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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KATIE A., *et al.*,

Plaintiffs,

v.

DIANA BONTA, *et al.*,

Defendants.

CASE NO. CV02-5662 AHM (SHx)

ORDER RE CLASS CERTIFICATION

I.

INTRODUCTION

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

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

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

FAC ¶ 37.[1] For the following reasons, the Court certifies a differently-defined class but holds that one of the named Plaintiffs, Gary E., may not represent the class, because his interests are not typical of the class as a whole.

II.

FACTS[2]

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

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

[2] This statement of facts does not include many of Plaintiffs' specific allegations against the Los Angeles County Defendants.

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

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

Wraparound services are

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

id. ¶ 59.

Therapeutic foster care consists of

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

id. ¶ 61.

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

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

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

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

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

1. The Plaintiffs

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

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

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

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

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

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[5] MacLaren was closed down sometime after this lawsuit was filed.

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

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

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

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

2. The State Defendants

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

III.

Class Certification Requirements

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

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

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

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

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

1. The Proposed Class Can Be Defined Adequately

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

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

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

> "The class consists of children in California who,
>
> (a) are in foster care or are at imminent risk of foster care placement; and
>
> (b) have a mental illness or condition that has been documented or, had an assessment already been conducted, would have been documented; and
>
> (c) who need individualized mental health services, including but not limited to professionally acceptable assessments, behavioral support and case management services, family support, crisis support, therapeutic foster care and other necessary services in the home or in a home-like setting, to treat or ameliorate their illness or condition.

For the purposes of this case, 'imminent risk of foster care placement' means that within the last 180 days a child has been participating in voluntary family maintenance services or voluntary family reunification placements[6] and/or has been the subject of either a telephone call to the Child Protective Services hotline or some other documented communication made to a local Child

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

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

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

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

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

2. Rule 23 Requirements

a. Numerosity

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

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

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

b. Commonality

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

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

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

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

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

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

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

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

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

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

The proposed class satisfies the commonality requirement.

c. Typicality

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

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

they reside.

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

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

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

d. Adequacy of Representation

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

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

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

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

e. Rule 23(b)(2) Requirements

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

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

IV.

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

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

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

V.

NOTICE IS NOT REQUIRED

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

VI.

CONCLUSION

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

"Children in California who

(a) are in foster care or are at imminent risk of foster care placement; and

(b) have a mental illness or condition that has been documented or, had an assessment already been conducted, would have been documented; and

(c) who need individualized mental health services, including but not limited to professionally acceptable assessments, behavioral support and case management services, family support, crisis support, therapeutic foster care and other necessary services in the home or in a home-like setting, to treat or ameliorate their illness

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[7] Docket No. 50.

or condition.

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

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

IT IS SO ORDERED.

DATE: June 18, 2003

A. Howard Matz
United States District Judge

Date Transmitted: 6/19/03 12:50:22 PM

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