laws. (Code of Civ. Proc. § 1094.5(b).) Respondent failed to evaluate each NOA beyond the definition of adequate notice. The Petitioner is entitled to relief from the court. Petitioner requests a ruling that the six NOAs do not meet the standards for an adequate notice of action, to vacate the decision and remand for an administrative hearing on the merits. (See *Gressley, supra.*, at 639.)

In each of the causes of action, the petition plead exhaustion of administrative remedied and that Petitioner has not other plain, speedy, and adequate remedy in the ordinary course of the law other than the relief sought in this petition. (Petition, ¶¶ 43; 51; 57; 64; 69 and 73.)

For these reasons, the first affirmative defense should be overruled.

B. Respondent's Second Affirmative Defense "Petitioner's Claims Are Barred by Applicable Statutes of Limitations."

Pursuant to Welfare and Institutions section 10962, within one year after receiving notice of the DSS' final administrative hearing decision, a petition may be filed with the superior court, under the provisions of Code of Civil Procedure section 1094.5 praying for a review of the entire proceedings in the matter, upon questions of law involved in the case. The Petitioner must ask for judicial review within one year from the date of receipt of the decision. (*Id.* [Emphasis added].)

Respondent's Answer mistakenly identifies May 16, 2016 as the date that the petition was filed. (Answer, at 1.) The hearing decision was both adopted and released on April 15, 2015. (AR 2.) The Petition for Writ of Administrative Mandamus was filed in the Sacramento County Superior Court on April 13, 2016, within one year of the release date. For this reason, the second affirmative defense should be overruled.

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C. Respondent's Third Affirmative Defense "Petition Is Barred By the Doctrine of Laches."

Petitioner is informed and believes that the primary source of this affirmative defense is Respondent's mistaken belief that the underlying petition was not timely filed. With respect to this affirmative defense, Petitioner restates the argument made with respect to the Second Affirmative Defense.

Petitioner's second position on this affirmative defense is that laches, an equitable defense, is not appropriate as a means of effectively dismissing a matter that focuses on an exclusively legal issue: were the six NOAs and each of them, legally deficient as written informing notices concerning the Petitioner's rights to receive IHSS benefits from Sonoma County. Per *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 461-462, laches is not a defense to the petitioner's prosecution of this matter at the level of a Superior Court writ of mandate timely filed per Welf. and Inst. Code Section 10962.

Petitioner's final position on this issue is to raise the counter defense of "unclean hands". "Unclean hands" considers the responsibility of all parties including the party alleging the equitable defense. (See *San Diego Dept. of Pub. Welfare v. Superior Court* (1972) 7 Cal. 3d 1, 9.) Laches as an affirmative defense, should be considered unavailable to one who does not come to court with clean hands. (*Wallace* v. *Board of Education,* 63 Cal.App.2d 611, 617.) In this matter, Petitioner's delay in seeking relief from the actions of Sonoma County clearly arise out of the county's failure to issue notices that were more than minimally informative. For this reason, the third affirmative defense should be overruled.

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D. Respondent's Fourth Affirmative Defense "Petition For Writ For [Sic] Mandate, As A Whole, And Each Claim For Relief Asserted In It, Is Stated In Conclusory Terms, Respondent Cannot Fully Anticipate All Affirmative Defenses That May Be Applicable In This Action."

Respondent's purported Fourth Affirmative Defense is confusing, inconsistent and digressive. It is wholly unsupported by the pleading and the administrative record. Petitioner respectfully requests that this affirmative defense be stricken.

CONCLUSION

Petitioner herein is a particularly vulnerable IHSS program beneficiary. She was born with a congenital developmental disability that has left her wholly dependent on the support of others to manage her day-to-day affairs, provide her with safe and sound quality of life and to interpret for her the rules and regulations of a complex scheme of social, medical and financial support systems. The basic mechanism for assuring that this scheme is operating properly is a legally valid written notice of action. While it is important that this mere document of notice is (a) properly titled and addressed to the claimant/beneficiary; (b) timely mailed to the claimant/beneficiary; and (c) presumptively received by the claimant/beneficiary, what is essential is the actual content of the notice document.

Petitioner is not seeking to require that DSS provide IHSS recipients with an extensively detailed uniquely personalized monogram as a notice of action. Petitioner is requesting only that the authorities discussed above be applied to the six IHSS notices of actions that she received.

As the hearing decision as issued is not consistent with these legal requirements, Petitioner respectfully requests that the hearing decision be vacated and reversed. The Respondent should be directed to issue a decision finding that none of the six NOAs are legally adequate and the matter is to

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be scheduled for a hearing on the merits as there is jurisdiction to conduct an administrative fair hearing with respect to the substantive consequences of each of the six NOAs and each of them.

Respectfully submitted,

Dated: July 30, 2018

GRACE GALLAGHER
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