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9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 OAKLAND DIVISION

13
 14 **DAVID OSTER, et al.,**

15 Plaintiffs,

16 v.

17 **WILL LIGHTBOURNE, Director of the**
 18 **California Department of Social Services,**
 19 **TOBY DOUGLAS, Director of the**
 20 **California Department of Health Care**
 21 **Services; CALIFORNIA DEPARTMENT**
 22 **OF HEALTH CARE SERVICES; and**
 23 **CALIFORNIA DEPARTMENT OF**
 24 **SOCIAL SERVICES,**

25 Defendants.

CV 09-4668 CW

**DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' MOTION FOR CLASS
 CERTIFICATION**

Date: January 19, 2012
 Time: 2:00 p.m.
 Judge: The Honorable Claudia Wilken

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INTRODUCTION

Because all recipients of In-Home Supportive Services (IHSS) potentially subject to reduced IHSS hours under Senate Bill 73’s “trigger cuts” are entitled to two independent determinations as to whether they may be subject to any reduction in their IHSS hours, many will likely qualify to avoid any reduction in hours, and four of the named plaintiffs are categorically exempt from the reductions, plaintiffs fail to and cannot meet the requirements for certification of their proposed classes relating to these reductions. And for the same reasons the parties agreed to a stay of litigation concerning earlier changes to the IHSS program, the court should defer consideration of plaintiffs’ proposed classes relating to Assembly Bill X4 4 until the appeal from this court’s first preliminary injunction is decided.

Facing a further deepening budget crisis, the California Legislature in Senate Bill 73 (SB 73) enacted a series of fiscally essential “trigger cuts” in the event that state revenues did not meet projected levels by December 2011. As these revenue projections were not met, a 20% reduction to IHSS recipient’s hours pursuant to this Legislation was scheduled to go into effect January 1, 2011, now temporarily restrained by this court’s order.

In enacting the reductions, the Legislature included provisions to ensure that the cuts are incurred only by those IHSS recipients who will not face a serious risk of out-of-home placement as a result. The most vulnerable recipients are exempted from the reductions, all other recipients are provided with an opportunity for an individualized administrative process and separate state hearing to determine whether a reduction in hours would place the recipient at serious risk of out-of-home placement before the cuts go into effect.

The individualized administrative process afforded to every affected IHSS recipient distinguishes this matter with respect to class certification, as well as on the merits, from prior IHSS limitations considered by this court. Because the State has created robust administrative remedies for *all* affected IHSS recipients, both the SB 73 putative class representatives and the putative class members do not have a ripe claim until they have exhausted their administrative remedies. No class may be certified when its representatives do not have standing.

Accordingly, the court should deny Plaintiffs’ Motion for Class Certification.

1 **FACTUAL BACKGROUND**

2 **I. SB 73¹**

3 In the summer of 2011, the California Legislature passed—and the Governor signed—SB
4 73. That legislation provided that if certain revenue targets were not met, the California
5 Department of Social Services (the Department) “shall implement a 20-percent reduction in
6 authorized hours of service” for In Home Support Services (IHSS) recipients. Cal. Welf. & Inst.
7 Code § 12301.07(a)(1). However, the statute provides for numerous measures to exempt from the
8 hours reduction IHSS recipients who would be at “at serious risk of out-of-home placement
9 unless all or part of the reduction is restored.” *Id.* at §§ 12301.07(a)(5), (b)(1), (e), (f).

10 **A. Certain IHSS Recipients are Exempt from the Hours Reduction**

11 First, the statute expressly exempts all IHSS recipients who also receive services under one
12 of the State’s Home and Community Based Services Waivers, which includes the: (1) AIDS
13 waiver; (2) Home and Community Based Services for the Developmentally Disabled waiver; (3)
14 In-Home Operations waiver; (4) Multipurpose Senior Services Program waiver; and (5) and the
15 Nursing Facility/Acute Hospital waiver. Cal. Welf. & Inst. Code at § 12301.07(a)(5). Over
16 42,000 IHSS recipients are on one of these waivers and therefore are statutorily exempt from this
17 reduction in IHSS service hours. Carroll Decl. at ¶ 5.

18 Second, the statute instructs that “[t]he department shall work with counties to develop a
19 process to allow for counties to preapprove IHSS Care Supplements.” Cal. Welf. & Inst. Code
20 § 12301.07(b). As described in greater detail below, IHSS Supplemental Care is an
21 individualized process which allows counties to partially or fully restore IHSS hours to recipients
22 who would be at serious risk of out-of-home placement. Carroll Decl., Ex. A, p. 7. The
23 preapproval process allows counties to exempt from the hours reduction IHSS recipients who
24 “would be categorically at serious risk of out-of-home placement as a result of the reduction and
25 who otherwise would be granted full restoration of their reduced hours.” Carroll Decl., Ex. A, p.5.

26
27 ¹ Because the Court is already familiar with the ABX4 4 cuts, Defendants will not
28 reiterate that factual background here.

1 Similar to IHSS recipients on waivers, the pre-approval process exempts IHSS recipients from
2 any reduction in hours without any action being required on the part of qualifying recipients. *Id.*

3 After consultation with the counties and with stakeholders,² the Department initially agreed
4 to pre-approve for exemption all IHSS recipients who are: (1) assessed for the statutory maximum
5 number of hours; (2) assessed for protective supervision; or (3) assessed with a functional rank of
6 5 in any one of four categories involving essential daily functions.³ Carroll Decl., Ex. A, p. 5.

7 The Department has subsequently added a fourth pre-approval category: all IHSS recipients who
8 also receive Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services. Carroll
9 Decl. at ¶ 8. These are IHSS recipients under the age of 21. *Id.* Therefore, approximately 66,000
10 IHSS recipients—roughly 15%—are completely exempt from the hours reduction because they
11 are on a waiver or they meet one of the pre-approval criteria. *Id.* These IHSS recipients will
12 receive a letter saying “you are exempt from this reduction” and “[y]our authorized hours will
13 NOT be reduced.” Carroll Decl., Ex. A, p. 19.

14 **B. Notices of Action for Affected IHSS Recipients**

15 All remaining IHSS recipients (i.e. those not on a waiver or pre-approved) are required by
16 statute to be mailed a notice informing them of the reduction at least 15 days prior to the
17 reduction going into effect. Cal. Welf. & Inst. Code § 12301.07(c). Among other required
18 information, the notice must explain “[h]ow all or part of the reduction may be restored if
19 the recipient believes he or she will be at serious risk of out-of-home placement as a consequence
20 of the reduction.” *Id.* at § 12301.07(c)(3). Every affected IHSS recipient can seek to have his or
21 her hours restored. *Id.*; see also Carroll Decl. at ¶ 9.

22 The notice explains that the recipient may fill out the enclosed IHSS Supplemental Care
23 Application if he or she believes that the 20-percent reduction places him or her at serious risk of
24 out-of home placement. Carroll Decl., Ex. A, p. 13. The notice further explains that the recipient

25 ² The Department sent a draft All County letter (ACL) to all interested stakeholders,
26 including organizational plaintiffs, four weeks before the final ACL was issued. Carroll Decl. at
27 ¶ 6.

28 ³ These categories are: (1) Inside Mobility; (2) Bowel, Bladder and Menstrual or having
authorized Paramedical Services for catheter or coloscopy care; (3) Transfer or authorized
Paramedical Services for bed sore care; and (5) Eating.

1 “will continue to get the same number of authorized service hours” if he or she submits the
2 Supplemental Care Application within 15 days of receiving the notice. *Id.* The notice also
3 informs the recipient how to seek a fair hearing from the State if he or she disagrees with the
4 county’s determination on the Supplemental Care application. *Id.* A “Right to Request a State
5 Hearing” explanation form is enclosed with the notice. *Id.* at p. 14.

6 **C. Supplemental Care Applications**

7 Counties assess Supplemental Care applications using a Supplemental Care worksheet
8 provided by the Department. Carroll Decl., Ex. A, p. 20. The worksheet was designed to identify
9 recipients who based on IHSS existing assessment data were the most likely to qualify for
10 admission to a skilled nursing facility—either because of a physical or a cognitive impairment—
11 such that the loss of any IHSS hours could render them at serious risk for out-of-home placement.
12 Carroll Decl. at ¶ 10. The worksheet utilizes objective indicia from a recipient’s case file,
13 including functional ranks in certain categories, to assist the county social worker in determining
14 whether the recipient has physical or cognitive impairments which put him or her at serious risk
15 of out-of-home placement with reduced hours. Carroll Decl., Ex. A, p. 20.

16 Although the Supplemental Care worksheet uses functional ranks to guide the assessment,
17 those ranks serve as a floor, not a ceiling, for determining whether an applicant is at serious risk
18 of out-of-home placement. Carroll Decl. at ¶ 11. If the functional rank criteria are met, the social
19 worker must presume that the candidate is at serious risk of out-of-home placement and restore
20 some or all of the authorized hours unless the social worker is satisfied that either: (1) re-
21 arranging the applicant’s existing hours, or (2) finding an alternative resource to provide the
22 necessary service, will eliminate the serious risk. *Id.*; see also Carroll Decl., Ex. A, p. 20.
23 Conversely, if the functional rank criteria are not met, the county social worker still retains the
24 discretion to restore some or all the hours if the worker believes that a reduction in hours would
25 cause a serious risk of out-of-home placement. Carroll Decl. at ¶ 11. After completing the
26 worksheet, the county social worker’s mandate is to take “steps to alleviate any serious risk of
27 out-of-home placement.” Carroll Decl., Ex. A, p. 8.
28

1 ABX4 4 should be stayed pending resolution of the preliminary injunction appeal, and plaintiffs
2 lifted the stay for the sole purpose of allowing them to pursue new claims concerning SB 73's
3 trigger cuts. The Court should not consider certification of the ABX4 4 classes at this time.

4
5 **A. Impending Ninth Circuit and Supreme Court Rulings Will Likely Impact
the ABX4 4 Putative Classes**

6 The "rigorous analysis" the district court must undertake in considering certification of
7 plaintiffs' proposed "Class A" and related subclasses necessarily will entail overlap with the
8 merits of the plaintiffs' underlying claim. *Wal-Mart Stores, Inc. v. Dukes*, --- U.S. ---, 131 S. Ct.
9 2541, 2551 (2011). Plaintiffs' "Class A," "Loss of Domestic and Related Services Subclass A,"
10 and "Children Subclass A" are classes of IHSS recipients whose IHSS services would be limited
11 or terminated, or who would be ineligible for IHSS, under the provisions of ABX4 4. On October
12 23, 2009, this Court issued a Preliminary Injunction enjoining Defendants from implementing any
13 changes to the IHSS program pursuant to ABX4 4. *See* Docket No. 198. In its Preliminary
14 Injunction Order, the Court ruled on the merits of Plaintiffs' Medicaid Act, ADA/RA, and
15 constitutional Due Process claims. *Id.*

16 Defendants appealed that Order, challenging the viability of each of Plaintiffs' substantive
17 claims. *See* Ninth Circuit Case No. 09-17581, Docket No. 7178639 (Dec. 29, 2009). The Ninth
18 Circuit specifically asked for supplemental briefing on whether the named plaintiffs and the
19 association plaintiffs have standing to pursue their Due Process, Medicaid Act, ADA and RA
20 claims. *See* Appellate Docket Nos. 68, 73-1, 75-1, 76. The appeal has been fully briefed and
21 argued before the Ninth Circuit. However, the Ninth Circuit withdrew submission and deferred
22 the case pending the United States Supreme Court's decision in the consolidated appeals *Douglas*
23 *v. Indep. Living Ctr. of S. Cal., et al.*, No. 09-958 *et al.*, which address whether Medicaid
24 recipients and providers may maintain a cause of action under the Supremacy Clause to enforce
25 sections of the Medicaid Act that are not privately enforceable. *See* Docket No. 311. A decision
26 by the Supreme Court is anticipated within the next few months.

27 Plaintiffs' standing and the merits of their substantive claims in these appeals are
28 intrinsically intertwined with the class certification analysis on many levels. For example, the

1 named plaintiffs must have standing in their own right to serve as representatives of putative class
2 members. If the Ninth Circuit determines that the named plaintiffs lack standing as to any or all
3 of their ABX4 4 claims, certification of plaintiffs' Class A and its subclasses would be foreclosed
4 as to those claims. See *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir.
5 2003) ("If the individual plaintiff lacks standing, the court need never reach the class action
6 issue." (quoting 3 Herbert B. Newberg on Class Actions § 3:19, at 400 (4th ed. 2002))); *Davis v.*
7 *Fed. Election Comm'n*, --- U.S. ---, 128 S.Ct. 2759, 2769 (2008) (internal citations and
8 quotations omitted) ("Standing is not dispensed in gross. Rather, a plaintiff must demonstrate
9 standing for each claim he seeks to press and for each form of relief that is sought.")

10 Additionally, the Ninth Circuit's rulings regarding the merits of Plaintiffs' Medicaid Act,
11 ADA, or due process claims also could impact the viability or scope of any class certification.
12 And if the Supreme Court determines that there is no cause of action under the Supremacy Clause,
13 Plaintiffs' "reasonable standards" and "sufficiency" claims under the Medicaid Act will
14 necessarily fail, and no class could be certified as to those causes of action.

15 Indeed, the parties recognized that deferring further litigation of plaintiffs' claims under
16 ABX4 4 was appropriate while the preliminary injunction appeal remained pending when they
17 previously stipulated to a stay of the action pending resolution of the appeal. In their stipulation,
18 the parties acknowledged that:

19 [T]here is a significant possibility that the Ninth Circuit's decision in the preliminary
20 injunction appeal could either eliminate the need for further litigation in this action or
significantly clarify and narrow the issues that would still need to be litigated; and

21 that it would be more efficient for the Court and the parties to stay all district
22 court proceedings except the Case Management Conference pending resolution of the
preliminary injunction appeal;

23 (Docket No. 304.) Pursuant to the parties' stipulation, the court agreed to a stay of the action. *Id.*

24 Plaintiffs' election to lift the stay to pursue new claims under SB 73 should not affect this
25 analysis that deferring further litigation concerning ABX4 4 pending resolution of the appeal is
26 appropriate. And in fact, Plaintiffs' Notice of Lifting of Stay expressly stated that they were
27 lifting the stay only to pursue these new claims under SB 73. Docket No. 319. Plaintiffs did not
28 purport to lift the stay to re-open litigation of issues under ABX4 4, or to seek class certification,

1 and the same rationale underlying the stay support deferring consideration of certification of the
2 proposed Class A until resolution of the preliminary injunction appeal. Implementation of
3 ABX4 4 remains suspended, in any event, until a final resolution of plaintiffs' claims. Cal. Welf.
4 & Inst. Code §§ 12309(i) & 12309.2(e).

5 For these reasons above, the Court should defer considering if the ABX4 4 classes should
6 be certified until after the Ninth Circuit issues a ruling on the preliminary injunction appeal.

7 **II. PLAINTIFFS LACK ARTICLE III STANDING TO CHALLENGE THE SB 73 CUTS**

8 **A. Class B Plaintiffs' Claims are Not Ripe for Adjudication**

9 Because every single IHSS recipient subject to a reduction of hours may seek restoration of
10 those hours from both the county and from the State through an individualized administrative
11 review process while receiving aid-paid pending, Plaintiffs' claims are not ripe for adjudication.
12 Accordingly, none of the SB 73 putative classes may be certified.

13 The Supreme Court has outlined three standing requirements which form the "irreducible
14 constitutional minimum of standing:" (1) the plaintiff must have suffered an injury in fact, which
15 is an invasion of a legally protected interest which is (a) concrete and particularized, and (b)
16 actual or imminent; (2) there must be a causal connection between the injury and the conduct
17 complained of such that the alleged injury is fairly traceable to the challenged conduct; and (3) it
18 must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of*
19 *Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992). Imminence requires the injury to be
20 "certainly impending" in order to "reduce the possibility of deciding a case in which no injury
21 would have occurred at all." *Id.* at 564 n.2. Moreover, "[s]tanding is not dispensed in gross.
22 Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form
23 of relief that is sought." *Davis*, --- U.S. ---, 128 S.Ct. at, 2769 (2008) (internal citations and
24 quotations omitted).

25 Under the related doctrine of ripeness, "[a] claim is not ripe for adjudication if it rests upon
26 contingent future events that may not occur as anticipated, or indeed may not occur at all." *Bova*
27 *v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (quoting *Texas v. United States*, 523 U.S.
28 296, 300, 118 S.Ct. 1257 (1998)). "That is so because, if the contingent events do not occur, the

1 plaintiff likely will not have suffered an injury that is concrete and particularized enough to
2 establish the first element of standing.” *Id.* (citing *Lujan*, 504 U.S. at 560). As with standing,
3 ripeness is determined on a claim-by-claim basis. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S.
4 332, 352-53 (2006).

5 The SB 73 statutory scheme creates three distinct sub-groups of IHSS recipients: (1) IHSS
6 recipients who are categorically exempt from the IHSS hours reduction because they are on
7 waivers or fall within the pre-approval categories; (2) IHSS recipients who will receive a notice
8 of reduction in their IHSS hours but whose functional ranks alone qualify them as being at serious
9 risk of out-of-home placement and make them presumptively eligible for restoration of those
10 hours through the individualized Supplemental Care application process⁵; and (3) IHSS recipients
11 who will receive a notice of hours reduction and who do not qualify as being at serious risk of
12 out-of-home placement based on their functional ranks alone, but who can nevertheless seek a
13 partial or full restoration of their hours through the individualized “Supplemental Care”
14 application process. For partially overlapping reasons, all three sub-groups lack standing. They
15 are each addressed in turn.

16 **1. IHSS Recipients on Waivers or Who Meet Preapproval Criteria Lack**
17 **Standing Because They Will Not Have Their Hours Reduced**

18 Class B and Children Subclass B named plaintiffs Oster, C.R., L.C., and Jones are on
19 waivers or fall within one of the pre-approval categories, and therefore they would not be subject
20 to any reduction of IHSS hours. Carroll Decl. at ¶ 4. Plaintiffs Oster and Jones are on
21 developmental disability and AIDS waivers, respectively. See Carroll Decl. at ¶ 4. Plaintiff L.C.
22 is a minor who fall within the EPSDT pre-approval category. *Id.* IHSS recipients on waivers or
23 who meet the pre-approval criteria do not even fall within plaintiffs’ class definition because they
24 will actually receive a letter stating that they “are exempt from this [20%] reduction” and that

25 ⁵ As discussed above, for IHSS recipients who objectively meet the functional ranks
26 criteria on the Supplemental Care worksheet, unless the county social worker can either: (1) re-
27 arrange the IHSS recipient’s hours to eliminate the serious risk of institutionalization; or (2)
28 arrange for the recipient to receive services from an informal alternative resource, the social
worker must partially or fully restore the recipient’s hours. *Id.* at p. 8. The worker’s mandate is
to take “steps necessary to alleviate any serious risk of out-of-home placement.” *Id.*

1 their “authorized hours will NOT be reduced.” *See* Carroll Decl., Ex. A, p. 19. Because they will
 2 not have their IHSS hours reduced pursuant to SB 73, much less receive a notice to that effect,
 3 they will not suffer any injury and therefore lack Article III standing.

4 Plaintiff Oster acknowledges being exempt from SB 73’s hours reduction, but nevertheless
 5 asserts standing on account of his purported fear of *mistakenly* receiving a Notice of Action
 6 stating that he will be subject to a 20% IHSS hours reduction. *See* Oster Decl. at ¶ 7. Subjective
 7 fear that a bureaucratic error might occur—and that this hypothetical bureaucratic error would
 8 cause injury—is far too speculative to confer Article III standing. *See Bova*, 564 F.3d at 1096
 9 (“[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur
 10 as anticipated, or indeed may not occur at all.”) IHSS recipients who will be exempt from the SB
 11 73’s IHSS hours reduction cannot demonstrate injury-in-fact, and therefore cannot serve as class
 12 representatives or otherwise be a part of Class B.

13 **2. Over 100,000 Putative Class Members Lack Standing Because They**
 14 **Qualify as Being at Serious Risk of Out-of-Home Placement Based on**
 15 **Functional Ranks Alone**

16 Plaintiffs have defined Class B as “[a]ll recipients of IHSS in the State of California who
 17 have received or will receive notices of action that include a reduction of IHSS hours based on SB
 18 73 or Defendants’ implementation of SB 73 [including future applicants for IHSS services.”
 19 Plaintiffs’ Motion for Class Certification at p. 14. This putative class is fatally overbroad because
 20 a significant portion of the putative class will not suffer any injury. “[N]o class may be certified
 21 that contains members lacking Article III standing The class must therefore be defined in
 22 such a way that anyone within it would have standing.” *Sanders v. Apple Inc.*, 672 F. Supp. 2d
 23 978, 991 (N.D. Cal. 2009) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir.
 24 2006)); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612-13, 117 S. Ct. 2231, 2244
 25 (1997) (Supreme Court was “mindful that Rule 23’s requirements must be interpreted in keeping
 with Article III constraints.”)

26 This putative class is fatally overbroad because, at a minimum, over 100,000 putative class
 27 members have functional ranks which qualify them as being at serious risk of out-of-home
 28 placement, thus making them presumptively eligible for restoration of those hours through the

1 Supplemental Care application process. Carroll Decl., Ex. A, p. 20. Plaintiffs have
2 acknowledged this as well. *See* Keeslar Decl. at ¶ 16. Most putative class members who fall
3 within this slice of the putative class would successfully have their hours restored if they seek
4 supplemental care, and therefore they lack Article III standing. Although this portion of the
5 putative class would receive a notice that their IHSS hours will be reduced (thus bringing them
6 within plaintiffs’ class definition), as a significant number of these recipients are likely to have
7 their hours restored if they request supplemental care, the threat of actual injury is too speculative
8 and remote to support Article III standing.

9 Therefore, because roughly 30% of the putative class is highly likely to have their IHSS
10 hours restored if they seek supplemental care, the putative class cannot be certified because these
11 putative class members lack Article III standing since the “contingent” event of an actual hours
12 reduction is too remote. *Lujan*, 504 U.S. at 560. This fact defeats class certification. *Sanders*,
13 672 F. Supp. 2d at 991 (“The class must therefore be defined in such a way that anyone within it
14 would have standing.”).

15 **3. IHSS Recipients Subject to Potential Reductions under AB 73 Can**
16 **Still Have Their Hours Restored and Lack a Ripe Claim Until They**
17 **Exhaust Administrative Remedies**

18 As discussed above, roughly 66,000 IHSS recipients will be exempt from the IHSS
19 authorized hours reduction from the start. Carroll Decl. at ¶ 8. Another 100,000 plus will not be
20 exempt at the onset, but will qualify as being at serious risk of out-of-home placement and
21 therefore be presumptively eligible for restoration of their hours if they seek supplemental care.
22 *Id.*

23 But critically, California has afforded all recipients subject to a potential reduction in hours
24 an opportunity to have their hours restored through the individualized Supplemental Care
25 application process if they demonstrate that they would be at serious risk of out-of-home
26 placement. Cal. Welf. & Inst. Code § 12301.07(c)(3). They are entitled to seek restoration of
27 their hours first from the county, and then from the State. *Id.* at § 12301.07(f). Both the county
28 and the state may consider all factors which are relevant to the determination of whether or not
the recipient would be at risk of out-of-home placement if his or her hours are reduced. Carroll

1 Decl. at ¶¶ 11, 14. Given this individualized administrative review process at both the county and
2 the state level, IHSS recipients must exhaust their administrative remedies before they have a ripe
3 claim that this Court can consider.

4 Until putative class members have exhausted the individualized administrative remedy
5 afforded to them without success in restoring their IHSS hours, their claims are unripe and they
6 lack Article III standing. *J.L. v. Social Sec. Admin.* 971 F.2d 260, 268 (9th Cir. 1992)
7 *disapproved on other grounds by Lane v. Pena*, 518 U.S. 187 (1996). Many putative class
8 members will in fact seek and receive Supplemental Care, and the State is entitled to adjudicate
9 the merits of each IHSS recipient's claims in the administrative forum it created.

10 **III. THE COURT SHOULD NOT CERTIFY THE SB 73 CLASSES**

11 **A. Children Subclass B is Now Moot**

12 As discussed above, Defendants are exempting all EPSDT IHSS recipients from the 20%
13 reduction through the pre-approval process with the counties. Carroll Decl. at ¶ 8. IHSS
14 recipients who are under 21 and who are not already covered by one of the waivers or pre-
15 approval criteria will be exempted and will not incur any hours reduction. *Id.* Accordingly, these
16 putative class members lack standing, and the Court should not certify this subclass.

17 **B. Class B Lacks Commonality**

18 If the court reaches the class certification analysis, it should decline to certify Class B
19 because, as defined, that putative class lacks both commonality and typicality.

20 As a threshold matter, plaintiffs must demonstrate that an identifiable and ascertainable
21 class exists. *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009). "An implied
22 prerequisite to certification is that the class must be sufficiently definite." *Id.*, citing *Whiteway v.*
23 *FedEx Kinko's Office & Print Servs., Inc.*, 2006 WL 2642528, at *3 (N.D. Cal. 2006). "A class
24 definition should be precise, objective, and presently ascertainable," though "the class need not
25 be so ascertainable that every potential member can be identified at the commencement of the
26 action." *Mazur*, 257 F.R.D. at 567, citing *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319
27 (C.D. Cal. 1998). Plaintiffs define Class B as:

1 All recipients of IHSS in the State of California who have received or will receive
2 notices of action that include a reduction of IHSS hours based on SB 73 or
3 Defendants' implementation of SB 73, including future applicants for IHSS services
4 whose notice of action will reflect reduced IHSS hours as a result of SB 73 or
5 Defendants' implementation of SB 73.

6 Although theoretically all recipients who receive a notice of action pursuant to SB 73 are
7 identifiable, that is not legally significant. Merely receiving a notice does not constitute a
8 redressable injury. It is only after the recipient pursues the Supplemental Care process, the fair
9 hearing process, and presumably all rights under Code of Civil Procedure section 1094.5, that it
10 can be determined whether a recipient's IHSS hours will be reduced, and then the inquiry
11 becomes whether the reduction will result in an out-of-home placement which arguably which
12 would constitute a violation of the ADA.. If there are a group of recipients who will not
13 understand the notices as plaintiffs' allege such that there is a violation of due process, plaintiffs
14 have not shown that such a class could be ascertainable. Therefore, given the circumstances,
15 plaintiffs have failed to demonstrate that an "identifiable and ascertainable" class exists.

16 In additional to determining whether plaintiffs have demonstrated that an ascertainable
17 class exists, a court's "task is to ascertain whether the proposed . . . class satisfies the
18 requirements of Rule 23(a) *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).
19 Rule 23(a) imposes four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4)
20 adequate representation. Fed. R. Civ. P. 23(a). Certification is proper only if "the trial court is
21 satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-*
22 *Mart v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotations omitted). "[A]ctual, not
23 presumed, conformance with Rule 23(a) remains . . . indispensable". *Id.* (internal citations
24 omitted). *Wal-Mart*, 131 S. Ct. at 2551.

25 The Supreme Court has recently clarified the commonality requirement under Rule
26 23(a)(2). *Wal-Mart*, 131 S. Ct. at 2551. The Court opined that commonality is *not* satisfied by
27 merely raising common questions such as (in that case) "[d]o all of us plaintiffs indeed work for
28 Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment
practice? What remedies should we get?" *Id.* Merely, reciting such questions "is not sufficient to
obtain class certification." *Id.* Rather, certification could only be granted where "the class

1 members have suffered *the same injury*,” which “does not mean merely that they [the class
2 members] have all suffered a violation of the same provision of law.” *Id.* (emphasis added).
3 Instead, there must be a common contention which can “generate common *answers* apt to drive
4 the resolution of the litigation.” *Id.*; see also *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981
5 (9th Cir. 2011). “Dissimilarities within the proposed class...have the potential to impede the
6 generation of common answers.” *Id.* (internal citations omitted).

7 Commonality can be established when all putative class members suffer the same injury,
8 even if the extent of that injury varies based on the factual circumstances of the individual class
9 members. But that is not the situation here. In this case, many putative class members will suffer
10 no injury at all, which is completely different than experiencing the same injury differently based
11 on individual factual circumstances. For the reasons discussed above, a substantial percentage of
12 the putative class—at a minimum those IHSS recipients who are exempt from the reduction or
13 whose functional ranks are sufficiently high that they are presumptively entitled to hours
14 restoration—will suffer no injury whatsoever.⁶

15 But more fundamentally, the individualized administrative review process available for
16 IHSS recipients affected by SB 73 destroys commonality. These class representatives may or
17 may not seek Supplemental Care. They may or may not convince the county social worker to
18 restore their hours. They may or may not seek a fair hearing. If they do seek a fair hearing, they
19 may or may not succeed in having their hours restored at that stage. But these are all issues that
20 will be *determined* individually by affected IHSS recipients. Such potential dissimilarities on
21 account of the individual determinations which must be made defeat commonality. Beyond
22 receiving an initial paper notice of the possibility of a reduction in IHSS hours, there is no
23 common “glue” binding all the putative class members.

24
25
26
27 ⁶ Plaintiffs claim that “all” Class B members will have their IHSS services reduced.
28 Plaintiffs’ Motion for Class Certification, p. 7. But unless Plaintiffs contend that not a single
IHSS recipient will timely seek and receive supplemental care, this claim cannot be accurate.

1 **C. Plaintiffs Have Failed to Demonstrate that Named Plaintiffs' Claims Are**
2 **Typical of the Claims of the Putative Class B Members**

3 Plaintiffs also fail to establish typicality. Rule 23(a)(3) requires that "the claims or defenses
4 of the representative parties be typical of the claims or defenses of the class." Fed. R. Civ. P.
5 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named
6 representatives aligns with the interests of the class." *Colapinto v. Esquire Deposition Services,*
7 *LLC*, 2011 WL 913251 *6 (E.D. Cal. March 8, 2011), citing *Weinberger v. Thornton*, 114 F.R.D.
8 599, 603 (S.D. Cal. 1986). Typicality tests whether the other members "have the same or similar
9 injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
10 whether other class members have been injured by the same course of conduct." *Hanon v.*
11 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). In order to adequately represent the
12 proposed class, Plaintiffs "must be part of the class and 'possess the *same interest* and suffer the
13 *same injury*' as the class members." *Amchem Prods.*, 521 U.S. at 625-26 (emphasis added).

14 Plaintiffs have failed to demonstrate that the facts and legal issues between the named
15 Plaintiffs and class members are typical. Given the Class B definition, four of the named
16 plaintiffs Oster, Jones, C.R. and L.C. are not members of the putative class, and therefore, cannot
17 be representative class members. None of them receive will "notices of action that include a
18 reduction of IHSS hours based on SB 73," and therefore, their claims, whatever they may be
19 cannot be "typical" given the class definition. Carroll Decl. at ¶¶ 4, 8.

20 As for the remaining four named plaintiffs, it is not clear if they would be typical of
21 members of an identifiable and ascertainable class. Plaintiffs have submitted no evidence at all
22 about named plaintiff Sheppard.⁷ As to the three remaining named plaintiffs, Hylton, Stern and
23 Thurman, it is again unclear whether their claims would be typical of an ascertainable class.
24 They may or may not understand the notices they receive and avail themselves of the
25 Supplemental Care or state fair hearing process. *See* Hylton, Stern and C. Thurman Decls. They

26 _____
27 ⁷ Plaintiffs submitted Ms. Sheppard's declaration in this case two years ago, but they have
28 not submitted any evidence regarding her current situation, and so therefore, plaintiffs fail to
demonstrate if her claims are typical of the claims of the putative class.

1 may choose not to apply for supplemental care or if they do, they may not pursue a state fair
2 hearing. But, even if they do, these processes are highly individualized, and by definition the
3 recipients cannot be members of an identifiable class, let alone typical of the members of any
4 class.

5 **CONCLUSION**

6 Plaintiffs have utterly failed to identify an ascertainable class, that the putative class has
7 common claims, or demonstrated how the potential claims of the named plaintiffs would be
8 typical of a putative class. Under these circumstances, plaintiffs’ motion for class certification
9 should be denied.

10
11 Dated: December 15, 2011

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