For Opinion See 66 Cal.Rptr.3d 300

Court of Appeal, First District, Division 4, California.
CAPITOL PEOPLE FIRST, et al., Appellants,
v.
DEPARTMENT OF DEVELOPMENTAL SERVICES (DDS), et. al., Respondents.
No. A113168.
November 21, 2006.

From the Superior Court of California for the County of Alameda Case No. 2002-038715 The Honorable Ronald M. Sabraw, Presiding

Respondents' Brief

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***i** *TABLE OF CONTENTS*

***iv** *TABLE OF AUTHORITIES*

STATE CASES

Lanterman Act ... 3-5, 7, 9, 38, 51, 53, 54

Medicaid Act ... 2, 9, 38

I. INTRODUCTION

It is difficult to imagine a claim less suited to class action treatment than this litigation. The proposed class of persons with developmental disabilities experience an incredible diversity of disabilities, medical conditions, living conditions and needs. California's system for persons with developmental disabilities works from the bottom up with services designed for each class member by a team of specialists familiar with their unique needs. Plaintiffs do not challenge clearly defined policies or practices which apply uniformly - or even at all - to each proposed class member. Rather, plaintiffs' unfocused allegations contend generally that defendants' practices, as carried out in thousands of individual cases, result in overly restrictive residential placements.

This case was filed in January 2002 by persons with developmental disabilities and advocacy organizations contending that defendants are violating state and federal anti-discrimination statutes, various constitutional provisions, the state statute which defines the system of services for persons with developmental disabilities and the federal Medicaid Act. Plaintiffs allege that they and other persons with developmental disabilities are unnecessarily institutionalized due to defendants' failure to conduct adequate assessments and to provide sufficient and timely services in the community. Defendants deny each of the plaintiffs' allegations and vigorously contest that any of the thousands of case-specific decisions regarding any of the class members have resulted in improper institutionalization.

The persons affected by defendants' system of services did not speak with a single voice to the trial court. Ten individuals and two organizations of family members, conservators and friends of persons with developmental disabilities intervened in the action to contest the plaintiffs' position. The intervenors disputed plaintiffs' view that the “system was broken” and vehemently disagreed with the remedies plaintiffs proposed.

Some four years after the original complaint was filed, plaintiffs moved for class certification. The trial court judge, before whom the case was pending throughout that period, carefully considered the evidence and concluded that the claims raised by the plaintiffs could not be tried on a class wide basis. The court found that common questions did not predominate over individual ones, that the plaintiffs were not adequate representatives of the putative class and that class members had other mechanisms to challenge defendants' actions, as set forth fully below.

Plaintiffs' Opening Brief fails to meet these objections. Indeed, plaintiffs ignore most of the ruling below and misread the remainder. Their arguments fail to demonstrate that the trial court abused its discretion.

***3** II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Introduction

The trial court's ruling on the motion for class certification arises in a factual setting unlike any other. Persons with developmental disabilities defy easy categorization, especially with regard to the issues raised in this litigation. The system of services designed for them is unique and is as complex and diverse as the population it serves. The trial court concluded that the legal and factual issues raised in plaintiffs' complaint could not be resolved in the context of a class action lawsuit. To understand this ruling, it is necessary to review the evidence in

the record regarding developmental disabilities and the system administered by the defendants.

B. The Lanterman Act System Of Services For Persons With Developmental Disabilities

In California, the Lanterman Act (the "Act") defines the roles of the agencies responsible for persons with developmental disabilities and the mechanisms for delivering services appropriate to each individual's needs. (Welf. & Inst. Code §§ 4500 et. seq.)[FN1] The administrative structure is highly decentralized with responsibility for most decisions placed in the hands of local, non-profit agencies. Because of the wide diversity in population served, the system is built around an individualized assessment of each consumer.

FN1. Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

The Department of Developmental Services (DDS) is the state agency with direct jurisdiction over the operation of Lanterman Act services. DDS directly provides services in five state-operated developmental centers (DCs) and two community- based facilities to approximately 3,100 of the state's more ***4** than 200,000 persons with developmental disabilities - identified in the Act as "consumers." (§§ 4512 (d), 4629.). Pursuant to the Act, DDS contracts with 21 non-profit agencies which operate regional centers (RCs) to render services to the vast majority of consumers.[FN2] Under the Act, DDS's role "is basically limited to promoting the cost-effectiveness of the operations of the RCs, and does not extend to the control of the manner in which they provide services or in general operate their programs." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389 - 90.)

FN2. The contracts require RCs to comply with federal and state law. (§ 4629.) The process for terminating a contract is strictly regulated under the Act. (§§ 4629(d), 4632, 4635.)

Each RC has a separate management structure and governing board. (§ 4622.) Each RC acts as "a single point of contact" for all consumers in a given geographic area. In this capacity, the RCs have comprehensive responsibility to the consumers in their catchment area; they determine eligibility, assess needs, and coordinate the delivery of services. (§§ 4620, 4643, 4646-4648.) All consumers, even those who reside in state-owned facilities, are assigned an individual case manager by the RC. (§ 4640.6; see also, e.g., 3JS0553, 3JS0710, 3JS0717, 3JS0740.) In most cases, consumers receive services from private vendors pursuant to contracts with the RCs. DDS has authorized over 150 different services which RCs may purchase on behalf of consumers from residential care, to transportation, to recreation. (Cal. Code Regs., Tit. 17 § 54342.)

C. The Population Served

RCs serve a population of incredible diversity. The term "developmental disability" is a very broad one; it refers to a severe and chronic disability that is ***5** attributable to a mental or physical impairment that begins before an individual reaches adulthood. The qualifying disabilities include mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions closely related to mental retardation or requiring similar treatment. (§ 4512(a).)

The persons served by defendants suffer from a wide variety of disabilities. (2JS0359.) Nearly a third suffer from a combination of two or more disabilities. (2JS0359.) The level of retardation statewide among consumers ranges from none or unknown to profound. (2JS0359.) Many face significant challenges such as problems with vision, hearing and ambulation. Approximately 10% are dually diagnosed with both a developmental disability and a mental health condition. (2JS0360.)

Because the term "developmental disability" includes such a broad spectrum of conditions, the persons served by defendants exhibit very different abilities for independent living. The proposed class includes persons who need minimal supervision and travel freely on public transportation. (2JS0360, 2JS0382.) It also incorporates persons who are nonverbal and require care in nursing facilities for very severe medical conditions. (2JS0361, 2JS0374.) Some disabilities cause threatening or self-injurious behaviors severe enough to endanger the person's life. (3JS0687, 3JS0695.) No two consumers exhibit the same strengths and weaknesses or require the same services.

D. The Assessment Process

Because of the highly complex and variable nature of the consumers' disabilities, California, pursuant to the Lanterman Act, assesses the needs of each consumer on an individual basis. The core of the system is the Individual Program Plan (IPP). The IPP must be prepared and reviewed and, if necessary, modified at least every three years, and must include an ***6** assessment of the consumer's capabilities and problems; a statement of time-limited objectives for improving his or her situation; a schedule of the type and amount of services necessary to achieve these objectives; and a schedule of periodic review to insure that the services have been provided and the objectives have been reached. (§ 4646.)

Each IPP is the product of an interdisciplinary team specifically constituted for each consumer. The team consists of the consumer, his/her family, conservator, and/or guardian, the RC service coordinator and any other person that the consumer or the family wishes to have as a member of the team. As the name implies, the interdisciplinary team includes appropriate professionals who are familiar with the consumer. (§ 4512(j).) The make up and membership of the planning team will obviously differ from consumer to consumer.

The IPP is developed "through a process of individualized needs determination." (§ 4646(b).) DDS's Individual Program Plan Resource Manual ("IPP Manual") directs planning teams to use "person-centered" planning methods and encourages teams to determine consumer choices even for those who can articulate choices only with difficulty. (2JS0361-362.) The IPP Manual requires teams to "consider whether there are any current or potential health and safety risks to the individual that would affect their desired life and living arrangement." (*Ibid.*) Team members must balance "freedom of choice and the safety and health of the individual" and "personal liberty and the expectations of society to conform to social norms." (*Ibid.*) The balance achieved will be "different for each individual." (*Ibid.*)

For persons living outside of a DC, RCs have the responsibility to conduct the IPP planning process. (*Ibid.*) DDS does not have the power ***7** to substitute its judgment for that of the RC as to decisions made in any IPP. (*Association for Retarded Citizens v. DDS, supra,* 38 Cal.3d at 390.) For persons living in DCs, the IPP planning team will typically include professionals who are state employees such as physicians, psychologists, social workers, therapists, and psychiatric technicians. (See, e.g., 2JS0430, 3JS0585.)

E. Types of Residential Settings

Consumers live in a wide variety of residential settings, most commonly in their own or their parents' home or in small group settings. (JA2350-1; see also *Sanchez v. Johnson* (9th Cir. 2005)416 F.3d 1051, 1065-1066.) The class proposed by the plaintiffs consisted of all persons living in settings which plaintiffs designated as "institutions." The only common characteristic is that they have a capacity of 16 or more. (4JA1086.) Therefore, they include a wide range of disparate settings. (6JA1548-1550.) The remaining facilities are privately owned and include skilled nursing facilities, community care facilities, and psychiatric treatment centers.

(2JS0388-0394.) The level and types of care vary from non-medical supervision (community care facilities) to intensive skilled nursing (sub-acute) to locked facilities for the care of seriously emotionally disturbed children (community treatment facilities). (*Ibid.*)

F. The Community Placement Plan and Deinstitutionalization

The Lanterman Act has created a Community Placement Plan (CPP) designed to move consumers from DCs to the community. (§ 4418.25; 9JA2402.) Under the CPP, RCs identify consumers they intend to move into the community and develop budgets to carry out the transition. (9JA2403.) There is no limit on the number of persons that a RC can place on its CPP budget. (9JA2272.) Since its inception in fiscal year 2001/2, the CPP has pumped $150 million new funding into the process of deinstitutionalization; ***8** this year's CPP budget is $73,800,000. (9JA2403-2404.) DDS expends as much as $275,000 per consumer per year to provide services and supports in the community. (9JA2403.)

New resources for persons with developmental disabilities are constantly being developed through the efforts of RCs. (2JS0364.) RCs receive funding for staff to identify services that are needed and to encourage the creation of new programs and to develop new vendors. (See, e.g., 9JA2295-2306.)

At the time of the hearing on plaintiffs' motion to certify a class, the most recent statistics showed that defendants provided services to 204,777 consumers. (9JA2381.) Despite unprecedented growth in caseload, the system of services has strengthened its ability to serve persons in community settings. In the fiscal year during which the motion was heard, the state budgeted $2.9 billion to serve consumers in the community, nearly 80% of whom live in their own home. (2JS0364-5.) In the 12 years preceding the motion, the percentage of consumers living in "institutions" as defined by plaintiffs underwent a steady decline from nearly 11% to under 4%. (2JS0365, 9JA2339-40, 9JA2381-7.)

TABLETABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***9** Looking at California's efforts to serve persons with developmental disabilities in the least restrictive environment, the Ninth Circuit found California's efforts at deinstitutionalization to be "genuine, comprehensive and reasonable." (*Sanchez v. Johnson, supra,* 416 F.3d at 1067.)

G. Administrative Remedies to Challenge Institutional Status

The overwhelming majority of consumers in DCs were placed there as the result of an order of a Superior Court, typically pursuant to sections 6500 *et. seq.* or *In re Hop* (1983) 29 Cal.3d 82.(9JA2341, 9JA2263-2264.) Therefore, these consumers are already subject to the jurisdiction of a superior court. Moreover, consumers, their conservators or their authorized representatives may bring a request for fair hearing to challenge any aspect of the his/her assessment and services as reflected in his/her IPP, including institutionalization. (Welf. & Inst. Code § § 4700 *et seq.*) Persons in DCs may also seek deinstitutionalization by writ of habeas corpus. (9JA2264.)

H. Claims Raised In Plaintiffs' Complaint

Plaintiffs' complaint alleges generally that "thousands" of persons with developmental disabilities are "needlessly isolated and segregated" in "public and private institutions." (4JA0942) The complaint alleges failures on the part of all 21 RCs and numerous state agencies in all aspects of their operations. Plaintiffs contend that defendants fail to conduct adequate assessments and do not "develop sufficient quality programs." (4JA0943) The complaint uses similarly expansive language in describing the manner in which defendants have

allegedly violated state and federal law including Lanterman Act, ADA, section 504, Government section 11135, various constitutional provisions, Medicaid Act, and a taxpayer action.

***10** I. Motion for Intervention

On November 20, 2002, 10 DC residents who wished to remain in institutions and two organizations representing parents, conservators and friends of DC residents filed a motion to intervene. (1JA0077-145.) Intervenors vehemently disagreed that plaintiffs were adequate representatives for the class, and argued that the relief sought by plaintiffs would impair the fundamental rights of those persons whose needs are best met in an institution. (1JA0087.)

Plaintiffs opposed the motion for intervention contending in part that family members and conservators do not have "a legally cognizable interest" in opposing institutional residents' constitutional and "statutory rights to receive services in integrated settings when their needs can be appropriately met outside the confines of a state institution." (1JA0267.) Therefore, they contended that intervenors' interests "are potentially and actually in conflict" with the interests of plaintiffs and the putative class. (1JA0265.) On January 28, 2003, the court granted the motion to intervene.

J. Plaintiffs' Motion for Class Certification

Plaintiffs filed their motion for class certification that is the subject of this appeal on September 29, 2005. Plaintiffs argued that their complaint addresses "policies and practices [that] affect every member of the plaintiff class." (1JS0007.) However, plaintiffs' motion is not consistent in its description of the policies and practices at issue. Plaintiffs listed the alleged common policies, procedures and policies in an attachment to their motion. (*Ibid.*) The list covers 13 items in nearly two pages of single-spaced type. (1JS0035-36.) Many items, such as "failing to engage in ... interagency coordination," allocating "a disproportionate amount of resources on ***11** institutional services in relation to community services," and interference by other state defendants in the efforts by DDS and RCs to "fulfill their responsibilities to prevent unnecessary institutionalization," are not discussed at all in the remainder of the memorandum. (*Ibid.*) Elsewhere, plaintiffs describe 11 "deficiencies in defendants' systems-planning and resource development efforts" which they could establish by "common proof." (1JS0013-14.) Some of the 11 deficiencies, such as failing to keep "waiting lists" and failing to "systematically collect data on gaps in the array of available services" are not included in the attachment. (*Ibid.*) At one point, plaintiffs state that there are *six* "factual and legal issues common to the class" and at another they *list five* different ways in which the class members have suffered "deprivations typical of those experienced by the entire class." (1JS0023-24, 1JS0027.) While there is some overlap, none of the lists use the same definitions or include the same factual or legal issues. The simplest description given by the plaintiffs describes two "pervasive practices" of:

1) failing to adequately assess for and identify the services and supports that would enable class members to live in more integrated non-institutional settings; and

2) failing to develop and/or provide sufficient community-based services and supports and living options to enable class members who do not need to be institutionalized to live in the most integrated settings appropriate.

(1JS0025.)

Plaintiffs' motion was accompanied by deposition testimony of state and RC staff regarding their personal opinions and/or experience and declarations of class members or their guardians ad litem each describing in detail their complaints against a particular RC or DC. (1JS0123-238.) In addition, plaintiffs provided excerpts of de-

positions of 14 individuals including ***12** employees of DDS, various RCs and client advocates. (1JS0276, 5JA 1107-1339) The testimony included opinions and conclusions based on the deponents' experiences. Finally, plaintiffs submitted some documentary evidence such as data from DDS on population, consumer characteristics and spending, a plan for the closure of a DC, and an article on funding levels sponsored by the California Alliance for Inclusive Communities, one of plaintiffs. (5JA1102-1355, 6JA1356-1466.)

K. Defendants' and Intervenors' Opposition

State defendants' opposition argued that the claims of named plaintiffs were not typical of the class; indeed, that the class members did not share typicality with each other as to the claims raised in the complaint. (2JS0370-375.) In addition, defendants argued that the claims made by plaintiffs were not subject to common proof. (2JS0375-384.) The opposition included declarations from RC and DC staff familiar with each of plaintiffs which contradicted the version of facts provided by plaintiffs. (2JS0560-563, 2JS0524-573, 3JS0574-65??,3JS0685-745.) Attachment B to state defendants' opposition summarized the factual controversies between the parties to demonstrate the wide spectrum of highly individualized disputes in the record. (2JS0395-424.) State defendants submitted a declaration from an expert in developmental disabilities who stated that the propriety of institutionalization was not subject to group analysis; "it is not possible to resolve [the] issue raised by plaintiffs-whether inadequate assessments and insufficient community resources lead to unnecessary institutionalization - without considering the facts of each consumer's case." (3JS0684)

Seventeen RCs filed a joint opposition. (8JA 1963-1988.) Emphasizing the tremendous diversity among class members, the RCs argued that the ***13** plaintiffs' theories could not be resolved in a class action. (*Ibid.*) Because the decisions at issue were decided on an individualized basis, these RCs argued that existing administrative and judicial remedies were superior. (8JA1975-1976.) The RCs also filed declarations from RC staff regarding numerous representative consumers who lived in a variety of institutional settings, and exhibited a wide variety of conditions and abilities for independent living. (2JS0280-351.) The reasons for their institutionalization and the restrictiveness of their residential settings differed widely.

Intervenors opposed the motion for class certification on the ground that plaintiffs could not adequately represent the class and that there was no community of interest among the class members. (8JA 1989-2001.) They filed declarations from persons regarding family members who had lived both in community settings and in DCs. Each declared that their relatives had experienced a better quality of life in DCs. (8JA2030-2031, 8JA2058-2059, 8JA2064, 8JA2069) They believed that DC offered greater opportunities for consumers to have contact with the community than in small group homes, and that DCs constituted the "least restrictive environment" for their family members. (8JA2031, 8JA2055, 8JA2080-2081)

L. Plaintiffs' Reply

Plaintiffs contested the facts related by state defendants as to each of the class members, and submitted their own table in response to Attachment B to state defendants' opposition, which purported to describe "defendants' errors" as to each named plaintiff. (10JA2652-2661.) Plaintiffs' table also included summaries of evidence as to individual class members to demonstrate "their commonality and typicality." (10JA2643, 10JA2662-2679.) The table summarized evidence under headings that paraphrased some, but not all, ***14** of plaintiffs' contentions of allegedly common illegal practices. Each contention was supported by evidence relating to a different set of class members. No one contention applied to all class members. (*Ibid.*) Each summary of evidence relied on factual allegations regarding the individual class members which were disputed by defendants.[FN3]

FN3. For instance, plaintiffs contend that one developmental center resident was subjected to "inappropriate readiness criteria" because defendants' planning focuses on "addressing her behaviors to make her ready for transition rather than on assessment and development of community services or supports ..." (10JA2665.) Defendants' evidence was that the resident has had a consistent pattern of failed placements, the most recent of which had failed due to her dangerous behaviors, including elopement and prostitution. (2JS0400, 3JS0693-696.) In another case, plaintiffs alleged that one class member had been placed in an institution "without first conducting an assessment to see if he could be deflected....." (10JA2668.) Defendants submitted evidence that the consumer voluntarily chose the placement following visits to other facilities and stated afterward that he was happy with the placement and did not want to move. (3JS0599-605.)

In response to intervenors' opposition, plaintiffs stated in part that intervenors' brief "expresses a pro-institutionalization ideology which is irrelevant to the resolution of Plaintiffs' motion or any other issue in this case." (10JA2690.)

M. The Order Denying Class Certification

On January 30, 2005, the trial court issued its order denying the motion for class certification. It first considered the impact of the fact that plaintiffs were seeking systemwide injunctive relief on its legal analysis. The court stated that the commonality analysis would be "focused more on the actions of the defendant than on whether those actions have a common effect on each of the Plaintiffs." (14JA3608.) Nor would the court have to address variations in individual injunctive relief. (*Ibid.*) However, because absent class members would not be allowed to opt out, the court would "pay closer attention to the ***15** adequacy analysis" and "think more carefully about whether class wide injunctive relief is the best means to address and remedy the alleged wrongdoing." (14JA3609.)

Citing *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 and 917-918, the court stated that class certification is determined "with reference to the claims asserted ...." (*Ibid.*) The court rejected plaintiffs' argument that certification be determined by a "super-claim" approach as adopted by the trial court in *Marisol A. By Forbes v. Giulani* (2nd Cir. 1997) 126 F.3d 372. (14JA3609-3610.) The court also refused to follow the approach argued by defendants that the court analyze each legal theory raised in the complaint separately even though this approach "is more consistent with California law." (14JA3610.) Instead, the court concluded it was more appropriate to focus on "the alleged wrongs than on the discrete legal theories alleged." (*Ibid.*)

The court found that "the discrete alleged wrongs at the center of Plaintiffs' claims concern primarily the development of IPPs." (*Ibid.*) The court identified the five central alleged wrongs as: 1) failure to provide understandable information in the IPP process; 2) inadequate assessments in the IPP process; 3) not basing IPP recommendations on the needs and choices of the disabled persons; 4) failure to provide timely services and supports as suggested by IPPs; and 5) failure to develop adequate community resources. (14JA3610-3611.) The court noted that both plaintiffs and defendants focused their analysis on these categories of issues. (*Ibid.*)

The court examined the issue of commonality under two different approaches. First, in what it described as the "standard approach," the court determined that plaintiffs had not met their burden of demonstrating that ***16** common issues of law and fact predominated, citing *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108. (14JA3611.)

The court also analyzed the requirement of commonality under the Federal Rule of Civil Procedure 23(b)(2) test, which the court described as an "alternate approach." (14JA3614.) The court found there was evidence that "Defendants had policies that were common and affected each member of the putative class." (*Ibid.*) However, even under the federal test, the court concluded that class certification would be improper. "The trier of fact cannot avoid the reality that each IPP is individualized in its development, content, and implementation, and this would restrict the use of sampling or statistical proof at trial." (14JA3619.)

The court concluded that plaintiffs did not satisfy the requirement that they be adequate representatives of the class because of the significant conflict between plaintiffs and intervenors. (14JA3615-3617.) The court considered the fact that absent class members could not opt out and that the systemic changes plaintiffs sought in defendants' policies would affect all persons in the system. As a result, the court concluded that plaintiffs had not demonstrated that they were adequate representatives of the class or that the interests of intervenors would be adequately protected if the class were certified. (*Ibid.*)

Finally, the court determined that the wrongs alleged by plaintiffs "cannot be readily cured on a class wide basis." (*Ibid.*) The court also found that the fair hearing procedure under § § 4701-4716 was an effective means for individuals to seek relief. (14JA3618-3619.)

***17** III. ARGUMENT

A. Standard of Review in the Court of Appeal

This court is limited to determining whether the superior court abused its discretion in denying class certification; "[a]ny valid pertinent reason stated will be sufficient to uphold the order." (*Caro v. Proctor & Gamble Co.* (1993) 18 Cal.App.4th 644, 655-656.)[FN4] Generally, the court of appeal will "not disturb a trial court ruling on class certification which is supported by substantial evidence unless (1) improper criteria were used ...; or (2) erroneous legal assumptions were made ..." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470, citations omitted.) "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

> FN4. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479,citations omitted.)

B. The Requirements for Class Certification

Section 382 of the Code of Civil Procedure authorizes class suits when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." In order to maintain a class action, there must exist "ascertainable class and a well-defined community of interest among the class members. The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or ***18** defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Richmond, supra,* 29 Cal.3d at 470, citations omitted.) C. The Trial Court Correctly Found That Plaintiffs Had Failed to Meet Their Burden of Establishing Commonality The trial court properly found that common issues of law and fact did not predominate and that plaintiffs could not adequately represent the class, and that an alternative procedure exits to address

plaintiffs' claims.

1. The legal standard

Plaintiffs' brief on appeal is remarkable in what it fails to address. While plaintiffs challenge the trial court's ruling that their claims lack commonality, no where do they discuss the standard under California law. Plaintiffs' brief seems to proceed on the mistaken assumption that all they must do is merely allege that the class shares common claims in order to meet this requirement. However, California law requires that courts examine the evidence that will actually be heard on plaintiffs' claims to determine whether the common questions predominate.

The proponent of class certification bears the burden of showing "that questions of law or fact common to the class predominate over the questions affecting the individual members." (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913.) Therefore, plaintiffs were required to demonstrate to the trial court "that the questions which they will be required to litigate separately are not numerous or substantial ...." (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 653-654, citations omitted.) Certification is properly denied where "the individual questions to be decided may prove too complex, numerous and substantial to allow the class action... or the benefits to be gained may not be significant enough to justify imposition ***19** of a judgment binding on absent parties." (*Ibid.*) Furthermore, a class action "will not be permitted... where there are diverse factual issues to be resolved, even though there may be many common questions of law." (*Ibid.*)

In order to accurately measure whether there is predominance, the court must necessarily consider the elements of plaintiffs' claims. "In order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks, supra,* 89 Cal.App.4th at 916,footnotes omitted.) The focus of the court's analysis "is on what type of questions - common or individual - are likely to arise in the action," and whether "the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327.)

Ultimately, the question faced by the court is a practical one. The court must determine "whether ... the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Id.* at 326.)

As a result, the court must scrutinize the record to determine whether commonality exists. As the supreme court has emphasized, the moving party's burden "is not merely to show that some common issues exist, but rather, to place substantial evidence in the record that common questions *predominate." (Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104, citations omitted, italics original.) In *Lockheed,* plaintiffs sought injunctive relief in the form of medical monitoring for a class of residents who had been exposed to toxins from drinking water contaminated by defendants' ***20** manufacturing plant. The court concluded that plaintiffs could demonstrate through common proof that defendants owed a duty to plaintiffs and that defendants had acted negligently in disposing of toxic chemicals. (*Id.* at 1108-9.) However, the *Lockheed* plaintiffs' claims required them to show that "the need for future monitoring is a reasonably certain consequence of [the] toxic exposure." (*Id.* at 1109.) On this point, the court concluded that "plaintiffs have not placed in the record sufficient evidence to warrant the trial court's concluding that they are likely to be able to make that demonstration with common proof." (*Ibid.*)

In contrast, the supreme court affirmed a trial court's order certifying a class in *Sav-On.* As in *Lockheed,* the court's conclusion was based on its examination of the evidentiary record:
Presuming in favor of the certification order, as we must, the existence of every fact the trial court could reasonably deduce from the record we cannot say it would be irrational for a court to conclude that, tried on plaintiffs' theory, questions of law or fact common to the class predominate over the questions affecting the individual members.

(34 Cal.4th at 329,internal quotations and citations omitted.) The court specifically noted that it was not necessary to "conclude that plaintiffs' evidence is compelling, or even that the trial court would have abused its discretion if it had credited defendant's evidence instead." (*Id.* at 331.) Nor was it relevant whether "the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Ibid.,* internal quotation omitted.)

Thus, the appellate court's role on this question is to determine "whether the record contains substantial evidence to support the trial court's predominance finding ...." (*Lockheed,* supra, 29 Cal.4th at 1106.) The trial ***21** court's analysis of the record is entitled to deference; "where a certification order turns on inferences to be drawn from the facts, reviewing court has no authority to substitute its decision for that of the trial court." (*Sav-On,* 34 Cal.4th at 328, citation omitted.)

2. The trial court's conclusion that the issues raised in plaintiffs claims are not subject to common proof is supported by the record

Among the most egregious of the misstatements in plaintiffs brief is the contention that the trial court "did not analyze any of Plaintiffs' legal claims or specify why any particular claim lacked commonality." (AOB at 33.) In fact, the trial court analyzed the evidence as to each of plaintiffs' claims and explained why individual questions overwhelmed the common questions. (14JA3612-36144.) Plaintiffs' brief largely ignores this portion of the order, which the trial court labeled "the standard approach" and the "soundest basis for decision." (14JA3619.) Significantly, plaintiffs' opening brief does not even attempt to argue that the trial court lacked substantial evidence for concluding that common issues did not predominate.[FN5] Also incorrect is the statement by plaintiffs that the trial court erroneously concluded that "systemic violations were insufficient to establish commonality." (AOB at 36.) The trial court did not announce a rule against class action treatment of allegations of unlawfulness in the administration of programs for persons with developmental disabilities. Instead, the trial court concluded that the issues raised by plaintiffs in this litigation did not meet the requirement of commonality. A review of the record before the trial court amply supports ***22** this conclusion. As demonstrated in the following sections, the trial court's conclusion that common questions do not predominate as to each claim raised by the plaintiffs is supported by the record.[FN6]

FN5. Instead, plaintiffs concentrate almost exclusively on what the trial court described as- an "alternative approach" under Federal Rule of Civil Procedure 23(b)(2). (See 14JA3614, 3619.)

FN6. The trial court's selection of these five claims is a fair summary of the legal and factual issues raised by plaintiffs case.

a. Plaintiffs' claim that defendants fail to provide understandable information

Given the innumerable individual factors that affect this aspect of plaintiffs' claims, it is no wonder that the court found no commonality. Plaintiffs' allegations regarding "inadequate" information are not limited to any

one representation or class of representations. The evidence demonstrated that class members receive information throughout their lives from a variety of official sources from state employees at developmental centers, RC case managers, independent advocates and social workers. (9JA2408-2409.) Both DDS and individual RCs provide written and web-based information for consumers regarding their rights and options under the system of services. (*Ibid.*) Furthermore, the information and the manner in which it will be provided depends on circumstances unique to the consumer. In answers to interrogatories, plaintiffs acknowledged that the type of information that needs to be provided "will obviously vary depending on the consumer." (9JA2248-2257.) A court examining plaintiffs' claim on this issue could not apply the same standard in each case; the ability of consumers to understand and their experiences vary widely. Some class members are profoundly retarded and non-verbal while others suffer from mild retardation and are highly verbal. (2JS371, 395-397.) Nor can plaintiffs' allegations be tested by reviewing records. Plaintiffs' expert, Lyn Rucker, testified that ***23** in order to determine whether the defendants had provided adequate information it would be necessary to conduct interviews of the consumer, staff, and family asking "what information was provided to you and what did you really want to know." (9JA2279.)

While plaintiffs' opening brief contends that their claims are all about "systemic" issues, their "common evidence" of "common practices and polices" allegedly resulting in class members receiving inadequate information is highly case-specific. (AOB at 43-44.) Plaintiffs do not-and cannot-contend that DDS has adopted policies that prohibit, restrict or impair the free flow of information. The DDS IPP Manual directs all publically funded agencies to "provide relevant information in an understandable form" to consumers and their families including "visual and experiential information" such as visits to different types of living arrangements and job prospects. (2JS371-372.) The only evidence cited by plaintiffs in the AOB in support of their theory that there is a common policy is the testimony of a Clients' Rights Advocate at one developmental center. She stated that in some cases information is provided in a "very understandable form"; in other cases it is not. (6JA1586.) In their motion to the trial court, plaintiffs cited declarations regarding instances in which plaintiffs alleged that individual consumers had failed to receive adequate information about services. (10JA2662-2664.) The complaints share little in common. In five cases, plaintiffs allege the consumers did not receive "experiential" information regarding the services and supports in the community. (10JA2662.) In another five instances, plaintiffs believe the consumers should have received information about specific services such as "supported living" or "Bates homes." (10JA2663-2664.) In the remaining six cases, the plaintiffs state generally that consumers were not given information ***24** on services and supports that would address their needs. (10JA2662-2664.) However, plaintiffs do not describe what information should be given or in what form.

Furthermore, defendants submitted declarations of developmental and RC staff that countered the testimony submitted by plaintiffs. A few examples are sufficient to demonstrate the facts of each case were hotly contested. For instance, plaintiffs claim that one consumer lived for "four years in institutions without being provided information on what community supports and services would address [her] needs." (10JA2662.) Defendants submitted the declaration of the consumer's case manager who stated that the consumer suffers from cerebral palsy, but is not cognitively impaired and has participated in numerous meetings with medical providers and other agencies to discuss her living arrangements. (8JA1958.) Plaintiffs cite the testimony of the mother of another consumer who claimed she did not receive information about services that would have permitted her daughter to come home from a sub-acute medical facility. (10JA2663.) Defendants' declaration states that the consumer's physician repeatedly told the consumer's parents that she could not be moved to a lower level of care because of her fragile and unstable medical condition including the need for a ventilator. (3JS707.) When the consumer's condition stabilized and she was weaned from the ventilator, the RC arranged for the consumer to be moved to

live with her parents. (3JS707-708.) Plaintiffs contend that a third consumer did not receive "basic information about what community resources, support groups and agencies were available to assist him with community living." (10JA2663.) Defendants counter that the consumer had sufficient information to make his own decisions about community placement. His team felt that he should be placed in a group ***25** home; however, he stated a strong preference for living in his own apartment. (2JS0562.) The RC contracted with a private agency that located housing and provided supports to permit him to live in his own home. (*Ibid.*)

Thus, an examination of the evidence supports the trial court's conclusion that this claim cannot be established through common proof. The trial court correctly determined that "[t]he evidence suggests that the IPPs are individualized and that much of the information [about community placements] is conveyed orally." (14JA3613.) The court properly noted that the evidence is entirely different from that in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 811-813. There, defendant's salesmen delivered a memorized, standard sales pitch based on a printed narrative and sales manual. This was sufficient to give rise to a common issue of whether the defendants had made false statements. Instead, the nature of plaintiffs' evidence is more similar to that in *Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 473, where liability turned on the representations made by lessors to a class of tenants. The court denied class action status because each lease was the product of individual discussion, and the interpretation of the contract "in each individual instance would involve a separate trial of the issue of meaning based upon extrinsic evidence of those discussions." (See also *Brown v. Regents of the University of California* (1984) 151 Cal.App.3d 982, 989.)

b. Plaintiffs' claim that defendants make inadequate assessments in the IPP process

Like their first claim, plaintiffs' contentions regarding assessments are very generalized complaints concerning a highly complex and individualized process. IPPs are the products of interdisciplinary teams convened specially for each consumer. No standard form is employed. As demonstrated by copies ***26** of IPPs submitted to the trial court, each IPP includes a detailed analysis of the consumer including medical history and behavioral, cognitive and social functioning. (See, e.g., 2JS0430-44, 3JS0585-596, 3JS0622-627.) The recommendations of the IPP are tailored to the needs of each consumer and the plan of services and supports is unique to each individual. (*Ibid.,* 3JS0656.)

Plaintiffs' complaints regarding the assessment process are non-specific and open ended. (AOB at 29.) They do not base their claim on the explicit policies of the defendants, nor do they identify specifically where the defendants' assessments have gone awry.

Plaintiffs support their contention that they proffered "common evidence" with only two citations. (AOB at 42.) Neither citation would support a conclusion that common issues predominate. In the first, a former employee of DDS declared that staff at the developmental center where she worked placed "too much emphasis on assessments of an individual's needs" and that staff had an "institutional bias" without citing any examples. (6JA 1473.) The second citation has nothing to do with the IPP process at all, it is to the deposition of a RC director who testified regarding the process for developing the RC's CPP. In any event, the claim that IPP's are not "comprehensive" can be tested only by reviewing individual cases.[FN7]

FN7. It is difficult to describe the IPPs prepared by defendants which are in the record as anything but comprehensive. (*See e.g.,* 2JS0430-444, 3JS0585-596, 3JS0622-627.) Whether they took more or less time than the CPPs described in plaintiffs' evidence and whether they adequately assessed the needs and wants of the consumer can only be determined on a case-by-case basis.

Based on this record, the trial court properly concluded that common issues do not predominate. Noting that "each IPP is designed by a team of caregivers/specialists for an individual putative class member," the "alleged ***27** legal deficiencies of each will be different." (13JA3613.) The evidence submitted by plaintiffs fully supports the trial court's observation. The complaints of inadequate assessment raised on behalf of each plaintiff and putative class member involve a series of highly individualistic factual disputes.

The lack of any common thread to the disputes over assessments dooms any effort to resolve plaintiffs' claims by class action. Even if plaintiffs could demonstrate that any one assessment was inadequate, that finding would have no application to any other class member given the particularized facts underlying each determination. Where the findings as to the liability of defendants to one class member cannot be extrapolated to other class members, then it is appropriate to deny class certification. (*Dunbar v. Albertson's Inc.* (2006) 141 Cal.App.4th 1422, 1432.)

c. Plaintiffs' claim that Defendants base IPP recommendations on factors unrelated to the needs and choices of the class members

Plaintiffs contend that defendants have a practice of making placement recommendations on "improper" considerations such as the "availability of services" and family objections to placement. (AOB at 42.) This contention cannot be resolved on common proof. Plaintiffs cannot identify any written policy or directive that requires that interdisciplinary teams employ the allegedly improper criteria. The very existence of the supposed policy, a point which is denied by defendants, can only be determined by reviewing individual cases. Furthermore, even if the criteria were applied, the court would have to determine if the assessment resulted in illegal institutionalization, an issue not amenable to a class-wide adjudication.

The "common evidence" of the alleged policy is based entirely on anecdotal testimony consisting of disputes over individual cases or hopelessly ***28** vague generalized conclusions. (AOB at 42.) For instance, one of plaintiffs' citations is to deposition testimony about disagreements between a particular individual and a RC regarding the merits of individual community facilities. (6JA1624-1625.) Another citation is to testimony by a RC employee questioning a physician's decision to require a community facility to have oxygen available for a consumer. (6JA1657-1658.) Other testimony cited by plaintiffs is more conclusionary. One deponent concluded that DC staff recommended institutional placement out of fear of losing their jobs. (7JA 1765.) Another thought that staff had an "institutional bias" because they have worked with individual consumers for a long time and believe "they're doing a great job." (7JA1793.) Plaintiffs allege that DC staff fail to recommend community placement because of the objections of family members. In support of this contention, plaintiffs cite the testimony of one advocate who acknowledges that staff should take the wishes of family into consideration, but that "in some cases" they give "more latitude ... than they should." (6JA 1575.) The same witness acknowledged that this occurs "on an individual basis." (6JA1576.)

The inherent unmanageability of plaintiffs' claims is exemplified in their contention that defendants improperly employ something they call "readiness criteria" when evaluating placement. (4JA1067.) It is not clear what plaintiffs mean by "readiness criteria," and their witnesses provide different definitions of the term. (9JA2309-2310, 9JA2314, 9JA2318-2319.) Others, including plaintiffs' own expert Toni Tucker, do not know what the term means. (9JA2336, 9JA2324, 9JA2328, 9JA2332.)

Even if the term were defined, a court could not determine whether defendants employ "readiness criteria" or whether it resulted in improper ***29** institutionalization without deciding highly contested factual disputes in in-

dividual cases. For instance, plaintiffs describe four consumers as to whom "inappropriate readiness criteria" have resulted in "unnecessary institutionalization." (10JA2665-2666.) Defendants dispute plaintiffs' factual assertions and conclusions as to each. (3JS0694, 3JS0580-83, 3JS0659-63, 3JS0673-77, 3JS0685-89, 3JS0668-73.)

The parties do not agree what the facts are or how to interpret them. These disputes are simply inappropriate for class treatment. More importantly, the propriety of defendants' actions turns on their professional judgment that the consumer's medical condition or behaviors make community placement unsafe to the consumer, staff or the public. The trial court properly concluded that there was no commonality in plaintiffs' contention that defendants employed improper criteria in developing IPPs because the "allegedly unlawful variables considered will be different for each IPP." (14JA3613; see *McCullah v. Southern California Gas Company* (2000) 82 Cal.App.4th 495, 500 (question of whether employer provided reasonable accommodation to class of disabled employees not suitable for class certification).)

d. Plaintiffs' claim that defendants fail to provide timely services and supports as suggested by IPPs

This portion of plaintiffs' claims is burdened by innumerable individual issues. Plaintiffs' own evidence is that defendants develop resources and move consumers from developmental centers to the community "person by person." (AOB at 43, citing 7JA1780.) The claim that defendants have failed to provide services in a timely fashion relies on highly particularized facts and cannot be proven on a class-wide basis. First, the range of services necessary to support class members is incredibly diverse and no two consumers share the same ***30** needs. Second, the length of time necessary to develop services will vary from one consumer to the other.

In order to place consumers in the community, defendants have to replicate the services provided in the institution in another setting. These services vary widely among the class members. For instance, one suffers from profound mental retardation, a seizure disorder and blindness. He is a very brittle diabetic who requires regular monitoring and currently lives in a skilled nursing unit at a developmental center. (3JS0663-664.) Another is a highly verbal young man with mild mental retardation who required treatment in a locked psychiatric facility for mental illness and substance abuse. (3JS734-737.) A third required specialized treatment for Prader-Willi syndrome, a rare genetic disorder which causes an insatiable appetite and very challenging behavioral needs. (2JS0570-573, 3JS0680.)

DDS provides funding from the CPP to develop new services if necessary, but they are built around an individual assessment of each consumer's unique needs. (9JA2405.) Nor can plaintiffs' complaint regarding the time required to develop services be resolved on a class-wide basis. In many cases it is necessary to develop a residence specifically for a particular individual. (See, e.g., 3JS0694, 3JS0744-745.) This will have an impact on whether a residence in the community is available. New community resources are provided by private vendors who may delay or prevent placement. (1JS0374.)

Thus, the trial court properly concluded that commonality did not exist because of the fact that IPPs are prepared individually for each class member:
***31** The timing of services and supports will, therefore, be determined by the circumstances of the individual. The Court cannot determine that the DDS or a RC acted unlawfully in every case where X service was not provided to Y individual within Z weeks.

(14JA3613.)

e. Plaintiffs' claim that defendants fail to develop adequate community resources

Plaintiffs contend that defendants have failed to develop a sufficient "array" of services throughout the state sufficient to insure that consumers can receive services in a community setting. The "array" of services necessary to meet the needs of class members is truly breathtaking. Similarly expansive are the unfocused complaints that plaintiffs raise regarding the availability of community resources. As expected, every aspect of plaintiffs' factual claims are subject to highly individualized factual disputes. For instance, plaintiffs claim that some institutional residents could live in the community if only defendants developed appropriate community resources. Defendants answer that the consumers have very significant medical and/or behavioral needs which cannot be met outside an institutional setting.. (Compare 10JA2672 to 2JS0452-455, 3JS0683-684, 3JS0663-665, 3JS0706-708.) In other cases, plaintiffs contend that the services that defendants provided to consumers *while they lived in the community* were inadequate sometimes causing their institutionalization. Defendants' evidence is that services existed in the community which would have assisted the consumer, but that the consumer's families prevented defendants from delivering them. (Compare 10JA2673-2675 to 3JS783-790, 3JS715-722, 3JS728-732, 3JS0723-727.)

Further complicating the commonality analysis is the fact that plaintiffs not only challenge institutionalization in DCs; they contend that class members ***32** in any facility with more than 16 beds are improperly institutionalized. There is no uniformity as to the reasons class members are admitted to various facilities, the degree to which they are integrated into the community, or the reasons they remain in the facilities. Furthermore, the decisions regarding placement in such facilities are solely in the hands of 21 different agencies each of which operates in a completely separate and distinct geographical area of a state more diverse than most countries. Indeed, the overbreadth of the proposed definition of "institution" completely undermines the notion of class certification. The evidence is that RCs treat placements into non-state facilities in very different ways. (10JA2458-2564.)

All of these factors justified the trial court's conclusion that this claim would "be dependent on first proving that classmembers have a legal right to a certain type of community resource and that preliminary inquiry is inherently individualized." (14JA3614.)

3. Plaintiffs' Many and Disjointed Arguments Regarding the Trial Court's Determination That Plaintiffs Had Not Met Their Burden Regarding Commonality Should All Be Rejected

Plaintiffs raise a series of objections to the trial court's ruling on commonality, much of which involves constructing straw men for the purpose of dispatching them. Plaintiffs' mischaracterize the trial court's ruling and then demonstrate how the court was incorrect to adopt a position it never took. Contrary to plaintiffs' reading of the ruling below, the trial court's ruling is based on California, and not federal, law; the court did not refuse to aggregate claims; nor did it "find commonality under *Sav-On."* The plaintiffs are wrong when they argue that the court focused improperly on ***33** individual issues or that they advanced sufficient evidence of common questions to justify certifying a class.

a. The Claims Analyzed by the Trial Court Were the Claims Identified by the Plaintiffs

Plaintiffs level a series of related criticisms against the trial court's ruling. They contend that the trial court failed to analyze their motion for class certification in light of their theories of recovery, that it focused on "discrete wrongs" instead of the aggregate claims of the class and that it improperly relied on evidence plaintiffs submitted in support of typicality rather than their evidence relating to commonality. None of these arguments accurately reflect the ruling below and all are mistaken.

The trial court, as required by California law, determined whether common questions predominated in light of

the claims asserted by the plaintiffs. (14JA3609, citing *Hicks, supra,* 89 Cal.App.4th at 916, 917-18.) Plaintiffs cannot credibly claim that the five "alleged wrongs" the trial court analyzed are not in fact their principal claims in this action. A review of the issues, both factual and legal, listed in their moving papers match those analyzed by the trial court. (See 10JA1065-1066, 1076-1077, 1080.) As plaintiffs themselves described their claims: "Each of plaintiffs' causes of action is based on the right of class members to assessments of the services and supports they need to avoid unnecessary institutionalization and live in the least restrictive environment, and then to receive those services and supports in a timely manner." (10JA2638.) In other words, the "discrete wrongs" identified by the trial court essentially mirror the factual and legal issues plaintiffs contend are common. (4JA1066-67, 1076-77, 1080; 10JA2638-2639.)

***34** Similarly, plaintiffs' contention that the court below failed to "aggregate" their claims is simply wrong. (AOB at 30-34.) In fact, the five alleged wrongs analyzed by the court were wrongs that plaintiffs claimed affected all class members. Plaintiffs should not be heard to complain about the approach the trial court took; it took plaintiffs' claims as they defined them. Plaintiffs specifically disavowed the approach advocated by defendants. (10JA2637.) The trial court here aggregated plaintiffs' claims - that is, it did not analyze each cause of action - and examined the claims to determine whether they could be established through common proof, as the court did in *Sav-On.* Therefore, plaintiffs' claim that the trial court did not aggregate their claims in contravention of California law is nonsensical.

Additionally, plaintiffs' contention that the trial court erroneously followed *J.B. by Hart v. Valdez* (10th Cir. 1999)186 F.3d 1280, 1289 for the proposition that "an allegation of systemic failures does not create a common legal issue" and the "disallowance" of the "aggregate approach" as "contrary" to California law must also be rejected. (AOB at 31.) Neither the trial court nor the *Valdez* court held that class actions may not address violations of the law that are "systemic." However, commonality does not exist merely because plaintiffs allege that it does. As the court in *Valdez* observed, "We refuse to hold, as a matter of law, that *any* allegation of a systematic violation of various laws automatically meets Rule 23(a)(2)." (186 F.3d at 1289, emphasis in original.) In reaching this conclusion, the decision in *Valdez* is completely consistent with California law.

Plaintiffs' complaint that the trial court somehow improperly based its decision on facts and evidence that they offered regarding the typicality requirement also must be rejected. (AOB at 38.) The trial court was not ***35** precluded from considering any of the evidence submitted by the parties as to any issue when it was determining whether common issues predominate. " '[Q]uestions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses ... and the determination of [any] conflicts and inconsistency in their testimony are matters for the trial court to resolve.' " (*Sav-On,* 34 Cal.4th at 334, quoting *Thompson v. City of Long Beach* (1953) 41 Cal.2d 235, 246.) Moreover, the trial court did not specifically cite to any particular evidence, but since it denied all the parties' evidentiary objections, it can be presumed that the court considered all the evidence submitted by the parties.

Indeed, plaintiffs themselves had difficulty distinguishing between evidence that relates to typicality from that which relates to commonality. For instance, plaintiffs' reply brief to the trial court included an Attachment A which purported to be summaries of "common evidence" as to individual plaintiffs and putative class members. (10JA2662-2679.) The table categorized the "common evidence" under broad contentions. The five "discrete wrongs" cited by the trial court closely track the contentions listed in plaintiffs' Attachment A. Plaintiffs cited the evidence to demonstrate plaintiffs' and putative class members' "commonality and typicality." (10JA2643.)

Plaintiffs can hardly fault the trial court for considering the factual issues cited by plaintiffs as "common" in de-

termining whether plaintiffs had satisfied the requirement of commonality. Therefore, their contention that the trial court ignored their theory of liability is completely incorrect.

***36** b. Plaintiffs' "Pattern and Practice" Evidence Fails to Establish Commonality.

Plaintiffs argue that the trial court erred when it "rejected" their "pattern and practice" evidence. (AOB at 39.) In this contention, plaintiffs are off base for two reasons. First, they ignore the standard of review; their burden is not to demonstrate that there was evidence which could have supported the trial court in reaching a contrary result, but whether substantial evidence supported the conclusion the court did reach. Secondly, the common evidence they cite is insufficient to prove the claims they raise in this litigation. In fact, the trial court did not err; it properly concluded that, based on all the evidence submitted by the parties, plaintiffs' claims could not be proved through common proof.

Plaintiffs contend they demonstrated commonality by "pattern and practice evidence consisting of testimony from Defendants about their policies and practices, admissions, documents, expert testimony, sampling and other evidence." (AOB at 41.) They also contend that they "described their intended use of statistics and further sampling for trial." (*Ibid.*) The evidence they cite is insufficient to demonstrate that common questions predominate.

The court properly concluded that plaintiffs' claims could not be proved by statistical or sampling evidence. (14JA3612, 14JA3619.) With regard to sampling, state defendants' expert, Richard Scheffler, PhD., testified: "In my opinion, with respect to [plaintiffs' contentions as described in Attachment 2], it would not be possible under accepted principles of social science research to conduct a study based on such sampling that would provide scientifically reliable results." (10JA2460.) Another of defendants' experts, Julia Mullen, expressed the same opinion. (9JA2411.) In response, plaintiffs' submitted the ***37** testimony of Lyn Rucker who acknowledged that she is not a statistician and that she had to consult with someone else to render her opinions about Dr. Scheffler's testimony. (12JA3097.) Ms. Rucker opined that sampling "could help to demonstrate" some of plaintiffs' allegations, but conceded that, " contentions, such as defendants' failure to establish a sufficient array of community services to meet the needs of persons in institutions, would not necessarily be proved by sampling." (12JA3099.) Thus, given the testimony of the parties' experts regarding sampling, the trial court did not err when it determined that the case could not be tried based on sampling or statistical proof at trial. (14JA3612, 3619.)[FN8]

FN8. Plaintiffs never explained what "statistical" evidence they would submit.

In view of the evidence submitted by defendants, this court must accept the trial court's conclusion that plaintiffs' claims could not be proven by sampling and statistical evidence. State defendants submitted substantial evidence that the claims raised by plaintiffs were not subject to statistical proof. Therefore, plaintiffs' argument that their expert's testimony should be believed over that of the state defendants is simply irrelevant. (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 507.)

More importantly, an examination of the evidence plaintiffs actually did present to the trial does not establish that common issues predominated or that those issues could be established through common proof. The remaining evidence fails to demonstrate commonality. (4JA1063-1066.) The fact that the majority of individuals could theoretically live in the community or that the state has a plan to close one DC and move the majority of its residents to community homes does not pertain to whether defendants are failing ***38** to perform adequate assessments or failing to create sufficient or timely community resources.

Similarly, plaintiffs claim that DDS does not maintain "wait lists" for individuals in private institutions and the testimony of a staff member that at Sonoma DC under the new community options guidelines no "referral list" will be maintained does not go to establishing any of plaintiffs' claims. Again, plaintiffs do not explain how this evidence is common to the class or even relevant to proving their claim that defendants have a practice or policy of failing to provide or ensure the development of community-based services.

In direct contrast, the plaintiffs in *Sav-On* proffered evidence that established they could prove their claims with common proof. The court identified as the central issue whether certain identical work tasks were "managerial" or "nonmanagerial." The court noted that this was an issue that could "easily be resolved on a class-wide basis by assigning each task to one side of the 'ledger.' " (*Id.* at 331.) Thus, the Supreme Court concluded: "A reasonable court could conclude that issues respecting the proper legal classification of [these managers'] actual activities, along with issues respecting [Sav-On's] policies and practices and issues respecting operational standardization, are likely to predominate in a class proceeding over any individualized calculations of actual overtime hours that might ultimately prove necessary." (*Id.* at 331.)

Unlike in *Sav-On,* this is not a case where the trial court could resolve any of the issues raised by plaintiffs' complaint by examining evidence common to the class. It simply is not possible for plaintiffs to establish liability against defendants for the alleged violation of dozens of Lanterman Act provisions as well as the ADA, numerous provisions of the Medicaid Act, and ***39** various federal and state constitutional provisions with proof that is common to the putative class. This not a case where the salient facts can be placed on one side of a ledger as opposed to another. Thus, the trial court correctly determined: "[I]t is clear that class certification is not proper given the individualized factual and legal issues the trier of fact would need to consider in reaching a decision." (14JA3619.)

c. The trial court did not improperly "focus" on individual issues

Plaintiffs also contend that the trial court erred by improperly focusing on individual claims as opposed to the system-wide deficiencies they allege. (AOB at 30-31.) However, the trial court did not find -- nor did defendants ever argue -- that class certification should be denied because individuals had different claims or sought different relief. Contrary to plaintiffs' claims, the trial court did not "focus" on individuals' placements, the individualized content of their IPPs, or the individuals' right to individual relief. (*Ibid.*) In fact, the trial court "considered that Plaintiffs are seeking systemwide injunctive relief only and are not seeking individualized relief." (14JA3607.) Thus, there was never a question that the trial court was analyzing plaintiffs' claims as seeking class wide injunctive relief, not relief for any individual.

Accordingly, the cases cited by plaintiffs to support their contention that the trial court improperly focused on individual issues are inapposite here. (AOB at 24-28.) Indeed, the cases support the trial court's determination to deny class certification.

***40** In each of those cases (save *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, which did not involve any class certification issues),[FN9] the court determined that the fact that there may be some issues that do not apply to all class members or that not all class members would be entitled to relief was not enough to defeat class certification. In each of those cases, the court determined that common issues predominated. For example, in *Mendoza v. County of Tulare* (1982) 128 Cal.App.3d 403, prisoners challenged the conditions in a county jail, claiming that the county was in violation of various constitutional provisions, the Civil Rights Act and the California Penal and Health and Safety Codes. The court determined that although there were some issues that were

only applicable to some prisoners, the complaint contained many allegations applicable to all persons in custody at the county jail, including the failure to maintain a licensed physician, inadequate medical treatment, failure to allow phone calls to attorneys, and the failure to provide access to an adequate law library. (*Id.* at 417.) Some allegations were only applicable to pretrial detainees and inmate drug addicts. The court concluded: "Although the causes of action set forth in [the] complaint reveal some questions of law that are inapplicable to the class as a whole, common questions substantially outweigh those applicable only to separate categories of the class." (*Id.* at 418.)

> FN9. In *Alch,* the issue before the court was whether a classwide claim under the Fair Employment and Housing Act could be stated. Plaintiffs did not seek, and the court did not rule on whether, the plaintiffs had met their burden under Code of Civil Procedure section 382.

Similarly, in *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, plaintiffs sought certification of a class of individuals who had been denied general relief benefits for failure to comply with work project rules. ***41** The only issue before the court was the legality of the county's sanctioning process. "This common question requirement is patently satisfied here by the class claim the County has violated state law by failing to distinguish between *willful* violations of work rules by competent healthy adults who may be sanctioned and *nonwillful* violations caused by negligence, inadvertence or mental or physical disability which may not serve as the basis for sanctioning." (*Id.* at 1277.) The court concluded that the county's administrative agency would decide the remaining issues of individual recipient qualification, entitlement and amount of damages. (*Ibid.*)

Unlike *in Mendoza* and *Reyes,* common issues which can be established through common proof do not predominate in this case. In analyzing the nature of the evidence that would be required to prove plaintiffs' claims, the trial court determined that the trier of fact would be required "to pay significant attention to the individual circumstances of class members." (14JA3619.) Thus, the trial court did not improperly "focus" on individual cases; it merely examined plaintiffs' claims and the evidence proffered, and concluded that it could not determine defendants' liability without considering the facts of thousands of individual cases.

d. Plaintiffs' Contention That the Trial Court Found That They Had Met the Test of Commonality under *Sav-On* Is a Misreading of the Ruling Below

A centerpiece of plaintiffs' brief is that the "Superior Court held that Plaintiffs had met the test for commonality under *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 24 Cal.4th 319 through evidence that Defendants have acted or refused to act on grounds generally applicable to the class." (AOB ***42** at 2.) Plaintiffs misconstrue both the trial court ruling in this case and the supreme court's decision in *Sav-On.*

The first problem with plaintiffs' contention is that the test that they attribute to the *Sav-On* decision appears no where in the case. The supreme court in *Sav-On* stated that the test for commonality in California is whether common issues predominate. (24 Cal.4th at 327.) The test described by plaintiffs in their brief is the test under FRCP 23(b)(2). The phrase "acted or refused to act on grounds generally applicable to the class" is not used at all in *Sav-On.*

Plaintiffs' contention is all the more mysterious in light of the trial court's explicit ruling on commonality. The trial court examined the evidence under what it described as the "standard commonality analysis" described in *Sav-On* and other California cases, and concluded that plaintiffs have failed to meet their burden. (14JA3611, 14JA3612-4, 14JA3619.)

The trial court also analyzed whether plaintiffs met the requirement of commonality under the federal rules. It was unnecessary for the court to do so. "It is only in the *absence* of relevant state precedent that courts turn to federal law and rule 23 for guidance." (*Stephen v. Enterprise Rent-A-Car* (1991)235 Cal.App.3d 806,814, citations omitted, emphasis in original.) This is especially the case where federal law has a different test for commonality than under California law. A class action under FRCP 23(b)(2) has no predominance or superiority requirement. (*Barnes v. American Tobacco Co.* (3rd Cir.1998) 161 F.3d 127, 143.) However, California courts require that common questions predominate even where the plaintiff seeks injunctive relief. (*Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 544-545.)

***43** In any event, the court concluded that it would have denied plaintiffs' motion even under the federal test. Although the trial court found "there is evidence that the Defendants had policies that were common and affected each member of the putative class," it would "still deny the motion for class certification because the claims asserted would require the trier of fact to pay significant attention to the individual circumstances of class members." (10JA3619.)

D. The Superior Court Did Not Abuse Its Discretion in Finding That Named Plaintiffs Are Not Adequate Class Representatives

In holding that the named plaintiffs were not adequate class representatives,[FN10] the trial court found:

> FN10. Establishing adequacy of representation is an element of the community of interest requirement. (*Lockheed Martin, supra,* 29 Cal.4th at 1104.)

In this case the named plaintiffs are legitimately pursuing claims that they honestly think are in the best interests of all the absent class members. The problem is that reasonable minds can differ and the Intervenors, who represent a sizeable number of absent class members, think that prosecution of the claims is not in their best interest.

(14JA3616.)

Based on this finding the court concluded: "[T]hat Plaintiffs have not demonstrated either (1) they will adequately represent the interests of all members of the class or (2) the interest of the Intervenors can be adequately protected by their presence in this case." (14JA3617.) These findings are supported by substantial evidence, are based on proper legal criteria, and should therefore be affirmed. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436.)

***44** Plaintiffs' assertion that the trial court's holding is inconsistent with the decision in *Richmond, supra,* 29 Cal.3d 462 is incorrect. (AOB at 49-53.) *Richmond* was an action by a group of homeowners against a developer for its alleged failure to provide adequate infrastructure for the home sites. The homeowners' association, in which the developer had a controlling interest, intervened and successfully opposed class certification on the ground that plaintiffs were inadequate class representatives because the association's survey showed that 6% of the class might be antagonistic to the case.

The court defined the "essential question presented" to be whether "antagonism per se by members of a class should automatically preclude certification of a class." (*Id.* at 473.) In rejecting such a rule, the court held that where antagonism to the class suit demonstrates a conflict "that goes to the very subject matter of the litigation," a party is not an adequate class representative, unless this antagonism can be removed through the use of sub-

classes or intervention by the dissident class members. (*Id.* at 470-471, citation and internal quotation marks omitted.)

Thus, in *J.P. Morgan & Co., Inc. v. Superior Court* (2005) 113 Cal.App.4th 195, the court found that conflicts between plaintiffs and absent class members precluded class certification in an antitrust suit. Citing *Richmond,* the court explained that whether a conflict defeats a party's claim of representative status entails an evaluation of "the seriousness and extent of conflicts involved compared to the importance of issues uniting the class; the alternatives to class representation available; the procedures available to limit and prevent unfairness; and any other facts bearing on the fairness with which the absent class member is represented." (*Id.* at 212, citation omitted, internal quotation marks omitted.)

***45** In this case, there is an additional factor that was not at issue in either *Richmond* or *J.P. Morgan:* plaintiffs seek only injunctive and declaratory relief. In such a case - in contrast to damage actions like *Richmond* and *J.P. Morgan* - the trial court is not required to provide class members with notice and an opportunity to opt out. (*Holmes v. California Nat'l Guard* (2001) 90 Cal.App.4th 297, 309 fn.8.) Consequently, class members can be bound by an injunction with which they vigorously disagree. For this reason, courts require far greater cohesiveness among class members in cases like the present one. (See, e.g., *Barnes, supra,* 161 F.3d 127 at142-143.) Indeed, the court in *Richmond* acknowledged the role the right to opt-out plays in mitigating possible conflicts by offering "additional protection": to absent class members who do not wish to be bound by the result of the suit. (*Richmond, supra,* 29 Cal.3d at 474.) Likewise, in conjunction with its finding that class certification should not be denied because 6% of the potential class members may be antagonistic, the court stated: "It should also be noted that the trial court will be in a better position to assess the true feelings of the class after court-approved, objectively worded notice is sent to the entire class and the absent members are given an opportunity to elect nonparticipation in the lawsuit." (*Id.* at 475, fn 10.)

A leading authority on class actions has explained, in the analogous context of Rule 23 of the Federal Rules of Civil Procedure, the importance of an opt-out right in assessing the effect of the conflict. A class action under FRCP 23(b)(3) for damages may avoid the negative impact of conflict among class members because dissenters may opt out, "limiting the class to those who favor the suit." (1 Newberg on Class Actions, §3:30.)

***46** 1. The conflict between plaintiffs and intervenors goes to the "subject matter of the litigation"

The evidence presented to the trial court fully supports a finding that the conflict between intervenors' position and the aims of the named plaintiffs goes to the very subject matter of the case. The deep-rooted and extensive differences between intervenors and plaintiffs entirely outweigh the few, if any, issues uniting the proposed class.

At the outset of the case, plaintiffs opposed the intervenors' motion to intervene - a stance which, in itself, demonstrates antagonism toward the intervenors. Plaintiffs' antagonism was made explicit in their opposition memorandum: "The organizations' and parent representatives' interests *are potentially and actually in conflict with the interests of the plaintiffs and the putative class."* (1JA0265, emphasis added.) Plaintiffs' efforts now to show that there is no conflict are disingenuous at best.

Plaintiffs now argue that no conflict exists because, as the trial court recognized, both plaintiffs and intervenors "would like thorough assessments and the best service possible." (AOB at 53.) This is like saying that two antagonistic political parties are not in conflict because each wants "good government."

Plaintiffs' explicit premise is that the present system for providing services to persons with developmental disabilities is fundamentally broken and illegal. In their view, the problems are systemic, not individual. (AOB at 32.) Plaintiffs contend that the least restrictive, most appropriate environment for virtually *all* persons with developmental disabilities is a community, non-institutional setting. Plaintiffs envision the elimination of all "institutions" with more than 16 beds, including the closure of the DCs. ***47** Consequently, the class-wide relief plaintiffs seek is a detailed injunction designed to ensure that assessments and the provision of services are directed at, and result in, community placements. (4JA1038-41.) In short, the whole point of plaintiffs' lawsuit is to compel deinstitutionalization.

Intervenors have a sharply different vision and perspective. While they accept that for some persons with developmental disabilities a community setting is appropriate, they vigorously assert that others are so profoundly impaired that a DC, with its centralized, constant protection and care, provides the least restrictive and safest environment, whether or not community placement opportunities become available. (JA2027; JA2031; JA2039; JA2058-59; JA2062-63; JA2069-70; JA2073-2074; JA2081-2082.)

Intervenors contend that the plaintiffs' broad assertions about the alleged defects in the system are either wrong or highly questionable. For example, a Director of CASH/PCR (a parents group of individuals who reside in DCs and an intervenor here) testified that individuals and their families are given understandable information on community services and supports to enable them to make meaningful choices. (JA2040.) He believes that when the IPP recommends DC placement "it is the result of thoughtful consideration by a critical collection of uniquely qualified professionals" and "vigorously disagrees with plaintiffs' contention that the IPP process is fundamentally flawed in favor of DC placement ...." (JA2040-41.)

All of the declarations submitted by Intervenors challenged plaintiffs' view that residing in the community was always superior to life in the developmental centers. (See JA2058-59; JA2062-63; JA2069; JA2073.) Intervenors also testified about explicit antagonism they experienced with ***48** Protection & Advocacy, the lead counsel in this case. (See JA2080-81; JA2072.)

In sum, the substantial and unrefuted evidence of a fundamental conflict between plaintiffs and intervenors supports the trial court's finding that plaintiffs will not adequately protect the interest of the intervenors.

2. The Number of Intervenors Does Not Preclude a Finding that Plaintiffs Are Inadequate Class Representatives

Plaintiffs argue that under *Richmond* representative status is precluded only where a "vast majority" of the putative class is antagonistic to the position of the named plaintiffs, and that intervenors fall short because they represent a mere "handful" of class members. (AOB at pp. 51-52.) This argument misconstrues *Richmond* and is wrong on the facts.

Richmond confirms that class certification is inappropriate "[w]hen a vast majority of the class perceives its interest as diametrically opposed to that of the named representatives ..." (*Richmond,* 29 Cal.3d at 471.) "If a vast majority of the class do not oppose the suit, the minority may have its views presented either as a subclass or as interveners." (*Ibid.*) These statements should not be construed as holding that when the dissenters are something less than a "vast majority," intervention or a subclass must, as a matter of law, must be adopted as the solution to the conflict. Instead, the statements should be read as a directive that where less than a vast majority dissents, the conflict, when the circumstances warrant, may be mitigated through the use of subclasses or intervention. This reading properly preserves the trial court's flexibility to determine - whatever the number of dissenters - whether there are procedures available to prevent unfairness or whether the antagonism, despite the procedures,

defeats the plaintiffs' claim of representative status.

***49** Plaintiffs make two arguments based on the number of intervenors in relation to the entire class. Neither has merit. They first assert that intervenors "consist of only 11 individuals" or less than.1% of the 7775 member class.[FN11] (AOB at 51.) This argument conveniently disregards the intervenor organizations, CASH/PCR and California Association for the Retarded which include the families or conservators of half of the approximately 3,100 residents of DCs as members. (JA2040.)

> FN11. If this argument had any validity, it would apply equally to the plaintiffs, themselves. There are 16 individual plaintiffs, who constitute .24 % of the class, yet they purport to speak for the entire class. Also, plaintiffs' math is wrong - 11 is .14% of 7775; not less than . %.

Acknowledging this fact, plaintiffs change tack and argue that when the approximately 4,600 putative class members, who reside in non-developmental center facilities, are added to the 3,100 residents of the developmental centers, intervenors' percentage of the putative class drops to about 20%. (AOB at 52.) In addition to the fact that 20% of the proposed class - approximately 1,500 consumers - is not a mere "handful" or a small minority, this argument fails to take into account that intervenors do not claim to represent the interests of consumers outside the DCs. Thus, to the extent it is relevant, the proper point of comparison is intervenors' percentage of the DC population - nearly 50%, not their percentage of the entire putative class.

In addition, plaintiffs offered no evidence showing how many DC residents and consumers in facilities with 16 or more beds agree with the suit's claims and objectives. It may well be that a relatively small percentage of class members concur with plaintiffs. Plaintiffs have not shown otherwise.

***50** Plaintiffs' attempt to marginalize the intervenors' view by arguing that they make up a legally insignificant portion of the class is contradicted by substantial and unrebutted evidence. Accordingly, the trial court clearly did not abuse its discretion when it concluded that representative status was defeated because the intervenors represent "a sizable number of class members" who think the prosecution of the action is not in "their best interest." (14JA3616.)

3. Intervention Does Not Sufficiently Mitigate the Conflict

Although intervenors are parties to the case, their status does not "cure" the conflict so as to allow plaintiffs to be adequate class representatives. At the heart of the conflict is an unbridgeable philosophical schism on the central issue of what constitutes the "most integrated, least restrictive environment." Plaintiffs fervently believe that with proper services and supports all DC residents can live in the community. Plaintiffs and their attorneys are determined, through lawsuits, legislation and lobbying, to mold the system to fit this conception. This case is part of that effort.

Intervenors just as ardently believe that for a large number of consumers the DC provides the most integrated, least restrictive environment. In their view, community placement for these consumers would be unsafe and result in a marked decrease in the quality of life.

This irreconcilable hostility precludes plaintiffs from being accorded representative status, even though intervenors are parties. A class action is not a devise to force opposing factions within the class to do battle - one as the class representative and one as an intervenor. Rather, it is a procedure that may be used to "sue or defend for the benefit of all," (Code Civ. Proc. § 382), and only where the party seeking certification establishes "a well-

defined ***51** community of interest among the class members." (*Richmond, supra,* 29 Cal.3d at470.) Here, plaintiffs seek to impose through a system-wide injunction their view of what is "for the benefit of all" in a situation where there is clearly no well-defined community of interest.

This lack of cohesiveness among class members is all the more important in judging the adequacy of plaintiffs' representation because, given that the suit seeks only injunctive and declaratory relief, intervenors and the members of their associations cannot elect to opt-out of the class. (14JA3617.) Therefore, should judgment be entered for the putative class, intervenors would likely be subject to an injunction with which they disagree, as well as the res judicata/collateral estoppel effects of the judgment.

For all of the foregoing reasons, the trial court's determination that plaintiffs were not adequate representatives is supported by substantial evidence and is based on proper legal criteria. This finding should therefore be affirmed.

E. The Trial Court Did Not Err in Finding that Plaintiffs' Claims Could Be Addressed Through Alternative Means

In assessing the suitability of class certification, the trial court addressed two issues. The court first considered the possible role a class action would play in deterring and redressing alleged government wrongdoing - in this case, primarily defendants' alleged failure to perform proper assessments and the alleged failure to provide adequate community services. The court next considered the availability of alternatives to a class action for handling the controversy. On the first issue, the court found that "the alleged wrongs cannot be readily cured on a class wide basis." On the second, the court concluded that the Lanterman Act's fair hearing procedure was an effective means for ***52** individuals to seek relief for alleged unlawful institutionalization. (14JA3618.) Both holdings are correct. Each follows from the court's determination that "the development and implementation of the IPPs is inherently individualized"- a proposition with which plaintiffs fully concur. (*Ibid.*)

1. The trial court did not abuse its discretion in finding that a class action is not an effective procedure for deterring alleged wrongdoing

In finding that a class action is not an effective procedure for deterring alleged illegal institutionalization, the trial court contrasted this case with cases in which "the class claims are generally discrete and capable of resolution by a court on a common basis." (14JA3618.) In these types of cases, a finding that a policy or practice applicable to all class members is illegal results in class-wide injunctive relief that resolves the ultimate issue in the case, e.g., a desegregation plan applicable to all class members or an injunction prohibiting the denial of welfare benefits based on a policy that has been unlawfully applied to all class members.

In contrast, in this case it is uncontested that the determination of whether a putative class member is illegally institutionalized can be made only after an individualized assessment. It is further uncontested that placement in a less restrictive environment can only be accomplished by the procurement of service and supports tailored to the unique needs of each consumer. Thus, the final result sought by this lawsuit requires resolution of issues which, by their very nature, cannot be decided on a class-wide basis.

Plaintiffs argue that the trial court's conclusion is wrong because "this case involves conduct that harms large numbers of people in systematic ways that are beyond the means of any individual plaintiff to prosecute through years of factual and expert discovery, much less trial." (AOB at 62.) This argument ***53** misses the point. No matter the exact form of the plaintiffs' proposed systemic injunctive relief, the wrong - alleged illegal institution-

alization of individual putative class members - can, in the end, only be redressed through a process which is individualized. The trial court did not abuse its discretion in finding that "the alleged wrongs cannot be readily cured on a class wide basis."

2. The trial court did not abuse its discretion in finding that the Lanterman Act's fair hearing procedure is an effective means for putative class members to seek relief

The trial court did not abuse its discretion in finding that the Lanterman Act's fair hearing procedure provides an effective means for putative class members to seek placement in a less restrictive environment. (14JA3618.)

As an integral part of the Lanterman Act, the Legislature enacted a comprehensive and detailed fair hearing procedure. (§§4700 *et seq.*) The Act makes fair hearings the exclusive remedy for issues relating to the provision of services. Thus, section 4706(a) provides that fair hearings are to be used to decide *"all issues* concerning the rights of persons with developmental disabilities to receive services under [the Act]." (Emphasis added.) Consistent with this directive, section 4710.5(a) confers a right to a fair hearing on any applicant or recipient of services or their authorized representative "who is dissatisfied with any decision or action of a service agency [FN12] which he or she believes to be illegal, discriminatory, or not in the recipient's or applicant's best interest." This language certainly encompasses a claim that an individual is improperly institutionalized (as defined by plaintiffs).

> FN12. Section 4704 defines "service agency" as "any developmental center or regional center that receives state funds to provide services to persons with developmental disabilities."

***54** In addition, the fact that the Legislature has made the fair hearing procedure the exclusive remedy for issues relating to the provision of services counsels strongly against class certification. As correctly noted by the trial court, the enactment of the procedure supports a presumption "that the Legislature considered this to be an effective means for individuals to seek relief." (14JA3618.)

Plaintiffs' arguments relating to the adequacy of fair hearings are without merit. Specifically, they assert that fair hearings cannot address or afford the class-wide relief sought in the action. While it may be correct that a hearing officer could not grant the injunctive relief plaintiffs seek, this does not mean that the fair hearing procedure is an ineffective remedy. The primary objective of the systemic injunctive relief sought by plaintiffs is individualized assessments aimed at community placements tailored to the unique needs of each individual consumer. For any putative class member who is dissatisfied with his/her current assessment or placement, this objective can be achieved through the Act's fair hearing process.

Plaintiffs' reliance on *Ramos v. County of Madera* (1971) 4 Cal.3d 685 is misplaced. In *Ramos,* plaintiffs challenged the County's policy of requiring children under age16 to work harvesting grapes as a condition for receipt of AFDC benefits. (*Id.* at 690-691.)

Unlike in *Ramos,* the issue in the present case is not whether the Lanterman Act's fair hearing procedure contemplates class injunctive relief. Rather, individual fair hearings are an effective means for challenging alleged ***55** unlawful institutionalization - the primary wrong alleged in the complaint. The proposed class-wide relief is not needed to achieve this result.[FN13]

> FN13. *Ramos* differs from this case in another important respect. In *Ramos,* each class members right to AFDC benefits depended upon the resolution of one essential issue - the legality of the work require-

ment. Here a separate set of issues and facts must be decided for each class member in order to determine whether he/she is unlawfully institutionalized.

Plaintiffs also argue that DDS and the other state defendants are not a "service agency" with respect to putative class members residing in "non-DC institutions," and therefore these individuals have no fair hearing remedy against the State defendants. (AOB at 55.) Although this assertion is accurate, it is not relevant. It is the RCs, not the state defendants, who are responsible for placing persons in "non-DC institutions." (2JS361-62.) In this context, the RCs are the "service agencies" for these consumers and as such their assessment and placement decisions can be the subject to a fair hearing. DDS and the other state defendants are not necessary parties.

Additionally, plaintiffs contend that class treatment is superior to "thousands of individual actions." However, these are not the alternatives. Neither the trial court nor defendants are suggesting that each putative class member be required to bring an action seeking the relief sought by plaintiffs in this case. Nor, contrary to plaintiffs' assertion, are they contending that one class member bring a test case. (AOB at 59-60.) Instead, the trial court found that the fair hearing process, as opposed to a class action or many individual lawsuits, is an effective remedy for any putative class member who believes he/she should be in a less restrictive environment.[FN14] Thus, in the court's view, ***56** the fair hearing process is adequate to achieve what plaintiffs themselves state is the objective of this action, namely, "[t]o ensure California's promise (codified in §§ 4501 & 4502) to persons with developmental disabilities of an entitlement to an opportunity to live integrated in the community by being served in the least restrictive setting." (AOB at 59.)

FN14. Furthermore, the number of putative class members or their conservators who actually contend that they are wrongfully institutionalized is unknown.

Plaintiffs also argue that a class action is needed because "individualized violations are difficult to articulate and prove." (AOB at 60.) If this is true, then plaintiffs have no case. Whatever the alleged "systemic" policies or practices, if plaintiffs cannot establish that they result in the unlawful institutionalization of individual putative class members, then plaintiffs' theory of the case fails.

Plaintiffs' further contention that a class is warranted because putative class members are persons with cognitive or other severe disabilities, who do not have the resources to sue all the defendants in this case is inapposite. (*Ibid.*) Again, the trial court did not find that individual actions should be pursued; only that the Legislature has determined that the fair hearing process is an effective and appropriate device for resolving problems that persons with developmental disabilities may have with the nature or type of services being provided to them.

Finally, plaintiffs assert that a writ of mandate is not a substitute for a class action because class members do not have standing to enforce a writ of mandate if one is obtained by the named plaintiffs. (AOB at 61.) This argument should be rejected because non-parties (e.g., putative class members) who contend that a writ of mandate is not being properly enforced by the plaintiffs may intervene in the action. (See, e.g., *Bustop v. Superior Court* (1997) 69 Cal.App.3d 66, 70.)

***57** IV. CONCLUSION

This is the kind of case which cannot conceivably be proved on a class wide basis. Defendants do not disagree that class actions are appropriate to test the legality of truly uniform governmental policies or practices. However, this is not such a case. The trial court's conclusion that class certification did not serve the interests of the parties, the court or the public was a proper one.

CAPITOL PEOPLE FIRST, et al., Appellants, v. DEPARTMENT OF DEVELOPMENTAL SERVICES (DDS), et. al., Respondents.
2006 WL 3907584 (Cal.App. 1 Dist.) (Appellate Brief)

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