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

DAVID OSTER, *et al.*,

Plaintiffs

v.

WILL LIGHTBOURNE, *et al.*,

Defendants

Case No.: CV 09-04668 CW

CLASS ACTION

REPLY IN SUPPORT OF PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION

Date: January 19, 2012
Time: 2 :00 pm
Place: Courtroom 2
Judge: Hon. Claudia Wilken

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INTRODUCTION

1
2 Plaintiffs’ motion for class certification with respect to both Class A and Class B should be
3 granted because Plaintiffs meet all the requirements for class certification set forth in Federal Rule of
4 Civil Procedure 23, as set forth in Plaintiffs’ opening brief. Defendants do not contend that Class A
5 fails to meet any of the Rule 23 requirements, and similarly do not contend that Class B fails to meet
6 the requirements of Rule 23(a)(1) (numerosity), Rule 23(a)(4) (adequacy), or Rule 23(b)(2)
7 (defendant has acted on grounds generally applicable to class making injunctive relief appropriate
8 with respect to class as a whole). Indeed Defendants’ brief devotes a scant three pages to discussion
9 of Rule 23.

10 Rather, Defendants’ opposition to class certification is based almost entirely on their
11 erroneous argument that Plaintiffs’ claims are not ripe, because IHSS recipients who will receive a
12 defective notice reducing their IHSS hours effective on a date certain might theoretically have those
13 hours restored if they understand the deficient notice, timely apply for Supplemental Care, meet the
14 functional ranks eligibility criteria for Supplemental Care, and receive full hours restoration. As
15 discussed below, Plaintiffs’ claims are now ripe, because they will receive a notice reducing their
16 hours now; the theoretical possibility of hours restoration at some later date does not change this
17 result. Moreover, Defendants’ ripeness argument is totally inapplicable to Named Plaintiffs Stern,
18 Thurman, and Hylton, and over 200,000 similarly situated class members, whose functional ranks
19 make them categorically ineligible for Supplemental Care, unless one accepts a for-litigation-only
20 interpretation of All-County Letter (“ACL”) 11-81, issued by Defendant California Department of
21 Social Services (“CDSS”) (Carroll Decl., Ex. A). Totally contrary to the actual language of the ACL
22 and its interpretation by county officials responsible for implementing it, a CDSS official now states
23 that functional ranks do not limit eligibility for supplemental care. Defendants’ Opposition to Class
24 Certification (“Opp.”) at 4. As discussed below, such a litigation-inspired change, without any
25 guarantee that it will remain in effect, does not make Plaintiffs’ claims unripe or moot.

ADDITIONAL FACTUAL BACKGROUND**A. SB 73**

SB 73 reduces IHSS recipients' hours by 20 percent effective January 1, 2012, except for specified exemptions. Cal. Welf. & Inst. Code §12301.07(a).¹ At the time Plaintiffs filed the TRO application and motion for class certification, it was a virtual certainty that this hours reduction would be triggered by shortfalls in state revenues. TRO Br. (Dkt. 329) 8:5-10. On December 13, 2011, the California Department of Finance issued its 2011-2012 revenue forecast and made it official that the hours cuts would take effect if not enjoined by this Court.²

SB 73 also established a new program called the IHSS Care Supplement and authorized individuals at "serious risk of out-of-home placement" to apply for that program. Cal. Welf. & Inst. Code §12301.07(f). It authorized the California Department of Social Services ("CDSS") to implement the new program through all-county letters or similar instructions. *Id.*, §12301.07(g)(1).

B. CDSS Procedures to Implement SB 73

CDSS has reprogrammed the software that manages its complex IHSS database, known as Case Management Information and Payrolling Systems ("CMIPS"), to implement the 20 percent reduction. Carroll Decl. (Dkt. 439-1) ¶4; Carroll Decl., Ex. A (Dkt. 439-2) at 3.³ This reprogramming is complex and takes weeks to complete. Petty Decl. (Dkt. 171) ¶6. The next implementation step is a "state-wide mass system update" to CMIPS (Kaljian Decl. (Dkt. 186) ¶2), whereby hundreds of thousands of recipient and provider computer files are modified automatically by the re-programmed software. Petty Decl. (Dkt. 171) ¶7. CDSS had planned to implement the programming changes through a system update on December 1, 2011, but implementation was enjoined by this Court. 5th Bird Decl. (Dkt. 331) ¶10; TRO (Dkt. 417).

The CMIPS software changes generate the written notices of action, which are then printed.

¹ Children under 21 are not among those specifically exempted. *Id.*, §12301.07(a)(5).

² That report can be found on the Department of Finance website and can be judicially noticed. *See* http://www.dof.ca.gov/documents/2012_Rev_Forecast_Determination.pdf.

³ ACL 11-81 has been filed as Exhibit A to the Carroll Declaration (Dkt. 439-2) and Exhibit 6 to Plaintiffs' Third Request for Judicial Notice (Dkt. 335-6). In this brief, Plaintiffs cite the exhibit to the Carroll Declaration.

1 Carroll Decl., Ex. A (Dkt. 439-2) at 8-9. Mailing the notices of action is the last step in the multi-
2 step process of implementing a system-wide reduction in IHSS hours; by the time it is sent, the
3 reductions have been implemented and will occur automatically. *See, e.g.,* Brown Decl. (Dkt. 170)
4 ¶3 (in 2009, court enjoined mailing of notices of action but “the implementation of the reductions
5 and termination under ABX4 4 effective November 1, 2009 *had already occurred on the IHSS*
6 *computer system, CMIPS*”) (emphasis added).

7 Once recipient and provider files are centrally modified using the reprogrammed CMIPS
8 software, the change in IHSS hours will automatically go into effect unless a county IHSS worker
9 calls up the recipient’s and provider’s CMIPS computer files and manually reverses the reductions.
10 Petty Decl. (Dkt. 171) ¶¶8, 13 (automated functionality to reverse changes does not exist, counties
11 must reenter information into CMIPS manually); 2009 Cert. of Compliance with Preliminary
12 Injunction (Dkt. 202-1) at 2 (same). The process of manually changing a recipient’s CMIPS file is
13 labor-intensive and time-consuming. Brown Decl. (Dkt. 170) ¶3 (CMIPS programming cannot
14 “easily be undone”); Callahan Decl. (Dkt. 184) ¶¶2-3 (manually modifying files of approximately
15 20% of Los Angeles County recipients in 2009 expected to take almost 10,000 hours); *also see*
16 Collins Decl. (Dkt. 185) ¶7 (2009); Kaljian Decl. (Dkt. 186) ¶5 (2009).

17 **C. ACL 11-81 and the Carroll Declaration**

18 On November 29, 2011, Defendants issued All County Letter 11-81 (“ACL 11-81”). Carroll
19 Decl., Ex. A (Dkt. 439-2). ACL 11-81 outlines the exemptions mandated by statute and individuals
20 pre-approved for Supplemental Care by CDSS; neither includes children under 21. *Id.* at 3, 5. The
21 ACL also establishes “a screening tool *to be used to counties to determine if a recipient is at serious*
22 *risk of out-of-home placement* as a consequence of the reduction in authorized hours.” *Id.* at 4
23 (emphasis added). Under the ACL, “[a]n individual *may* be considered to be at serious risk of out-
24 of-home placement if he/she, on the basis of his/her most recent assessment/reassessment, meets the
25 [specified minimum functional rank] criteria” *Id.* at 4 (emphasis in original).

26 The ACL instructs that, “[w]hen a completed application for IHSS Supplemental Care is
27 received, the county shall complete the IHSS Supplemental Care Worksheet” *Id.* at 6. That
28

1 Worksheet contains three sections: Sections A and B, under the heading “Serious Risk of Out-of-
 2 Home Placement,” and Section C, under the heading “IHSS Supplemental Care Request
 3 Disposition.” *Id.* at 20. Section A specifies minimum functional ranks in various physical activities
 4 of daily living, and instructs that “[t]hree (3) or more ‘YES’ responses for the following items
 5 indicate serious risk in this category.” *Id.* Section B specifies a minimum combined total of
 6 functional ranks for certain mental functions, and similarly instructs, “[a] ‘YES’ response...
 7 indicates serious risk in this category.” *Id.* The worksheet specifies that Section C, which describes
 8 how the risk can be addressed, shall be “[c]ompleted ... only if recipient/applicant is determined to
 9 be at serious risk.” *Id.* The ACL and associated documents provide no alternative guidance for
 10 assessing “serious risk of out-of-home placement” (as opposed to the risk faced by every IHSS
 11 recipient, who necessarily has been deemed to need all authorized services in order to remain safely
 12 at home) other than these specified functional ranks.⁴

13 County officials uniformly understood the ACL to instruct that functional ranks established
 14 the minimum eligibility criteria for IHSS Care Supplements, even though these officials did not
 15 support this manner of assessing eligibility.⁵ County social workers, who would be the ones filling
 16
 17

18 ⁴ The Worksheet provides no space for social workers to state any reasons a person is at risk
 19 of out-of-home placement other than functional ranks. A fundamental tenet of IHSS is that social
 20 workers must document the reasons for the actions they take. *See, e.g.,* DSS Manual of Policies and
 21 Procedures (RJN, Ex. H (Dkt. 18-8))§§30-761, 30-575.1(a)(6)(A)-(D); Figueroa Decl. (Dkt. 69) ¶6;
 D’Antonio Decl. (Dkt. 350) ¶3; Crockett Decl. (Dkt. 67) ¶7. Thus, it would be rather strange to
 establish a system for assessing serious risk, which determines eligibility for Care Supplements,
 without providing any opportunity for documentation of reasons.

22 ⁵ *See* Elliott Decl. (Dkt. 351) (San Francisco County) ¶14 (“[T]he ACL uses functional ranks
 23 to determine if clients are eligible for a Care Supplement”); 3rd Collins Decl. (Dkt. 344) (San Luis
 24 Obispo County) ¶¶22-32 (many consumers will not be eligible for Care Supplement even if apply
 25 due to ACL eligibility requirements, because functional ranks are too low); Cottrell Decl. (Dkt. 346)
 26 (Contra Costa County) ¶¶3-4 (ACL sets mandatory eligibility criteria for Care Supplements); 3rd
 27 Guerra Decl. (Dkt. 362) (Nevada-Sierra Counties) ¶¶7, 9 (CDSS plans to use functional ranks as an
 28 eligibility screening tool for Care Supplement); 3rd Kaljian Decl. (Dkt. 375) (Sonoma County) ¶¶15-
 16 (many clients at risk of out-of-home placement or health deterioration are not eligible for Care
 Supplements under ACL due to their low functional ranks); 2nd Hathaway Decl. (Dkt. 365) (Alpine
 County) ¶¶14,20 (consumers won’t qualify for Care Supplement due to low functional ranks even
 though need the assistance to prevent institutionalization); Smith Decl. (Dkt. 400) (Yolo County)
 ¶¶13-14 (only recipients with certain functional ranks qualify for the Care Supplement).

1 out the Supplemental Care Worksheet, understood it similarly.⁶

2 After the filing of this action and issuance of the TRO, Defendants reversed course in two
3 significant ways. First, according to a declaration filed in opposition to this motion, Defendants
4 have “recently decided” to pre-approve Care Supplements for all children under 21. Carroll Decl.
5 (Dkt. 439-1) second ¶8. Second, this same declaration now claims that the functional ranks specified
6 in the Care Supplement Worksheet “serve[] as a floor, not a ceiling,” in that they establish a
7 presumption of serious risk, but that county social workers “retain the discretion to exercise their
8 independent judgment” and may approve a Care Supplement even if the recipient’s scores do not
9 meet the minimum in the worksheet. Carroll Decl., ¶¶10-11. Defendants do not address or dispute
10 the record evidence that county officials believe otherwise, or the language of the ACL itself. *See*
11 *supra* at nn. 5-6.

12 **D. CDSS Estimates of Impact of SB 73**

13 Shortly after SB 73’s enactment, CDSS developed estimates of the impact of the reductions.
14 Keeslar Decl. (Dkt. 376-1), Ex. A at 2-3. CDSS projected that out of 411,144 IHSS recipients,
15 246,686 (60 percent) would be eligible for full or partial restoration of hours. CDSS also estimated
16 that 61,672 recipients (25 percent of the 246,886) would be eligible for the Care Supplement but
17 would *not* return the application. *Id.* at 3. Of those who would apply, 37,003 (9 percent) would be
18 found eligible for full restoration of hours, and the remainder would be eligible for partial
19 restoration. *Id.* at 3. Overall, CDSS estimated that approximately 226,000 recipients would not have
20 any hours restored. *Id.*

21 Subsequently, CDSS official Eileen Carroll estimated that 372,000 individuals would not be
22 automatically exempted or preapproved for Care Supplements, and so would receive notices of
23 action of the 20 percent reduction. Keeslar Decl. (Dkt. 376) ¶16. Of these, 112,000 would be
24

25
26 ⁶ *See* D’Antonio Decl. (Dkt. 350) ¶¶14-20 (many consumers will not qualify for Care
27 Supplement due to functional ranks); Izsadore Decl. (Dkt. 372) ¶¶15-16 (clients with mental
28 disabilities often do not have high enough ranks in personal care services to qualify for Care
Supplement).

1 eligible for Care Supplements, leaving 250,000 ineligible for partial or full hours restoration. *Id.*
 2 ¶16. In her declaration filed in opposition to class certification, Ms. Carroll provides similar
 3 estimates. Carroll Decl. (Dkt. 439-1) second ¶8. Defendants do not dispute Plaintiffs' estimates.

4 **E. Reinstatement of Reduced Hours**

5 If CDSS estimates are correct, approximately 189,000 recipients will apply for the new Care
 6 Supplement program (even though some of these individuals will not be eligible). Counties will
 7 "reinstatement the reduced hours" of recipients who apply within 15 days of receiving a reduction notice
 8 "pending its determination" of the Care Supplement application. Carroll Decl., Ex. A (ACL 11-81)
 9 (Dkt. 439-2) at 7. To accomplish this, counties will need to manually reverse the hours reductions
 10 for tens of thousands of recipients, just as they did in 2009 after this Court's issuance of a
 11 preliminary injunction. Given the numbers of recipients involved, it is "inevitabl[e]" that counties
 12 will not be able to manually restore hours for everyone before the next time sheets are mailed out.
 13 Cottrell Decl. (Dkt. 346) ¶15; 3rd Kaljian Decl. (Dkt. 375) ¶¶13, 21. Manually reversing reductions
 14 in thousands of CMIPS files is likely to "lead to a high rate of errors," so that "many IHSS recipients
 15 will be wrongfully cut off from benefits." Kaljian Decl. (Dkt. 186) ¶6; Collins Decl. (Dkt. 185) ¶8
 16 (same).

17 **ARGUMENT**

18 **I. THIS COURT SHOULD CERTIFY CLASS A RELATING TO THE ABX4 4 CUTS.**

19 There is no justification for Defendants' request that this Court defer ruling on certification
 20 of "Class A," challenging the service reductions and terminations effectuated by ABX 4-4.
 21 Deferring consideration of certification would confound judicial efficiency by forcing this Court to
 22 decide similar class certification issues twice, and would be contrary to recent Circuit authority
 23 holding that a class should be certified when class-wide preliminary injunctive relief is awarded.

24 Initially, Defendants put the cart before the horse when they argue that the class should not
 25 be certified because the Ninth Circuit might rule against Plaintiffs on the merits or on standing.⁷

26
 27 ⁷ In fact, Defendants' request that this Court defer ruling on class certification pending a
 28

1 Opp. 5-6. This Court has already found Plaintiffs likely to succeed on the merits and, implicitly, that
 2 Plaintiffs have standing; it need not assume that the Ninth Circuit will reverse these rulings. Dkt.
 3 198. At any rate, in order to certify the class, this Court need find only the presence of a common
 4 merits question capable of class-wide resolution, not that Plaintiffs' claims have merit. *See Wal-*
 5 *Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551-52 (2011). In some cases, the inquiries may
 6 overlap; for example, in *Dukes*, upon which Defendants rely, the Supreme Court had to decide
 7 whether Wal-Mart engaged in a common policy or practice of discrimination in order to determine
 8 commonality. *Id.* Here, by contrast, there is no dispute regarding the presence of a common policy
 9 or practice, and Defendants have not even alleged a similar intertwinement of merits and class
 10 certification issues.

11 Defendants are also incorrect that the previously operative stay is any bar to the certification
 12 of Class A. Opp. 7-8. The Stipulation and Order Granting Stay states that either party may lift the
 13 stay upon three days' written notice, which Plaintiffs provided on November 28, 2011. Dkt. 303 ¶3,
 14 319. The Stipulation does not provide for a partial or limited lifting of the stay. The fact that
 15 Plaintiffs explained *why* they were lifting the stay in no way limits the effectiveness of Plaintiffs'
 16 notice. The Third Amended Complaint, like the previous complaints, sets forth class allegations for
 17 Class A, and so a ruling on the filed class certification motion is appropriate.⁸

18 Further, the Ninth Circuit's recent ruling in *M.R. v. Dreyfus*, 2011 WL 6288173 (9th Cir
 19 2011) makes it clear that resolution of class certification now is warranted. In that case, the Ninth
 20 Circuit reversed a district court's refusal to enjoin reductions to Medicaid-funded personal care
 21 services challenged under the ADA, but refused to grant system-wide relief because the district court
 22

23
 24 potential adverse ruling by the Ninth Circuit is odd in light of an anticipated advantage to the
 25 Defendants in that circumstance: if a class is certified and this Court, or the Ninth Circuit, rules
 26 against Plaintiffs on the merits, that ruling will be binding on the whole class.

27 ⁸ The pendency of the preliminary injunction appeal also does not present any barrier to
 28 resolution of class certification. *See Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir.
 1982) (district court entered summary judgment for defendant while appeal from preliminary
 injunction was pending; "it is firmly established that an appeal from an interlocutory order does not
 divest the trial court of jurisdiction to continue with other phases of the case.").

1 had not ruled on class certification. Therefore, the Ninth Circuit granted injunctive relief to the
 2 named plaintiffs only, finding that, “without a properly certified class, a court cannot grant relief on
 3 a class-wide basis.” *M.R.*, 2011 WL 6288173 at *20 (citation omitted). To avoid any similar barrier
 4 to class-wide relief here, this Court should rule on certification of Class A.

5 Finally, Defendants have not even argued, much less shown, that Class A does not meet Rule
 6 23 requirements. Class A should be certified for all of the reasons set forth in our opening brief.

7 **II. PLAINTIFFS HAVE STANDING TO CHALLENGE THE SB 73 CUTS.**

8 **A. Class B Plaintiffs Have Standing To Pursue Their Claims, Which Are Ripe Now Despite**
 9 **the Potential Availability of Hours Restoration (For Some But Not All Plaintiffs) By**
 10 **Timely Applying For Supplemental Care.**

11 There is no merit to Defendants’ contention that Class B cannot be certified because
 12 Plaintiffs’ claims are not ripe.⁹ As Defendants acknowledge, “[a] claim is not ripe for adjudication
 13 if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at
 14 all.” *Opp.* 8 (quoting *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009)). “That is so
 15 because, if the contingent events do not occur, the plaintiff likely will not have suffered an injury
 16 that is concrete and particularized enough to establish the first element of standing.” *Id.* 8-9. (citing
 17 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

18 Defendants argue that Plaintiffs’ claims are not ripe because plaintiffs “may seek restoration
 19 of those hours” by applying for Supplemental Care. *Opp.* 8, 10-12. This is exactly backwards.
 20 Here, all class members will, by definition, have suffered the challenged injury, as the class is
 21 defined to include only those IHSS recipients “who have received or will receive notices of action
 22 that include a reduction of IHSS hours based on SB 73 or Defendants’ implementation of SB 73...”

23 ⁹ Although Defendants’ argument heading refers to standing, and Defendants cite to the
 24 standing requirements set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (*Opp.*
 25 at 8) the only “standing” argument they make is a ripeness argument. This is unsurprising, as they
 26 cannot otherwise challenge standing: “When the suit is one challenging the legality of government
 27 action... [and] the plaintiff is himself an object of the action...at issue..., there is ordinarily little
 28 question that the action...has caused him injury, and that a judgment preventing...the action will
 redress it.” *Id.* at 561-62. Here the class by definition includes only those IHSS recipients who are
 “an object of the action”—recipients who receive notices reducing their hours pursuant to SB 73.

1 Third Amended Complaint (Dkt. 431) ¶225. Defendants misunderstand their own administrative
2 practices when they argue that “[m]erely receiving a notice does not constitute redressable injury.”
3 Opp. 13. In fact, receipt of the notice means with absolute certainty that a recipient’s benefits have
4 already been reduced automatically through the centralized reprogramming of the CMIPS system.
5 *Supra*, Additional Factual Background (“Facts”),§B. This satisfies *Lujan* and *Bova*. The
6 “contingent future event that may not occur as anticipated” (*Bova*, 564 F.3d at 1096) is the
7 restoration of hours through the Supplemental Care process, *not* the hours reduction itself.¹⁰

8 For that reason, courts faced with similar ripeness arguments have rejected them. In *Pashby*
9 *v. Cansler*, 2011 WL 6130819, *4 (E.D.N.C. Dec. 8, 2011), for example, the named plaintiffs,
10 challenged the categorical elimination of eligibility for personal care services almost identical to
11 those at issue here, and had actually filed administrative appeals which had not yet been resolved.
12 The court rejected the state’s argument that their claims were thus not ripe and could not be certified
13 as a class. “The formal administrative decision that has been challenged here is Defendant’s
14 implementation of Policy 3E; Plaintiffs need not wait until the resolution of their administrative
15 appeals under the new policy to challenge legality of it.” *Pashby*, 2011 WL 6130819 at *4.

16 Moreover, as explained *infra* Section II.B.3, Named Plaintiffs Stern, Thurman, and Hylton
17 are categorically ineligible for restoration of hours through the Supplemental Care process, due to
18 their functional ranks. Thus, there can be no question that their claims (and those of all similarly
19 situated class members) are ripe now.

21 ¹⁰ For example, in *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996) a hearing impaired prisoner
22 requested a certified sign language interpreter for a hearing. The state offered to provide a
23 correctional officer who knew some sign language, but was not a certified interpreter. The prisoner
24 refused to attend the hearing. When the prisoner later brought suit under the ADA, the state argued
25 that his claim was not ripe because he had failed to attend the hearing, arguing that it “required the
26 Court to engage in a speculative inquiry of whether his rights under the ADA...would have been
27 violated had he attended the hearings.” *Id.* at 452. The Ninth Circuit rejected the state’s ripeness
28 argument, stating that “challenges to a governmental agency’s actions are ripe for review if the
issues presented are purely legal, and the challenged action is final.” *Id.* at 452-53. The Court of
Appeals specifically found that the prisoner had standing to raise his claim, because he had “alleged
actual harm from a decision already executed as to him” (*id.* at 453), despite defendant’s argument
that it could not be determined whether an ADA violation had occurred until the prisoner actually
attending the hearing without a certified interpreter.

1 Receipt of the notice is also injury sufficient to confer standing because of the defects in the
2 notice itself. A violation of a constitutional right such as procedural due process rights, is injury *per*
3 *se.* *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Plaintiffs receiving a notice that they allege to be
4 constitutionally defective have standing to challenge such notices. *See, e.g., McClelland v.*
5 *Massinga*, 786 F.2d 1205, 1210 (4th Cir. 1986) (standing to challenge defective process, despite
6 eventual outcome of process); *Pashby*, 2011 WL 6130819 at *4 (Medicaid recipients had standing to
7 challenge notice of termination on due process grounds, even though, with assistance, they had
8 managed to file timely administrative appeals).

9 Defendants' argument boils down to the far-fetched argument that Plaintiffs' claims are not
10 ripe and cannot be considered for class certification until they have exhausted their state
11 administrative remedies. Opp. 12. This would be an unprecedented contention. It is well
12 established that exhaustion of administrative remedies is not required under 42 U.S.C. §1983, under
13 which most of Plaintiffs' claims are brought. *Patsy v. Bd. Of Regents*, 457 U.S. 496, 500-501
14 (1982).¹¹

15 Where exhaustion of administrative remedies is not required by statute (and Defendants
16 make no claim that it is), "federal courts must balance the interest of the individual in retaining
17 prompt access to a federal judicial forum against countervailing institutional interests favoring
18 exhaustion." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992), *superseded by statute on other*
19

20 ¹¹ For decades, federal courts have certified classes and issued prospective injunctive relief
21 without first requiring exhaustion of administrative remedies, although state hearings are available to
22 challenge the denial of virtually every service funded by Medicaid and the Social Security Act
23 *See, e.g., Beltran v. Myer*, 677 F.2d 1317 (9th Cir. 1982) (affirming class-wide preliminary
24 injunction prohibiting implementation of Medi-Cal eligibility rules, where administrative hearings to
25 contest individual eligibility denials were available but not required or discussed); *Lankford v.*
26 *Sherman*, 451 F.3d 496 (8th Cir. 2006) (reversing denial of preliminary injunction re: limited
27 coverage of Medicaid DME; state hearings were available but not required or discussed); *Owens v.*
28 *Heckler*, 753 F.2d 675 (8th Cir. 1985) (affirming injunctive relief to certified class to prevent
reduction of AFDC benefits; state hearings were available but not required or discussed). *See also,*
Mayer v. Wing, 922 F.Supp. 902, 906 (S.D.N.Y. 1996) (where Medicaid plaintiffs challenging
reductions in home care benefits had received reduction notices, and had state hearings pending, they
had standing and injury because outcome was uncertain and defective notices and hearing
procedures constituted injury *per se*).

1 grounds as recognized in *Booth v. Churner*, 532 U.S. 731 (2001). Where “[t]he general
2 [administrative] procedure heavily burdens the individual interests [by] impos[ing] short, successive
3 filing deadlines that create a high risk of forfeiture of a claim for failure to comply,” this weighs
4 against requiring exhaustion. *Id.* at 152. Here, that is assuredly the case—recipients are eligible for
5 aid paid pending only if they seek hours restoration within 15 days of receipt of the notice, and are
6 categorically ineligible for hours restoration if they apply more than two months after receiving
7 notice. Carroll Decl., Ex A (ACL 11-81) (Dkt. 439-2) at 7. Similarly, exhaustion is not required
8 where there is “some doubt as to whether the agency was empowered to grant effective relief”
9 because it “lack[s] authority to grant the type of relief requested.” *McCarthy*, 503 U.S. at 147-48
10 (citation omitted). Indeed, California’s highest court has already found the state hearing procedure
11 does not allow class-wide relief, so that there is no requirement for exhaustion of the state fair
12 hearing procedure under the California Welfare and Institutions Code for class claims. *Ramos v.*
13 *County of Madera*, 4 Cal.3d 685 (1971). Thus, this case is unlike *J.L. v. Social Sec. Admin.*, 971
14 F.2d 260 (9th Cir. 1992), cited by Defendants (Opp. 12), in which the administrative process was
15 capable of producing the systemic remedies sought by the plaintiffs, and other prudential concerns
16 similarly weighed in favor of requiring exhaustion. Accordingly, there is no requirement that
17 Plaintiffs exhaust administrative remedies. Their claims are ripe.

18 In their Opposition, Defendants divide the class into three sub-groups as to whom they raise
19 separate ripeness challenges – 66,000 recipients who are exempt or pre-approved for the new Care
20 Supplement; 100,000 recipients who will receive reduction notices but meet the functional rank
21 criteria in the ACL and are potentially eligible for hours restoration if they submit a timely
22 application; and 278,000 recipients who will also receive reduction notices and whose functional
23 ranks do not meet the criteria in the ACL. Opp. 9, 11; *supra*, at Facts §D. For the Court’s
24 convenience, Plaintiffs address arguments raised with respect to each group, although the general
25 principles set forth above already demonstrate that Plaintiffs’ claims are ripe.

26 1. **IHSS Recipients Who are Exempt or Preapproved Meet the Class B**
27 **Definition Only if They Actually Receive a Reduction Notice, in Which**
28 **Case They Will also Sustain Injury and Have Standing.**

1 Defendants argue that Named Plaintiffs Oster, C.R., L.C. and Jones lack standing because
 2 they are exempt or preapproved for Supplemental Care and are not subject to the SB 73 cuts. Opp. 9-
 3 10. Assuming *arguendo* this is true, it does not defeat class certification, since only one named
 4 plaintiff with standing for each claim is required. *Central States S.E. & S.W. Areas Health & Welf.*
 5 *Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 241-42 (2007). It is undisputed that at
 6 least three Named Plaintiffs (Stern, Thurman and Hylton) are not exempt and will be subject to the
 7 20 percent reduction.

8 Moreover, Class B is limited to recipients who actually receive a reduction notice based on
 9 SB 73. Third Amended Complaint (Dkt. 431) ¶225. Plaintiffs have documented a serious risk,
 10 which Defendants have not attempted to rebut, that some exempt recipients will receive reduction
 11 notices in error. TRO Br. 34:13-35:2 & n.69.¹² Such IHSS recipients will experience injury and
 12 have the same claims as other class members. Any recipients who are correctly exempted or
 13 preapproved will by definition not be members of Class B, so their standing is immaterial and the
 14 class should be certified. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010) (class of
 15 individuals who are detained without required bond hearing properly certified, even though
 16 government may sometimes comply with bond hearing requirement, because individuals who
 17 receive hearing are excluded from class definition).

18 **2. Recipients Who Are Eligible or Presumptively Eligible for a Care**
 19 **Supplement Will Suffer Injury and Have Ripe Claims.**

20 Defendants argue that the class cannot be certified because many putative class members
 21 who receive reduction notices have high enough functional index ranks that “a significant number of
 22 these recipients *are likely* to have their hours restored *if* they seek supplemental care.” Opp. 11
 23 (emphasis added). Defendants’ own language demonstrates three crucial points: first, *every* class
 24

25 ¹² The Carroll Declaration notes that DSS conducted a CMIPS-waiver list data match on an
 26 unspecified date, without explaining how often the data match will be repeated, highlighting the risk
 27 of error Plaintiffs presented. Dkt. 439-1 ¶4. Nor is there any indication that the CMIPS re-
 28 programming which already took place takes into account Defendants’ “recent decision” to exempt
 children such as Named Plaintiff L.C.

1 member's hours *will be reduced*, the only question is whether they will be subsequently restored;
 2 second, it is the restoration (*not* the reduction) that depends on contingent events (whether recipients
 3 apply for restoration, and whether hours are restored); and third, at least *some* class members will not
 4 timely apply and/or not be approved for hours restorations.¹³

5 The only things that are *certain* are that the CMIPS files for these recipients will be
 6 automatically re-programmed to reduce their hours, they will receive notices of action reducing their
 7 hours, and at least some will *not* have their hours restored. Thus, it is undisputed that they will all
 8 suffer injury in the form of a defective notice and hours reductions. The only question is whether
 9 they will successfully complete a timely Care Supplement Application and later have their hours
 10 restored. Plaintiffs have explained that many recipients will fail to submit a Care Supplement
 11 application, or will fail to do so in a timely manner, because of deficiencies in the notice, visual
 12 disabilities or language issues, mental health or cognitive impairments, or other factors. TRO Br.
 13 29:8-31:19 & nn.58-61, 38:1-10 & nn.73-74; Wallace Decl. (Dkt. 409) ¶33. CDSS itself estimated
 14 that over 60,000 recipients who are eligible for the Care Supplement will not submit an application.
 15 2nd Keeslar Decl. (Dkt. 376-1), Ex. A at 2. This CDSS projection was part of a cost estimate that
 16 recognized that short-term savings were greater when IHSS recipients were deterred by the
 17 application requirement and failed to request restoration of the hours. Defendants' insistence that
 18 this group of recipients faces no injury must be weighed against CDSS' cynical recognition in this
 19 cost estimate that tens of thousands of recipients who are at serious risk of out of home placement
 20 even by the agency's restrictive standards will nonetheless be subjected to the 20% reductions.

21 **3. IHSS Recipients with Functional Ranks Below the Care Supplement**
 22 **Requirements Have Ripe Claims and Are Not Required to Exhaust**
 23 **Administrative Remedies.**

24 ¹³ Care Supplement applications from class members whom Defendants claim are
 25 presumptively at serious risk of institutionalization will be denied if submitted after March 1, 2012
 26 or if the reductions will cause adverse health consequences but not serious risk of
 27 institutionalization, and denied in part or in whole if county social workers conclude that they can
 28 rearrange their priorities or rely on free care to close the gap. Carroll Decl., Ex. A (ACL 11-81)
 (Dkt. 439-2) at 7-8, 20. Hours will be reduced pending the Care Supplement determination, so for
 up to 90 days, if not submitted within 15 days. *Id.* at 6.

1 Defendants implicitly concede that more than 250,000 IHSS recipients will not meet the
2 functional rank criteria in the Care Supplement Work Sheet distributed to counties in ACL 11-81.
3 Opp. 11. Named Plaintiffs Stern, Thurman and Hylton are members of this group, as they do not
4 have the functional ranks required to qualify for Care Supplements. Stern Decl. (Dkt. 401) ¶25, Ex.
5 A at 3; Thurman Decl. (Dkt. 404) ¶30, Ex. A at 2; 2nd Hylton Decl. (Dkt. 371-1), Ex. A at 2.

6 Defendants now deny that such individuals are categorically ineligible for Care Supplements,
7 and assert that they simply do not get the benefit of the presumption of serious institutionalization
8 risk. *See supra*, Facts, § C. While Plaintiffs welcome this apparent reversal of course, the Carroll
9 Declaration contradicts the plain language of the ACL and the uniform understanding of the county
10 IHSS officials who will be administering the Care Supplement application process. *See supra* at
11 nn.5, 6. Defendants have not publicized this new position through a new All County Letter or other
12 formal directive. Nothing in Defendants' brief or declaration indicates that Defendants have
13 instructed any county officials regarding this new policy, or that it has been disseminated to anyone
14 beyond this Court and the attorneys for the parties. Thus, counties and social workers will
15 presumably follow the existing ACL, which instructs that only individuals with specified functional
16 ranks are eligible for Care Supplements. This Court must decide class certification based on the
17 current state of affairs, not an alternative that Defendants propose in litigation but have not publicly
18 shared.

19 Moreover, Defendants could disavow this interpretation at a later date, and again take the
20 position that functional ranks are the "ceiling" not the floor, and that only class members with
21 sufficiently high ranks will even be considered for the Care Supplement. Just as the voluntary
22 cessation of illegal activity in response to pending litigation does not moot a case, unless the party
23 alleging mootness can show that the "allegedly wrongful behavior could not reasonably be expected
24 to recur," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (citation
25 omitted), this statement in a declaration cannot operate to make Plaintiffs' claims unripe.
26 Defendants have failed to demonstrate that they "have completely and irrevocably eradicated the
27 effects of the alleged violation" *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007) (citations
28

1 omitted).

2 Even if Defendants' new policy had been set forth in ACL 11-81, moreover, this third group
 3 of Plaintiffs would have standing for the reasons set forth in relation to the second group of
 4 Plaintiffs. *See supra*, §II.A.2. Moreover, Plaintiffs' due process claims do not in any way depend
 5 on whether the functional rank criteria are dispositive or simply influential. TRO Br. 29:8-34:2 &
 6 nn.58-67. Plaintiffs would still challenge the use of functional ranks to establish a presumption,
 7 even if ranks are not dispositive as to eligibility. TRO Br. 38:11-16, 39:27-40:2 & n.75, 40:21-41:9
 8 45:16-47:17 & nn.80-81. And Plaintiffs' Medicaid and ADA claims are largely unaffected by the
 9 functional ranks issue; Plaintiffs challenge the budget-driven reduction of hours previously
 10 determined necessary to enable recipients to remain safely at home, the requirement that elderly or
 11 disabled recipients affirmatively apply for restoration of hours and do so by a specified date, the
 12 absence of consideration of adverse health consequences that do not immediately lead to a serious
 13 risk of institutionalization, and the exemption of waiver participants but not similarly situated
 14 individuals. TRO Br. 36:19-38:10 & n.72, 39:19-40:2 & n.75, 40:21-41:23 & n.76, 45:1-15.
 15 Plaintiffs' challenge to SB 73 and its implementation do not depend on the specific administration of
 16 the Care Supplement application process by counties, and so is ripe now even for individuals who
 17 are eligible for hours restorations. *Compare United States v. Baker*, 658 F.3d 1050, 1054-55 (9th
 18 Cir. 2011) (while challenge dependent on factual circumstances of search would be unripe, facial
 19 challenge to suspicionless search probation condition was ripe).

20 **III. CLASS B MEETS ALL THE REQUIREMENTS OF RULE 23.**

21 **A. The Children Subclass B is Not Moot.**

22 Defendants assert that the claims of the EPSDT recipients are moot based solely upon the
 23 declaration of a mid-level state official – filed only with this Court and not otherwise reflected in an
 24 official document that would bind Defendants in the future – that CDSS recently decided to exempt
 25 them from the hours reductions by including them among the groups pre-approved for the care
 26 supplement. Opp 3, 12 (citing Carroll Decl. ¶8). This decision must have been made in the last few
 27 weeks, since ACL 11-81, issued three days before the TRO filing, lists the groups of recipients who
 28

1 will be pre-approved, but children are not included. ACL 11-81 (Dkt. 439-2) at 5. Plaintiffs’
2 counsel made requests to CDSS in October and November to clarify whether EPSDT children would
3 be subjected to the 20 percent cuts, with no response. 5th Bird Decl. (Dkt. 331) ¶¶ 2-3. As with Ms.
4 Carroll’s new interpretation of the eligibility for the care Supplement, Plaintiffs welcome this change
5 but are concerned that it is not reflected in any ACL or other formal directive, as are other pre-
6 approval categories.

7 As previously explained, “a defendant claiming that its voluntary compliance moots a case
8 bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior
9 could not reasonably be expected to recur.” *Laidlaw*, 528 U.S. at 189 (citation omitted). Without
10 such a rule, “the courts would be compelled to leave [t]he defendant ... free to return to his old
11 ways.” *Porter*, 496 F.3d at 1017 (alterations in original) (quoting *United States v. Concentrated*
12 *Phosphate Exp. Ass’n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)). Defendants have
13 not met these standards, since there is no formally promulgated statement, such as a new ACL to
14 bind them to Carroll’s last-minute decision to exempt EPSDT recipients. Until Defendants satisfy
15 the standards in *Porter* and *Laidlaw*, by ensuring that CDSS may not does not change its mind again
16 and the subject children to the 20 percent reduction, the claims of the child subclass are not moot.

17 **B. Class B is Ascertainable and Meets Commonality Requirements.**

18 Here, the test for class membership is straightforward and objective: receipt of a reduction
19 notice. Defendants concede that this class is ascertainable. Opp. 13. Based on their erroneous
20 assumption that the notices do not reflect concrete injury (an argument that is refuted at *supra*
21 §II.B.), Defendants fashion their own hypothetical class definitions, such as “recipients who will not
22 understand the notices,” then attack Plaintiffs because they “have not shown that such a class could
23 be ascertainable.” Opp. 13. Since this is not the class for which Plaintiffs seek certification, this
24 argument is specious.

25 Plaintiffs demonstrated in their opening class certification brief that they meet the
26 commonality requirement by raising common questions—that is, a question “of such a nature that it
27 is capable of classwide resolution—which means that determination of its truth or falsity will resolve
28

1 an issue that is central to the validity of each of one of the claims in one stroke.” *Wal-Mart v. Dukes*,
 2 131 S.Ct. 2541, 2551 (2011). For example, the notice is either constitutionally deficient, or it is not.
 3 *See, e.g., Pashby*, 2011 WL 6130819 at *8 (certifying due process class). Reducing hours already
 4 found necessary to enable recipients to live safely at home by 20 percent, and restoring hours only
 5 for those with specified functional ranks (or those at “serious risk of out of home placement,” if Ms.
 6 Carroll’s interpretation of the ACL binds Defendants), either violates Medicaid’s comparability,
 7 reasonable standards, sufficiency, and EPSDT requirements, or it does not. *See, e.g., Risinger v.*
 8 *Concannon*, 201 F.R.D. 16, 19-23 (D.Me. 2001) (certifying EPSDT class). The Supplemental Care
 9 application process is either a discriminatory method of administration that violates the ADA, or it is
 10 not. *See, e.g., Dominguez v. Schwarzenegger*, 270 F.R.D. 477 (N.D. Cal. 2010) (certifying ADA
 11 class).

12 There is no merit to Defendants’ argument that a class cannot be certified because some
 13 class members will allegedly “suffer no injury at all.” Opp. 14. As discussed *supra* §II.B., all class
 14 members suffer legally cognizable injury when they receive defective notice, and when their hours
 15 are reduced, even if there is some future contingent possibility that some of them may have their
 16 hours restored. Accordingly, Defendants are incorrect when they argue that the potential for hours
 17 restoration destroys commonality. *See, e.g., Dukes*, 131 S.Ct. at 2553 (commonality and typicality
 18 satisfied on behalf of “every applicant... who *might* have been prejudiced by” a biased test.
 19 (emphasis added);¹⁴ *D.G. v. Yarbrough*, 2011 WL 5553145 (N.D. Okla. Nov. 15, 2011) at *10 (post-
 20 *Dukes* decision refusing to decertify class alleging “exposure to an impermissible risk of harm,”
 21 despite fact that less than two percent of the class had actually experienced that harm).

22 **C. Named Plaintiffs’ Claims are Typical of Those of Putative Class Members.**

23 Defendants claim that it is “not clear” whether Named Plaintiffs Stern, Hylton, Thurman, and
 24

25 ¹⁴ In the employment discrimination context, there is always the possibility that an individual
 26 subjected to a discriminatory test is not harmed thereby because, for example, the individual is not
 27 otherwise qualified. Similarly here, all class members suffer legally cognizable injury when they
 28 receive defective notices reducing their hours, even if some might ultimately succeed in having their
 hours restored.

1 Sheppard have claims that are typical of the class. Of course it is. Typicality is demonstrated when
 2 the claims of a named plaintiff are reasonably similar to those of the class. *Weinberger v. Thornton*,
 3 114 F.R.D. 599, 603 (S.D. Cal. 1986) (“The test generally is whether... the action is based on
 4 conduct which is not unique to the named plaintiffs, and whether other class members have been
 5 injured by the same course of conduct [citation omitted]”). “In government benefit class actions, the
 6 typicality requirement is generally satisfied when the representative plaintiff is subject to the same
 7 statute, regulation or policy as class members.” *Rancourt v. Concannon*, 207 F.R.D. 14, 16 (D.Me,
 8 2002) (citing 5 Newberg § 23:04). “[A] named plaintiff’s claim is typical if it stems from the same
 9 event, practice or course of conduct that forms the basis of the class claims and is based upon the
 10 same legal or remedial theory.” *Hum v. Dericks*, 162 F.R.D. 628, 638 (D.Haw. 1995) (citation
 11 omitted). Here, Stern, Hylton, Thurman, and Sheppard are all subject to SB 73 and Defendants’
 12 implementation thereof, and all are slated to receive notices reducing their IHSS hours by twenty
 13 percent. Because each and every IHSS recipient who receives a reduction notice is subjected to this
 14 identical conduct, Named Plaintiffs Stern, Thurman and Hylton are typical. (To the extent that
 15 Named Plaintiffs L.C., Oster, C.R., and Jones receive reduction notices, they too are typical).

CONCLUSION

17 For all of the foregoing reasons, Plaintiffs request that this Court grant class certification.

19 Date: December 22, 2011

Respectfully submitted,

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