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JUN 18 2003
CENTRAL DISTRICT OF CALIFORNIA
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

KATIE A., *et al.*,
Plaintiffs,
v.
DIANA BONTA, *et al.*,
Defendants.

CASE NO. CV02-5662 AHM (SHx)
**ORDER RE CLASS
CERTIFICATION**

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**I.
INTRODUCTION**

This lawsuit challenges the alleged failure of the State of California and the County of Los Angeles to provide appropriate mental health services to foster children in California with “behavioral, emotional or psychiatric impairments . . . who need individualized mental health services” First Amended Complaint (“FAC”). ¶ 37. The Plaintiffs are five troubled children who are in the custody of the Los Angeles County Department of Children and Family Services (“DCFS”). The Defendants are Los Angeles County; DCFS; Acting Director of DCFS Marjorie Kelly; Director of California Department of Health Services (“DHS”) Diana Bontá; and Director of the California Department of Social Services

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1 (“DSS”) Rita Saenz. Plaintiffs have reached a tentative settlement agreement
 2 with the Los Angeles County Defendants on behalf of a subclass of children who
 3 are in the custody of DCFS, or have been referred to or are subject to referral to
 4 DCFS. Whether the Los Angeles subclass may be certified and whether that
 5 settlement should be approved are not at issue here. What *is* at issue is whether,
 6 in their suit against Defendants Bontá and Saenz (hereinafter “State Defendants”),
 7 Plaintiffs may, under Fed. R. Civ. P. 23(b)(2), represent a class composed of:

8 children in foster care in California, or at imminent risk of foster care
 9 placement, who have a behavioral, emotional or psychiatric
 10 impairment and who need individualized mental health services,
 11 including but not limited to professionally acceptable assessments,
 12 behavioral support and case management services, family support,
 13 crisis support, therapeutic foster care and other necessary services in
 14 the home or in a home-like setting, to treat or ameliorate their
 15 disabilities or impairments.

16 FAC ¶ 37.¹ For the following reasons, the Court certifies a differently-defined
 17 class but holds that one of the named Plaintiffs, Gary E., may not represent the
 18 class, because his interests are not typical of the class as a whole.

19 II.

20 FACTS²

21 Unless otherwise noted, the First Amended Complaint alleges the
 22 following.³ More than 90,000 children are in foster care in California. FAC ¶ 3.
 23 According to a 2001 report of the Little Hoover Commission, more than 50,000
 24 of those children may need, but do not receive, adequate mental health services.
 25 *Id.* ¶ 45. Plaintiffs allege that for foster children with “behavioral, emotional or

26 ¹ Plaintiffs later proposed a modified definition of the requested class. See
 27 Section III(1), below.

28 ² This statement of facts does not include many of Plaintiffs’ specific
 29 allegations against the Los Angeles County Defendants.

³ In reviewing a motion for class certification, the Court generally is bound
 to take the substantive allegations of the complaint as true. *Blackie v. Barrack*, 524
 F. 2d 891, 901 n. 17 (9th Cir. 1975).

1 psychiatric impairments,” *id.* ¶ 37, adequate mental health services include,
2 among other things, wraparound services, therapeutic foster care services and/or
3 case management services.

4 Wraparound services are

5 specific individualized community-based services and supports
6 designed for children who have serious mental or emotional disorders
7 and provided in the child’s own home or an alternative family setting.
8 . . . Although the key to wraparound is provision of services and
9 supports tailored to the individual needs of each child, typical
10 wraparound services include crisis intervention, mobile therapy,
11 therapeutic staff support, behavioral specialist consultation, cognitive
12 retraining, family based rehabilitation services, specialized
13 evaluations, family therapy, parent education and training, and other
14 outpatient psychiatric and psychological services.

15 *id.* ¶ 59.

16 Therapeutic foster care consists of

17 intensive and highly coordinated mental health and support services
18 provided to a foster parent or care giver, in which the foster
19 parent/care giver becomes an integral part of the child’s treatment
20 team. . . . For children in the foster care system or who are at risk of
21 out-of-home placement and whose needs are too great for a
22 conventional foster home . . . therapeutic foster care is an important
23 alternative to placement in an institutional or congregate care setting.

24 *id.* ¶ 61.

25 Case management services assist Medicaid beneficiaries in obtaining
26 needed medical, social, educational and other services. FAC ¶ 62. Plaintiffs
27 claim that case management is “essential to coordinate the provision of
28 [wraparound] services and to coordinate health care services with services
available from other programs, such as child welfare and education.” *Id.* ¶ 59.

Plaintiffs allege, and State Defendants agree, that virtually all foster
children in California receive, or are eligible to receive, their health care services
through Medi-Cal, California’s Medicaid program. *Id.* ¶ 3; Answer ¶ 3. This
means, according to Plaintiffs, that virtually all foster children in California who
have “behavioral, emotional or psychiatric impairments,” FAC ¶ 37, are entitled
to case management, wraparound and/or therapeutic foster care services where
appropriate.

Plaintiffs allege, however, that foster children with such impairments do

1 not have access to Medicaid case management on a consistent, statewide basis.
2 *Id.* ¶ 63. They also allege that California does not provide wraparound or
3 therapeutic foster care as a Medi-Cal service, nor does California provide
4 components of these services to Medi-Cal-eligible children on a consistent
5 statewide basis. *Id.* ¶¶ 60-61. These failures, Plaintiffs allege, violate the Early
6 and Periodic Screening, Diagnostic and Treatment (“EPSDT”) requirements of
7 the Medicaid Act (42 U.S.C. § 1396 *et seq.*); Substantive Due Process under the
8 United States and California Constitutions (U.S. Const. amend. XIV; CA Const.
9 art. I § 7(a)); the Americans with Disabilities Act (42 U.S.C. § 12132, 28 C.F.R. §
10 35.130); the Rehabilitation Act (29 U.S.C. § 701 *et seq.*); and California
11 Government Code § 11135 and its associated regulations. *Id.* ¶¶ 76-92.

12 Plaintiffs seek a judgment declaring that Defendants’ alleged failure to
13 comply with the foregoing constitutional, statutory and regulatory provisions is
14 unconstitutional. They also seek a permanent injunction against further
15 violations. FAC, pages 26-27. They do not seek monetary damages, either
16 compensatory or punitive.

17 1. The Plaintiffs

18 All five fictitiously-named Plaintiffs are children who are or were residing
19 in Los Angeles in the custody of DCFS.⁴ Plaintiff Katie A. is a fourteen-year-old
20 girl who currently resides in Los Angeles County. She was removed from her
21 home at age four on account of neglect; her mother was homeless and her father
22 incarcerated. FAC ¶ 10. By age five, Katie’s assessments indicated that she was
23 a trauma victim, that she has difficulty with peer relations and needs intensive
24 individualized treatment, with supportive services for her caretaker. *Id.* ¶ 11-12.
25 However, Plaintiffs allege that DCFS has consistently placed Katie in congregate
26

27 ⁴ Each of the named plaintiffs is prosecuting this action through a court-
28 approved guardian *ad litem*.

1 care facilities with other behaviorally and emotionally disturbed children, where
2 she has received limited attention. *Id.* ¶ 12. In her ten years in DCFS custody,
3 Katie has been in thirty-seven out-of-home placements, including four different
4 group homes, nineteen stays at eight different psychiatric hospitals and seven
5 stays at the MacLaren Children’s Center (“MacLaren”).⁵ *Id.* ¶ 14.

6 Plaintiff Mary B. is a sixteen-year-old legally blind girl who resides in Los
7 Angeles County and who has been in foster care for three years. She was
8 removed from her home at age thirteen after being physically and emotionally
9 abused and left unsupervised by her mother. She was subsequently diagnosed
10 with a sexually transmitted disease and revealed that she had been sexually
11 abused by her maternal uncle and stepfather. *Id.* ¶ 15. During her three years in
12 DCFS custody, Mary has had twenty-eight placements, including “repeated”
13 psychiatric hospitalizations. *Id.* ¶ 16, 18. Plaintiffs allege that she has never
14 received a comprehensive psychiatric assessment since her entry into DCFS
15 custody. *Id.* ¶ 16. Although a Department of Mental Health screening committee
16 suggested that a specialized foster home with wraparound services could meet
17 Mary’s needs, DCFS placed her in a large residential facility. *Id.* ¶ 18. She
18 currently resides in a high-level, restrictive group home. *Id.*

19 Plaintiff Janet C. is eleven years old and has been in foster care in Los
20 Angeles County for more than two years. *Id.* ¶ 19. She was removed from her
21 parents’ custody following reports of physical abuse in the home. *Id.* During her
22 time in foster care, she has had twenty-five placements, including five with family
23 members, twelve hospital stays at seven different hospitals and three stays at
24 MacLaren. *Id.* ¶ 23. Plaintiffs allege that DCFS has failed to provide Janet with
25 the consistent, intensive mental health services and other support that she needs.
26 *Id.* ¶ 21. As a result, she “continues to deteriorate.” *Id.*

27
28 ⁵ MacLaren was closed down sometime after this lawsuit was filed.

1 Plaintiff Henry D. is a nine year-old legally blind boy who currently resides
2 in a group home in Los Angeles County. *Id.* ¶¶ 24, 27. He was first removed
3 from his home at the age of four following reports of physical and sexual abuse
4 by his mother's boyfriend. Plaintiffs allege that despite documentation of
5 Henry's serious behavioral and emotional problems, DCFS did not provide him
6 with a mental health evaluation or appropriate mental health services. *Id.* ¶ 24.
7 Henry was later returned to his mother's custody, but she subsequently returned
8 him to foster care on account of further abuse by her boyfriend. *Id.* ¶ 25. He has
9 been diagnosed with Major Depression and Post Traumatic Stress Disorder and
10 was not provided with intensive individual therapy until about six months after
11 that diagnosis. *Id.* Plaintiffs allege that DCFS's current case plan for Henry is
12 deficient in that it fails to identify his individual needs and any specific services
13 to be provided to him. *Id.* In the fourteen months following his second removal
14 from his home, Henry had twelve placements, including six hospital stays at three
15 different hospitals and one stay at MacLaren. *Id.* ¶ 27.

16 Plaintiff Gary E. is a fourteen year old boy who returned home after six
17 months in foster placements. *Id.* ¶ 28. During his six months in foster care, a
18 therapist documented Gary's significant emotional and behavioral problems
19 which have impeded his educational progress. *Id.* ¶ 29. However, Plaintiffs
20 allege that Gary did not receive appropriate mental health and behavioral support
21 services. *Id.* He was returned to his mother's home, without any supportive
22 services, because DCFS determined that there was no facility capable of meeting
23 Gary's educational, physical and emotional needs. *Id.* ¶ 30. Plaintiffs allege that
24 without appropriate supportive services, Gary faces the imminent risk of another
25 entry into the foster care system. *Id.* ¶ 31.

26 Though Gary E. formerly resided in Los Angeles County, he is now
27 residing with his father in Boise, Idaho. In December 2002, the juvenile
28 dependency court authorized a visit by Gary with his father. Although Gary was

1 to return to California in early January, he did not return because delinquency
2 charges were filed against him requiring him to stay in Idaho. 3/13/03 Joint
3 Statement of Plaintiffs' Counsel and County Defendants on Progress of Named
4 Plaintiffs at 2. As a result of those charges, Gary is currently on probation, one
5 condition of which is that he not leave Idaho without a court order. Gary's father
6 has applied for legal custody of Gary and DCFS services for Gary have been
7 suspended pending determination of whether he will return to Los Angeles. *Id.*

8 **2. The State Defendants**

9 Defendant DHS is the single state agency responsible for administering or
10 supervising the administration of Medi-Cal. Answer ¶ 32 (citing 42 U.S.C. §
11 1396a(a)(5)). Defendant CDSS is the single state agency responsible for
12 supervising the administration of child welfare services in California. Answer ¶
13 36. *See also* Calif. Welf. & Inst. Code §10600. To that end, CDSS is empowered
14 to promulgate regulations and standards, *id.* § 10554, and investigate, examine
15 and make reports on public officers responsible for the administration of public
16 social services funds administered by CDSS. *Id.* § 10602. Additionally,
17 Defendant Saenz, CDSS's Director, is responsible for administering laws relating
18 to child welfare services (except health care services and medical assistance), *id.*
19 § 10553(b), and has the authority to take action against counties that fail to
20 comply with state statutes and regulations addressing child welfare services. *Id.* §
21 10605.

22 **III.**

23 **Class Certification Requirements**

24 Federal Rule of Civil Procedure 23 establishes the standards for certifying
25 a class action. Under Rule 23(a), class certification is appropriate where: (1) the
26 proposed class is so numerous that joinder is impracticable, (2) there are
27 questions of law or fact common to the class, (3) the claims or defenses of the
28 representative parties are typical of the claims or defenses of the class, and (4) the

1 representative parties will fairly and adequately protect the interests of the class.
2 Fed. R. Civ. P. 23(a). Plaintiffs also must satisfy one of the Rule 23(b)
3 requirements. In this case, they seek to proceed under Rule 23(b)(2).
4 Certification under Rule 23(b)(2) is appropriate where the opposing party “has
5 acted or refused to act on grounds generally applicable to the class, thereby
6 making appropriate final injunctive relief or corresponding declaratory relief with
7 respect to the class as a whole.” Fed. R. Civ. P. 23(b)(2).

8 The party seeking class certification bears the burden of establishing that
9 he or she meets the requirements of Rule 23. *Zinser v. Accufix Research Institute,*
10 *Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). The Court must conduct a “rigorous
11 analysis” to determine that the prerequisites are met, *General Tel. Co. of the*
12 *Southwest v. Falcon*, 457 U.S. 147, 161 (1982), but a plaintiff seeking class
13 certification need not make a prima facie showing that he will prevail on the
14 merits of his substantive claims. *Murray v. Local 2620*, 192 F.R.D. 629, 631
15 (N.D. Cal. 2000). Rather, in reviewing a motion for class certification, the Court
16 generally is bound to take the substantive allegations of the complaint as true.
17 *Blackie v. Barrack*, 524 F. 2d 891, 901 n. 17 (9th Cir. 1975). The Court will look
18 beyond the pleadings only when necessary to decide whether the Rule 23
19 requirements have been satisfied. *Bates v. United Parcel Service*, 204 F.R.D.
20 440, 443-44 (N.D. Cal. 2001). If the moving party has met his burden under Rule
21 23, the Court has broad discretion to certify the class. *Zinser*, 253 F.3d at 1186.

22 In certifying a class, the court should keep in mind the dual purposes of
23 Rule 23: (1) to promote judicial economy through the efficient resolution of
24 multiple claims in a single action; and (2) to provide persons with smaller claims,
25 who would otherwise be economically precluded from doing so, the opportunity
26 to assert their rights. 7A Wright, Miller & Kane, Federal Practice & Procedure 2d
27 (“Wright”) § 1754; Schwarzer, Tashima & Wagstaffe, Cal.Prac. Guide:
28 Fed.Civ.Pro. Before Trial § 10:250 (The Rutter Group 2003).

1 Before assessing each of the explicit requirements of Rule 23, the Court
2 must evaluate the State Defendants' threshold contention that the class Plaintiffs
3 seek to represent is not adequately defined.

4 **1. The Proposed Class Can Be Defined Adequately**

5 "An essential prerequisite of an action under Rule 23 is that there must be a
6 'class.'" Wright § 1760. However, the contours of the class need not be so clear
7 that every potential member may be identified at the time of class certification.
8 *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)
9 (citing Wright § 1760). Rather, "a class will be found to exist if the description of
10 the class is definite enough so that it is administratively feasible for the court to
11 ascertain whether an individual is a member." *Id.* (citing *Aiken v. Obledo*, 442
12 F.Supp. 628, 658 (E.D.Cal.1977)). Plaintiffs seek to certify a Rule 23(b)(2) class;
13 a definition that identifies all potential class members with precision is not
14 necessary because they seek not money damages on behalf of individual class
15 members but institutional reform on the part of DHS and DCFS. *See*
16 Fed.R.Civ.P. 23 Advisory Comm. Notes 1966 Amendment (23(b)(2) actions
17 include those "in the civil rights field where a party is charged with
18 discriminating unlawfully against a class, usually one whose members are
19 incapable of specific enumeration."). As such, the focus is primarily on what
20 Defendants are doing (and what Plaintiffs allege they ought to be doing) rather
21 than exactly who they are doing (or failing to do) it to.

22 The Court has discretion to limit or otherwise redefine the class if the Court
23 finds that the Plaintiffs' class definition does not meet a "minimum standard of
24 definiteness." 7A Wright § 1760. At the hearing on this motion, the Court
25 expressed its view that two aspects of the class definition plaintiffs originally
26 proposed – see page 2, *supra* – were unduly vague or overbroad. First, the phrase
27 "at imminent risk of foster care placement" without more, did not and could not
28 meaningfully identify those children not in foster care who may be entitled to, but

1 are not then receiving, the enumerated mental health services. Second, the terms
 2 “behavioral [and] emotional . . . impairment” are overbroad. As State Defendants
 3 pointed out, those terms are so elastic and imprecise that they could be construed
 4 to encompass virtually all children in California, at least at some points in almost
 5 every child’s development. At the Court’s request, both sides then submitted
 6 proposed written revisions to the original class definition. Based on those
 7 supplemental proposals and on the arguments of the parties at the hearing, the
 8 Court now holds that the following class definition is adequate for purposes of a
 9 Rule 23(b)(2) class action.

10 “The class consists of children in California who,

- 11 (a) are in foster care or are at imminent risk of foster care
 12 placement; and
 13 (b) have a mental illness or condition that has been documented or, had
 14 an assessment already been conducted, would have been
 15 documented; and
 16 (c) who need individualized mental health services, including but not
 17 limited to professionally acceptable assessments, behavioral support
 18 and case management services, family support, crisis support,
 19 therapeutic foster care and other necessary services in the home or in
 20 a home-like setting, to treat or ameliorate their illness or condition.

21 For the purposes of this case, ‘imminent risk of foster care placement’
 22 means that within the last 180 days a child has been participating in voluntary
 23 family maintenance services or voluntary family reunification placements⁶ and/or
 24 has been the subject of either a telephone call to the Child Protective Services
 25 hotline or some other documented communication made to a local Child

26 ⁶ Plaintiffs represented that these services are provided to children formerly in
 27 foster care who are returned for a trial period to live with their families to determine
 28 whether those children can function at home. These children are “at risk,” because
 they will be returned to foster care if things go badly. *Accord Coleman v. Wilson*, 912
 F.Supp. 1282, 1293 (E.D. Cal. 1995) (certifying a Rule 23(b)(1) and 23(b)(2) class
 consisting of “all inmates with serious mental disorders who are now *or who will in*
the future be confined within the California Department of Corrections” except for
 three correctional facilities) (emphasis added).

1 Protective Services agency regarding suspicions of abuse, neglect or
2 abandonment.

3 In the foregoing definition of the certifiable class, the phrase “mental
4 illness or condition,” tracks the language of 42 U.S.C. § 1396d(r)(1)(A)(ii) and 42
5 U.S.C. § 1396d(r)(5), which govern the provision of EPSDT services. The
6 language added at the end of the definition also provides a meaningful standard
7 for the phrase “imminent risk of foster care placement.”

8 State Defendants nevertheless argue that the services enumerated in
9 requirement (c) are unduly vague and ambiguous. Whatever uncertainty may be
10 inherent in those terms will not defeat Rule 23(b)(2) class certification. In this
11 case, Plaintiffs are arguing that the law entitles children in foster care (or at
12 imminent risk of foster care placement) to certain mental health assessments and,
13 if necessary, mental health services, which the State currently is not providing.
14 To prevail, Plaintiffs will have to show why failure to make those services
15 available violates the law. Plaintiffs are entitled to define a Rule 23(b)(2) class
16 by this kind of reference to the injury they allege. In *Daniels v. City of New York*,
17 198 F.R.D. 409 (S.D.N.Y. 2001), the plaintiffs asked the court to certify a class
18 consisting of all persons who had been or would be subjected by officers of the
19 Street Crimes Unit of the New York City Police Department to “illegal stopping
20 and/or frisking . . . in the absence of the reasonable articulable suspicion . . . [in
21 violation of the Fourth Amendment] . . . in a manner that discriminates on the
22 basis of race and/or national origin in violation of the Equal Protection Clause of
23 the Fourteenth Amendment.” *Id.* at 412. The defendants argued that the class
24 was not sufficiently well-defined, because determination of class membership for
25 each putative plaintiff would require an individualized assessment of the very
26 thing the plaintiffs were trying to prove on behalf of the class as a whole – that
27 the police had violated that individual’s Fourth and Fourteenth Amendment
28 rights. Rejecting that contention, the Court held that the class met the specificity
requirement, noting that “general class descriptions based on the harm allegedly

1 suffered by plaintiffs [are] acceptable in class actions seeking only declaratory
2 and injunctive relief under Rule 23(b)(2).” *Id.* at 416 (citation omitted). *See also*
3 *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir. 1993) (class
4 definition in Rule 23(b)(2) class action met specificity requirement despite that
5 class was defined by reference to the wrongdoing Plaintiffs alleged). If and to the
6 extent that after discovery has been conducted it proves advisable to break down
7 this class into sub-classes, the Court has the authority to do so. *Marisol A. v.*
8 *Giuliani*, 126 F.3d 1372, 1378 (2d. Cir. 1997).

9 2. **Rule 23 Requirements**

10 a. **Numerosity**

11 To satisfy the Rule 23(a) requirements for certification, the proposed class
12 must be so numerous that joinder of all members is impracticable. Fed. R. Civ. P.
13 23(a)(1). Although decisions vary as to the number of members sufficient to
14 make joinder impracticable, in general, courts have held that joinder is practicable
15 where there are fewer than 25 parties, and impracticable where there are more
16 than 35. 7A Wright § 1762; *Patrick v. Marshall*, 460 F.Supp. 23, 26 (N.D. Cal.
17 1978). It is not necessary that the exact size of the class be known if “general
18 knowledge and common sense indicate that it is large.” *Perez-Funez v. District*
19 *Director, I.N.S.*, 611 F.Supp. 990, 995 (C.D. Cal. 1984) (quoting *Orantes-*
20 *Hernandez v. Smith*, 541 F.Supp. 351, 370 (C.D. Cal.1982)). Additional factors
21 in assessing whether joinder is impractical are geographic diversity of class
22 members, whether individual claimants can institute separate suits, and whether
23 the class representatives seek injunctive or declaratory relief. *Jordan v. County of*
24 *Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds*, 459 U.S.
25 810 (1982).

26 The numerosity requirement is easily satisfied here. The class consists of
27 children in foster care, or at imminent risk of being placed in foster care, who are
28 Medi-Cal eligible and who need mental health services. Plaintiffs allege – and
the

1 State Defendants agree – that there are more than 90,000 children in foster care in
2 California and that virtually all of those children are Medi-Cal eligible. FAC ¶ 3;
3 Answer ¶ 3. The State Defendants also do not quarrel with Plaintiffs’
4 representation that a 2001 report of the Little Hoover Commission found that
5 there were “[m]ore than 50,000 children in the foster care system who may need
6 mental health services [but] do not get them.” FAC ¶ 45. Those 50,000 children
7 are located throughout California and allegedly lack essential mental health
8 services. Joinder is impracticable, because those numerous class members are
9 minors without the financial or psychological means to institute individual
10 actions against the State.

11 **b. Commonality**

12 Rule 23(a)(2) requires that common questions of law or fact exist among
13 class members. The Ninth Circuit has construed this requirement “permissively,”
14 and, in fact, considers the requirements for finding commonality under Rule
15 23(a)(2) to be “minimal.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-1020
16 (9th Cir. 1998). Indeed, “[a]ll questions of fact and law need not be common to
17 satisfy the rule. The existence of shared legal issues with divergent factual
18 predicates is sufficient.” *Id.* at 1019. Thus, in a civil-rights suit, “commonality is
19 satisfied where the lawsuit challenges a system-wide practice or policy that
20 affects all of the putative class members.” *Armstrong v. Davis*, 275 F.3d 849, 868
21 (9th Cir. 2001). And suits alleging that a government program does not comply
22 with the mandates of federal statutes or regulations “generally satisfy the
23 commonality requirement,” because “the government’s uniform policies and
24 alleged legal violations similarly affect all of the members of the putative class.”
25 *5 Moore’s Federal Practice* § 23.23[5][g] (Matthew Bender 3d ed.).

26 In *Baby Neal v. Casey*, 43 F.3d 48 (3d Cir. 1994), the plaintiffs sought to
27 certify a class consisting of abused or neglected children in the custody of
28 Philadelphia’s Department of Human Services. They alleged that systemic
deficiencies prevented that Department from providing various child welfare

1 services legally mandated by the United States Constitution and by federal and
2 state law. *Baby Neal*, 43 F.3d at 52. The Third Circuit held that the class
3 satisfied the commonality requirement. The court observed that “[Rule 23(b)(2)]
4 classes have been certified in a legion of civil rights cases where commonality
5 findings were based primarily on the fact that defendant's conduct is central to the
6 claims of all class members irrespective of their individual circumstances and the
7 disparate effects of the conduct.” *Id.* at 57. The Court held that alleged violations
8 by the Department of statutory and Constitutional standards amounted to a
9 “common course of conduct” toward all children in its custody sufficient to
10 satisfy the commonality requirement, without need for individualized
11 determinations of the propriety of injunctive relief. *Id.* Moreover, the court noted
12 that commonality does not require that all members of the class suffer the same
13 injury. That they were all subject to the injury or faced the immediate threat of
14 injury sufficed for Rule 23(b)(2). *Id.*

15 In *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997), eleven
16 children brought an action challenging alleged systemic failures of the New York
17 City child welfare system in violation of the federal and New York state
18 Constitutions and various federal and state laws. *Id.* at 375. Each named plaintiff
19 challenged a different aspect of the child welfare system, including alleged
20 inadequate training and supervision of foster parents, failures to properly
21 investigate reports of suspected neglect and abuse, delays in removing children
22 from abusive homes, and the inability to secure appropriate placements for
23 adoption. *Id.* at 376. The named plaintiffs sought to certify a class consisting of
24 “[a]ll children who are or will be in the custody of the New York City
25 Administration for Children's Services (‘ACS’), and those children who, while
26 not in the custody of ACS, are or will be at risk of neglect or abuse and whose
27 status is or should be known to ACS.” *Id.* The district court identified as a
28 common question of law whether each child had a legal entitlement to the
specified services and it identified as a common question of fact whether

1 defendants had systematically failed to provide the services. *Id.* at 377. The
2 Second Circuit held that the district court did not abuse its discretion in finding
3 that the plaintiffs' alleged injuries "derive from a unitary course of conduct by a
4 single system," *id.*, and therefore satisfy the commonality requirement.

5 According to Plaintiffs, EPSDT requires screening services – to identify
6 defects, conditions and illness – as well as treatment services, to correct or
7 ameliorate those conditions. *Id.* (citing 42 U.S.C. § 1396d(r)(1), 42 C.F.R. §
8 441.56(b), 42 U.S.C. § 1396d(r)(5)). Plaintiffs maintain that for foster children
9 with mental health problems, such mandatory treatment services include
10 "professionally adequate assessments and case management and, depending on
11 the needs of the child, may include behavioral support services, individualized
12 wraparound services, therapeutic foster care and psychiatric or clinical services
13 provided in a home-like setting." FAC ¶ 58. Plaintiffs go on to allege that foster
14 children with such impairments do not have access to Medicaid case management
15 on a consistent, statewide basis. *Id.* ¶ 63. They also allege that California does
16 not provide wraparound or therapeutic foster care as a Medi-Cal service, nor does
17 California provide components of these services to Medi-Cal-eligible children on
18 a consistent statewide basis. *Id.* ¶¶ 60-61.

19 Plaintiffs allege that DHS is violating the EPSDT requirements and the
20 other constitutional and statutory provisions described at page 4, *supra*, by not
21 ensuring that these services are provided to foster children with "behavioral,
22 emotional or psychiatric impairments." (In the class this Court has certified they
23 are children with a "mental illness or condition.") CDSS promulgates regulations
24 and standards, *id.* § 10554, is responsible for administering laws relating to child
25 welfare services, *id.* § 10553(b), and has the authority to take action against
26 counties that fail to comply with state statutes and regulations addressing child
27 welfare services. *Id.* § 10605.

28 The class satisfies the commonality requirement, because DHS and CDSS's
alleged failure to provide adequate mental health services to foster children in

1 California is “a system-wide practice or policy that affects all of the putative class
2 members,” *Armstrong*, 275 F.3d at 868. As in *Baby Neal*, the alleged conduct of
3 the Defendant governmental agencies is a “common course of conduct” affecting
4 all members of the proposed class. *Baby Neal*, 43 F.3d at 57. Whether these
5 mental health services must be but are not provided to foster children are the
6 common issues of fact and law in Plaintiffs’ case against Defendants DHS and
7 CDSS.

8 Defendants rely heavily on the Tenth Circuit’s holding in *J.B. v. Valdez*,
9 186 F.3d 1280 (10th Cir. 1999), to support their argument that the commonality
10 requirement is not satisfied. In *J.B.* the plaintiffs sought declaratory and
11 injunctive relief alleging that systemic failures in the state welfare system had
12 resulted in a lack of available therapeutic services to mentally or developmentally
13 disabled children in New Mexico. *Id.* at 1282, 1289. The majority held that the
14 district court did not abuse its discretion when it declined to certify a class
15 consisting of all children in or at risk of being in state custody with mental or
16 developmental disabilities that require treatment. The court rejected the plaintiffs’
17 theory of commonality, finding that the children came into state custody in a
18 variety of ways and that they did not share a common statutory or constitutional
19 claim. It stated, “[w]e refuse to read an allegation of systematic [sic] failures as a
20 moniker for meeting the class action requirements.” *Id.* at 1189. This is
21 inconsistent with Ninth Circuit (*Armstrong*), Second Circuit (*Marisol A.*) and
22 Third Circuit (*Baby Neal*) precedent and would defeat the strong policy
23 arguments favoring availability of class action remedies to those subjected to
24 “system-wide practice[s] or polic[ies],” *Armstrong*, 275 F.3d at 868. *See also*
25 *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (“It is sufficient if class
26 members complain of a pattern or practice that is generally applicable to the class
27 as a whole.”) What matters is whether the proposed systemic changes will affect
28 an individual class member, not how he or she came to be a class member in the
first place.

1 The proposed class satisfies the commonality requirement.

2 **c. Typicality**

3 The typicality requirement “is designed to assure that the named
4 representative’s interests are aligned with those of the class.” *Jordan*, 669 F.2d at
5 1321. Where such an alignment exists, a representative who vigorously pursues
6 his or her own interests will necessarily advance the interests of the class. *Id.*
7 The Ninth Circuit interprets the Rule 23(a) typicality requirement permissively.
8 *Hanlon*, 150 F.3d at 1020. A named plaintiff must be a member of the class he
9 seeks to represent and must “possess the same interest and suffer the same injury”
10 as class members. *Falcon*, 457 U.S. at 156. The named plaintiffs’ claims need
11 not be identical to the claims of the class; rather, the claims are typical if they are
12 “reasonably co-extensive with those of absent class members.” *Hanlon*, 150 F.3d
13 at 1020. It is sufficient for the plaintiffs’ claims to “arise from the same remedial
14 and legal theories.” *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D.
15 439, 449 (N.D. Cal. 1994).

16 The State Defendants’ principal argument against typicality is that because
17 all representative Plaintiffs are or were in the custody only of Los Angeles
18 County, they are not representative of other class members in the custody of other
19 California counties. *Opp.* at 18. Defendants’ argument fails. They have
20 demonstrated no reason to find that a named plaintiff living in Los Angeles
21 County has a different interest in causing DHS and CDSS to ensure she receives
22 the mental health services she needs and to which she is entitled than does a class
23 member residing in a different county. Similarly, the injury a representative
24 plaintiff suffers because Medi-Cal does not routinely provide, say, wraparound
25 services, arises from the same remedial or legal theory as the injury a class
26 member in a different county suffers from that same Medi-Cal limitation. In
27 short, because the named Plaintiffs are challenging state practices and policies
28 allegedly being followed in *all* California counties, it is irrelevant in what county

1 they reside.

2 The State Defendants are correct, however, that Plaintiff Gary E.'s interests
3 are not typical of the class. Since the First Amended Complaint was filed, Gary
4 E. traveled to Idaho to visit his father, who resides there. Since then, Gary's
5 father has applied for legal custody of Gary and Gary may not leave Idaho absent
6 a court order. For this reason, DCFS services for Gary have been suspended
7 pending determination of whether he will return to Los Angeles. 3/13/03 Joint
8 Statement of Plaintiffs' Counsel and County Defendants on Progress of Named
9 Plaintiffs at 2. Although Plaintiffs may be correct in their unsupported assertion
10 that (at least for reporting or record keeping purposes) Gary E. remains in the
11 custody of DCFS (presumably until Gary's father receives legal custody), Reply
12 at 8 n. 5, Gary's interest in California-provided benefits is not typical of the
13 interest of other class members in those same benefits.

14 The State Defendants' other argument against typicality is that the named
15 Plaintiffs' interests are now moot, because they have reached a settlement with
16 the Los Angeles County Defendants. Opp. at 12. This argument also fails,
17 because, as described above, the Complaint asserts that the law imposes particular
18 obligations on DHS and CDSS. The State Defendants have provided no support
19 for their argument that if the County Defendants fulfil their obligations to the
20 named plaintiffs the State Defendants would no longer continue to have
21 independent responsibilities to them or to the class as a whole.

22 For these reasons, the Court holds that Plaintiffs Katie A., Mary B., Janet
23 C. and Henry D. satisfy the typicality requirement, but that Gary E. does not.

24 **d. Adequacy of Representation**

25 Before certifying a class under Rule 23, the Court must find that "the
26 representative parties will fairly and adequately protect the interests of the class."
27 Fed. R. Civ. P. 23(a)(4). This depends on two questions: (1) whether the named
28 Plaintiffs and their counsel have any conflicts of interest with other class
members

1 and (2) whether the named plaintiffs and their counsel will prosecute the action
2 vigorously on behalf of the class. *Hanlon*, 150 F. 3d at 1020.

3 Defendants do not argue that the named Plaintiffs or their counsel have
4 conflicts of interest with other class members and there is no reason to suspect
5 there are such conflicts. The State Defendants do appear to challenge Plaintiffs'
6 counsel's ability to pursue this action vigorously by challenging Plaintiffs'
7 counsel's decision not to join the 57 other California counties in this action.
8 Defendants argue that because the provision of public social services is a county
9 function and responsibility, class members will not obtain the relief they seek
10 without naming all California counties in this suit. *Opp.* at 19 (citing *Welf. &*
11 *Inst. Code* § 10800). The State Defendants also maintain that children in
12 different counties will receive and be eligible for different child welfare services.
13 *Opp.* at 19. However, California law subjects the administration by all counties
14 of federal or state-funded foster care services to CDSS and DHS regulations.
15 *Welf. & Inst. Code* §§ 10054, 10800. Plaintiffs' counsel's decision to sue the
16 state agencies that promulgate and enforce the regulations that are binding on all
17 counties by no means suggests that Plaintiffs' counsel will not vigorously
18 represent the class. This is especially true, given that in the context of these kinds
19 of claims an injunction against the State Defendants will bind all California
20 counties. *E.g. Blanco v. Anderson*, 39 F.3d 969, 971-72 (9th Cir. 1994).

21 Finally, discovery disputes notwithstanding, the Court finds that the Legal
22 Director of the ACLU of Southern California (Rosenbaum Decl. ¶ 5), the Legal
23 Director of the Judge David L. Bazelon Center for Mental Health Law (Birnum
24 Decl. ¶ 1), the chair of the Los Angeles Pro Bono Committee of the Heller
25 Ehrman White & McAuliffe firm (Peterson Decl. ¶ 2), the Center for Law in the
26 Public Interest (Diamond Decl. ¶ 1) and the Western Center on Law and Poverty
27 (Newman Decl. ¶ 3), are highly capable of representing the class.

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e. Rule 23(b)(2) Requirements

Besides the four requirements of Rule 23(a), Plaintiffs must also satisfy the requirements of one of the subdivisions of Rule 23(b). This action satisfies the requirements of Rule 23(b)(2).

Certification under Rule 23(b)(2) is appropriate where the opposing party “has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Fed. R. Civ. P. 23(b)(2). As the Advisory Committee Notes explain, Rule 23(b)(2) was adopted to permit the prosecution of civil rights actions. *See* Fed. R. Civ. P. 23 Adv. Comm. Notes 1966 Amend.; *Walters*, 145 F.3d at 1047. This lawsuit seeks declaratory and injunctive relief against allegedly illegal statewide practices concerning provision of mental health services to children in foster care. Since this action “complain[s] of a pattern or practice that is generally applicable to the class as a whole,” *id.*, it clearly satisfies the Rule 23(b)(2) standard.

IV.

DISCOVERY ON “CLASS RELATED ISSUES” IS NOT NEEDED BEFORE THE COURT CERTIFIES THIS CLASS

Rule 23(c)(1) contemplates that the Court will determine whether to certify the class “as soon as practicable after the commencement of an action.” The Local Rules require that a motion for class certification be filed within 90 days after service of a Complaint purporting to commence a class action. L.R. 23-3. Nevertheless, the State Defendants argue that class certification is “premature” at this time, because, they have not yet had the opportunity to conduct discovery “on a host of class-related issues.” Opp. at 24. Without specifying what “class-related issues” Defendants are referring to, Defendants appear to suggest they need discovery to ascertain more clearly what Plaintiffs’ claims are. However, as the Court has explained above in its analysis of the individual Rule 23 requirements,

1 the First Amended Complaint contains allegations sufficient to understand
2 Plaintiffs' claims for class certification purposes. Moreover, Defendants have not
3 pointed out any particular factual uncertainties which, if resolved, would bear on
4 whether class certification would be appropriate. Accordingly, Defendants'
5 request that the Court defer ruling on class certification pending unspecified
6 discovery is denied.

7 **V.**

8 **NOTICE IS NOT REQUIRED**

9 Rule 23(c)(2) requires that notice be provided to class members in Rule
10 23(b)(3) class actions. Fed. R. Civ. P. 23(c)(2). There is no such corresponding
11 requirement for Rule 23(b)(2) class actions. *Eisen v. Carlisle & Jacquelin*, 417
12 U.S 156, 177 n. 14 (1974); *EEOC v. General Telephone Co.*, 599 F.2d 322, 334
13 (9th Cir. 1979) ("When an action is certified under Rule 23(b)(2) . . . absent class
14 members are not required to receive notice or to have the opportunity to opt-out of
15 the suit."). Accordingly, no notice is required in this Rule 23(b)(2) action.

16 **VI.**

17 **CONCLUSION**

18 For the foregoing reasons, Plaintiffs' motion to certify a class is
19 GRANTED.⁷ The following class is certified:

20 "Children in California who

- 21 (a) are in foster care or are at imminent risk of foster care
22 placement; and
- 23 (b) have a mental illness or condition that has been
24 documented or, had an assessment already been
25 conducted, would have been documented; and
- 26 (c) who need individualized mental health services,
27 including but not limited to professionally acceptable
28 assessments, behavioral support and case management
services, family support, crisis support, therapeutic
foster care and other necessary services in the home or
in a home-like setting, to treat or ameliorate their illness

⁷ Docket No. 50.

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or condition.

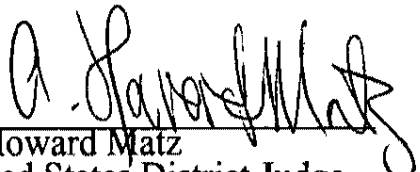
For the purposes of this case, 'imminent risk of foster care placement' means that within the last 180 days a child has been participating in voluntary family maintenance services or voluntary family reunification placements and/or has been the subject of either a telephone call to the Child Protective Services hotline or some other documented communication made to a local Child Protective Services agency regarding suspicions of abuse, neglect or abandonment."

However, Plaintiff Gary E. may not serve as a class representative, because his recent relocation to Idaho prevents him from satisfying the Rule 23(a)(3) typicality requirement.

IT IS SO ORDERED.

DATE:

June 18, 2003


A. Howard Matz
United States District Judge