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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 I. N., a minor, by and through her mother
and *Guardian ad Litem*, Zarinah F.;
17 J. B., a minor by and through his mother
and *Guardian ad Litem*, Alisa B.,
18
19 Plaintiffs,
v.

20 JENNIFER KENT, Director of the
Department of Health Care Services;
21 State of California DEPARTMENT OF
HEALTH CARE SERVICES,
22
23 Defendants.

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

CLASS ACTION

**JOINT MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

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. (hereafter “Plaintiffs”) and Defendants California Department of Health Care Services and Jennifer Kent, (hereafter “Defendants”), will jointly move the Court for (1) preliminary approval of the proposed class settlement agreement (hereafter “the Agreement”); (2) notice to the proposed settlement class, and an order directing notice to the same; and (3) a scheduling order setting deadlines for objections and a fairness hearing.¹ This motion is made on the grounds that: 1) the Agreement is in the best interests of the class members and within the range of possible approval; 2) the proposed manner and forms of noticing the settlement of the class members would fairly apprise class members of the terms of the settlement; and 3) the proposed timetable for mailing the written notice of settlement, lodging objections, and holding a hearing regarding final approval of the settlement is appropriate.

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.”), Richard Schwartz (hereafter “Schwartz Decl.”), Robert Newman (hereafter “Newman Decl.”), Zarinah F. (hereafter “Zarinah F. Decl.”), Alisa B. (hereafter “Alisa B. Decl.”), the exhibits attached thereto, Plaintiffs’ Motion for Certification of Settlement Class, which is being filed concurrently herewith, and the complete files and records in this action. The Agreement

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¹ This motion is being filed concurrently with Plaintiffs’ Motion for Certification of Settlement Class, whereby Plaintiffs will move the Court to certify the proposed settlement class and appoint Plaintiffs’ counsel as Class Counsel. Defendants will file a statement in support of class certification.

1 and the Parties' proposed class notice are attached respectively as Exhibits 1 and 2 to the
2 Declaration of William Leiner.

3 DATED: February 28, 2019

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

By: /s/ Carolyn O. Tsai
Carolyn O. Tsai
Attorneys for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The proposed class-wide settlement of this lawsuit addresses Plaintiffs’ allegations, including but not limited, that Defendants have violated the Medicaid Act (42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), 1396a(a)(43)(C), and 1396a(a)(8), 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.*) by failing to arrange for approved Medi-Cal funded Private Duty Nursing services, also known as in-home nursing services, for Medi-Cal beneficiaries under the age of 21 who are eligible for Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services.

Following several all-day, in-person settlement conferences before the Honorable Jacqueline Corley, United States Magistrate Judge, and exchanges of information and numerous proposals since August, 2018, the parties have executed this Class Action Settlement (“Agreement”). The Agreement provides for significant relief to the proposed settlement class, including:

- the designation of a Medi-Cal program or contracted as having primary responsibility to provide case management for approved Private Duty Nursing services;
- oversight and monitoring of the Medi-Cal program or contracted organization by Defendants and Class Counsel; and
- the ability for class members to contact Defendants directly with questions or concerns about their Private Duty Nursing or the case management services they are receiving.

In addition, the Agreement provides for continuing jurisdiction by the Court to oversee enforcement of the Agreement for nine months after Defendants issue notices to Medi-Cal programs and contracted organizations requiring them to provide case management services to arrange for all approved Private Duty Nursing services desired by the class member, and a dispute resolution process overseen by Magistrate Judge Corley.

1 The Agreement is fair, adequate, and reasonable. The Parties have negotiated an
2 agreement that provides significant benefits to the class and avoids protracted litigation. If
3 the Court grants preliminary approval, class members will be notified of the terms of the
4 settlement and informed of their right to object or comment before the final approval
5 hearing. The Parties have agreed on a timeline for notice to the class, objections, briefing,
6 the fairness hearing, and adjudicating attorneys' fees and expenses, subject to approval by
7 the Court.

8 Accordingly, the Parties jointly request: (1) preliminary approval of the proposed
9 class settlement agreement; (2) an order approving the form and distribution of notice to
10 the proposed settlement class; and (3) a scheduling order setting deadlines for objections
11 and a fairness hearing.

12 **II. THE PARTIES AND NATURE OF THE CASE**

13 Plaintiffs I.N., age 8, and J.B., age 6, are Medi-Cal beneficiaries who are eligible for
14 EPSDT services. Zarinah F. Decl. ¶ 15; Alisa B. Decl. ¶ 14. EPSDT provides
15 comprehensive, preventative, diagnostic, and treatment services to Medi-Cal eligible
16 children under the age of 21. 42 U.S.C. §§ 1396a(a)(43)(C), 1396d(r). One such treatment
17 available under EPSDT is Private Duty Nursing services—nursing services provided in a
18 child's home by a registered nurse or licensed practical nurse for beneficiaries who require
19 more individual and continuous care than is available from a visiting nurse or routinely
20 provided by the nursing staff of the hospital or skilled nursing facility. 42 U.S.C. §
21 1396d(a)(8); 42 C.F.R. § 440.80. Both Plaintiffs allege they have significant medical
22 needs and require these services to live safely at home with their families, but have rarely
23 received all of the nursing hours for which they are approved, and have not received the
24 assistance they need from Defendants to secure all of their approved hours. Zarinah F.
25 Decl. ¶ 15-19; Alisa B. Decl. ¶ 14-17. Plaintiffs have further alleged that Defendants'
26 have placed the burden on them to navigate a complex system with little to no support to
27 obtain the benefits their children are entitled to receive. Zarinah F. Decl. ¶¶ 7, 18; Alisa B.
28 Decl. ¶¶ 7, 16.

1 For these reasons, Plaintiffs brought this action, alleging that Defendants fail to
2 comply with the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B),
3 1396a(a)(43)(C), and 1396a(a)(8), the Americans with Disabilities Act, 42 U.S.C. § 12131
4 *et. seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq.* Plaintiffs seek
5 injunctive relief requiring Defendants to arrange for their Private Duty Nursing
6 services—either directly, or through referral to appropriate agencies, organizations, or
7 individuals. Plaintiffs do not seek damages.

8 Defendant Department of Health Care Services (hereafter “DHCS”) is the single
9 state agency responsible for administering California’s Medicaid program, called Medi-
10 Cal. *See* Cal. Welf. & Inst. Code § 14100.1. Medi-Cal does not itself provide health care
11 services to beneficiaries, nor does Medi-Cal provide those beneficiaries with money to
12 purchase health care services directly. Rather, Medi-Cal is a vendor payment program,
13 wherein DHCS, either directly through its fee-for-service delivery system, or through
14 Medi-Cal managed care plan organizations with which DHCS contracts, reimburses
15 participating providers for the services they provide to Medi-Cal beneficiaries. These
16 services include Private Duty Nursing services, as well as case management services,
17 which include developing plans of care, referral services, appointment scheduling, and
18 monitoring and follow up. 42 U.S.C. § 1396d(a)(19); 42 C.F.R. § 440.169(d).

19 Defendants utilize multiple delivery systems to provide services to members of the
20 settlement class: Managed Care Plans, county California Children’s Services (hereafter
21 “CCS”) programs, fee-for-service only, and Waiver Agencies. CCS is a state and county
22 partnership program for children who have certain diseases or health problems. Cal. Code
23 Regs., tit. 22, §§ 41401 *et. seq.* and § 51013. County CCS programs are responsible for,
24 *inter alia*, authorizing private duty nursing and providing case management services for
25 Medi-Cal eligible children enrolled in CCS. Waiver Agencies contract with DHCS to
26 provide administrative and comprehensive care management services to individuals
27 eligible for the Home and Community-Based Alternatives (HCBA) Waiver under 42
28

1 U.S.C. section 1396n(c).² Managed Care Plans contract with DHCS to authorize and
2 provide private duty nursing services and case management services, along with other
3 services, for Medi-Cal eligible children enrolled in a plan. Finally, children in the fee-for-
4 service only program can request authorization from DHCS for their providers to provide
5 and bill for case management services.

6 Defendant Jennifer Kent is DHCS' current Director and is responsible for directing
7 DHCS' medical programs and contractual arrangements. Her responsibilities in this role
8 include ensuring DHCS' compliance with federal and state laws. *See* Cal. Welf. & Inst.
9 Code § 14100.1; Cal. Welf. & Inst. Code § 14154(d).

10 Defendants deny liability under the federal laws at issue, and assert that their
11 current policies, practices, and procedures meet all their obligations under applicable law.

12 **III. PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS**

13 Prior to initiating this litigation, Plaintiffs' counsel notified Defendants on
14 November 9, 2017 that families were struggling to secure approved Private Duty Nursing
15 services, were attempting to seek help from DHCS but not receiving any meaningful
16 assistance to arrange for these services, and their children were at risk of harm and
17 placement outside the family home. Leiner Decl. ¶ 14. Plaintiffs' counsel met
18 telephonically with DHCS attorneys and administrators multiple times between December
19 of 2017 and April of 2018 in an attempt to resolve this matter but were unable to do so. *Id.*

20 On May 24, 2018, Plaintiffs filed this class action lawsuit. ECF No. 1. On July 23,
21 2018, Defendants filed a motion to dismiss. ECF No. 39. In response, Plaintiffs filed their
22 First Amended Complaint on August 8, 2018, thereby rendering Defendants' motion moot.
23 ECF No. 47. Defendants filed a second motion to dismiss on August 23, 2018, arguing
24 that Plaintiffs lacked Article III standing for all claims in the First Amended Complaint.
25 ECF No. 51. Plaintiffs opposed the motion. ECF No. 54. On October 10, 2018, this
26

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

1 Court issued an order denying Defendants' motion to dismiss. ECF No. 66. Defendants
2 answered Plaintiffs' First Amended Complaint on October 31, 2018. ECF No. 79.

3 The Court held a Case Management Conference on September 6, 2018 and issued a
4 scheduling order on September 10, 2018. ECF No. 56. The scheduling order set, *inter*
5 *alia*, a deadline of December 6, 2018 for Plaintiffs to file their class certification motion
6 and a trial date of November 18, 2019. *Id.* The scheduling order also referred the Parties
7 to Honorable Jacqueline Corley, United States Magistrate Judge, for a settlement
8 conference. *Id.*

9 Since the filing of this lawsuit, Plaintiffs have pursued a two-track approach of
10 preparing for class certification and trial while exploring the possibility of settlement.
11 Leiner Decl. ¶ 16. In August 2018, the parties exchanged their initial disclosures and
12 Plaintiffs served written discovery, including interrogatories and requests for production of
13 documents. *Id.* Plaintiffs began noticing depositions in September 2018 and served a
14 request for inspection and request for admissions in October 2018. *Id.* In October 2018,
15 Plaintiffs also sought the Court's assistance with a discovery dispute, resulting in the
16 taking of two depositions that same month, which included: 1) the primary author of a
17 2016 DHCS study which identified a 29% shortfall in approved Private Duty Nursing
18 hours across 3,654 EPSDT beneficiaries; and 2) DHCS' designee regarding their data
19 retrieval processes for electronically stored information. *Id.*, Exh. 5; ECF No. 75.

20 Concurrently, the Parties participated in a pre-settlement conference meeting on
21 October 25, 2018, exchanged settlement conference statements on October 31, 2018 and
22 met with Magistrate Judge Corley on November 2, 2018, for an all-day settlement
23 conference. Leiner Decl. ¶ 17. Although the Parties did not reach an agreement, progress
24 was made, and the Court agreed to extend the deadline to move for class certification so
25 the parties could focus on settlement negotiations. *Id.*; ECF No. 82. The parties made
26 further progress at a second settlement conference with Magistrate Judge Corley on
27 November 30, 2018, after which point the Court again agreed to extend the class
28 certification deadline. *Id.*; ECF No. 88. After additional day-long settlement conferences

1 with Magistrate Judge Corley on December 21, 2018 and January 22, 2019, and telephonic
2 conferences February 20, 2019 and February 27, 2019, the Parties reached an agreement to
3 resolve all claims in this case and fully executed the Agreement on February 28, 2019.

4 Leiner Decl. ¶ 17.

5 **IV. SUMMARY OF THE SETTLEMENT**

6 **A. The Settlement Class**

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

14 The expansion of the settlement class to include all Medi-Cal beneficiaries under
15 the age of 21 approved to receive Medi-Cal funded Private Duty Nursing—not just those
16 who are experiencing a shortfall in hours—is appropriate here. Expanding the settlement
17 class will prevent the harm at issue before it occurs. Families will be able to receive case
18 management services *regardless* of whether they are currently face a shortfall in nursing
19 hours. Thus, the expanded class definition will ensure that class members who anticipate a
20 shortfall in hours for a specific reason (*e.g.*, knowing that a nurse will quit at some point in
21 the future and there are no identified alternatives) will be able to access the benefits of the
22 Agreement. Further, the amount of Private Duty Nursing hours children receive can vary
23 from month to month and sometimes even from week to week. Accordingly, a child may
24 receive full staffing in one month and face a significant shortfall the next. Broadening the
25 class definition enables children in this precarious situation to obtain benefits provided
26 under the Agreement before a crisis develops.

27

28

B. Case Management to Secure Approved Private Duty Nursing

Pursuant to the terms of the Agreement, Defendant DHCS will issue directives to managed care plans, county CCS programs, Medi-Cal providers, and Waiver Agencies, all of which services to Medi-Cal beneficiaries. Agreement at ¶¶ 21-23. The directives will require these programs to provide case management services to class members who need help obtaining approved Private Duty Nursing services. *Id.* The directives will also explain that case management services must include at least the following:

- providing class members with information about the number of Private Duty Nursing hours they are approved to receive;
- contacting individuals and agencies that provide nursing services to obtain those services for class members;
- helping class members receive nursing services from more than one individual nurse provider or agency at a time; and
- assisting individuals and agencies that provide nursing services to navigate the process of enrolling to become a Medi-Cal provider. *Id.*

Defendants will also require CCS Counties, Medi-Cal managed care plans, and Waiver Agencies to revise their policies and procedures if necessary to implement these requirements, and to provide a notice to class members, separate and apart from the notice to class required by Rule 23(e), with the following information: (1) the case management services available to arrange for Private Duty Nursing services; (2) the procedure for class members to file complaints if they are dissatisfied with the case management services they are receiving or are facing difficulties obtaining Private Duty Nursing; and (3) Class Counsel's contact information. *Id.* Defendants will also publish a Provider News Flash (bulletin) advising providers serving Class Members who receive Private Duty Nursing services through fee-for-service Medi-Cal and are not participants in CCS, a managed care plan, or the Home and Community-Based Alternatives Waiver, that the provider is permitted to bill Medi-Cal for case management for approved Private Duty Nursing services.

1 **C. Designation of Primary Case Management Agency**

2 The Agreement sets forth a framework to determine which of the Medi-Cal delivery
3 systems (managed care plans, CCS, fee-for-service, or a Waiver Agency) will have the
4 primary responsibility to arrange for class members' approved Private Duty Nursing.
5 Agreement at ¶ 24. However, the Agreement also sets forth a "no wrong door" model. *Id*
6 at ¶ 25. As part of this model, Defendants have agreed that regardless of which Medi-Cal
7 program has primary responsibility for arranging for class members' approved Private
8 Duty Nursing, the class member and/or the class member's personal representative may
9 contact any Medi-Cal program or contracted organization that the class member is
10 enrolled in to request case management for Private Duty Nursing services. *Id.* The
11 delivery system must then provide the case management services to the class member as
12 set forth in the Agreement and work collaboratively with the delivery system primarily
13 responsible for case management of approved private duty nursing services for that class
14 member. *Id.*

15 **D. Obtaining Assistance from DHCS**

16 Defendant DHCS will maintain an email address that class members can contact
17 with questions or concerns about Private Duty Nursing services or the case management
18 services they are receiving from their designated service delivery system. Agreement at
19 ¶ 26. When contacted by a class member through this email address, DHCS has agreed to
20 (1) forward the message to the appropriate delivery system program; and (2) respond to the
21 sender, acknowledging receipt of the message, providing the contact information for the
22 appropriate delivery system program, describing any action taken in response to the
23 inquiry, and notifying the sender that, if the issue is not resolved, that the sender should
24 notify DHCS. *Id.* If the sender notifies DHCS that the issue is not resolved, DHCS has
25 agreed to take other actions DHCS deems appropriate to assist the sender to resolve the
26 issue. *Id.*

1 **E. Monitoring by Class Counsel**

2 Class Counsel will have the opportunity to review drafts of the directives
3 Defendants will send to the Medi-Cal delivery systems responsible for arranging for class
4 members' Private Duty Nursing. Agreement at ¶ 27. Class Counsel will also receive
5 copies of all approved policies and procedures that result from these directives. *Id.* In
6 addition, Defendants have agreed to: 1) make publicly available the final results of DHCS
7 audits of managed care plans for compliance with the Agreement; 2) provide Class
8 Counsel with aggregate data regarding email communications that concern Private Duty
9 Nursing, including the number of inquiries received, the number of class members those
10 inquiries concern, an assessment of the nature of the inquiries by categories to be
11 developed by DHCS, and the delivery systems to which the inquiries are referred; and 3)
12 meet with Class Counsel at least three times during the term of the Agreement. *Id.*

13 **F. Specific Relief for Named Plaintiffs**

14 Until the Agreement is implemented, DHCS has agreed to expedite the assumption
15 of responsibility by named plaintiffs' respective delivery systems for case management of
16 their approved Private Duty Nursing services. Until the appropriate entity assumes
17 responsibility, DHCS has designated a point of contact who will be responsible for
18 working with Plaintiffs to resolve issues and questions related to the authorization and/or
19 staffing of their Private Duty Nursing services. *Id.*

20 **G. Attorneys' Fees and Costs**

21 At the fairness hearing, Plaintiffs will seek Court approval for \$435,000 in
22 attorneys' fees and costs incurred in litigating this lawsuit. Agreement at ¶ 28. Defendants
23 have agreed not to oppose a motion for up to \$435,000 in attorney's fees and costs. *Id.*
24 This amount includes not only the time devoted by Plaintiffs' counsel to prosecuting the
25 case through this motion for preliminary approval of the settlement, but also all the time
26 the attorneys will spend in the future in moving for final approval of the settlement plus
27 monitoring Defendants' compliance with the settlement once it is approved. Leiner Decl.
28 ¶ 23. The amount represents a significant discount from Plaintiffs' fee and costs. *Id.* The

1 lodestar amount for the six attorneys who Plaintiffs' seek to appoint as class counsel for
2 the settlement class exceeds \$600,000 for work completed through finalizing the
3 settlement. *Id.* Plaintiffs' have also incurred \$14,046 in costs and fees, including expert
4 fees. *Id.*; see *Lovell v. Chandler*, 303 F.3d 1039, 1058 (9th Cir. 2002) (holding that expert
5 witness fees and litigation expenses are recoverable under the ADA). Plaintiffs do not
6 seek a multiplier. Leiner Decl. ¶ 23. As discussed herein, the settlement confers a
7 significant non-monetary benefit on the class in the form of case management services to
8 enable class members to receive the Private Duty Nursing hours approved by Medi-Cal.

9 **H. Dismissal and Continued Jurisdiction**

10 No later than 61 days from final approval of the Agreement, the Parties will jointly
11 ask the Court to dismiss this action and retain jurisdiction over this matter for the purpose
12 of ensuring compliance with the terms of the Agreement. Agreement at ¶ 36. The Court's
13 jurisdiction to ensure compliance with the Agreement will end nine months after
14 Defendants send the directives to Medi-Cal Managed Care Plans, county CCS programs,
15 fee-for-service providers, and Waiver Agencies as required by the Agreement. *Id.*
16 However, the Parties may agree, or the Court may order, continued performance by
17 Defendants beyond this date. *Id.*

18 **I. Dispute Resolution Process**

19 The Parties have agreed to a three-step dispute resolution process. First, the Parties
20 have agreed to contact the opposing party before filing any motion or lawsuit to enforce
21 the Agreement. Agreement at ¶ 37. Second, if the Parties cannot successfully resolve the
22 issue, the Parties will complete at least one conference with Magistrate Judge Corley, her
23 designee, or another mutually agreeable mediator. *Id.* Third, if the conference is not
24 successful, then either party may file a motion to enforce the Agreement after 30 days from
25 the date of the conference. *Id.* However, if either party believes that irreparable harm will
26 occur to it by pursuing the process set forth above, the party must contact Magistrate Judge
27 Corley and confer with her or her designee before filing any motion or lawsuit to enforce
28 the terms of the Agreement. *Id.*

1 **J. Release of Claims**

2 In consideration for the benefits obtained under the agreement, the members of the
3 class will release their claims for injunctive and declaratory relief against DHCS and its
4 Director, Jennifer Kent. The released claims include those claims set forth in the
5 Complaint and First Amended Complaint, up to and including the execution date of the
6 Settlement Agreement, against Defendants Jennifer Kent, in her official capacity as
7 director of DHCS, and DHCS. The specific claims set forth in the Complaint and First
8 Amended Complaint consist of claims under the Medicaid Act, Americans with
9 Disabilities Act, Section 504 of the Rehabilitation Act and California Government Code
10 Section 11135 with regard to failing to arrange for approved Medi-Cal funded private duty
11 nursing services for Medi-Cal beneficiaries under the age of 21. Agreement at ¶ 30.

12 The original Complaint contained one claim for disability discrimination under
13 California Government Code § 11135 which was not included in the operative First
14 Amended Complaint. Plaintiffs withdrew this claim after Defendants filed their first
15 Motion to Dismiss and argued that the Eleventh Amendment bars Plaintiffs from bringing
16 this state law claim against a state agency and state officials in federal court absent a
17 waiver of sovereign immunity. ECF No. 39.

18 Individual named plaintiffs I.N. and J.B. have agreed to fully release “any and all
19 claims, damages, liabilities, rights, and complaints as set forth or asserted in the Notice of
20 Intent to Sue dated November 9, 2017, the Complaint, and the First Amended Complaint,
21 against Defendants Jennifer Kent, in her official capacity as director of DHCS, and DHCS,
22 up to and including the execution date of this Settlement Agreement.” Agreement at ¶ 30.
23 The Notice of Intent to sue also contained the California Government Code § 11135 claim,
24 which was included in the Complaint but not the First Amended Complaint.

25 **V. ARGUMENT**

26 **A. The Settlement Merits the Court’s Preliminary Approval**

27 The Ninth Circuit maintains a “strong judicial policy” that favors the settlement of
28 class actions. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Class*

1 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). In reviewing a proposed
2 class-action settlement agreement, a court first “conducts a preliminary approval or pre-
3 notification hearing to determine whether the proposed settlement is “within the range of
4 possible approval.” *Grant v. Capital Management Services, L.P.*, 10-cv-2471-WQH
5 (BGS), 2013 WL 6499698, at *2 (S.D. Cal. Dec. 11, 2013) (quoting *In re M.L. Stern*
6 *Overtime Litig.*, 07-CV-0118-BTM (JMA), 2009 WL 995864, at *3 (S.D. Cal. Apr. 13,
7 2009)); see also *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D.
8 Cal. 2007); *Manual for Complex Litigation* (Fourth) § 21.632 (2004) (explaining that
9 courts “must make a preliminary determination on the fairness, reasonableness, and
10 adequacy of the settlement terms and must direct the preparation of notice of the
11 certification, proposed settlement, and date of the final fairness hearing”). “Second,
12 assuming that the court grants preliminary approval and notice is sent to the class, the court
13 conducts a ‘fairness’ hearing, at which all interested parties are afforded an opportunity to
14 be heard on the proposed settlement.” *Horton v. Merrill Lynch*, 855 F. Supp. at 825, 827
15 (E.D. N.C. 1994).

16 Preliminary approval entails an initial assessment of the fairness of the proposed
17 settlement made by a court “on the basis of information already known, supplemented as
18 necessary by briefs, motions, or informal presentations by parties.” *Manual for Complex*
19 *Litigation* § 21.632. *Newberg on Class Actions* summarizes the preliminary approval
20 criteria as follows:

21 If the preliminary evaluation of the proposed settlement does not disclose
22 grounds to doubt its fairness or other obvious deficiencies, such as unduly
23 preferential treatment of class representatives or of segments of the class, or
24 excessive compensation for attorneys, and appears to fall within the range
25 of possible approval, the court should direct that notice under Rule 23(e) be
26 given to the class members of a formal fairness hearing, at which
27 arguments and evidence may be presented in support of and in opposition
28 to the settlement.

Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:25 (4th Ed. 2002).

1 Moreover, there is an “initial presumption of fairness when a proposed class
2 settlement was negotiated at arm’s length by counsel for the class.” *Murillo v. Texas A&M*
3 *Univ. Sys.*, 921 F. Supp. 443, 445 (S.D. Tex. 1996) (citation omitted); *see also Harris v.*
4 *Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29,
5 2011) (citation omitted). “Although Rule 23 imposes strict procedural requirements on the
6 approval of a class settlement, a district court’s only role in reviewing the substance of that
7 settlement is to ensure that it is ‘fair, adequate, and free from collusion.’” *Lane v.*
8 *Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (citation omitted).

9 Other factors courts consider in assessing a settlement proposal include: “(1) the
10 strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of
11 further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the
12 amount offered in settlement; (5) the extent of discovery completed and the stage of the
13 proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
14 participant; and (8) the reaction of the class members to the proposed settlement.” *Lane*,
15 696 F.3d at 819; *see also In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1179 (N.D. Cal.
16 1993). The district court must explore these factors comprehensively to satisfy appellate
17 review, but “the decision to approve or reject a settlement is committed to the sound
18 discretion of the trial judge.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
19 1998).

20 Here, the settlement presented to the Court for preliminary approval represents a
21 fair and reasonable resolution of this dispute, and is worthy of notice to and consideration
22 by the class members. The settlement negotiated by the Parties was the result of arm’s
23 length negotiations by experienced counsel on both sides, each with a comprehensive
24 understanding of the strengths and weaknesses of each party’s respective claims and
25 defenses. Leiner Decl. ¶¶ 4-9, 23; Somers Decl. ¶¶ 2-15; Newman Decl. ¶¶ 4-14;
26 Schwartz Decl. ¶¶ 2-5. The settlement was preceded by adversarial litigation that involved
27 discovery and motion practice. Leiner Decl. ¶¶ 14, 16. The parties engaged in settlement
28 efforts before the lawsuit was filed, and settlement efforts continued after the filing of the

1 lawsuit where the Parties participated in settlement conferences before the Honorable
2 Jacqueline Corley, United States Magistrate Judge, on November 2, 2018, November 30,
3 2018, December 21, 2018, January 22, 2019, February 20, 2019 and February 27, 2019.
4 *Id.* at ¶¶ 14-15, 17. During that time, the Parties exchanged additional information used to
5 further evaluate the Agreement, including Defendants’ contracts with managed care plans,
6 policies and procedures related to the provision of case management services, policy
7 directives issued by Defendants to agencies that provide services to class members, and
8 information about the provider enrollment process. *Id.* at ¶ 19. Accounting for this
9 information, the Parties made multiple revisions to the settlement agreements, and
10 concluded that the Agreement executed on February 28, 2019, will provide effective relief
11 to the class while efficiently and expeditiously resolving disputed issues. *Id.* That the
12 Parties negotiated the relief for the benefit of the proposed settlement class before
13 resolving attorney’s fees and costs further demonstrates the absence of any collusion. *Id.*
14 at ¶ 18. Lastly, the Guardians ad Litem for Plaintiffs also provided Plaintiffs’ counsel with
15 significant feedback about the terms of the settlement agreement throughout the
16 negotiations, have reviewed the terms of the final Agreement, and fully support it. *Id.* at
17 ¶ 20; Zarinah F. Decl. ¶¶ 4-6, 21; Alisa B. Decl. ¶ 4-6, 19.

18 Moreover, the outcome of the litigation is currently uncertain. If the case had not
19 settled, the Parties would have continued the discovery process (including additional
20 discovery-related motions), litigated class certification, and prepared for trial, scheduled
21 for November 18, 2019. Leiner Decl. ¶ 24; Somers Decl. ¶ 15; Newman Decl. ¶ 15;
22 Schwartz Decl. ¶6. Proceeding through a contested class certification motion, discovery
23 and pre-trial motions, trial, and possible appeals would impose risks and costs, and would
24 substantially delay the implementation of mutually agreed remedies in this matter. *Id.*
25 Given the relief achieved and the risks involved in further litigation, the negotiated
26 settlement represents a fundamentally “fair, reasonable and adequate” resolution of the
27 disputed issues and should be preliminarily approved. *See* Fed. R. Civ. P. 23(e)(2).
28

1 **B. The Court Should Direct Distribution of the Notice of Settlement**

2 The content of the notice to a settlement class certified under Rule 23(b)(2) is
3 within the Court’s discretion. Fed. R. Civ. P. 23(c)(2)(a), (e)(1); *Kim v. Space Pencil, Inc.*,
4 C 11–03796 LB, 2012 WL 5948951, at *4 (N.D. Cal. Nov. 28, 2012). Notice provided
5 under Rule 23(e) must “generally describe [] the terms of the settlement in sufficient detail
6 to alert those with adverse viewpoints to investigate and to come forward and be heard.”
7 *Lane*, 696 F.3d at 826 (quoting *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 962 (9th
8 Cir. 2009)).

9 Here, the Parties have agreed on a form of notice and a notice distribution plan that
10 will effectively inform the class about the settlement and their right to object. Leiner
11 Decl., Exh. 2. The notice summarizes the key components of the settlement in plain
12 language and provides procedures for submitting objections and for participating in the
13 fairness hearing. Leiner Decl. ¶ 25

14 DHCS is identifying the full set of Class Members as follows:

- 15 a. To identify Class Members authorized for Private Duty Nursing Services
16 through Medi-Cal fee-for-service, DHCS is running a query in its “SURGE”
17 database to pull the Client Index Numbers (CIN) and names for all Class
18 Members.
- 19 b. To identify Class Members authorized to receive Private Duty Nursing services
20 by a Medi-Cal managed care plan, DHCS is requiring all Medi-Cal managed
21 care plans to provide DHCS with a list of the CIN numbers and names of all
22 Class Members.
- 23 c. To identify those Class Members authorized to receive Private Duty Nursing
24 services by a California Children’s Services (CCS) County Program:
- 25 o DHCS is running a query in the CMS Net case management system for
26 CCS to pull the CIN numbers for all Class Members.
- 27
28

1 ○ DHCS is requiring each CCS county program to compile a list of the CIN
2 numbers and names of all Class Members recently approved for Private
3 Duty Nursing Services, to ensure that all Class Members are identified.

4 d. DHCS will compile a Class Member list from the gathered CIN and name data,
5 and run a query in the Medi-Cal Eligibility Data System (MEDS) to obtain
6 home address and language preference of each Class Member. That information
7 will be used to create a mailing file.

8 Preparation of Class Notices for Mailing, and Mailing of Class Notices will be
9 completed by DHCS as follows:

10 a. DHCS will utilize third-party contractor MAXIMUS to translate and mail
11 approved Class Notices, including an insert with multi-language access
12 taglines notifying beneficiaries of the availability of free language services,
13 and a nondiscrimination notice.

14 ○ DHCS will transfer the Class Member List and approved Class Notice to
15 MAXIMUS.

16 ○ MAXIMUS will perform readability reviews if court directed.

17 ○ MAXIMUS will translate the notices into threshold languages identified
18 on the mailing file for each beneficiary.

19 ○ Using the Class Member List MAXIMUS will prepare and mail notices
20 to each Class Member's name and address.

21 b. DHCS anticipates that it will take no longer than 75 days from approval of
22 the Class Notice to the date that MAXIMUS mails out the Class Notices to
23 the Class Members.

24 Disability Rights California will also maintain a settlement website, which will
25 include the Agreement, the class notice, and other information and documents related to
26 this case, including motions for final approval of the Agreement and attorneys' fees.

27 Leiner Decl. ¶ 27. Disability Rights California will post the class notice no later than 75
28 days of the order preliminarily approving the Agreement. Leiner Decl. ¶ 25.

1 Lastly, ordinarily publications issued by Defendants are reviewed by staff dedicated
2 and trained in editing text to meet a sixth-grade reading level. This process is estimated to
3 take an additional two weeks for the Proposed Notice to Class in this case. Because of the
4 additional delay, and the parties' understanding that the Notice to Class is a court issued
5 document, the parties have agreed to defer to the Court's preference on this additional
6 review.

7 Such notice constitutes sufficient notice to the class, the best notice practicable
8 under the circumstances, and complies fully with the requirements of Rule 23 of the
9 Federal Rules of Civil Procedure. *Id.* at ¶ 28. The proposed forms of notice apprise class
10 members in a fair and neutral way of the existence of the settlement with the Defendants
11 and their rights with respect to the settlement. The Parties respectfully submit that the
12 class notice and notice distribution plan satisfy the required standards for notices of class
13 settlements.

14 **C. The Court Should Approve the Proposed Scheduling Order**

15 The Parties are submitting herewith a proposed scheduling order including dates for
16 issuance of the class notice, deadlines for objections, a date for the fairness hearing to
17 determine final approval of the agreement.

18 In particular, the Parties propose the following schedule, based on the date of the
19 Court's approval of the concurrently submitted notice to class members:

- 20 ○ Last day for mailing of Notice of Settlement to class members and posting
21 the Notice of the websites of Disability Rights California and the Department
22 of Health Care Services: no later than 75 days³ after the date of Court's
23 approval of the Notice;
- 24 ○ Last day for Plaintiffs to file their motion for attorneys' fees and costs: no
25 later than 75 days after the Court's approval of the Notice.

26
27
28 ³ Additional time would be necessary should the Court desire readability review, as described page
18, *supra*.

- 1 ○ Last day for class members to mail objections to Settlement Agreement to
- 2 the Court: 30 days after date the Notice of Settlement to class members is
- 3 postmarked;
- 4 ○ Last day for Parties to file a Summary of Objections and Responses with the
- 5 Court: 21 days after the deadline for class members to mail objections to the
- 6 Settlement Agreement to the Court;
- 7 ○ Fairness Hearing: 14 days after date parties file the Summary of Objections
- 8 and Responses.

9 The Parties request that the Court enter proposed order filed herewith with such
 10 changes as the Court deems appropriate.

11 **VI. CONCLUSION**

12 The proposed settlement will benefit thousands of children who have been approved
 13 for Medi-Cal funded Private Duty Nursing services to obtain the services they need to live
 14 safely at home with their families. It is a fair, reasonable, and adequate settlement of the
 15 claims at issue. The Parties therefore request that the Court preliminarily approve the
 16 Agreement and issue the proposed scheduling order, including setting a date for a fairness
 17 hearing.

18 DATED: February 28, 2019

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

19

20

By: /s/ Carolyn O. Tsai
 Carolyn O. Tsai
 Attorneys for Defendants

21

22

23

24 **FILER'S ATTESTATION**

24

25

26

I hereby attest, pursuant to Local Rule 5-1(i)(3), that concurrence in the filing of
 this document has been obtained from each of its signatories.

27 DATED: February 28, 2019

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

28

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 10:27 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: [103](#)

Docket Text:

Joint MOTION for Settlement , Preliminary Approval of Class Action 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 with Exhibits 1-5, # (2) Declaration of Zarinah F., # (3) Declaration of Alisa B., # (4) Declaration of Sarah Somers with Exhibits 1-2, # (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:

Document description:Main Document

Original filename:C:\fakepath\PA Motion.pdf

Electronic document Stamp:

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Document description:Declaration of William Leiner with Exhibits 1-5

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

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Document description:Declaration of Zarinah F.

Original filename:C:\fakepath\PrelimApproval-Motion-ZarinahFDecl 20190219.pdf

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Document description:Declaration of Alisa B.

Original filename:C:\fakepath\PA Motion-AlisaBDecl.pdf

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Document description:Declaration of Sarah Somers with Exhibits 1-2

Original filename:C:\fakepath\PA Motion-SomersDecl w Exhibits.pdf

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Document description:Declaration of Robert Newman

Original filename:C:\fakepath\PrelimApproval-Motion-NewmanDecl.pdf

Electronic document Stamp:

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Document description:Declaration of Richard Schwartz

Original filename:C:\fakepath\PrelimApproval-Motion-SchwartzDecl.pdf

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Document description:Proposed Order

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