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9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12

13 CITY AND COUNTY OF SAN FRANCISCO,  
 14 Plaintiff,  
 15 vs.  
 16 ALEX M. AZAR II, et al.,  
 17 Defendants.

No. C 19-02405 WHA  
 No. C 19-02769 WHA  
 No. C 19-02916 WHA

**DECLARATION OF DIANA  
 TOCHE, D.D.S., IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 SUMMARY JUDGMENT AND IN  
 SUPPORT OF THEIR OPPOSITION  
 TO DEFENDANTS' MOTION TO  
 DISMISS OR, IN THE  
 ALTERNATIVE, FOR SUMMARY  
 JUDGMENT**

18 STATE OF CALIFORNIA, by and through  
 ATTORNEY GENERAL XAVIER BECERRA,  
 19 Plaintiff,  
 20 vs.

21 ALEX M. AZAR, et al.,  
 22 Defendants.

Date: October 30, 2019  
 Time: 8:00 AM  
 Courtroom: 12  
 Judge: Hon. William H. Alsup  
 Action Filed: 5/2/2019

23 COUNTY OF SANTA CLARA et al,  
 24 Plaintiffs,  
 25 vs.  
 26 U.S. DEPARTMENT OF HEALTH AND  
 HUMAN SERVICES, et al.,  
 27 Defendants.

1 I, Diana Toche, D.D.S., declare:

2 1. The matters stated in this declaration are true based on my own personal  
3 knowledge, except as to those matters stated on information and belief, and as to those matters, I  
4 believe them to be true, and if called as a witness, I would competently so testify.

5 2. I am the Undersecretary for Health Care Services, California Department of  
6 Corrections and Rehabilitation (CDCR) and have been serving in this capacity since May 13,  
7 2014. Previously, I served CDCR as the Acting Undersecretary for Administration and Offender  
8 Services, Acting Director of the Division of Health Care Services and Deputy Director, Division  
9 of Health Care Services, Dental Programs. Some of my current duties as Undersecretary for  
10 Health Care Services include directing the management and supervision of medical, mental  
11 health, dental and ancillary health care services for inmates under the jurisdiction of CDCR.

12 3. In conjunction with Clark Kelso, the federal Receiver appointed under the federal  
13 class action of *Plata v. Newsom*, I lead California Correctional Health Care Services (CCHCS),  
14 the state entity responsible for providing health care services to CDCR's adult prison population.  
15 The CCHCS providers and contractors provide medical, dental, and mental health care services to  
16 over 125,000 prison inmates in 35 CDCR institutions and contracted facilities. CCHCS has  
17 almost 18,000 state civil service positions authorized in Fiscal Year 2018-2019, primarily located  
18 at the 35 prisons, at its headquarters in Elk Grove, California, and at CDCR headquarters in  
19 Sacramento, California. In addition to state funding, CCHCS is eligible to receive federal  
20 Medicaid funds for the inpatient hospitalization of some inmates through the California  
21 Department of Health Care Service Medi-Cal program, pursuant to California Penal Code  
22 sections 5072 and 2065.

23 4. I am familiar with the rule, "Protecting Statutory Conscience Rights in Health  
24 Care; Delegations of Authority," RIN 0945-AA10, issued by the U.S. Department of Health and  
25 Human Services (the Rule), published in the Federal Register on May 21, 2019.

26 5. The Rule will impose an immediate cost on CCHCS due to its notice, assurance  
27 and certification, recordkeeping, and reporting requirements. The Rule has already imposed costs  
28 on CCHCS as CCHCS has been required to spend twenty hours reading and analyzing the Rule,

1 and attempting to determine its impact on CCHCS programs and whether programmatic changes  
2 are necessitated.

3 6. The Rule allows health care staff and ancillary personnel to refuse to provide care  
4 on religious or moral grounds for wide range of services, including but not limited to abortion,  
5 sterilization and euthanasia. Objections could apparently also impact providing vaccinations,  
6 treatment for gender dysphoria and delivering end-of-life care.

7 7. CCHCS was established in order for the state to better coordinate its continuing  
8 remedial efforts with those of the court-appointed Receiver in the *Plata* case. Inmates in the  
9 custody of CDCR are entitled to receive medical, dental and mental health care in a  
10 nondiscriminatory and timely manner under both federal and state law. California Penal Code  
11 sections 3402 through 3409 mandate services for female inmates, including contraception, birth  
12 control and abortion. Under the Eighth and Fourteenth Amendments, CCHCS is obliged to  
13 provide transgender inmates with medical and mental health care services. As noted by the  
14 Supreme Court in *Brown v. Plata*, 563 U.S. 493 (2011), mental health and medical care in CDCR  
15 were determined to fall below Eighth Amendment standards in 1995 and 2001, respectively.  
16 Providing timely access to emergency, routine and specialty care and ensuring inmates receive  
17 competent, effective services as required for CCHCS and CDCR to comply with the continuing  
18 orders of the federal district court cases are key linchpins of CCHCS' efforts.

19 8. Ensuring there are sufficient numbers of providers, nurses and support staff  
20 available to provide inmate care within the California prison system and that they effectively  
21 coordinate with community specialty and hospital services are essential components of a  
22 constitutionally adequate correctional health care delivery system. In addition, custody and  
23 transportation staff must be available and ready to ensure security for in-prison care and  
24 especially for off-site services and hospitalizations. The Rule appears to allow a medical provider  
25 to deny care for an uncertain range of health services without providing notice or making  
26 alternative options available. It is not clear whether objections could be lodged by the  
27 correctional staff whose assistance is critical to the delivery of a contested medical service.  
28 Having to arrange for substituted provider staff and rescheduling appointments and transportation

1 will increase risks in the delivery of inmate health care services. Delays by themselves can put  
2 CCHCS out of compliance with court orders. Additional staff and contractors will be added to  
3 ensure sufficient redundant capabilities are available for unexpected objections to provide care.  
4 Modifications to workforce policies regarding the expected performance, procedures for  
5 conducting employee investigations and modifications to bargaining unit agreements are  
6 anticipated, particularly during the first year of the Rule.

7 9. The notification provisions of the Rule will impose further costs on CCHCS.  
8 Although the Rule indicates that the notice provisions are now voluntary (unlike in the proposed  
9 rule), the Rule also states that adherence to the notice provisions will be taken into consideration  
10 when assessing whether an agency is in compliance. To provide notice, CCHCS will need to:  
11 (1) post the notice in Appendix A (or similar text) at each CCHCS establishment where notices to  
12 the public and workforce are customarily posted, and thereafter continuously take steps to ensure  
13 that the notice is not altered, defaced, or covered by other materials, (2) include the notice on each  
14 of its websites, and (3) include the notice in its personnel manuals, applications, and benefits and  
15 training materials, as inclusion in these materials will be a factor in determining whether CCHCS  
16 is in compliance. The estimated costs of compliance with these notification provisions is  
17 approximately \$10,000 due to the necessary changes to websites, physical postings at medical  
18 facilities and administrative facilities, as well as costs associated with updates to training  
19 manuals, new employee documentation, internship materials, and updates to benefits handbooks.

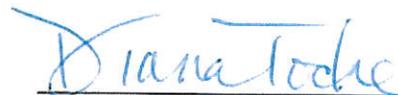
20 10. The Rule also includes an assurance and certification requirement that should be  
21 included with all applications, reapplications, and amendments and modifications. The provision  
22 also places an obligation on CCHCS to take actions to come into compliance. Notably and under  
23 the compliance provision, if a sub-recipient (as defined by the Rule) is found in violation,  
24 CCHCS will be subject to remedial action. The Rule requires CCHCS to undertake some  
25 additional oversight obligations regarding its hundreds of contracted health care providers  
26 working both within CDCR institutions and in the community which would require CCHCS to  
27 utilize additional staff time to perform this sub-recipient monitoring component.

1           11.     In addition to responding to complaints and investigations, the compliance  
2 provision of the Rule includes a recordkeeping and reporting requirement applicable to all  
3 recipients and sub-recipients which obligates CCHCS to include information concerning any  
4 compliance reviews or complaints to the Office of Civil Rights within the last five years as part of  
5 the application process. The costs of responding to any complaints and any resulting  
6 recordkeeping and reporting requirements is unknown but hard costs and staff time could be  
7 significant depending on the number of complaints submitted.

8           12.     The Rule places at risk federal funds CCHCS receives from the U.S. Department  
9 of Health and Human Services. In the past two fiscal years, CCHCS has received over \$89  
10 million dollars from Medi-Cal, funds critically necessary to support the current level of care by  
11 civil service and contracted staff and facilities. The appointment of the federal Receiver was, in  
12 large part, due to the state's inability to adequately ensure a sufficient number of CDCR providers  
13 and arrange for an available network of community specialists and facilities. A loss of federal  
14 funding would materially undermine the efforts of CCHCS and CDCR to provide a constitutional  
15 level of health care for California inmates.

16  
17           I declare under penalty of perjury under the laws of the United States and the State of  
18 California that the foregoing is true and correct to the best of my knowledge.

19           Executed on August 22, 2019, in Sacramento, California.

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21           

22           Diana Toche, DDS  
23           Undersecretary, Health Care Services  
24           California Department of Corrections and  
25           Rehabilitation