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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

I. N., a minor, by and through her mother and *Guardian ad Litem*, Zarinah F.; J. B., a minor by and through his mother and *Guardian ad Litem*, Alisa B.,

Plaintiffs,

v.

JENNIFER KENT, Director of the Department of Health Care Services; State of California DEPARTMENT OF HEALTH CARE SERVICES,

Defendants.

Case No.: 3:18-cv-3099-WHA

CLASS ACTION

PLAINTIFFS' MOTION FOR CERTIFICATION OF SETTLEMENT CLASS

Date: April 4, 2019
Time: 8:00 a.m.
Place: Courtroom 12, 19th Floor
Hon. William Alsup

Action Filed: May 24, 2018

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT on April 4, 2019 or as soon thereafter as the matter may be heard, Plaintiffs, I.N. and J.B. (collectively "Plaintiffs"), individually and on behalf of all others similarly situated, will move the Court, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure and Rule 7-2 of the Local Civil Rules of this Court, for an order (1) certifying the proposed Settlement Class of all Medi-Cal beneficiaries who are EPSDT eligible and for whom Medi-Cal Private Duty Nursing services have been approved; (2) appointing Plaintiffs as class representatives; and (3) appointing William Leiner and Elissa Gershon of Disability Rights California, Sarah Somers and Jane Perkins of the National Health Law Program, Robert Newman of the Western Center on Law and Poverty, and Richard Schwartz of Browne George Ross LLP as Class Counsel.

This motion is made on the grounds that (1) the proposed Settlement Class is so numerous that joinder would be impracticable; (2) the proposed Settlement Class share common questions of fact and law; (3) Plaintiffs' claims are typical of those of the proposed Settlement Class; (4) Plaintiffs and Plaintiffs' counsel will adequately represent the proposed Settlement Class. Certification of the class under Rule 23(b)(2) is appropriate as only injunctive relief is sought. This motion is based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities, the supporting Declarations of William Leiner (hereafter "Leiner Decl."), Sarah Somers (hereafter "Somers Decl."), Robert Newman (hereafter "Newman Decl."), Richard Schwartz (hereafter "Schwartz Decl."), Zarinah F. (hereafter "Zarinah F. Decl."), and Alisa B. (hereafter "Alisa B. Decl."), and the exhibits attached thereto, the Parties' Joint Motion for

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Preliminary Approval of Class Action Settlement, which is being filed concurrently herewith, and the complete files and records in this action.[1]

DATED: February 28, 2019

By: */s/ William Leiner*
William Leiner
Attorneys for Plaintiffs

[1] This motion is being filed concurrently with the Parties' Joint Motion for Preliminary Approval of Class Action Settlement, whereby the Parties are jointly moving the Court for (1) preliminary approval of the proposed class settlement agreement; (2) an order directing notice to the proposed Settlement Class; and (3) a scheduling order setting deadlines for objections and a fairness hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs I.N., age 8, and J.B., age 6, are Medi-Cal beneficiaries who are eligible for Early and Periodic Screening, Diagnostic, and Treatment (hereafter, "EPSDT") services. EPSDT provides comprehensive, preventative, diagnostic, and treatment services to Medi-Cal eligible children under the age of 21. One such treatment available under EPSDT is Private Duty Nursing services – nursing services provided in a child's home by a registered nurse or licensed vocational nurse for beneficiaries who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility. Both I.N. and J.B. have significant medical needs, and have been approved by Medi-Cal to receive Private Duty Nursing services to live safely at home with their families. However, Plaintiffs have rarely received all of their approved Private Duty Nursing hours. Their families have been given little to no support from the Medi-Cal program to obtain the benefits Plaintiffs are entitled to receive, thereby placing them at serious risk of injury or institutionalization.

Plaintiffs accordingly brought this class action lawsuit to challenge the failure by the Department of Health Care Services and its Director, Jennifer Kent (collectively, "Defendants") to arrange for approved Private Duty Nursing services for themselves and other similarly situated children, as required by the Medicaid Act, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act.

Pursuant to the Parties' concurrently filed Joint Motion for Preliminary Approval of Class Action Settlement, Plaintiffs now seek certification of the following Settlement Class:

> All Medi-Cal beneficiaries who are EPSDT eligible and for whom Medi-Cal Private Duty Nursing services have been approved.

For the following reasons, Plaintiffs respectfully move for an order certifying this matter as a class action, pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, appointing Plaintiffs as class representatives, and appointing Class Counsel for

the purpose of monitoring and implementing the settlement. *First*, the Settlement Class is so numerous that it would be impracticable to join all Medi-Cal beneficiaries who are EPSDT eligible and for whom Medi-Cal Private Duty Nursing services have been approved. There are at least 3,500 members of the Settlement Class. *Second*, members of the Settlement Class share common questions of law and fact; namely, whether Defendants violate federal laws by failing to establish an effective system to arrange for class members' approved Private Duty Nursing services resulting in significant shortfalls in Class Members' approved hours, thereby placing them at risk of institutionalization. *Third,* Plaintiffs' claims are typical of those of the proposed class. Plaintiffs, like the members of the Settlement Class, are Medi-Cal beneficiaries who have been approved to receive Medi-Cal Private Duty Nursing services, and have not received meaningful assistance from Defendants to help them arrange for these services. *Fourth,* Plaintiffs will adequately represent the Settlement Class as they have no conflicts with the claims of the Settlement Class. Likewise, Plaintiffs' attorneys have no conflict with the claims of the proposed Settlement Class and collectively have decades of experience in class actions, public benefits, and other complex cases in federal and state courts, making them more than adequate Class Counsel. *Finally*, this case is appropriate for certification under Rule 23(b)(2) because the Settlement Class is subject to uniform relief, and Plaintiffs only seek injunctive relief.

II. THE PARTIES AND NATURE OF THE CASE

Plaintiffs I.N. and J.B. are Medi-Cal beneficiaries who are eligible for EPSDT and have been approved to receive Medi-Cal Private Duty Nursing services. Zarinah F. Decl. ¶ 15; Alisa B. Decl. ¶ 14. They both have significant medical needs and require these services to live safely at home with their families, but have rarely received all of the nursing hours for which they are approved. I.N. has quadriplegic cerebral palsy, epilepsy, and other disabilities that cause her severe pain. She cannot stand, walk, or sit up on her own and needs a gastronomy tube to eat. Zarinah F. Decl. ¶¶ 9-12. She has been approved for 56 hours per week of Private Duty Nursing services, but has rarely received that

amount. *Id.* at ¶ 15. J.B. has severe neuromuscular diseases that cause muscle atrophy and nerve damage. He requires a ventilator to breathe and a gastronomy tube to receive nutrition. Alisa B. Decl. ¶¶ 9-12. He has been approved to receive 135 hours of Private Duty Nursing services, but received less than half that amount for most of his life. *Id.* at ¶ 14. Despite their parents' determined advocacy, I.N. and J.B. were unable to obtain the services they needed, which they allege is due to the Defendants' failure to respond to their requests for assistance and to arrange for those services. Zarinah F. Decl. ¶¶ 16-18; Alisa B. Decl. ¶¶ 15-16. Plaintiffs further allege that Defendants' failures place the burden on them to navigate a complex system with little to no support to obtain the benefits their children are entitled to receive. *Id.* These failures have led to, for example, Defendants' distribution of outdated referral lists, referrals to providers who do not accept Medi-Cal, or referrals to search engines, such as Google; none of which have helped Plaintiffs obtain their approved nursing hours. Zarinah F. Decl. ¶¶ 16-17; Alisa B. Decl. ¶ 15.

Tragically, Plaintiffs are not alone. Plaintiffs' counsel began investigating Medi-Cal beneficiaries' access to Medi-Cal Private Duty Nursing services in 2016. Since that time, Plaintiffs' counsel have spoken to over 100 families with children who were approved for Medi-Cal Private Duty Nursing. Leiner Decl. ¶¶ 9-10. Many families explained how they were unable to obtain all of their approved Private Duty Nursing services and that there was no system in place to help them actually secure these services. *Id.* Furthermore, a study done by Defendants in December 2016 found that there are at least 3,500 Medi-Cal beneficiaries under the age of 21 who are approved for Private Duty Nursing services but that 29% of those service hours go unfilled, providing further support to Plaintiffs' allegations that Defendants lack an effective system to arrange for approved nursing care. *Id.* at ¶ 11, Exh. 4.

Defendant DHCS is the single state agency responsible for administering California's Medicaid program, called Medi-Cal. *See* Cal. Welf. & Inst. Code § 14100.1. Medi-Cal does not itself provide health care services to beneficiaries, nor does Medi-Cal provide those beneficiaries with money to purchase health care services directly. 42

C.F.R. § 430.0; *Orthopedic Hospital v. Belshe,* 103 F.3d 1491, 1493 (9th Cir. 1997). Rather, Medi-Cal is a vendor payment program, wherein DHCS, either directly through its Fee-for-Service delivery system, or through Medi-Cal managed care plan organizations with which DHCS contracts, reimburses participating providers for the services they provide to Medi-Cal beneficiaries. *Id.* These services include Private Duty Nursing services, as well as case management services, which include developing plans of care, referral services, appointment scheduling, and monitoring and follow up. 42 U.S.C. § 1396d(a)(19); 42 C.F.R. § 440.169(d).

In addition to contracting with Medi-Cal managed care plans, Defendants also either directly oversee or contract with two other Medi-Cal programs and organizations that provide services to members of the Settlement Class: county California Children's Services (hereafter "CCS") programs and Waiver Agencies. CCS is a state program administered by DHCS for children who have certain diseases or health problems. Cal. Code Regs., tit. 22, §§ 41401 *et. seq*. CCS is responsible for, *inter alia*, authorizing in-home shift nursing and providing case management for Medi-Cal eligible children enrolled in that program. *Id.;* Cal. Code Regs., tit. 22 § 51013. DHCS contracts with Waiver Agencies to provide administrative and comprehensive care management services to individuals eligible for the Home and Community-Based Alternatives (HCBA) Waiver under 42 U.S.C. section 1396n(c).[2] Depending on a number of factors (such as the child's medical conditions and/or county of residence), one or more of the systems described above may have responsibility for authorization or case management of Medi-Cal Private Duty Nursing services.

Defendant Jennifer Kent is DHCS' current Director and is responsible for directing, organizing, and administering DHCS' medical programs and contractual arrangements. Her responsibilities in this role include the responsibility to ensure DHCS' compliance

[2] The "HCBA Waiver" refers to one of California's Medicaid Home and Community-Based Services Waiver programs authorized under 42 U.S.C. section 1396n(c). The HCBA Waiver provides case management services and authorization of home-based Waiver services to persons at risk for nursing home or other institutional placement.

with federal and state laws. *See* Cal. Welf. & Inst. Code § 14100.1; Cal. Welf. & Inst. Code § 14154(d).

III. THE SETTLEMENT CLASS

The Settlement Class is defined as "all Medi-Cal beneficiaries who are EPSDT eligible and for whom Medi-Cal Private Duty Nursing services have been approved." Settlement Agreement at ¶ 20. The Settlement Class is different from the proposed class in the First Amended Complaint, which consisted of "all Medi-Cal beneficiaries under the age of 21 in California who have been approved for in-home shift nursing or Private Duty Nursing services by the Defendants, but are not receiving the nursing services at the level approved by the Defendants." First Amended Complaint at ¶ 20.

The expansion of the Settlement Class to include all Medi-Cal beneficiaries under the age of 21 approved to receive Medi-Cal funded Private Duty Nursing—not just those experiencing a shortfall in hours—is appropriate here. Expanding the Settlement Class will ensure that children and their families can obtain the benefits under the Settlement Agreement, even if they are not presently facing a shortfall in nursing hours. Thus, the expanded class definition will ensure that class members who anticipate a shortfall in hours for a specific reason (*e.g.,* knowing that a nurse will quit at some point in the future and there are no identified alternatives) will be able to access the benefits of the Settlement Agreement. Further, the amount of Private Duty Nursing hours children receive can vary from month to month and sometimes even from week to week. Accordingly, a child may receive full staffing in one month and face a significant shortfall the next. Broadening the class definition enables children in this precarious situation to obtain benefits provided under the Settlement Agreement before a crisis develops.

IV. ARGUMENT

A. Certifying the Class Is Appropriate under Federal Rules of Civil Procedure, 23(a) and (b)(2)

The proposed Settlement Class satisfies the four threshold requirements for class certification under Federal Rule of Civil Procedure 23(a). These requirements are: (1)

numerosity of potential class members, (2) commonality of factual or legal issues among class members, (3) typicality of the class representatives' claims, and (4) adequate representation of class-wide interests by class representatives and Class Counsel. Certification of a Federal Rule of Civil Procedure, 23(b)(2) class is also appropriate because this action seeks injunctive relief only, and the relief under the Settlement Agreement is applicable the class as a whole.

1. The Proposed Class Meets the Numerosity Requirement

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). It is sufficient to demonstrate "only the difficulty or inconvenience of joining all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). There is a presumption of impracticality in the Ninth Circuit where the numbers of the prospective class include at least forty members. *See, e.g., Hernandez v. Cnty. of Monterey*, 305 F.R.D. 132, 152 (N.D. Cal. 2015) ("A class or subclass with more than 40 members raises a presumption of impracticability based on numbers alone."). When the exact size of the proposed class is unknown, but general knowledge and common sense indicate that it is large the numerosity requirement is satisfied. *In re Abbott Laboratories Norvir Anti-Trust Litigation*, Nos. C 04-1511 CW, C 04-4203 CW, 2007 WL 1689899, at *6 (N.D. Cal. Jun. 11, 2007) (*citing* Alba Cone & Herbert B. Newberg, *Newberg on Class Actions* § 3.13 (4th ed. 2002)).

Here, the Settlement Class includes thousands of children and youth under the age of 21 who are approved for Medi-Cal Private Duty Nursing. In December 2016, DHCS prepared a study regarding access to Medi-Cal Private Duty Nursing services, which identified over 3,500 EPSDT eligible beneficiaries who are approved for Medi-Cal Private Duty Nursing, including children enrolled in managed care plans or CCS. Leiner Decl. ¶ 11, Exh. 3. For this reason, joinder of all members is clearly impractical and the proposed class meets the numerosity requirement.

2. The Settlement Class Satisfies the Commonality Requirement

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Class claims must "depend upon a common contention . . . that [] is capable of class-wide resolution … mean[ing] that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The Ninth Circuit construes the commonality requirement permissively. "[A]ll that Rule 23(a)(2) requires is 'a single significant question of law or fact'" that will "generate common answers[.]" *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 957 (9th Cir. 2012) (*quoting Mazza v. Am. Honda Motor* Co., 666 F.3d 581, 589 (9th Cir. 2012)). In civil rights actions, "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members. Under such circumstances, individual factual differences among class members pose no obstacle to commonality." *Parsons v. Ryan*, 754 F.3d 657, 682 (9th Cir. 2014). Lastly, class actions that seek injunctive or declaratory relief by their very nature present common questions of law and fact. *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.,* 239 F.R.D. 9, 26 (D.D.C. 2007).

The proposed Settlement Class in this case satisfies the commonality requirement. The claims set forth in the First Amended Complaint raise common questions of law and fact that are likely to apply to all Class Members, due to the variable nature of the difficulties families experience in securing approved Private Duty Nursing. The questions common to the class members include whether Defendants' system-wide policies, practices, and procedures resulted in class members being unable to obtain the levels of Private Duty Nursing they need, including whether (a) Defendants failed to arrange for Plaintiffs' and class members' Private Duty Nursing services in violation of the Medicaid Act (42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), 1396a(a)(43)(C); (b) Defendants failed to furnish medical assistance with reasonable promptness as required by 42 U.S.C. § 1396a(a)(8)); and (c) Defendants' failure to ensure that Private Duty Nursing services were provided to the class in the most integrated setting appropriate placed them at risk of

institutionalization in violation of the Americans with Disabilities Act (42 U.S.C. §§ 12131 *et. seq*.), and Section 504 of the Rehabilitation Act (29 U.S.C. § 794 *et seq.*)).

In addition, the relief requested under the Settlement Agreement also supports a finding of commonality. For commonality to be met "Plaintiffs must have a common question that will connect many individual (…) decisions to their claim for class relief." *Ellis v. Costco*, 285 F.R.D. 492, 508–09 (N.D. Cal. 2012).

Here, the relief sought under the Settlement Agreement answers the common questions posed by Defendants' alleged failures to arrange for Plaintiffs' and class members' approved Private Duty Nursing services. Namely, members of the proposed Settlement Class will benefit from the designation of a Medi-Cal program or contracted organization that will provide case management services to secure class members' approved Private Duty Nursing, oversight and monitoring of these programs by Defendants, and the ability for class members to contact DHCS directly with questions or concerns about the Private Duty Nursing or the case management services they are receiving. Settlement Agreement at ¶¶ 21-27.

Other courts have certified classes and granted class-wide relief in cases arising from the same claims presented here. In *O.B. v. Norwood*, as in the instant case, the Medicaid agency worked through a contractor to arrange for Private Duty Nursing; yet, families' requests for help were met with little to no assistance, leaving families to attempt to recruit nurses on their own. 170 F. Supp. 3d 1186 (N.D. Ill. 2016). There, the plaintiffs alleged a violation of EPSDT requirements for failing to arrange for the services they and similarly situated children needed. *Id*. at 1190. A class was certified in that case. *O.B. v. Norwood,* No. 15-C-10462, 2016 WL 2866132 (N.D. Ill. May 17, 2016). The district court also held that the Medicaid agency had likely violated EPSDT requirements, given that the agency had authorized services but they had not been delivered. 170 F. Supp. at 1196. The court issued a preliminary injunction ordering the Medicaid agency to "take immediate and affirmative steps to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment of in-home shift nursing

services to the Plaintiffs *and Class* at the level approved by the Defendant, as required by the Medicaid Act." *Id*. at 1197-98 (emphasis added). The Seventh Circuit affirmed, holding that Medicaid requires states to provide or ensure the provision of services, not merely pay for them. *O.B. v. Norwood*, 838 F.3d 837 (7th Cir. 2016).

Plaintiffs share questions of law and fact with the rest of the members of the Settlement Class, who consist of similarly situated individuals deprived by Defendants of an effective system to arrange for approved Private Duty Nursing services in accordance with federal law. The questions are central to this case, and resolving them through the Settlement Agreement will address the systemic failures that result in the inability of Plaintiffs and the Settlement Class to obtain their approved Private Duty Nursing services. The Settlement Class thus satisfies the commonality requirement.

3. The Proposed Class Representatives Satisfy the Typicality Requirement

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The test of typicality is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Parsons*, 754 F.3d at 685 (*citing Hanon v. Dataproducts Corp*., 976 F.2d 497, 508 (9th Cir. 1992)). The claims of class representatives meet the typicality requirement if they are reasonably co-extensive with those of the class; the facts and legal theories need not be identical. *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998). Injuries do not have to be identical, but simply similar and arising from the same course of conduct by the defendant. *Parsons*, 754 F.3d at 685-86.

Commonality and typicality are closely related; a finding of one generally compels a finding of the other. *Wehner v. Syntex Corp*., 117 F.R.D. 641, 644 (N.D. Cal. 1987); *Wal-Mart Stores*, 564 U.S. at 349-50 n.5 ("Both [commonality and typicality] serve as guideposts for determining whether under the particular circumstances maintenance of a

class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.").

Here, Plaintiffs I.N. and J.B. are children with multiple disabilities and significant medical needs. Zarinah F. Decl. ¶¶ 9-14; Alisa B. Decl. ¶¶ 9-13. Both Plaintiffs are eligible and approved to receive Private Duty Nursing hours. Zarinah F. Decl. ¶ 15; Alisa B. Decl. ¶ 14. Both Plaintiffs have rarely received all of their approved Private Duty Nursing hours, although the hours Plaintiffs receive can vary from month to month or sometimes even week to week, including some weeks with fully staffed hours. *Id.* Plaintiffs' parents had to rely on their own efforts to find nurses to staff their children's approved Private Duty Nursing hours and received little to no help from Defendants in arranging for such services. Zarinah F. Decl. ¶¶ 16-18; Alisa B. Decl. ¶¶ 15-16. When Plaintiffs' parents sought assistance from Defendants, they were told to search for nurses online and otherwise given lists of nursing agencies that were not accepting new patients, did not contain phone numbers that worked, did not accept Medi-Cal, or were too far away from their homes. Zarinah F. Decl. ¶¶ 16-17; Alisa B. Decl. ¶¶ 15-16. Both Plaintiffs' parents resorted to advertising for their own nurses, without success. Zarinah F. Decl. ¶ 17; Alisa B. Decl. ¶ 16.

Plaintiffs' claims are typical of the proposed Settlement Class. Plaintiffs' counsel began investigating the provision of Private Duty Nursing services in 2016. Since that time, Plaintiffs' Counsel have spoken to over 100 families with children who were approved for Medi-Cal Private Duty Nursing. Leiner Decl. ¶¶ 9-10. Many families explained how they were unable to obtain all of their approved Private Duty Nursing hours and that there was no system in place to help them actually secure these services. *Id.* Furthermore, DHCS' own December 2016 access study identified a 29% shortfall in approved Private Duty Nursing hours across nearly 3,654 EPSDT beneficiaries, which is further evidence of the lack of an effective system by Defendants to arrange for approved nursing care. *Id.* at ¶ 11, Exh. 4.

DHCS' failure to create an effective system to arrange for approved Private Duty Nursing is evidenced by Plaintiffs' stories and by many other examples of children who receive fewer nursing hours than for which they are approved, and are unable to obtain the help they need to arrange for all of their approved hours. For the foregoing reasons, Plaintiffs' claims are typical of the members of the Settlement Class.

4. Class Representatives and Experienced Class Counsel Here Meet the Adequacy Requirements

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To establish adequacy, the named plaintiffs and Class Counsel must: 1) not have conflicts of interest with the proposed class; and 2) prosecute the action vigorously on behalf of the class. *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012); *see also In re LinkedIn User Privacy Litigation*, 309 F.R.D. 573, 584-85 (N.D. Cal. 2015) (adequacy requirement satisfied where named plaintiff and other members of the class shared interest in securing relief, there was no evidence of conflicts of interest, named plaintiff demonstrated willingness to vigorously prosecute case, and Class Counsel had relevant experience).

Adequacy of the class representatives is met here – in fact, Plaintiffs' interests are squarely aligned with the class. Plaintiffs do not have interests antagonistic to those of the Settlement Class, and they are committed to the vigorous prosecution of this suit. Zarinah F. Decl. ¶ 4; Alisa B. Decl. ¶ 4. For Plaintiff J.B., his interest in vigorously representing the class is unaffected by the fact that in recent months there are weeks in which his nursing hours are fully staffed; based on a history of chronic shortfalls and variability in the nursing hours he receives each week, J.B. continues to share all Settlement Class members' interest in ensuring an effective system to arrange for approved Private Duty Nursing. Alisa B. Decl. ¶¶ 14, 17-18.

Rules 23(a)(4) and (g) also requires that class counsel be adequate and for courts to additionally consider class counsel's: (1) work in identifying or investigating potential claims in the action; (2) experience in handling class actions, other complex litigation, and

the types of claims asserted in the action; (3) knowledge of the applicable law; and (4) resources committed to represent the class. "Absent a basis for questioning the competence of counsel, the named plaintiffs' choice of counsel will not be disturbed . . . ." *Mateo v. M/S Kiso*, 805 F. Supp. 761, 771 (N.D. Cal. 1991); *see also Wehner*, 117 F.R.D. at 644 ("It is presumed plaintiffs' counsel is competent to litigate this case and will fairly and adequately represent the interests of the class members.").

Here, Plaintiffs' counsel will more than adequately represent the interests of the Settlement Class. Counsel has vigorously pursued relief on behalf of the class through a multi-year investigation, litigation, and eventually through a detailed arms-length Settlement Agreement, which includes monitoring Defendants' compliance with the Settlement Agreement once it is approved. Leiner Decl. ¶¶ 9-16. Plaintiffs' counsel have significant experience in representing people with disabilities and in complex and large class action litigation, including class action litigation regarding Medi-Cal benefits. *Id*. at ¶¶ 2-7; Somers Decl. ¶¶ 2-14; Newman Decl. ¶¶ 2-9; Schwartz Decl. ¶¶ 2-6. Based on Plaintiffs' counsel's knowledge of this case, and ample experience in class litigation and Medicaid and ADA cases, there is no basis for questioning the competence of counsel.

Plaintiffs and Plaintiffs' counsel therefore will adequately represent the interests of the proposed Settlement Class.

5. The Ascertainability Requirement Does Not Apply Here, But Even If It Did, the Class Is Ascertainable

Plaintiffs are seeking certification of a class pursuant to Rule 23(b)(2). Some courts have held that the ascertainability requirement does not apply to classes certified under Rule 23(b)(2). *See e.g., In re Yahoo Mail Litigation*, 308 F.R.D. 577, 597 (N.D. Cal. 2015) (holding ascertainability requirement inapplicable to (b)(2) class and noting that the Ninth Circuit has not ruled on the issue but other circuits have held the requirement inapplicable to (b)(2) classes); *Dunkin v. Quigley*, 99 F. Supp. 3d 1297, 1386 (W.D. Wash. 2015); *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015); *Shook v. El Paso Cnty*., 386 F.3d 963, 972 (10th Cir. 2004) (explaining "lack of identifiability" of class members cannot

defeat certification of a (b)(2) class and "many courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable").

Even if the Court concludes that the ascertainability requirement applies, the class here is ascertainable. Ascertainability may be satisfied if the class is defined with "objective criteria" and if it is "administratively feasible to determine whether a particular individual is a member of the class." *Lanovaz v. Twinings North America, Inc*., 2014 WL 1652338, at *2-3 (N.D. Cal. Apr. 24, 2014) (*quoting Wolph v. Acer Am. Corp*., No. 09-01314, 2012 WL 993531, at *1-2 (N.D. Cal. Mar. 23, 2012)).

As discussed previously, DHCS is the single state agency that administers the state's Medicaid program, Medi-Cal. *See* Cal. Welf. & Inst. Code § 14100.1. DHCS or Medi-Cal organizations and programs under DHCS' control, such as CCS or managed care plans, approve class members' Private Duty Nursing services and reimburse nursing providers for these services. As such, membership in the class can be determined based on Defendants' own recordkeeping systems. Indeed, pursuant to the notice distribution plan in the Parties' Joint Motion for Preliminary Approval of Settlement, filed concurrently herewith, Defendants will identify and distribute notice to class members who have been approved to receive Medi-Cal Private Duty Nursing services. For these reasons, the Settlement Class satisfies the ascertainability requirement.

6. The Proposed Class Meets the Requirements of Rule 23(b)(2)

Class certification is warranted under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is "almost automatically satisfied in actions primarily seeking injunctive relief." *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 520 (N.D. Cal. 2011) (citation omitted). The Ninth Circuit has held that "[t]hese requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally

applicable to the class as a whole." *Parsons*, 754 F.3d at 688 (*citing Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010)).

Certifying the proposed class under Rule 23(b)(2) is appropriate for settlement purposes because this action seeks injunctive relief, and the Agreement will result in uniform class-wide relief which includes the designation of a Medi-Cal program or contracted organization that will provide case management services to secure class members' approved Private Duty Nursing services, oversight and monitoring of case management agencies by Defendants, and the ability for class members to contact Defendant DHCS directly with questions or concerns about their Private Duty Nursing or the case management services they are receiving. Settlement Agreement at ¶¶ 21-27.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for certification of the Settlement Class, appoint Plaintiffs I.N. and J.B. as class representatives; and appoint William Leiner and Elissa Gershon of Disability Rights California, Sarah Somers and Jane Perkins of the National Health Law Program, Robert Newman of the Western Center on Law and Poverty, and Richard Schwartz of Browne George Ross LLP as Class Counsel.

DATED: February 28, 2019

Respectfully Submitted,

By: */s/ William Leiner*
William Leiner
Attorneys for Plaintiffs

Motions

3:18-cv-03099-WHA Ivory N. et al v. Kent et al

ADRMOP,REFSET-JSC

U.S. District Court

California Northern District

Notice of Electronic Filing

The following transaction was entered by Leiner, William on 2/28/2019 at 6:05 PM PST and filed on 2/28/2019

Case Name: Ivory N. et al v. Kent et al
Case Number: 3:18-cv-03099-WHA
Filer: J. B.
I. N.
Document Number: 102

Docket Text:
MOTION to Certify Class *for Settlement* filed by J. B., I. N.. Motion Hearing set for 4/4/2019 08:00 AM in San Francisco, Courtroom 12, 19th Floor before Judge William Alsup. Responses due by 3/14/2019. Replies due by 3/21/2019. (Attachments: # (1) Declaration of William Leiner, # (2) Declaration of Zarinah F., # (3) Declaration of Alisa B., # (4) Declaration of Sarah Somers, # (5) Declaration of Robert Newman, # (6) Declaration of Richard Schwartz, # (7) Proposed Order) (Leiner, William) (Filed on 2/28/2019)

3:18-cv-03099-WHA Notice has been electronically mailed to:

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3:18-cv-03099-WHA Please see Local Rule 5-5; Notice has NOT been electronically mailed to:

The following document(s) are associated with this transaction:

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Original filename:C:\fakepath\CC Motion - LeinerDecl w Exhibits.pdf
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