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15 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO/OAKLAND DIVISION

17 V.L., *et al.*,) **Case No.: CV 09-04668 JSW**
18) **CLASS ACTION**
Plaintiffs) **PLAINTIFFS' NOTICE OF**
19) **MOTION AND MOTION FOR**
v.) **CLASS CERTIFICATION;**
20 WAGNER, *et al.*,) **MEMORANDUM OF POINTS**
21) **AND AUTHORITIES IN SUPPORT**
Defendants) **Hearing Date: To Be Determined**
22)
23)
24)

1 **NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION**

2 TO: JOHN A. WAGNER, Director of the California Department of Social
3 Services; DAVID MAXWELL-JOLLY, Director of the California Department of
4 Health Care Services; CALIFORNIA DEPARTMENT OF HEALTH CARE
5 SERVICES; and CALIFORNIA DEPARTMENT OF SOCIAL SERVICES:

6 **PLEASE TAKE NOTICE** that at the date, time, and location set by the Court for the
7 Hearing on Plaintiffs’ Motion for Temporary Restraining Order, or as soon thereafter as counsel may
8 be heard, in the United States District Court for the Northern District of California, the Named
9 Plaintiffs V.L. by and through his *guardian ad litem* Nancy Lagahid, David Oster; Willie Beatrice
10 Sheppard; C.R. by and through his *guardian ad litem* Michelle Rivera; and Dotty Jones individually
11 and on behalf of all others similarly situated, will and do hereby move under Rules 23(a) and
12 23(b)(2) of the Federal Rules of Civil Procedure for an order certifying the following class for the
13 purposes of injunctive and declaratory relief for First, Second, Third, Fourth, Fifth, and Seventh
14 Claims for Relief:

15 “All recipients of IHSS in the State of California whose IHSS services
16 will be limited, cut, or terminated under the provisions of ABX4 4, and
17 all applicants to IHSS in the State of California who would have been
18 eligible for IHSS services but who are either not eligible, or are
19 eligible for fewer services, as a result of ABX 4 4.”

20 Plaintiffs also move for certification of the following subclasses:

21 a. For the Sixth Claim for Relief: “**Loss of Domestic and related Services Subclass**” to
22 be defined as “all present and future IHSS recipients and applicants who have been or would have
23 been authorized to receive domestic and/or related IHSS, and whose IHSS will be reduced to
24 eliminate some or all of their domestic and/or related services under the provisions of ABX4 4.”

25 b. For the Ninth Claim for Relief: “**Termination of Benefits Subclass**” to be defined as
26 “all present and future IHSS recipients and applicants who have been or would have been authorized
27 to receive IHSS, and whose IHSS services will be terminated or denied in their entirety under the
28 provisions of ABX4 4

 c. For the Eighth Claim for Relief: “**Children Subclass**” to be defined as “all present or
future IHSS recipients who are under the age of 21, who qualify for full-scope Medi-Cal with federal

1 financial participation, and who therefore are entitled to the protections of the Early Periodic
2 Screening Diagnosis and Treatment provisions of the federal Medicaid Act (42 U.S.C. §
3 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r)) who have been or would have been
4 authorized to receive IHSS, and whose IHSS services will be reduced or terminated under the
5 provisions of ABX4 4.”

6 Plaintiffs further request that this Court appoint Named Plaintiffs’ counsel to serve as class
7 counsel.

8 The Named Plaintiffs move for certification because the above-defined Plaintiff class and
9 subclasses are so numerous that joinder would be impracticable, there are common questions of law
10 or fact among the class members and subclass members, the claims of the representative Named
11 Plaintiffs are typical of those of the class and subclasses, and the Named Plaintiffs and their counsel
12 will fairly and adequately represent the class and subclass interests. Additionally, Defendants John
13 A. Wagner, Director of the California Department of Social Services; David Maxwell-Jolly, Director
14 of the California Department of Health Care Services; California Department of Health Care
15 Services; and California Department of Social Services have acted or refused to act on grounds
16 applicable to the entire class and subclasses, rendering declaratory and injunctive relief appropriate
17 to the class and subclasses as a whole.

18 This Motion is based on the following Memorandum of Points and Authorities, the
19 Declarations of Class Counsel Dara Schur, Anna Rich, Shawna Parks, Charles Wolfinger, and Jane
20 Perkins in Support of Plaintiffs’ Motion for Class Certification; the Declarations filed in Support of
21 Plaintiffs’ Application for Order Shortening Time, Motions for Temporary Restraining Order,
22 Preliminary Injunction, and Class Certification; attached exhibits; the arguments of counsel; and all
23 other relevant pleadings, briefs, and evidence.

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The Named Plaintiffs represent a prospective class of over 130,000 low-income seniors and other people with disabilities throughout California who are threatened with the loss of critical In-Home Supportive Services (IHSS) services that enable them to remain safely in their homes. They move for an order certifying this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Plaintiffs seek declaratory and injunctive relief to enforce (1) the procedural due process rights of prospective class members guaranteed to them by the Fourteenth Amendment of the United States Constitution; (2) the requirements of Title XIX of the Social Security Act, 42 U.S.C. § 1396a *et seq.* (“the Medicaid Act”); and (3) the integration mandate and other anti-discrimination provisions of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12312 (“ADA”) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”).

This action readily satisfies the requirements for class certification under Rule 23(a) and the requirements of Rule 23(b)(2). *First*, there are in excess of 130,000 people in the class, and the subclasses each have thousands of members. *Second*, members of the proposed class and subclasses share common issues of fact and law. *Third*, the Named Plaintiffs are typical of the class because they are threatened with the loss or reduction of IHSS benefits. *Fourth*, Named Plaintiffs are adequate class representatives with experienced class action counsel. Finally, this case is appropriate for certification under Rule 23(b)(2) because the class has been subjected to a common set of practices for which plaintiffs seek only injunctive and declaratory relief.

II. BACKGROUND**A. The IHSS Program**

The purpose of the IHSS program is “to enable the aged, blind or disabled poor to avoid institutionalization by remaining in their homes with proper supportive services.” *Miller v. Woods*, 148 Cal.App.3d 862, 867 (1983); *See also* California Welfare and Institutions Code (“Welf. & Inst. Code”) § 12300(a) (IHSS provides services to those who in the absence of these services “cannot

1 safely remain in their homes . . .”). People eligible for this program must be aged 65 or over, blind,
2 or disabled, and must also be poor under standards of the federal Supplemental Security
3 Income/State Supplemental Payment Program. Amended Class Action Complaint for Injunctive and
4 Declaratory Relief (“Amended Complaint”) ¶ 28.

5 IHSS services, provided in the recipients’ home, include (1) domestic services; (2) related
6 services (meal preparation and clean-up, restaurant meal allowance, laundry, and food and other
7 shopping); (3) personal care services (bowel and bladder care, respiration, feeding, routine bed
8 baths, bathing, oral hygiene and grooming, dressing, repositioning and rubbing skin, including range
9 of motion exercises), transfers, care and assistance with prosthetic devices, assistance with self-
10 administration of medication, routine menstrual care, skin care, and ambulation); (4) travel to
11 medical appointments; (5) yard hazard abatement; (6) protective supervision; (7) teaching and
12 demonstration services, and (8) paramedical services. Welf. & Inst. Code §§ 12300(b) & (c);
13 14132.95(d)(1), (2); 14132.951(c).

14 **B. ABX4 4 Changed Eligibility for IHSS Services**

15 ABX4 4, effective July 1, 2009, amended Welf. & Inst. Code § 12309 and added § 12309.2
16 to terminate or reduce IHSS services based on measures called functional rankings and composite
17 Functional Index scores. These statutes eliminate Domestic and Related Services for all IHSS
18 recipients who have been assessed to have a Functional Index *Rank* of below 4 for a particular
19 service and terminate all IHSS services for recipients with a composite Functional Index *Score* of
20 below 2.0. Stats. 2009, c. 4, § 29 (Part II) (amending Welf. & Inst. Code §§ 12309(e)(1)) and *id.*, §
21 30 (Part II) (adding Welf. & Inst. Code §12309.2(a)(1)). CDSS estimates that 38,000 Californians
22 will lose all IHSS services and 97,000 will lose domestic and related services. CDSS Press Release,
23 September 18, 2009, Exh. F to Kline Decl.

24 Functional index ranks and scores do not measure the safety risk of reducing or eliminating
25 services; furthermore, these ranks and scores have never even been sent to IHSS recipients, so
26 recipients have never before had the opportunity to challenge their accuracy. In particular, as county
27 officials responsible for IHSS programs attest, FI scores were not designed to measure need or
28 eligibility and have never been used for such purposes. Collins Decl. ¶ 27 (county social workers

1 “do not use the composite FI scores for any reason.”); Crockett Decl. ¶¶ 4, 8, 16; Kaljian Decl. ¶ 6
 2 (FI score not an eligibility standard); Nicco Decl. ¶ 20 (no one has ever used functional index ranks
 3 or scores for any purpose); Calame Decl., ¶ 6 (“completely arbitrary”).

4 **III. ARGUMENT**

5 **A. Plaintiffs Meet the Standards for Certification Under Rule 23(a).**

6 Rule 23(a) of the Federal Rules of Civil Procedure allows an action to be maintained as a
 7 class action provided that it meets four conditions: “(1) the class is so numerous that joinder is
 8 impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses
 9 of the representative parties are typical of the claims or defenses of the class; and (4) the
 10 representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
 11 23(a). *See Rodriguez v. Hayes*, -- F.3d --, 2009 WL 2526622, *10 (9th Cir. 2009). Rule 23(a) is read
 12 liberally in the context of civil rights suits. *Armstrong v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla.
 13 1986) (citing *Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975)). As shown below, the
 14 proposed class here easily satisfies all of the requirements of Rule 23(a).

15 **1. The Proposed Class Meets the Numerosity Requirement of Rule** 16 **23(a)**

17 A class action may be maintained only if “the class is so numerous that the joinder of all
 18 parties is impracticable.” Fed. R. Civ. P. 23(a)(1). Impracticability addresses the expense and
 19 burden, to the parties and the court, of litigating each claim individually, rendering the case difficult
 20 or inconvenient without joining all members of the class. *Harris v. Palm Springs Alpine Estates*,
 21 329 F.2d 909, 913-14 (9th Cir. 1964). Courts have often found the numerosity requirement satisfied
 22 by the sheer number of class members. Courts in the Ninth Circuit have found that classes of far
 23 fewer than 100 members are sufficiently numerous to render joinder impracticable. *Perez-Funez v.*
 24 *District Dir.*, 611 F.Supp. 990, 995 (C.D. Cal. 1984) (“Classes consisting of 25 members have been
 25 held large enough to justify certification.”).

26 In this case, there are more than 130,000 people in the class, more than 97,000 in the Loss of
 27 Domestic and Related Services Subclass, more than 36,000 in the Termination of Benefits Subclass,
 28

1 and more than 1000 children in the Children Subclass. Amended Complaint ¶ 150. Plaintiffs meet
2 the numerosity requirement of Rule 23(a)(1).

3 **2. There are Questions of Law and Fact Common to the Class**

4 Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” Fed. R.
5 Civ. P. 23(a)(2). “[F]or the commonality requirement to be met, there must only be one single issue
6 common to the proposed class.” *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 648 (C.D. Cal. 1996).¹
7 “All questions of fact and law need not be common to satisfy the rule. The existence of shared legal
8 issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled
9 with disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th
10 Cir. 1998).

11 A class action is particularly appropriate when the issues involved are common to the class as
12 a whole and when they “turn on questions of law applicable in the same manner to each member of
13 the class.” *General Telephone Co. v. Falcon* 457 U.S. 147, 155 (1982). The Ninth Circuit has held,
14 in the civil rights context, that “commonality is satisfied where [a] . . . lawsuit challenges a system-
15 wide practice or policy that affects all of the putative class members . . . In such circumstance [*sic*],
16 individual factual differences among the individual litigants or groups of litigants will not preclude a
17 finding of commonality.” *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (affirming
18 certification of class of prisoners with disabilities despite facts showing different disabilities and
19 accommodation needs because the entire class had common issues related to systemic policies and
20 implementation) (citations omitted). The Ninth Circuit has observed that courts “have generally
21 given [Rule 23(a)(2)] a permissive application in a variety of substantive law areas so that the
22 commonality requirement is usually found to be satisfied.” *Jordan v. County of Los Angeles*, 669
23 F.2d 1311, 1320 (1982), *vacated and rem’d on other grounds*, 459 U.S. 810 (1982).

24 _____
25 ¹In addition, courts apply the commonality requirement more liberally where, as here, plaintiff seeks
26 class certification under Rule 23(b)(2) because a proposed class seeking declaratory or injunctive
27 relief generally challenges policies and practices affecting an identifiable group in the same way.
28 *See Von Colln v. County of Ventura*, 189 F.R.D. 583, 591 (C.D. Cal. 1999) (“[W]hen addressing
commonality of class members proposed under Rule 23(b)(2), a court may employ a liberal
definition of commonality.”).

1 Class actions are routinely certified cases similar to this one, including those that allege
 2 violation of constitutional due process, the Medicaid Act, the ADA, or Section 504. *Risinger v.*
 3 *Concannon*, 201 F.R.D. 16, 19 (D. Me. 2001) (finding commonality where plaintiffs alleged that
 4 defendant’s provision of services violated Medicaid EPSDT requirements); *Hernandez v. Medows*,
 5 209 F.R.D. 665, 669 (S.D. Fla. 2002) (certifying class of Medicaid beneficiaries, noting that “factual
 6 differences between class members do not preclude a finding of commonality, as long as common
 7 questions of law exist.”); *Cyrus v. Walker*, 233 F.R.D. 467 (S.D. W.Va. 2006) (certifying class in a
 8 case alleging that changes in Medicaid home and community based services eligibility
 9 determination processes led to termination of benefits in violation of due process); *See generally*,
 10 *Capitol People First v. DDS* 155 Cal. App. 4th 676 (2007) (reversing a trial court and ordering
 11 certification of a class in a case alleging that unnecessary institutionalization violated the Medicaid
 12 Act, the ADA, and other laws).

13 Welf. & Inst. Code §§ 12309(e) and 12309.2 have adversely affected all class members by
 14 terminating or reducing their IHSS services. While the ultimate effect of the termination or
 15 reduction on each individual class member may be different, “[t]he legality of defendant’s practice
 16 or policies ... [is] ... a question common to the class, and the existence of different factual questions
 17 with respect to various [plaintiffs] will not defeat satisfaction of the commonality requirement.”
 18 *Jordan*, 669 F.2d at 1320.

19 **a. Common Issues of Fact**

20 The common issues of fact include the following:

- 21 (1) Class members have been receiving IHSS services after their county has found, using
 22 criteria developed by the state, that they need these services in order to live safely at home. Welf. &
 23 Inst. Code § 12300(a); Amended Complaint ¶¶ 34-38; California Department of Social Services
 24 Manual of Policies and Procedures § 30-700.1 (“Services shall be authorized only [where] Social
 25 services staff of the designated county department has had a face-to-face contact with the recipient in
 26 the recipient’s home at least once within the past 12 months . . . and has determined that the recipient
 27
 28

1 would not be able to remain safely in his/her own home without IHSS [and] [p]erformance of the
2 service by the recipient would constitute such a threat to his/her health/safety that he/she would be
3 unable to remain in his/her own home”); Altman Decl. ¶¶ 3-5; Castro Decl. ¶¶ 5-10; Goldberg Decl.
4 ¶¶ 3; Guerro Decl. ¶¶ 12-15; Hathaway Decl. ¶ 16; Nicco Decl. ¶¶ 5, 11-12; Collins Decl. ¶¶ 10-12.

5 (2) Prior to the enactment of ABX4 4, class members were not informed of their
6 Functional Index Ranks or of their composite Functional Index Scores. Amended Complaint ¶¶ 66,
7 85; Baran Decl. ¶ 9; Aho Decl. ¶ 9; Bean Decl. ¶¶ 5-6; Drass Decl. ¶ 3; Guerra Decl. ¶ 11; Good
8 Decl. ¶ 9; F.H. Decl. ¶ 3; Hylton Decl. ¶ 7; Janson Decl. ¶ 3; Lagahid Decl. ¶ 9; Mandel Decl. ¶ 5;
9 Oster Decl. ¶ 5; Worden Decl. ¶ 7.

10 (4) All class members will be provided only 10 days of notice prior to reduction of
11 termination of their IHSS services and the notice is not readily understandable (Amended Complaint
12 ¶ 95);

13 (5) All class members will have their IHSS services terminated or reduced. Amended
14 Complaint ¶ 148; Cal. Welf. & Inst. Code §§ 12309 & 12309.2.

15 Because the issue of Defendants’ compliance with the federal statutes is common to all class
16 members, the commonality requirement has been satisfied.

17 **b. Common Issues of Law**

18 Among the common issues of law for the entire class are:

19 (1) Whether Defendants are violating Plaintiffs’ rights arising from the federal
20 constitutional guarantee of procedural due process and provisions of the Medicaid Act by failing to
21 provide adequate notice and opportunity for hearing prior to depriving members of the Plaintiff class
22 of critical IHSS services.

23 (2) Whether Defendants are violating the Medicaid Act by failing to provide (a)
24 comparable Medicaid services to individuals with similar needs; and (b) services according to
25 reasonable standards.

26 (3) Whether Defendants are violating the integration mandate of the Americans with
27 Disabilities Act of 1990, 42 U.S.C. § 12312 (“ADA”), and Section 504 of the Rehabilitation Act of
28 1973, 29 U.S.C. § 794 (“Section 504”), by reducing or terminating IHSS for class members, thus

1 placing class members at imminent risk of being segregated and confined unnecessarily in
2 institutional settings in order to receive services;

3 (4) Whether Defendants are violating the ADA and Section 504 by cutting IHSS benefits
4 in a manner that discriminates or has the effect of discriminating against class members based on the
5 type of disability, or by using methods of administration that exclude individuals with disabilities
6 from IHSS.

7 The above issues are common to all class members, including those in subclasses. In
8 addition, the following are common issues of law regarding the subclasses:

9 (1) For the “Loss of Domestic and Related Services Subclass,” whether Defendants are
10 violating the sufficiency provisions of the Medicaid Act by terminating IHSS domestic and related
11 services to individuals for whom such services have been deemed necessary pursuant to an
12 individual service plan approved by the state;

13 (2) For the “Termination of Benefits Subclass,” whether Defendants are violating the
14 requirement imposed by the Medicaid Maintenance of Effort Clause of the American Recovery and
15 Reinvestment Act (“ARRA”).

16 (3) For the “Children Subclass,” whether Defendants are violating the Medicaid Act’s
17 Early and Periodic Screening, Diagnostic and Treatment (EPSDT) requirements by failing to assure
18 that children obtain the full range of personal care services necessary to correct or ameliorate their
19 physical and mental conditions, including services that could replace lost IHSS.

20 **3. The Named Plaintiffs’ Claims Are Typical of the Claims of the**
21 **Class**

22 The claims of the Named Plaintiffs who represent the class must be typical of the class
23 claims. Fed. R. Civ. P. 23(a)(3). “A class representative must be part of the class and possess the
24 same interest and suffer the same injury as the class members.” *General Telephone Co.*, 457 U.S. at
25 156 (citations omitted). The primary purpose of the typicality requirement is to ensure that the
26 nature of the claims brought by the class representative are so interrelated that the interests of the
27 class members will be fairly and adequately protected in their absence. *Id.* at 157. “[T]he
28 commonality and typicality requirements of Rule 23(a) tend to merge....” *Id.*, at 158 n.13. “[A]

1 named plaintiff's claim is typical if it stems from the same event, practice or course of conduct that
 2 forms the basis of the class claims and is based upon the same legal or remedial theory." *Ibid.* See
 3 also *Rodriguez*, 2009 WL 2526622 at *11.

4 Here, the claims of the Named Plaintiffs mirror those of the class as a whole. Each of the
 5 Named Plaintiffs is a recipient of IHSS. Each faces the same unlawful acts by Defendants:
 6 termination or reduction of the IHSS services that allow him or her to remain safely at home. See
 7 Common Issues of Fact above, section III.A.2.a. The Named Plaintiffs, like the proposed class as a
 8 whole, claim that Defendants' practices violate their rights under the federal constitution and
 9 statutes. See Common Issues of Law, section III.A.2.b. The claims of the Named Plaintiffs are
 10 typical of all class members who may lose IHSS, or receive reduced IHSS, due to ABX4 4, and the
 11 Named Plaintiffs seek the same relief as all class members. Amended Complaint ¶ 152.

12 Hence, the requirements of Rule 23(a)(3) are met for both the proposed class and the
 13 proposed subclasses.

14 **4. The Named Plaintiffs and Their Attorneys Will Fairly and**
 15 **Adequately Protect the Interests of the Class**

16 The final requirement of Rule 23(a) is that the representative parties must "fairly and
 17 adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy of
 18 representation requirement is two-fold: (1) the proposed class representatives must not have conflicts
 19 of interest with the proposed class, and (2) they must have qualified and competent counsel. See
 20 *Hanlon*, 150 F.3d at 1020. Because the Named Plaintiffs have no interests that conflict with or are
 21 antagonistic to those of the class, and their counsel are qualified, Plaintiffs meet this requirement as
 22 well.

23 **a. The Named Plaintiffs' Interests are Not Antagonistic to**
 24 **Those of the Class**

25 The class representatives do not have any interests that are antagonistic to the interests of the
 26 class because they share the same interests and this lawsuit is not collusive. *In re Northern Dist. of*
 27 *Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982); *Rodriguez*, 2009 WL
 28 2526622, at *12.

1 Here, as discussed above, the Named Plaintiffs' claims and their loss of IHSS services are
2 typical of the claims of the proposed class members. None of the Named Plaintiffs seeks personal
3 damages or other individualized relief to the exclusion of other class members. To the contrary, the
4 focus of this litigation is the grant of broad injunctive and declaratory relief that will benefit the
5 entire class. Collusion is absent. No conflicts exist that could hinder the Named Plaintiffs' ability to
6 pursue the litigation vigorously on behalf of the class. They will fairly and adequately protect the
7 interests of the class.

8 **b. Plaintiffs' Counsel Are Qualified to Litigate This Action**

9 Rule 23(a)(4) also requires that the proposed class representatives be able to prosecute the
10 action vigorously through qualified counsel. *In re MDC Holdings Securities Litig.*, 754 F. Supp 785,
11 802 (S.D. Cal. 1990). It has been recognized that public interest attorneys with experience in
12 protecting the interests of the poor adequately represent class interests. *See, e.g., Lopez v. Heckler*,
13 572 F. Supp. 26, 31 (C.D. Cal. 1983), *modified on other grounds*, 725 F.2d 1489 (9th Cir.), *vacated*
14 *and remanded on other grounds*, 469 U.S. 1082 (1984).

15 Lead counsel for the class is Melinda Bird with Disability Rights California, who has been
16 involved in public interest class action cases for more than twenty-five years. Ms. Bird is teamed
17 with other highly experienced lawyers from Disability Rights California, as well as highly
18 experienced lawyers from Disability Rights Legal Center, the National Senior Citizens Law Center,
19 the National Health Law Project, and Charles Wolfinger, a lawyer with specialized expertise
20 regarding California's In-Home Supportive Services programs. Collectively, these long-established
21 public interest firms and attorneys have decades of extensive experience in litigation of federal class
22 actions involving disability and health programs, including representation of classes at the trial and
23 appellate levels. They include some of the most experienced lawyers in the nation and the state on
24 public benefits and Medicaid, disability discrimination, and In-Home Supportive Services issues.
25 Declarations of Schur, Perkins, Rich, Parks, and Wolfinger in Support of Plaintiffs' Motion for Class
26 Certification, and resumes attached thereto. The resources and experiences of proposed class
27 counsel are more than adequate to represent the class competently.

28 Additionally, no conflicts exist between counsel, Named Plaintiffs, and the proposed class

1 members that would compromise their ability to represent the class.

2 In summary, the Named Plaintiffs satisfy the adequacy of representation requirement under
3 Rule 23(a)(4) both with respect to their interests and their choice of counsel.

4 **B. This Case Satisfies Rule 23(b)(2) Because Defendants have Acted on Grounds**
5 **Generally Applicable to the Class, Making Final Injunctive and Declaratory**
6 **Relief Appropriate and Making Notice Unnecessary**

7 In addition to the four requirements of Rule 23(a), the Named Plaintiffs also must satisfy the
8 requirement contained in one of the subdivisions of Rule 23(b). In this case they satisfy Rule
9 23(b)(2), which requires that “the party opposing the class has acted or refused to act on grounds
10 generally applicable to the class, thereby making appropriate final injunctive relief or corresponding
11 declaratory relief with respect to the class as a whole . . .” In interpreting this requirement, courts
12 have held that where the primary purpose in bringing the action is to seek injunctive relief, the action
13 is properly certifiable under Rule 23(b)(2). *Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir.
14 1977) *aff’d in relevant part, rev’d in part*, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979);
15 *Stolz v. United Bd. of Carpenters and Joiners of Am.*, 620 F.Supp. 396, 407 (D. Nev. 1985). Civil
16 rights cases against parties charged with class-based discrimination are “prime examples” of actions
17 under Rule 23(b)(2). *Amchem Products v. Windsor*, 521 U.S. 591, 614 (1997). For example, the
18 Ninth Circuit has held that class determination under Rule 23(b)(2) is appropriate when “class
19 members complain of a pattern or practice that is generally applicable to the class as a
20 whole...[e]ven if some class members have not been injured by the challenged practice....” *Walter*
21 *v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998). Rule 23(b)(2) “does not require us to examine the
22 viability or bases of class members’ claims for declaratory and injunctive relief, but only to look at
23 whether class members seek uniform relief from a practice applicable to all of them.” *Rodriguez*,
24 2009 WL 2526622 at *13. *See also Cyrus v. Walker*, 233 F.R.D. 467 (S.D. W.Va. 2006) (certifying
25 class in a case alleging that changes in Medicaid home and community based eligibility
26 determination processes led to termination of benefits in violation of due process.); *M.A.C. v. Betit*
27 284 F. Supp. 2d. 1298 (D. Utah, 2003) (certifying class of disabled Medicaid recipients challenging
28

1 the denial of Medicaid waiver services as a violation of the Medicaid Act and the integration
2 mandate of the ADA).

3 This case is exemplary of a Rule 23(b)(2) action because Defendants' enforcement of Welf.
4 & Inst. Code §§ 12309(e)(1) and 12309.2(a)(1) affects all members of the class as well as the Named
5 Plaintiffs, and because Plaintiffs seek only declaratory and injunctive relief. Defendants' violations
6 of federal law have equal application to all class members, as all class members are people with
7 disabilities who receive IHSS services.

8 Class-wide final injunctive and declaratory relief is appropriate to facilitate enforcement of
9 judgments. Given that the Plaintiffs seek only declaratory and injunctive relief, and the granting of
10 such relief is appropriate with respect to the class as a whole to remedy Defendants' discriminatory
11 actions, Rule 23(b)(2) is satisfied in this case.

12 Because Plaintiffs seek to certify a class under Rule 23(b)(2), Rule 23(c)(2)(A) prejudgment
13 notice is not required. Fed. R. Civ. P. 23(c)(2)(A). *Elliot*, 564 F.2d at 1228-29; *Navarro-Ayala v.*
14 *Hernandez-Colon*, 951 F.2d 1325, 1336-37 (1st Cir. 1991).

15 **C. The Court Should Designate Plaintiffs' Counsel as Class Counsel Pursuant to**
16 **Rule 23(g)(1).**

17 When a class is certified, the court must appoint class counsel (Fed. R. Civ. P. 23(g)(1)), and
18 the class certification order must list these counsel. Fed. R. Civ. P. 23(c)(1)(B). The court considers
19 four factors in appointing class counsel:

- 20 "(i) the work counsel has done in identifying or investigation potential claims in the action;
21 (ii) counsel's experience in handling class actions, other complex litigation and the types of
22 claims asserted in the action;
23 (iii) counsel's knowledge of the applicable law; and
24 (iv) the resources that counsel will commit to representing the class."

24 Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

25 Pursuant to these four factors, Plaintiffs' counsel qualify for appointment in this case. As
26 reflected in the Amended Complaint and Plaintiffs' concurrently filed Motion for Preliminary
27 Injunction, Plaintiffs' counsel has committed extensive time and resources to investigating and
28 analyzing Plaintiffs' claims. Counsel is very experienced in class actions and complex litigation and

1 has extensive knowledge of discrimination and benefits law. Declarations of Schur, Rich, Parks,
2 Perkins, and Wolfinger in Support of Plaintiffs’ Motion for Class Certification. The Court should
3 appoint Plaintiffs’ counsel as class counsel in its class certification order.

4 **IV. CONCLUSION**

5 For the reasons stated above, the Named Plaintiffs have satisfied all of the requirements of
6 Rule 23(a) and Rule 23(b)(2) with respect to the proposed defined class, and Rule 23(g)(1) as to
7 appointment of class counsel. Plaintiffs respectfully request that this Court:

- 8 1) Certify this case as a Rule 23(b)(2) class action;
- 9 2) For the First, Second, Third, Fourth, Fifth, and Seventh Claims for Relief, define the class

10 as:

11 “All recipients of IHSS in the State of California whose IHSS services
12 will be limited, cut, or terminated under the provisions of ABX4 4, and
13 all applicants to IHSS in the State of California who would have been
14 eligible for IHSS services but who are either not eligible, or are
15 eligible for fewer services, as a result of ABX 4 4 (hereinafter the
16 “Class”).”

- 17 3) In addition to the claims for the class as a whole, for the Sixth Claim for Relief, certify a
18 “**Loss of Domestic and related Services Subclass**” to be defined as “all present and
19 future IHSS recipients and applicants who have been or would have been authorized to
20 receive domestic and/or related IHSS, and whose IHSS will be reduced to eliminate some
21 or all of their domestic and/or related services under the provisions of ABX4 4.”

- 22 3) In addition to the claims for the class as a whole, for the Ninth Claim for Relief, certify a
23 “**Termination of Benefits Subclass**” to be defined as “all present and future IHSS
24 recipients and applicants who have been or would have been authorized to receive IHSS,
25 and whose IHSS services will be terminated or denied in their entirety under the
26 provisions of ABX4 4.”

- 27 4) In addition to the claims for the class as a whole, for the Eighth Claim for Relief, certify a
28 “**Children Subclass**” to be defined as “all present or future IHSS recipients who are
under the age of 21, who qualify for full-scope Medi-Cal with federal financial
participation, and who therefore are entitled to the protections of the Early Periodic

1 Screening Diagnosis and Treatment provisions of the federal Medicaid Act 42 U.S.C. §
2 1396a(a), who have been or would have been authorized to receive IHSS, and whose
3 IHSS services will be reduced or terminated under the provisions of ABX4 4.”

4 4) Appoint Plaintiffs’ counsel to serve as class counsel; and

5 5) Dispense with any requirement for Plaintiffs to give notice to absent class members at this
6 stage of the litigation.

7
8 Date: October 5, 2009

Respectfully submitted,

9
10 /s/

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*Oster, Willie Beatrice Sheppard, Dotty Jones, C.R., and
the Plaintiff Class*