IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RAYNETTE AH CHONG, PATRICIA SHEEHEY, PATRICK SHEEHEY, individually and or behalf of the class of licensed foster care providers in the State of Hawaii, Plaintiff, vs. PATRICIA MCMANAMAN, in her official capacity as the Director of the Hawaii Department of Human Services, Defendant.	CIVIL NO. 13-00663 LEK-KSC

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

On April 23, 2015, Plaintiffs Raynette Ah Chong ("Ah Chong"), Patricia Sheehey, and Patrick Sheehey ("the Sheeheys," all collectively, "Plaintiffs") filed their Motion for Class Certification ("Motion"). [Dkt. no. 120.] Defendant Rachael Wong, DrPH, in her official capacity as the Director of the Hawai`i Department of Human Services ("DHS" or "Defendant"),[1] filed her memorandum in opposition on June 29, 2015,[2] and

[1] When Plaintiffs filed the First Amended Complaint for Declaratory Judgment and Permanent Injunctive Relief ("First Amended Complaint"), Patricia McManaman was the Director of DHS. [First Amended Complaint, filed 4/30/14 (dkt. no. 47), at ¶ 13.]

[2] Defendant filed an errata to her memorandum in opposition on June 29, 2015. [Dkt. no. 131.]

Plaintiffs filed their reply on July 6, 2015. [Dkt. nos. 130, 133.] This matter came on for hearing on July 20, 2015. After careful consideration of the Motion, supporting and opposing memoranda, and the arguments of counsel, Plaintiffs' Motion is HEREBY GRANTED IN PART AND DENIED IN PART for the reasons set forth below. In brief, the Motion is granted in that the Court will certify the class as: all currently licensed foster care providers in Hawai`i who are entitled to receive foster care maintenance payments pursuant to the Child Welfare Act when they have foster children placed in their homes. Ah Chong shall be the class representative, and current counsel shall be the class counsel. The Motion is denied in all other respects.

BACKGROUND

I. Plaintiffs' First Amended Complaint

Plaintiffs bring this case pursuant to 42 U.S.C. § 1983, seeking declaratory judgments and injunctive relief on the grounds that DHS's foster care maintenance payments and adoption assistance payments are inadequate,[3] which they allege violates the Child Welfare Act, Title IV-E of the Social Security

[3] Plaintiffs have also included allegations regarding the adequacy of DHS's permanency assistance payments, but the Court does not discuss those allegations in this Order because Plaintiffs do not seek certification of a subclass regarding permanency assistance, nor have they alleged that recipients of the permanency assistance payment are part of the class for which that they seek certification.

Act, §§ 670-679(b) ("CWA" or "Title IV-E"). [First Amended Complaint at ¶¶ 1-3.]

The First Amended Complaint alleges that: Plaintiffs are long-time foster care providers[4] who have current foster care licenses from DHS; the Sheeheys are currently caring for a foster child in their home, for whom they receive foster care maintenance payments; Ah Chong has provided foster care services to over one hundred children in Hawai`i since the mid-1990s; and Ah Chong is licensed to provide foster care for up to two children through September 13, 2015. [Id. at ¶¶ 9-11.]

DHS continues to ask Ah Chong to care for foster children. In early April 2014, DHS asked Ah Chong to be "on standby" to take in a male foster child who attended kindergarten in her hometown. [Id. at ¶ 11.] She agreed, but was ultimately informed that the boy was placed with another foster family. [Id.] Ah Chong expects to take a foster child into her home if she is offered a placement of a boy between the ages of five and nine. [Id. at ¶ 12.] Although Ah Chong has no current foster children living in her home, she has two children in her permanent custody and two more whom she adopted, all of whom came to her home through the foster care system. At the time

[4] Foster parents or foster care providers are now known as "resource caregivers." [Motion, Decl. of Claire Wong Black ("Black Decl."), Exh. 5 (testimony regarding House Bill 1576 - Relating to Foster Care Services by Judith Wilhoite, Family Programs Hawai`i).]

Plaintiffs filed the First Amended Complaint, Ah Chong was receiving monthly payments from DHS for each of those children. The monthly payments, however, are limited by the amount of DHS's foster care maintenance payments pursuant to the CWA and DHS rules. [Id.]

The First Amended Complaint claims that Plaintiffs have not received payments adequate to cover the costs of providing care to their foster children. The First Amended Complaint also claims that Ah Chong has received inadequate adoption assistance payments to support former foster children who she has adopted because that payment is limited to the amount of the inadequate foster care maintenance payment. [Id. at ¶ 2.]

When Plaintiffs filed the First Amended Complaint, the foster care maintenance payment rate was $529 a month per child, regardless of age. The First Amended Complaint alleges that this amount has not been increased since 1990, and it is insufficient due to the increased costs of food, housing, utilities, clothing, and other necessities. [Id. at ¶ 39.] The First Amended Complaint claims that payments made to Hawai`i foster care providers fall far short of covering the costs that the providers incur, in violation of the CWA. These violations also impact the adoption assistance payment rate, which is capped at the amount of the foster care maintenance payment. [Id. at ¶¶ 6-7.] The adoption assistance payment must be based on an assessment of the

care and supervision required by the child. However, the fact that it is capped at the amount of the inadequate foster care maintenance payment prevents full and fair consideration of the child's needs and the adoptive parents' circumstances, which is required by law. [Id. at ¶¶ 48-49.]

According to the First Amended Complaint, bills to increase the monthly maintenance payment amounts have failed in the Hawai`i legislature during each of the past three bienniums. Until the 2013 session, DHS opposed any increase. In 2013, the legislature granted DHS's request to defer any increase because DHS needed time to "assess the feasibility" of an adjustment. [Id. at ¶ 50.] Although bills were introduced during the 2014 legislative session that would have increased the amount of the foster care maintenance payment and the adoption assistance payment, none of the proposals addressed Defendant's obligation to periodically adjust the amount of the foster care maintenance payment. [Id. at ¶ 51.]

The First Amended Complaint prays for, *inter alia*: 1) a declaratory judgment that Defendant is violating the CWA; 2) a permanent injunction requiring Defendant to pay foster care maintenance payments that satisfy the requirements of the CWA; 3) an order requiring Defendant to prepare and implement a payment system that complies with the CWA; 4) an order requiring Defendant to base adoption assistance on the foster care

maintenance payment that is prepared and implemented in accordance with that system; 5) an award of attorneys' fees and costs; and 6) any other appropriate relief.

II. Motion

Plaintiffs ask this Court to certify a class, pursuant to Fed. R. Civ. P. 23, consisting of:

> all parents providing care to children in Hawai`i and eligible to receive support payments pursuant to the Child Welfare Act ("CWA") that are fully or partially funded by the federal government and that are based on - and capped by - the foster care maintenance rates set by the Hawai`i Department of Human Services (collectively, the "Class").

[Motion at 2.] In addition, they ask this Court to certify the following subclasses:

> **Foster Care Payment Subclass:** all licensed foster care providers in Hawai`i who shelter foster children and are entitled to receive foster care maintenance payments pursuant to the CWA (collectively, the "Foster Care Subclass").
>
> **Adoption Assistance Payment Subclass:** all adoptive parents in Hawai`i who are providing care to children with special needs and are entitled to receive adoption assistance payments pursuant to the CWA (collectively, the ["]Adoption Assistance Subclass").

[Id. at 3 (emphases in original).] The Court will refer to the Foster Care Subclass and the Adoption Assistance Subclass collectively as the "Subclasses."

Plaintiffs emphasize that the amount of the monthly foster care maintenance payment was $504 per child as of

July 1, 1989, and it was increased to $529 on July 1, 1990. [Mem. in Supp. of Motion at 4 (citing Haw. Admin. R. § 17-828-6(d)(2)(A)).] Plaintiffs state that DHS finally recommended that the legislature increase the rate in 2014. [Id. at 5.] On July 23, 2014, DHS announced the following new foster care maintenance payment rates: $575 for children under age five; $650 for children between ages six and eight; and $676 for children twelve and over. [Black Decl., Exh. 6 (DHS Press Release dated 7/23/14 - Resource Caregivers Receive Increased Board Payments).] Plaintiffs argue that the rates remain insufficient and "fail to comply with CWA's requirement that [DHS] provide foster care maintenance payments sufficient to cover the costs enumerated in the CWA or individualized needs." [Mem. in Supp. of Motion at 6.]

Plaintiffs assert that the Class and the Subclasses each meet the requirements for certification set forth in Rule 23(a), and certification is appropriate pursuant to Rule 23(b)(2) because Plaintiffs seek class-wide injunctive relief. In the alternative, they argue that certification would be appropriate pursuant to Rule 23(b)(1)(B).

STANDARD

"Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that Rule 23(a) has been satisfied." Parsons v. Ryan, 754 F.3d 657, 674 (9th Cir.

2014) (some citations and internal quotation marks omitted) (quoting Wal–Mart Stores, Inc. v. Dukes, ––– U.S. ––––, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)). Rule 23 states, in pertinent part:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
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> > (1) the class is so numerous that joinder of all members is impracticable;
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> > (2) there are questions of law or fact common to the class;
> >
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
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> > (4) the representative parties will fairly and adequately protect the interests of the class.
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> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
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> > (1) prosecuting separate actions by or against individual class members would create a risk of:
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> > > . . . .
> > >
> > > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; [or]
> >
> > (2) 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[.]

The Rule 23(a) requirement are known as: "(1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." Parsons, 754 F.3d at 674 (footnote omitted).

The Ninth Circuit has stated that:

> In evaluating whether a party has met the requirements of Rule 23, we recognize that "Rule 23 does not set forth a mere pleading standard." Wal–Mart, 131 S. Ct. at 2551. We therefore require a party seeking class certification to "affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Id. Similarly a party must affirmatively prove that he complies with one of the three subsections of Rule 23(b).

Id.

DISCUSSION

The Class and the Subclasses "must **independently** meet Rule 23's prerequisites." See Baker v. Castle & Cooke Homes Haw., Inc., Civil No. 11–00616 SOM–RLP, 2014 WL 1669158, at *16 (D. Hawai`i Apr. 28, 2014) (emphasis in Baker) (citing Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981) (noting that a subclass "must independently meet all of rule 23's requirements for maintenance of a class action")). Insofar as the gravamen of Plaintiffs' case is the alleged inadequacy of the foster care maintenance payment, the Court first turns to the Rule 23 analysis for the Foster Care Subclass.

I. Foster Care Subclass

A. Numerosity

This Court has stated:

> The numerosity inquiry "requires examination of the specific facts of each case and imposes no absolute limitations." Gen. Tel. Co. of the Nw., Inc. v. E.E.O.C., 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980). Courts, however, have found the numerosity requirement to be satisfied when a class includes at least 40 members. See Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (noting that "numerosity is presumed at a level of 40 members") (citation omitted); In re Nat'l W. Life Ins. Deferred Annuities Litig., 268 F.R.D. 652, 660 (S.D. Cal. 2010) (noting that "[c]ourts have found joinder impracticable in cases involving as few as forty class members") (citations omitted); E.E.O.C. v. Kovacevich "5" Farms, No. CV–F–06–165 OWW/TAG, 2007 WL 1174444, at *21 (E.D. Cal. Apr. 19, 2007) (noting that "[c]ourts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members"); Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 262 (S.D. Cal. 1988) (noting that "[a]s a general rule, classes of 20 are too small, classes of 20–40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough").

Davis v. Abercrombie, Civil No. 11–00144 LEK–BMK, 2014 WL 4956454, at *6 (D. Hawai`i Sept. 30, 2014) (alterations in Davis) (citation omitted).

In the present case, Plaintiffs have submitted evidence that there are over one thousand licensed foster care providers, and, as of June 30, 2014, DHS was making monthly foster care maintenance payments for 1,131 foster children. Of the 1,131 foster children, 568 received the payments pursuant to Title IV-

E, with an estimated increase to 628 for the next quarter. [Black Decl, Exh. 8 (DHS's financial report for the quarter ending 6/30/14 to the United States Department of Health and Human Services) at SOH04837.]

Defendant does not contest that 568 or 628 members of the Foster Care Subclass would be sufficiently numerous for certification, [Mem. in Opp. at 16,] but Defendant argues that the members of the Class and the members of the Subclasses are not sufficiently ascertainable [id. at 10-15].[5] This district court, however, has stated that "a class may be certified even when the exact membership of the class is not immediately ascertainable, as long as Plaintiffs demonstrate that it is large enough that joinder is impracticable." Baker, 2014 WL 1669158, at *4 (citation omitted). Further,

> While the Ninth Circuit has not spoken explicitly on the issue, [a district court within the circuit has stated] that "[b]efore a class may be certified, it is axiomatic that such a class must be ascertainable." Vandervort v. Balboa Capital Corp., 287 F.R.D. 554, 557 (C.D. Cal. 2012). See also Williams v. Oberon Media, Inc., 468 Fed. Appx. 768, 770 (9th Cir. 2012) (affirming denial of class certification for lack of ascertainability); accord Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013) ("Class

[5] "Before analyzing numerosity under Rule 23(a)(1), courts typically require the named plaintiff to demonstrate that their proposed class is ascertainable." Newton v. Am. Debt Servs., Inc., No. C–11–3228 EMC, 2015 WL 3614197, at *5 (N.D. Cal. June 9, 2015) (some citations omitted) (citing 7A Charles Alan Wright et al., Federal Practice and Procedure § 1760 at 142–47 (3d ed. 2005)).

> ascertainability is an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3).") (internal quotation omitted). However, "ascertaining [the] actual identities [of all class members] is not required" at the class certification stage. Knutson v. Schwan's Home Serv., Inc., 2013 WL 3746118, at *5 (S.D. Cal. July 15, 2013). The key factor is that the identities be ascertainable at some point in the litigation. In other words, "the proposed class definition [must be] definite enough for the court to [eventually] determine whether someone is a member of the class." Id.

Id. at *7 (some alterations in Baker) (emphasis omitted). Based on the record currently before it, this Court finds that it will eventually be able to determine who the members of the Foster Care Subclass through the DHS's records regarding licensing of foster care providers, placement of foster children, and disbursement of the foster care maintenance payment. This Court therefore finds that the Foster Care Subclass is sufficiently ascertainable.

Defendant also argues that Plaintiffs have not established numerosity because they have not established the number of persons who have been injured in the same manner that Plaintiffs allege they been injured. Defendant argues that Plaintiffs "should have been able to identify other providers who believe they have been injured in the same manner as Plaintiffs" and "demonstrated the required numerosity through detailed payment information of the proposed members of the class (not

just the Plaintiffs) and expert testimony regarding that data." [Mem. in Opp. at 17.]

> Plaintiffs emphasize that, under the CWA:
>
> The term "foster care maintenance payments" means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. . . .

42 U.S.C. § 675(4)(A). They have presented evidence that DHS's current foster care maintenance payment - also known as the "Board Rate" - is based on the United States Department of Agriculture's ("USDA") Urban West Estimated Annual Expenditures on a Child by Husband-Wife Families for three of the § 675(4)(A) categories - food, shelter, and personal incidentals. [Reply, Decl. of Claire Wong Black ("Black Reply Decl."), Exh. 1 (Hawaii CWS Foster Care Board Rate Projections).] Further, Plaintiffs assert that the current Board Rates - which were set in 2014 - are based on the USDA estimates for 2011, with a five percent discount "in order to fit within a 'known amount of money' [DHS] could request from the Legislature, without regard to Hawaii's higher cost of living or inflation from 2011 to 2014." [Reply at 4-5 (citing Black Reply Decl., Exh. 2 (excerpts of trans. of 6/5/15 depo. of Susan M. Chandler, Ph.D.) at 10, 13, 20, 24-25, 42; id., Exh. 3 (email chain dated 12/22/13 between, *inter alia*,

Patricia McManaman and Mona Maehara, discussing whether $8 million is a fixed amount for their budget and whether to use numbers from the 2012 USDA report or the 2011 USDA report); id., Exh. 4 (email chain from January 2014 between, *inter alia*, McManaman and Maehara, including McManaman's direction to use 95% of 2011 costs)).]

Thus, Plaintiffs contend that DHS's foster care maintenance payment amount is inadequate because: 1) it does not account for all of the expenses required by § 675(4)(A); and 2) it is inadequate to cover the three categories of expenses that DHS considered in determining the amount. The harm that Plaintiffs allege is suffered by all foster care providers who receive DHS's foster care maintenance payment. This Court therefore finds that Plaintiffs have presented sufficient evidence of the number of potential members of Foster Care Subclass who have suffered the injury that Plaintiffs allege in this case. This Court FINDS that the Foster Care Subclass satisfies the numerosity requirement.

B. Commonality

As to the commonality requirement, the Ninth Circuit has stated:

> Rule 23(a)(2) requires "questions of law or fact common to the class." In Wal–Mart v. Dukes, the Supreme Court announced that this provision requires plaintiffs to "demonstrate that the class members 'have suffered the same injury,'" not merely violations of "the same provision of law."

> 131 S. Ct. at 2551 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)). Accordingly, plaintiffs' claims "must depend upon a common contention" such that "determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. at 2551. "What matters to class certification . . . is not the raising of common 'questions' — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id. (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)).
>
> Plaintiffs need not show, however, that "every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is 'even a single common question,' a would-be class can satisfy the commonality requirement of Rule 23(a)(2)." Wang [v. Chinese Daily News], 737 F.3d [538,] 544 [(9th Cir. 2013)] (quoting Wal–Mart, 131 S. Ct. at 2556); see also Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 589 (9th Cir. 2012) (noting that "commonality only requires a single significant question of law or fact"). Thus, "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015, 1029 (9th Cir. 2012) (quotation marks and citation omitted).

Parsons, 754 F.3d at 674-75 (some alterations in Parsons) (footnotes omitted).

This Court finds that there are multiple issues of law and fact that are common to Foster Care Subclass. These include, *inter alia*: how DHS determined the current foster care maintenance payment amounts; whether DHS periodically reviews the adequacy of the amounts; whether it is permissible for the State

of Hawai`i ("the State") to pay for § 675(4)(A) expense categories through payments apart from the foster care maintenance payment ("foster care related payments"); and, if that practice is permissible, whether the current foster care maintenance payment amounts are adequate to cover the costs of the three § 675(4)(A) categories that DHS based the current amounts upon. This Court acknowledges that there may be some factual differences among the potential members of the Foster Care Subclass. For example, some foster care providers may receive more foster care related payments than others. These differences, however, do not defeat commonality because commonality does not require "complete congruence." See Rodriguez v. Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010) (citation and quotation marks omitted). Further, the common issues are significant issues in the determination of the Foster Care Subclass's claims. See Mazza, 666 F.3d at 589 ("commonality only requires a single **significant** question of law or fact" (emphasis added)).

This Court therefore FINDS that the claims of the proposed Foster Care Subclass have enough common questions of law and fact to satisfy the commonality requirement.

C. Typicality

As to the typicality requirement, the Ninth Circuit has stated:

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). 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." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). Thus, "[t]ypicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." Id.

As the Supreme Court recognized in Wal–Mart, Rule 23(a)'s commonality and typicality requirements occasionally merge: "Both 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." 131 S. Ct. at 2551 n.5. We expressed a similar point over a decade earlier in Armstrong v. Davis, a case in which we also clarified how to analyze typicality in cases like this one:

> Where the challenged conduct is a policy or practice that affects all class members, the underlying issue presented with respect to typicality is similar to that presented with respect to commonality, although the emphasis may be different. In such a case, because the cause of the injury is the same — here, the [Board of Prison Term's] discriminatory policy and practice — the typicality inquiry involves comparing the injury asserted in the claims raised by the named plaintiffs with those of the rest of the class. We do not insist that the named plaintiffs' injuries be

> identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct.
>
> 275 F.3d [849,] 868–69 [(9th Cir. 2001), *abrogated on other grounds, as noted in*, Harris v. Alvarado, 402 F. App'x 180, 181 (9th Cir. 2010)].

Parsons, 754 F.3d at 685 (some alterations in Parsons). However, "the class representative 'must be part of the class and possess the same interest and suffer the same injury as the class members.'" Ubaldi v. SLM Corp., No. 11–01320 EDL, 2014 WL 1266783, at *7 (N.D. Cal. Mar. 24, 2014) (quoting General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982)).

It is undisputed that neither Ah Chong nor the Sheeheys currently have a foster child in their home. See Motion, Decl. of Raynette Nalani Ah Chong ("Ah Chong Decl.") at ¶¶ 2-7; id., Decl. of Patricia Sheehey at ¶ 8. Defendant has presented evidence that, from December 2012 to December 2, 2014, the Sheeheys had a child-specific license to care for an infant foster child. The license was terminated on December 2, 2014, when they adopted the child. [Mem. in Opp., Decl. of Lynne Kazama ("Kazama Decl.") at ¶ 12.[6]] Although the Sheeheys have expressed a willingness to accept future placements of foster

[6] The Kazama Declaration was omitted from the memorandum in opposition. Defendant filed it on June 29, 2015, as the errata to the memorandum in opposition. [Dkt. no. 131.] Ms. Kazama is an assistant program administrator in the DHS, Social Services Division, Child Welfare Services Branch. [Kazama Decl. at ¶ 1.]

children, under certain circumstances, they do not currently have a license to be foster care providers. See First Amended Complaint at ¶ 8. In contrast, Ah Chong has a current foster care license, and she was offered a foster placement on a "standby" basis during the pendency of this case. [Ah Chong Decl. at ¶¶ 3, 6.]

As the Foster Care Subclass definition is written, neither Ah Chong nor the Sheeheys would be members of the subclass because it is limited to foster care providers with a **current** placement. See Motion at 3 ("all licensed foster care providers in Hawai`i **who shelter** foster children and **are entitled** to receive" (emphases added)). Prior placements and prior receipt of the foster care maintenance payment are not enough. Further, the Sheeheys are not currently licensed foster care providers. Thus, neither Ah Chong nor the Sheeheys have claims that are typical of the Foster Care Subclass.[7] See Ubaldi, 2014

[7] Plaintiffs emphasize that the Sheeheys have standing to challenge the foster care maintenance payment amount because they were serving as foster care providers - and were receiving the foster care maintenance payment - at the time Plaintiffs filed the First Amended Complaint. They also emphasize that this Court has already found that Ah Chong has standing to challenge the foster care maintenance payment amount. See Order Denying Defendant's Motion to Dismiss Plaintiff Raynette Ah Chong from First Amended Complaint, filed 7/24/14 (dkt. no. 77), at 11, *available at* 2014 WL 3726140.

It is true that "[s]tanding is determined as of the commencement of litigation." Yamada v. Snipes, 786 F.3d 1182, 1203 (9th Cir. 2015) (alteration in Yamada) (citations and quotation marks omitted). The fact that, at the time they filed

(continued...)

WL 1266783, at *7 (discussing the putative class representative's class membership, interest, and injury within the typicality analysis).

This Court, however, finds that it is not appropriate to limit the Foster Care Subclass to foster care providers with current placements. Defendant has represented that approximately fifty percent of foster children are in foster care for thirty days or less. Thus, a subclass limited to providers with **current** placements could be so fluid as to impair effective representation in this case. The limitation is also undesirable from a policy perspective because of the possibility that DHS could prevent a licensed foster care provider from participating in the subclass by simply waiting until after the litigation is over to place a foster child with that provider.[8] This Court therefore FINDS that the definition of the Foster Care Subclass should be: all currently licensed foster care providers in Hawai`i who are entitled to receive foster care maintenance

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[7](...continued)
the First Amended Complaint, Plaintiffs had standing to challenge the foster care maintenance payment amount means that they can continue to pursue their own claims in this case. However, it does not control this Court's analysis of the Rule 23(a) requirements.

[8] This Court emphasizes that it has considered this as argument on the basis of policy only. There is no indication in the record that DHS has refused to place a foster child in Ah Chong's home to prevent her from participating in this case.

payments pursuant to the Child Welfare Act when they have foster children placed in their homes.

So defined, the Foster Care Subclass will challenge policies and practices that affect all of its members, *i.e.* the determination of the amount of the foster care maintenance payment and whether and how that amount is periodically adjusted. The typicality inquiry is therefore similar to the commonality inquiry, but the focus is on the similarity of the alleged injuries and whether there is a common cause. As to the first factor, Plaintiffs allege they there were injured in the past because they received the inadequate foster care maintenance payment and they are facing future injury if they accept future foster placements because the amount of the foster care maintenance payment is still inadequate. Ah Chong's injury - the imminent receipt of the allegedly inadequate foster care maintenance payment - is similar to the injuries suffered by the unnamed subclass members, who either are currently receiving the allegedly inadequate foster care maintenance payment or - like Ah Chong - face the imminent receipt of the inadequate payment when they accept a future foster placement. The Sheeheys, however, do not face the same imminent injury because they do not have a current license to be foster care providers, and their injury of receiving the allegedly inadequate payment in the past is not sufficiently similar to render their claims typical of the

claims of the unnamed subclass members. As to the second factor, this Court finds that Ah Chong's alleged injuries and the injuries allegedly suffered by the unnamed subclass members are the result of same course of conduct - the determination of the amount of the foster care maintenance payment and the payment of inadequate amounts.

This Court therefore FINDS that Ah Chong's claims are "reasonably coextensive with those of absent [sub]class members," see Hanlon, 150 F.3d at 1020, and therefore the proposed Foster Care Subclass satisfies the typicality requirement.

D. Adequacy

As to the adequacy requirement, this Court has stated:

> In determining whether the named plaintiffs will fairly and adequately protect the interests of the class, courts in the Ninth Circuit ask two questions: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Staton [v. Boeing Co.], 327 F.3d [938,] 957 [(9th Cir. 2003)] (citing Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)). This requirement is satisfied as long as one of the class representatives is an adequate class representative. Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 n.2 (9th Cir. 2001).

Davis, 2014 WL 4956454, at *14 (citation omitted). In addition, "'[a]dequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees.'"

Id. at *15 (quoting Ellis v. Costco Wholesale Corp., 657 F.3d 970, 985 (9th Cir. 2011)).

Because the Sheeheys are not currently licensed foster care providers, they are not members of the Foster Care Subclass, and their interests are distinct from the interests of the subclass. This Court therefore finds that the Sheeheys would not be adequate representatives of the Foster Care Subclass.

As noted, *supra*, Plaintiffs can still satisfy the adequacy requirement by establishing that there is one adequate representative of the subclass, *i.e.* that Ah Chong would be an adequate representative. Defendant argues that Ah Chong would not be an adequate representative of the Foster Care Subclass because she received different foster care related payments from those that other foster care providers receive. Because the providers receive different amounts of total support, they have not suffered the same injury, and their interests are not coextensive. This Court disagrees.

Every foster care provider receives the foster care maintenance payment when he or she has a foster placement. Thus, they all suffer the same alleged injury - they all receive a payment that is insufficient to provide for all of the foster care expense categories that the State is required to pay for under § 675(4)(A). Defendant can raise a defense that the arguably low rates for the foster care maintenance payment are

justified because those payments are supplemented by the foster care related payments. Plaintiffs also argue that, even if the CWA allows the State to limit the foster care maintenance payment to provide for only certain § 675(4)(A) expense categories, the rates that DHS has set are insufficient to provide for the three categories DHS included in the calculation of the rates. This Court therefore finds that Ah Chong and the unnamed members of the Foster Care Subclass suffer the same injury, and there is no conflict of interest between Ah Chong and the unnamed subclass members. Further, there is ample evidence in the current record to support a finding that Ah Chong will vigorously prosecute this case on behalf of the Foster Care Subclass. This Court finds that Ah Chong is an adequate representative of the Foster Care Subclass.

The proposed counsel for the subclass are: the Hawai`i Appleseed Center for Law and Economic Justice ("Appleseed Center"); Alston, Hunt, Floyd & Ing ("Alston Hunt"); and Morrison & Foerster LLP ("Morrison Foerster"). Plaintiffs state that all three legal services providers "are experienced in federal civil rights litigation and class actions." [Mem. in Supp. of Motion at 15-16 (citing cases).] Although the preferred practice when filing a motion for class certification is to submit declarations attesting to counsel's qualifications, this Court will accept the representations in the Motion because this Court is familiar with

counsel's relevant experience in this district, and their experience in other courts is a matter of public record. This Court also notes that Defendant has not contested the Appleseed Center's, Alston Hunt's, and Morrison Foerster's qualifications to be counsel for the Foster Care Subclass. Further, there is no evidence in the record of any conflict of interest between proposed counsel for the Foster Care Subclass and the members of the subclass. This Court therefore finds that the Appleseed Center, Alston Hunt, and Morrison Foerster are adequate counsel for the Foster Care Subclass.

Insofar as this Court had found that there is at least one adequate representative of the subclass and that the proposed counsel is adequate, it FINDS that Foster Care Subclass satisfies the adequacy requirement.

E. Rule 23(b)

As noted *supra*, in addition to satisfying all of the Fed. R. Civ. P. 23(a) requirements, a proposed class or subclass must comply with one of the subsections in Rule 23(b). Plaintiffs seek certification pursuant to Rule 23(b)(2), or in the alternative, Rule 23(b)(1).

> Rule 23(b)(2) requires that "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." Although we have certified many different kinds of Rule 23(b)(2) classes, the primary role of this provision has always been the

> certification of civil rights class actions. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) ("Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.' Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples." (citations omitted)) . . . .

Parsons, 754 F.3d at 686 (alterations in Parsons). The Ninth Circuit has further stated:

> In Wal–Mart, the Supreme Court summarized Rule 23(b)(2)'s requirements as follows:
>
> > The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted — the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. . . .
>
> 131 S. Ct. at 2557 (citation omitted). These 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. See Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010). That inquiry does not require an examination of the viability or bases of the class members' claims for relief, does not require that the issues common to the class satisfy a Rule 23(b)(3)-like predominance test, and does not require a finding that all members of the class have suffered identical injuries. See id.; Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998). Rather, as the text

> of the rule makes clear, this inquiry asks only whether "the party opposing the class has acted or refused to act on grounds that apply generally to the class." Rule 23(b)(2).

Id. at 687-88 (alterations in Parsons) (footnotes omitted). In addition, Rule 23(b)(2) requires that "'final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'" Id. at 689 (quoting Wal–Mart, 131 S. Ct. at 2557 (stating that Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant")).

In the instant case, Plaintiffs ask this Court to, *inter alia*:

> b. Declare that Defendant is violating the Child Welfare Act by failing to pay amounts sufficient to cover the costs of (and the costs of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, and reasonable travel costs that are incurred by licensed foster parents in accordance with federal and state laws and regulations and by failing to employ a methodology for determining and updating foster care maintenance rates that takes into account statutorily prescribed criteria;
>
> c. Enjoin Defendant temporarily and permanently from failing to pay foster care maintenance payments that satisfy the requirements of the Child Welfare Act; [and]
>
> d. Order Defendant to forthwith prepare and implement a payment system that complies with the Child Welfare Act by paying licensed foster parents the costs of (and the costs of providing) the items specified in Section

> 675(4)(A) of the Child Welfare Act, such as food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation, in an amount subject to proof, and by adjusting that amount each year[.]

[First Amended Complaint at pgs. 20-21.]

The proposed Foster Care Subclass seeks uniform declaratory and injunctive relief from the current system of calculating and disbursing the foster care maintenance payment, and the State policies and practices that would be affected if the subclass prevails are generally applicable to the subclass as a whole. The Court therefore FINDS that the proposed Foster Care Subclass meets the criteria set forth in Rule 23(b)(2). Based on this finding, the Court does not need to address Plaintiffs' alternative argument that certification would also be appropriate pursuant to Rule 23(b)(1).

The Court now turns to the Rule 23 analysis for the Adoption Assistance Subclass.

II. Adoption Assistance Subclass

A. Numerosity

Plaintiffs have presented evidence that, as of June 30, 2014, DHS was making monthly adoption assistance payments for 3,379 children. Of the 3,379 adopted children, 2,759 received the payments pursuant to Title IV-E. [Black Decl, Exh. 8 at SOH04840.]

As with the Foster Care Subclass, Defendant does not contest that a subclass with members in the thousands would be sufficiently numerous for purposes of Rule 23(a)(1). Instead, Defendant argues that there is no ascertainable number of putative subclass members who have allegedly suffered the same injury as Plaintiffs. Defendant emphasizes that, since Plaintiffs seek injunctive relief as a remedy in a 42 U.S.C. § 1983 claim, they can only enforce a federal right. Defendant argues that there is no right under the CWA to a minimum amount, or to a specific amount, of adoption assistance. The only possible right is the purported right to have an individualized determination of the amount of the assistance payment, which takes into account the parents' circumstances and the child's needs. See 42 U.S.C. § 673(a)(3);[9] ASW v. Oregon, 424 F.3d 970,

[9] Section 673(a)(3) provides that adoption assistance payments

> shall be determined through agreement between the adoptive parents and the State or local agency administering the program under this section, which **shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted**, and may be readjusted periodically, with the concurrence of the adopting parents (which may be specified in the adoption assistance agreement), depending upon changes in such circumstances. However, in no case may the amount of the adoption assistance payment . . . exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the

(continued...)

978 (9th Cir. 2005) (holding that parents who receive Title IV-E adoption assistance payment may bring a § 1983 action to assert that they were denied individualized determinations of the amount of their payments).[10]

Because § 673(a)(3) provides that the amount of the adoption assistance payment **cannot exceed** the amount of the foster care maintenance payment, it is possible that the adoption assistance payment amount may be **less than** the amount of the foster care maintenance payment in some cases. Defendant has presented evidence that, as a matter of policy, the State always pays the maximum amount possible under the statute to eliminate any financial disincentive to adopting a child with special needs. [Kazama Decl. at ¶ 7.] Thus, there are no individualized assessments of the adoptive parents' circumstances and the adoptive child's needs. The lack of an individualized assessment is an issue that impacts all parents who receive adoption assistance payments under Title IV-E, and the proposed Adoption Assistance Subclass would consist of all parents receiving adoption assistance payments. This Court therefore rejects

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[9](...continued)
adoption assistance payment is made had been in a foster family home.

(Emphasis added.)

[10] Defendant reserves the right to challenge the Ninth Circuit's holding in ASW on appeal in this case. [Mem. in Opp. at 13 n.4.]

Defendant's argument that the Adoption Assistance Subclass is not ascertainable. This Court FINDS that the Adoption Assistance Subclass satisfies the numerosity requirement.

B. Commonality

Although the lack of individualized assessments is common to all members of the proposed Adoption Assistance Subclass, this Court must also consider whether the subclass members suffer common injuries as a result of the denial of individualized assessments. Unlike the foster care maintenance payment, the adoption assistance payment does not have a defined list of expenses that the payment must provide for. In fact, there is no measurable standard for the payment; only the requirement that the agreement between the State and the adoptive parents take into the consideration the parents' circumstances and the adoptive child's needs. Plaintiffs argue that the foster care maintenance payment amount is so low that an individualized assessment of the adoptive parents' circumstances and the adoptive child's needs would **always** require a higher amount than what is currently available. However, determining whether individualized assessments would result in agreed-upon adoption assistance payments that are higher than the current amount of the foster care maintenance payment would require this Court to examine specific parents' circumstances and specific children's needs.

In determining whether commonality exists among the Adoption Assistance Subclass, this Court must examine the nature of the subclass's claims. See Parsons, 754 F.3d at 676 ("In this case, as in all class actions, commonality cannot be determined without a precise understanding of the nature of the underlying claims." (some citations omitted) (citing Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, --- U.S. ----, 133 S. Ct. 1184, 1194–95, 185 L. Ed. 2d 308 (2013))). The significant issues in the determination of the Adoption Assistance Subclass's claims are individual issues, not issues that are common to the entire subclass. See Mazza, 666 F.3d at 589.

It is true that, if the foster care maintenance payment amounts were higher, the members of the Adoption Assistance Subclass would benefit because they would have the ability to negotiate higher payments in their § 673(a)(3) agreements with the State. However, the factual and legal issues regarding whether the foster care maintenance payment amounts must be increased and periodically adjusted will be litigated by the Foster Care Subclass. There are no issues of law or fact regarding the amount of the foster care maintenance payment that are both unique to the Adoption Assistance Subclass and common to the members of the that subclass. This Court therefore FINDS that the Adoption Assistance Subclass does not satisfy the commonality requirement.

Insofar as a proposed class or subclass must satisfy all of the Rule 23(a) requirements to be certified, this Court CONCLUDES that the Adoption Assistance Subclass cannot be certified. Plaintiffs' Motion is DENIED as to their request to certify the Adoption Assistance Subclass.

III. Class

For the same reasons that this Court concludes that the Adoption Assistance Subclass cannot be certified, this Court also CONCLUDES that the members of the proposed Adoption Assistance Subclass cannot be included within the Class. There is no indication in the record that the Class that Plaintiffs proposed would consist of anyone other than the members of the proposed Foster Care Subclass and the members of the proposed Adoption Assistance Subclass. This Court therefore CONCLUDES that the proposed Foster Care Subclass shall constitute the Class in this case.

CONCLUSION

On the basis of the foregoing, Plaintiffs' Motion for Class Certification, filed April 23, 2015, is HEREBY GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED insofar as:

1) this Court will certify the following class - all currently licensed foster care providers in Hawai`i who are entitled to receive foster care maintenance payments pursuant to the Child Welfare Act when they have foster children placed in their homes - ("the Class");

2) Ah Chong shall be the representative of the Class; and

3) the attorneys from the Hawai`i Appleseed Center for Law and Economic Justice; Alston, Hunt, Floyd & Ing; and Morrison & Foerster LLP who are the current attorneys of record for Plaintiffs shall be the Class counsel.

The Motion is DENIED in all other respects. All claims not prosecuted by the Class shall be prosecuted on behalf of the named Plaintiffs only.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, August 17, 2015.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

RAYNETTE AH CHONG, ET AL. VS. McMANAMAN; CIVIL 13-00663 LEK-RLP; ORDER GRANTING PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION