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CLARK COUNTY DFS, TOM MORTON and LOUIS PALMA

8
9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF NEVADA**

11 CLARK K., by his next friend Sherry Anderson;)
JALEN, SIA, ROSHAUN, CALEB, and KING A.)
12 by their next friend Tarrah Logan; TONI, SUMMER,)
and FRANK B., by their next friend Marilyn)
13 Paikai; and DONNA C., by her next friend)
Jacquelyn Romero,)

Case No.: 2:06-cv-01068-RCJ-RJJ
JUDGE: Hon. Robert C. Jones

14 Plaintiffs,

15 vs.

16
17 MICHAEL WILLDEN, Director of the Nevada
DHHS; FERNANDO SERRANO, Administrator
of the Nevada Division of Child and Family
18 Services; JOHN DOE, Bureau Chief of the Bureau
of Services for Child Care of the Division of
19 Child and Family Services;
VIRGINIA VALENTINE, Clark County Manager;
20 TOM MORTON, Director
of Clark County Department of Family Services;
21 LOUIS PALMA, Manager of Shelter Care for the
Clark County Department of Family Services;
22 BRUCE L. WOODBURY, TOM COLLINS,
CHIP MAXFIELD, YVONNE ATKINSON
23 GATES, MYRNA WILLIAMS, LYNETTE
BOGGS MCDONALD and RORY REID, Clark
24 County Commissioners; and CLARK COUNTY,

25 Defendants.
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**CLARK COUNTY DEFENDANTS' PROPOSED ORDER DENYING
PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION**

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3 Plaintiffs' Renewed Motion for Class Certification (Court Docket (CD) # 195) came before
4 this court for hearing on June 9, 2007. After considering the motion, the pleadings and papers on
5 file in this matter, and oral argument by the parties, the Court issues the following Order.

6
7 **Plaintiffs' Renewed Motion for Class Certification**

8 Plaintiffs' Renewed Motion and accompanying briefs sought to certify a class of "all child
9 abuse or neglect victims who are or will be involuntarily placed outside the homes of their parents or
10 guardians by County Department of Family Services pursuant to an order of the court under Nev.
11 Rev. Stat. § 432B." ¹

12 Under Fed. R. Civ. P. 23(a), "[a] district court may certify a class only if: '(1) the class is so
13 numerous that joinder of all members is impracticable; (2) there are questions of law and fact
14 common to the class; (3) the claims or defenses of the representative parties are typical of the claims
15 or defenses of the class; and (4) the representative parties will fairly and adequately protect the
16 interests of the class.' " *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1176 (9th Cir. 2007). "The district
17 court must also find that at least one of the following three conditions are satisfied: (1) the
18 prosecution of separate actions would create a risk of : (a) inconsistent or varying adjudications or
19 (b) individual adjudications dispositive of the interests of other members not a party to those
20 adjudications; (2) the party opposing the class has acted or refused to act on grounds generally
21 applicable to the class; or (3) the questions of law or fact common to the members of the class
22 predominate over any questions affecting only individual members, and a class action is superior to
23 other available methods for the fair and efficient adjudication of the controversy. *See Fed. R. Civ. P.*
24 *23(b).*" *Id.*

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28 ¹ *See* Plaintiffs' Combined Reply to Clark County Defendants' and State Defendants' Oppositions to Plaintiffs' Renewed
Motion for Class Certification (CD # 224) at 5 (refining and narrowing the originally-proposed class definition).

1 Plaintiffs asserted in their briefs and at oral argument that nearly any evaluation of facts at
 2 this pre-certification stage of the litigation is impermissible as an assessment of the merits of the
 3 case. The Court disagrees and notes that it must apply a “rigorous analysis” to see that the class
 4 certification criteria have been met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th
 5 Cir. 2001) (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). This
 6 analysis fairly encompasses an evaluation of the factual record and allows for factual findings. *See*
 7 *Dukes*, 509 F.3d at 1175-76, 1178 n.2 (deferring to district court’s broad discretion to make factual
 8 findings as to the applicability of Rule 23 criteria and to the district court’s decision whether to
 9 certify class).²

11 As discussed below, the Court finds, based on the record before it, that Plaintiffs have met
 12 the numerosity requirement of Fed. R. Civ. P. 23(a) but have not met the rest of the 23(a)
 13 prerequisites or the maintainability requirement of Rule 23(b)(2).

15 Numerosity

16 This Court has previously ruled that the numerosity requirement of Rule 23(a) has been
 17 established. CD # 134 at 44-45. The Court further finds that the narrowed class definition advanced
 18 by Plaintiffs in their Combined Reply (CD #224 at 5) also meets the numerosity requirement.

20 Commonality

21 The commonality requirement for class certification is met if plaintiffs’ grievances share a
 22 common question of law or of fact. *See Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).
 23 Additionally, the commonality test for class actions is qualitative rather than quantitative; one
 24 significant issue common to the proposed class may be sufficient to warrant certification. *Dukes*,
 25 509 F.3d at 1184. Moreover, in a civil rights suit, the commonality requirement for class
 26

27 ² *See also* Advisory Committee Note to 2003 Proposed Amendments to Rule 23, 201 F.R.D. 560 at 592-93 (discussing
 28 how pre-certification discovery can illuminate, for example, nature of the issues, whether the evidence on the merits is
 common to members of the proposed class, whether the issues are susceptible to class-wide proof, and what trial
 management problems the case will present – “this discovery does not concern the weight of the merits or the strength of
 the evidence.”)

1 certification is satisfied where the lawsuit challenges a system-wide practice or policy that affects all
2 putative class members, despite individual factual differences among individual litigants or groups
3 of litigants. *See Armstrong*, 275 F. 3d at 868.

4 In *Armstrong*, the Ninth Circuit held that differences in particular class members' disabilities
5 did not justify requiring separate actions, since all disabled prisoners and parolees suffered similar
6 harm from board's system-wide failure to accommodate their disabilities, i.e., the harm they suffered
7 was all of a piece – they were denied parole and parole revocation proceedings without the
8 appropriate administrative process being followed. *See Armstrong*, 275 F. 3d at 868.

9
10 In this case, by contrast, Plaintiffs' evidence presented to the Court has not shown that this
11 suit challenges a systemwide practice or a policy affecting all putative class members, rather than
12 alleged individual wrongs against the named plaintiffs. Plaintiffs contend that they have shown
13 "overwhelming evidence" of systemwide violations as set forth in *Dukes v. Wal-Mart*. The Court
14 disagrees.

15
16 In *Dukes*, the district court analyzed factual data showing evidence of company-wide policies
17 and practices and statistical data presented by an expert statistician. 509 F.3d at 1178-1182.
18 Additionally, the district court considered circumstantial and anecdotal evidence to bolster the
19 statistical evidence of pattern and practice of discrimination and to bring the statistical numerical
20 evidence to life. 509 F.3d at 1182. Here, on the other hand, plaintiffs have submitted only
21 circumstantial and anecdotal supporting evidence without the underlying statistical expert evidence
22 based on well-established statistical evidence. In making its discretionary and qualitative assessment
23 of whether the commonality requirement had been fulfilled for certification purposes, this Court
24 finds that the requirement has not been satisfied based on merely the circumstantial and anecdotal
25 evidence before the Court at this time.
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Typicality

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2 The typicality requirement for class certification requires that claims of class representatives
3 be typical of those of the class, and is satisfied when each class member's claim arises from the same
4 course of events, and each class member make similar legal arguments to prove defendants' liability.
5
6 *See Armstrong*, 275 F.3d at 868. The typicality requirement for class certification does not require
7 that named plaintiffs' injuries be identical with those of other class members, only that unnamed
8 class members have injuries similar to those of named plaintiffs and that injuries result from the
9 same, injurious course of conduct. *See Armstrong*, 275 F. 3d at 869.

10 For example, in *Armstrong*, the Ninth Circuit stated that the undisputed facts from trial
11 showed that the State of California regularly discriminated against disabled prisoners and parolees
12 during its parole and parole revocation hearing processes. 275 F.3d at 854. The district court found
13 that the California Board of Prison Terms (the state parole authority) failed to make proper
14 accommodations for numerous disabled prisoners and parolees, with the result that a number of such
15 individuals forfeited their rights to parole and parole revocation hearings and appeals, while others
16 were unable to represent themselves adequately at such proceedings, all in contravention of federal
17 law. 275 F.3d at 854. Therefore, it was undisputed on appeal that the unnamed class members had
18 injuries similar to those of named plaintiffs and that the injuries (forfeiture of rights to parole and
19 parole-determinative proceedings) resulted from the same, injurious course of conduct.
20
21

22 In this purported class action, by contrast, the alleged harms among the named plaintiffs
23 alone are diverse and manifold, ranging from deprivation of educational assistance services, to
24 deprivation of psychological services, to deprivation of psychotropic medications, to improper
25 reunification with a natural parent, to the emotional distress caused by the death of a sibling, and
26 more. Each of these injuries is alleged to be caused by different courses of conduct by government
27 actors, including failure to supervise, failure to provide educational services and psychological
28 services, etc. Each of these alleged actions or inactions by government actors are, in turn, alleged to

1 be caused by larger systemic factors such as large caseloads per caseworker, insufficient training of
2 caseworkers, shortage of guardians ad litem and CASAs to represent children in dependency
3 proceedings, and other problems. The sheer number and complexity of issues that currently are
4 asserted in this case among the named plaintiffs alone fail to meet Rule 23(a)'s mandate that
5 unnamed class members have injuries similar to those of named plaintiffs and that injuries result
6 from same, injurious course of conduct. *See* Armstrong, 275 F. 3d at 867 (Plaintiffs showed that
7 each of them was discriminated against in violation of the ADA at parole or parole revocation
8 hearings – each of them “suffered from the same injurious conduct; each incurred the same injury;
9 and each is seeking the same relief.”)

11 Plaintiffs point to case law from other jurisdictions but there is no Ninth Circuit case law
12 with class certification based on “common” issues at the extreme level of generality urged here.³
13 This Court is in agreement with *J.B. v. Valdez*, in which the Tenth Circuit said that it would not
14 “read an allegations of systemic failures as a moniker for meeting the class action requirements. 186
15 F.3d 1280, 1289 (10th Cir. 1999).

17 The typicality question is tied into the commonality question discussed above, as the two
18 inquiries of commonality and typicality tend to merge. *See Dukes*, 509 F.3d at 1184. Class
19 representatives must show typical claims that are reasonably coextensive with those of the absent
20 class members. *Dukes*, 509 F.3d at 1184. Because plaintiffs have not demonstrated any pattern or
21 practice of violation of the putative class members’ legal rights, there is no way for the Court to
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24
25 ³ The Ninth Circuit’s recent cases cited by the parties involving certified classes were
26 certified for issues much more narrowly-drawn than the ones here. *See, e.g., Walters v. Reno*, 145
27 F.3d 1032 (class certified for aliens alleging a due process violation for inadequate notice of
28 deportation following charges of document fraud); *Hanlon v. Chrysler*, 150 F.3d 1011 (certified
class of minivan owners alleging defectively designed rear lift gate latch); *Dukes v. Wal-Mart*, 509
F.3d 1168 (certified class alleging sex discrimination against women employees resulting in
systematically lower wages and fewer and delayed promotions); *LaDuke v. Nelson*, 762 F.2d 1318
(certified class of migrant workers seeking relief from random checks by INS of migrant worker
housing buildings).

1 assess whether the named plaintiffs' claims are reasonably coextensive with those of the absent
2 putative class members at this time. Therefore, the typicality requirement has not been satisfied.

3 Adequacy of Representation

4 The adequacy of representation factor for class certification requires that (1) the proposed
5 representative plaintiffs do not have conflicts of interest with the proposed class; and (2) plaintiffs
6 are represented by qualified and competent counsel. *Dukes*, 509 F.3d at 1185.

7
8 The Court cannot ascertain at this point that the proposed representative plaintiffs do not
9 have conflicts of interest with the proposed class. As discussed above in the context of
10 commonality, plaintiffs have not offered sufficient evidence of patterns or practices of systemwide
11 violations. As discussed in *Armstrong*, “[f]or class certification to occur, the court must find that the
12 named plaintiffs adequately represent the interests and experiences of the overall class. In making
13 such findings, the trial court must be afforded a wide degree of discretion to determine when a
14 particular number of inmate witnesses is sufficient to justify system-wide relief for the identified
15 violation.” 275 F.3d at 871. Here, there is insufficient evidence of justification for systemwide
16 relief as opposed to individual relief for the named plaintiffs.

17
18 The Court also cannot ascertain at this time whether plaintiffs are adequately represented by
19 current counsel, and the Court has a duty to protect the interests of class members. “Attorneys and
20 parties seeking to represent the class assume fiduciary responsibilities and the court bears a residual
21 responsibility to protect the interests of class members.” 15 Herbert B. Newberg & Alba Conte,
22 *Newberg on Class Actions* § 15.3 at 13 (4th ed. 2002) (quoting *Manual for Complex Litigation* (3d
23 ed.) § 30. Given the lack of classwide evidence at this point, it remains a possibility that plaintiffs’
24 counsel are not providing zealous representation of their individual clients, including their claims for
25 money damages, in order to pursue the larger class allegations on behalf of their organization and
26 generate attorneys’ fees. The named plaintiffs, not to mention the absent putative class members,
27 run the risk of having their potentially substantial money damages claims barred by statutes of
28

1 limitations and res judicata concerns. Thus, the adequacy of representation requirement has not been
2 fulfilled at this time.

3 **Maintainability of Class Action Under Rule 23(b)(2)**

4 In determining the applicability of Rule 23(b)(2), a court must examine the specific facts and
5 circumstances of each case, focusing predominantly on plaintiffs' intent in bringing suit. At a
6 minimum, the court must satisfy itself that (1) even in the absence of possible monetary recovery,
7 reasonable plaintiffs would bring suit to obtain the injunctive or declaratory relief sought; and (2)
8 that the injunctive or declaratory relief sought would be both reasonably necessary and appropriate
9 were the plaintiffs to succeed on the merits. *Dukes*, 509 F.3d at 1186.
10

11 As discussed above in the context of adequacy of representation, the Court is unable to
12 satisfy itself at this time that the potential money damages claims of the named plaintiffs are
13 protected adequately in this suit seeking only injunctive and declaratory relief for a putative class.
14 Therefore, the Court cannot say that reasonable plaintiffs would bring suit to obtain the injunctive or
15 declaratory relief.
16

17 Additionally, the Court cannot tell at this time that the injunctive or declaratory relief sought
18 would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.
19 Inextricably tied into the consideration of whether class certification is appropriate is the question of
20 the scope of injunctive relief. Plaintiffs contend that the scope or any details of the relief they seek is
21 immaterial at this early stage of the litigation, but this assertion ignores the Ninth Circuit's
22 discussion in *Armstrong* regarding the U.S. Supreme Court's hesitance in ordering systemwide relief
23 against governmental actors rather than awarding individual damages for proven harms. As the
24 *Armstrong* Court observed,
25

26 [t]he scope of injunctive relief is dictated by the extent of the violation established . .
27 . [t]he key question . . . is whether the inadequacy complained of is in fact
28 'widespread enough to justify system wide relief . . [under the] longstanding maxim
that injunctive relief against a state agency or official must be no broader than
necessary to remedy the constitutional violation. System-wide relief is required if the

1 injury is the result of violations of a statute or the constitution that are attributable to
2 policies or practices pervading the whole system . . . or if the unlawful policies or
3 practices affect such a broad range of plaintiffs that an overhaul of the system is the
4 only feasible manner in which to address the class’s injury. However, if injunctive
relief is premised upon only a few isolated violations affecting a narrow range of
plaintiffs, its scope must be limited accordingly. . . .

5 We also note that the decision to grant system-wide prospective injunctive relief does
6 not occur in a vacuum; it is intimately connected to determinations made earlier in the
7 lawsuit . . . and the court’s determination that relief may be sought by a class of
8 plaintiffs is relevant to the scope of the relief to be awarded. In fact, class
certification serves to alter that court’s inquiry: when a class is properly certified, the
9 injury asserted by the named plaintiffs . . . is asserted on behalf of all members of the
10 class . . [and] the “plaintiff” has been broadened to include the class as a whole, and
no longer simply those named in the complaint.

11 275 F.3d at 870-71. (citations and quotations omitted).

12 When plaintiffs seek injunctive relief against a state agency on behalf of a class, but relief on
13 behalf of a large class is inappropriate, the court will limit relief to named plaintiffs. *See Armstrong*
14 275 F.3d at 870 n.27; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983) (if a plaintiff
15 “has suffered an injury barred under the Federal Constitution, he has a remedy for damages under §
16 1983”).

17 On the other hand, in determining scope of injunctive relief that interferes with affairs of
18 state agency, a federal court must ensure, out of federalism concerns, that any injunction heels
19 closely to the identified violation, and is not overly intrusive and unworkable, and would not require
20 for its enforcement the continuous supervision by a federal court over conduct of state officers. *See*
21 *Armstrong*, 275 F.3d at 872. Because the issue of injunctive relief is tied in with certification of any
22 class, this Court does not believe certification is appropriate until plaintiffs are able to show
23 systemwide violations mandating systemwide relief rather than the individual claims of the named
24 plaintiffs for damages.

25
26 **Conclusion**

27 For the reasons stated above, the Court hereby DENIES WITHOUT PREJUDICE Plaintiffs’
28 Renewed Motion for Class Certification. While the numerosity requirement of Rule 23(a) has been

1 met, the other three requirements of Rule 23(a) have not been demonstrated, and plaintiffs have not
2 shown the putative class to be maintainable under Rule 23(b)(2).

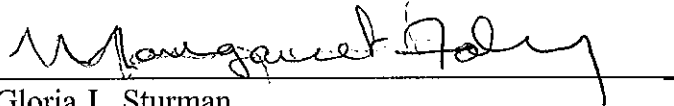
3 IT IS SO ORDERED.

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5 **Date:** July 9, 2008

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7
8 UNITED STATES DISTRICT JUDGE

9 Submitted by:

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11 

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