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U.S. COURT OF APPEALS

12-15366

MAR - 6 2012

1	IN THE UNITED STATES DISTRICT COURT	FILED _____	
2	FOR THE NORTHERN DISTRICT OF CALIFORNIA	DOCKETED _____	DATE _____
			INITIAL _____

3

4 DAVID OSTER, et al.,

5 Plaintiffs,

6 v.

No. C 09-4668 CW

ORDER GRANTING
PLAINTIFFS' MOTION
FOR CLASS
CERTIFICATION
(DOCKET No. 356)

7 WILL LIGHTBOURNE, Director of the
8 California Department of Social
9 Services; TOBY DOUGLAS, Director
10 of the California Department of
11 Health Care Services; CALIFORNIA
12 DEPARTMENT OF HEALTH CARE
13 SERVICES; and CALIFORNIA
14 DEPARTMENT OF SOCIAL SERVICES,
15
16 Defendants.

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18 This action arises from two provisions of California law,
19 ABX4 4 and SB 73, which mandate reductions to the State's In Home
20 Support Services (IHSS) Program for elderly and disabled persons.
21 Plaintiffs have moved for class certification, pursuant to Federal
22 Rule of Civil Procedure 23(a) and (b)(2). Docket No. 356.
23 Plaintiffs also seek the appointment of class representatives and
24 class counsel. Defendants oppose the request for class
25 certification and object to certain proposed class
26 representatives. Having reviewed all of the parties' submissions
27 and heard oral argument, the Court grants Plaintiffs' motion.

28 BACKGROUND

29 Plaintiffs seek certification of Class A for the First,
30 Second, Third, Fourth, Fifth and Seventh Claims, defined as,

31 All recipients of IHSS in the State of California
32 whose IHSS services will be limited, cut, or
33 terminated under the provisions of ABX4 4, and all

United States District Court
For the Northern District of California

1 applicants to IHSS in the State of California who
2 would have been eligible for IHSS services but who are
3 either not eligible, or are eligible for fewer
4 services, as a result of ABX4 4.

5 The proposed class representatives for Class A are Named
6 Plaintiffs David Oster, C.R., Dottie Jones, L.C. and Charles
7 Thurman.

8 Plaintiffs also seek to certify Class B for the First,
9 Second, Third, Fourth, Fifth, Sixth and Seventh claims for relief,
10 defined as,

11 All recipients of IHSS in the State of California who
12 have received or will receive notices of action that
13 include a reduction of IHSS hours based on SB 73 or
14 Defendants' implementation of SB 73, including future
15 applicants for IHSS services whose notice of action
16 will reflect reduced IHSS hours as a result of SB 73
17 or Defendants' implementation of SB 73.

18 The proposed class representatives for Class B are Named
19 Plaintiffs Andrea Hylton, Helen Polly Stern, L.C., and Charles
20 Thurman.

21 The Sixth Claim in the operative complaint is brought
22 pursuant to the Medicaid Act's requirement that states provide
23 "sufficient benefits." Part A of that claim alleges that ABX4 4
24 violates the sufficiency requirement by terminating or reducing
25 IHSS domestic and related services to individuals for whom such
26 services have been deemed necessary pursuant to an individual
27 service plan approved by the State. The Sixth Claim, Part A, is
28 alleged on behalf of Loss of Domestic and Related Services
Subclass A. Accordingly, Plaintiffs seek certification of Loss of
Domestic and Related Services Subclass A, based on Part A of the
Sixth Claim, defined as,

1 All present and future IHSS recipients and applicants
2 who have been or would have been authorized to receive
3 domestic and/or related IHSS, and whose IHSS will be
4 reduced to eliminate some or all of their domestic
5 and/or related services under the provisions of
6 ABX4 4.

7 The proposed class representatives for Loss of Domestic and
8 Related Services Subclass A are Named Plaintiffs Dottie Jones and
9 Charles Thurman.

10 The Eighth Claim in the operative complaint pertains to the
11 provisions of the Medicaid Act under which Early Periodic
12 Screening, Diagnostic and Treatment (EPSDT) for children and youth
13 under age twenty-one is a mandatory Medicaid service. The Eighth
14 Claim contains Part A, alleging that ABX4 4 fails to ensure that
15 Medi-Cal recipients under the age of twenty-one receive medically
16 necessary personal care services required by the EPSDT provisions
17 of the Medicaid Act. Accordingly, Plaintiffs propose a Children
18 Subclass A, based on Part A of the Eighth Claim for relief,
19 defined as,

20 All present or future IHSS recipients who are under
21 the age of 21, who qualify for full-scope Medi-Cal
22 with federal financial participation, and who
23 therefore are entitled to the protections of the Early
24 Periodic Screening Diagnosis and Treatment provisions
25 of the federal Medicaid Act, 42 U.S.C. § 1396a(a), who
26 have been or would have been authorized to receive
27 IHSS, and whose IHSS services will be reduced or
28 terminated under the provisions of ABX4 4.

29 The proposed class representatives for Children Subclass A are
30 Named Plaintiffs C.R. and L.C.

31 Part B of the Eighth Claim alleges that SB 73 violates the
32 EPSDT provisions of the Medicaid Act by failing to ensure that
33 Medi-Cal recipients under the age of twenty-one receive medically

1 necessary personal care services as required by the EPSDT
2 provisions of the Medicaid Act. Accordingly, Plaintiffs seek
3 certification of Children Subclass B, based on Part B of the
4 Eighth claim for relief, defined as,

5 All present or future IHSS recipients who are under
6 the age of 21, who qualify for full-scope Medi-Cal
7 with federal financial participation, and who
8 therefore are entitled to the protections of the Early
9 Periodic Screening Diagnosis and Treatment provisions
10 of the federal Medicaid Act, 41 U.S.C. § 1396a(a), who
11 have received or will receive notices of action that
12 include a reduction of IHSS hours based on SB 73 or
13 Defendants' implementation of SB 73, including future
14 applicants for IHSS services whose notice of action
15 will reflect reduced IHSS hours as a result of SB 73
16 or Defendants' implementation of SB 73.

17 The proposed class representative for Children Subclass B is Named
18 Plaintiff L.C.

19 Pursuant to Federal Rules of Civil Procedure 23(g)(1) and
20 23(c)(1)(B), Plaintiffs seek appointment of the law firms of
21 Disability Rights California, Disability Rights Legal Center, Law
22 Offices of Charles Wolfinger, National Health Law Program, and the
23 National Senior Citizens Law Center as class counsel to represent
24 the Classes and Subclasses defined above.

25 LEGAL STANDARD

26 Plaintiffs seeking to represent a class must satisfy the
27 threshold requirements of Rule 23(a) as well as the requirements
28 for certification under one of the subsections of Rule 23(b).
Rule 23(a) provides that a case is appropriate for certification
as a class action if: "(1) the class is so numerous that joinder

1 of all members is impracticable; (2) there are questions of law or
2 fact common to the class; (3) the claims or defenses of the
3 representative parties are typical of the claims or defenses of
4 the class; and (4) the representative parties will fairly and
5 adequately protect the interests of the class." Fed. R. Civ. P.
6 23(a).

7 Rule 23(b) further provides that a case may be certified as a
8 class action only if one of the following is true:
9

10 (1) prosecuting separate actions by or against
individual class members would create a risk of:

11 (A) inconsistent or varying adjudications with
12 respect to individual class members that would
13 establish incompatible standards of conduct for the
party opposing the class; or

14 (B) adjudications with respect to individual class
15 members that, as a practical matter, would be
16 dispositive of the interests of the other members
not parties to the individual adjudications or
would substantially impair or impede their ability
to protect their interests;

17 (2) the party opposing the class has acted or refused to
18 act on grounds that apply generally to the class, so
19 that final injunctive relief or corresponding
declaratory relief is appropriate respecting the class
as a whole; or

20 (3) the court finds that the questions of law or fact
21 common to class members predominate over any questions
22 affecting only individual members, and that a class
action is superior to other available methods for fairly
23 and efficiently adjudicating the controversy. The
matters pertinent to these findings include:

24 (A) the class members' interests in individually
controlling the prosecution or defense of separate
25 actions;

26 (B) the extent and nature of any litigation
concerning the controversy already begun by or
27 against class members;

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1 (C) the desirability or undesirability of
2 concentrating the litigation of the claims in the
particular forum; and

3 (D) the likely difficulties in managing a class
action.

4 Fed. R. Civ. P. 23(b).

5 Plaintiffs seeking class certification bear the burden of
6 demonstrating that each element of Rule 23 is satisfied, and a
7 district court may certify a class only if it determines that the
8 plaintiffs have borne their burden. Gen. Tel. Co. of Sw. v.
9 Falcon, 457 U.S. 147, 158-61 (1982); Doninger v. Pac. Nw. Bell,
10 Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). The court must conduct
11 a "rigorous analysis," which may require it "to probe behind
12 the pleadings before coming to rest on the certification
13 question." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551
14 (2011) (quoting Falcon, 457 U.S. at 160-61). "Frequently that
15 'rigorous analysis' will entail some overlap with the merits of
16 the plaintiff's underlying claim. That cannot be helped." Dukes,
17 131 S. Ct. at 2551. To satisfy itself that class certification is
18 proper, the court may consider material beyond the pleadings and
19 require supplemental evidentiary submissions by the parties.
20 Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975).

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23 DISCUSSION

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25 Defendants request that the Court defer ruling on Plaintiffs'
26 motion for class certification until resolution of an appeal of
27 this Court's first preliminary injunction. On October 19, 2009,
28 the Court enjoined Defendants' implementation of ABX4 4, which

1 amended sections 12309(e) and 12309.2 of the California Welfare
2 and Institutions Code to terminate from eligibility for IHSS
3 services those recipients with Functional Index Scores of less
4 than 2.0 and to eliminate domestic and related services for
5 recipients with functional ranks of less than 4 for those
6 services. On October 23, 2009, the Court issued an order
7 explaining its reasons for granting the injunction. The October
8 23, 2009 order reviewed the merits of Plaintiffs' claims that
9 ABX4 4 violated the Medicaid Act, the Americans with Disabilities
10 Act (ADA) and the Rehabilitation Act, as well as the due process
11 clause of the Constitution. Defendants argue that a determination
12 of the appeal will assist the Court's analysis under Rule 23,
13 which requires some consideration of the merits of Plaintiffs'
14 underlying claims. Dukes, 131 S. Ct. at 2551.

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16 The Court declines Defendants' request. Plaintiffs seek a
17 second preliminary injunction granting class-wide relief, which
18 necessitates the Court's resolution of whether class certification
19 is appropriate. M.R. v. Dreyfus, 663 F.3d 1100, 1121 (9th Cir.
20 2011) (noting that, subject to certain exceptions, without a
21 properly certified class, a court cannot grant relief on a class-
22 wide basis.). When granting the first preliminary injunction, the
23 Court declined to resolve whether class certification was
24 appropriate. Since then, the Ninth Circuit has clarified that the
25 Court must address the issue now.
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1 Defendants argue that certification of Class B should be
2 denied because Class B Plaintiffs' claims are not ripe for
3 adjudication. For purposes of Article III standing, "the
4 plaintiff must have suffered an injury in fact, which is an
5 invasion of a legally protected interest which is (a) concrete and
6 particularized, and (b) actual or imminent." Lujan v. Defenders
7 of Wildlife, 504 U.S. 555, 560 (1992). Defendants assert that,
8 under the related doctrine of ripeness, Class B claims rest on
9 contingent future events.
10

11 First, Defendants point out that individuals who receive IHSS
12 services under certain specified Medi-Cal Home and Community Based
13 Waiver programs or who meet certain pre-approval criteria will not
14 have their hours reduced. According to the November 29, 2011
15 letter that Defendant California Department of Social Services
16 sent to all of the counties (All County Letter or ACL), these
17 individuals will not receive a notice that they will be subjected
18 to the reduction in hours. Therefore, these individuals will not
19 be members of Class B and their standing is not at issue. It is
20 true that Oster and Jones, who receive IHSS services under
21 specified waiver programs and will not receive a notice of reduced
22 hours, are not suitable as representatives for Class B. Although
23 Plaintiffs initially sought appointment of Oster and Jones as
24 class representatives for Class B, they now propose only Hylton,
25 Stern, L.C., and Thurman.
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1 Defendants also argue that certain putative members of Class
2 B will qualify as being at serious risk of out-of-home placement,
3 and, therefore, will presumptively qualify for a restoration of
4 their hours upon their submission of a Supplemental Care
5 application. In light of this fact, Defendants contend the claims
6 of these putative members of Class B are unripe and the class
7 itself is overbroad. Members of Class B have ripe claims because
8 the injury is the initial notice and imposition of the hours
9 reduction, as provided for in the notices they were slated to
10 receive. If the putative class members do not submit a request
11 for Supplemental Care, even those who presumptively qualify for a
12 restoration of hours will have their hours cut. Thus, the
13 availability of the Supplemental Care application does not negate
14 the injury due to the notice of hours reduction. Furthermore,
15 Class B is not overbroad because it is limited to those who have
16 or will receive notice that they are subject to the cuts.

19 Defendants dispute that Class B satisfies the commonality
20 requirement because the class is not reasonably ascertainable.
21 Defendants argue that it will not be clear who has suffered an
22 injury until members of Class B complete the Supplemental Care
23 application, the fair hearing process and "presumably all rights
24 under California Code of Civil Procedure section 1094.5." This
25 argument does not take into account Class B's injury. The injury
26 suffered by members of Class B is based on the notice and
27 imposition of the impending twenty percent reduction in services,
28

1 not the later denial of a request for Supplemental Care to restore
2 hours of services lost. By definition, members of Class B are
3 IHSS recipients, as well as future IHSS recipients, who have
4 received or will receive notices of action that indicate that
5 their IHSS hours will be reduced by twenty percent based on SB 73
6 or Defendants' implementation of SB 73. Therefore, the injury is
7 common to all members of Class B.
8

9 Defendants assert that under Walmart v. Dukes, 131 S. Ct.
10 2541 (2011), Plaintiffs cannot show that members of Class B
11 suffered the same injury. This case is readily distinguishable
12 from Dukes. There, the Supreme Court had to determine whether a
13 common practice of discrimination existed under the employers'
14 policy that gave discretion to managers to select candidates for
15 promotion. Here, there is no question that SB 73 institutes a
16 twenty percent reduction in IHSS hours for individuals who are not
17 exempt or pre-approved for an exception to the reduction. That
18 recipients may request restoration of the hours through the
19 Supplemental Care application process does not destroy the
20 commonality of the injury. Furthermore, the application process,
21 as evidenced by the worksheet and the ACL, does not afford
22 discretion to social workers to restore hours to recipients who do
23 not meet certain criteria related to their functional rankings.
24 Class litigation is a permissible method for Plaintiffs to seek a
25 resolution of the common questions regarding whether SB 73
26 violates the ADA, the Rehabilitation Act or the Medicaid Act and
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1 whether the notices comport with due process requirements. For
2 purposes of Class B, Plaintiffs have demonstrated commonality
3 under Federal Rule of Civil Procedure 23.

4 Finally, Defendants assert that any claims of Children
5 Subclass B are moot. According to Eileen Carroll, Deputy Director
6 of the Adult Programs Division of the California Department of
7 Social Services, all IHSS recipients who receive EPSDT services,
8 which includes all IHSS recipients under twenty-one years old, are
9 pre-approved for exemption from the reduction in services. The
10 Court, however, declines to find the claims of this subclass moot
11 because there is no indication that the EPSDT exemption is legally
12 binding on the counties by virtue of statutory or regulatory law,
13 or otherwise. Ms. Carroll's declaration was given for purposes of
14 litigation and does not appear to be binding on Defendants.
15

16 CONCLUSION

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18 Plaintiffs' motion for class certification and appointment of
19 class representatives and class counsel is granted. Docket No.
20 356. The claims and subclasses are certified as defined above.
21 The class representatives and class counsel identified above are
22 appointed.

23 Class A is certified as of October 19, 2009, when this Court
24 granted Plaintiffs' motion for preliminary injunction as to ABX4 4
25 reductions to IHSS. Class B is certified as of December 1, 2011,
26 when this Court granted Plaintiffs' motion for a temporary
27

1 restraining order as to the reductions in IHSS services imposed by
2 SB 73.

3 These classes are certified to pursue Plaintiffs' First
4 through Eighth Claims for injunctive and declaratory relief under
5 the due process clause of the United States Constitution, the
6 Medicaid Act, and the ADA, and § 504 of the Rehabilitation Act.

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8 IT IS SO ORDERED.

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10 Dated: 3/2/2012

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12 _____
13 CLAUDIA WILKEN
14 United States District Judge

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United States District Court
For the Northern District of California