2006 WL 3907585 (Cal.App. 1 Dist.) (Appellate Brief)
Court of Appeal, First District, Division 4, California.

CAPITOL PEOPLE FIRST, et al., Appellants,
v.
DEPARTMENT OF DEVELOPMENT SERVICES, et al., Respondents.

No. A113168.
November 29, 2006.

On Appeal From the Superior Court of California, County of Alameda Case No. 2002-038715 Honorable Ronald M. Sabraw

Respondents' Brief

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***1** I. *INTRODUCTION.*

Plaintiffs have appealed from the Superior Court's denial of class action status for a purported class of all California residents with a developmental disability "who are (or become) institutionalized, and those who are at risk of being institutionalized." Under settled principles of California law, the Superior Court correctly denied class certification, finding that plaintiffs do not adequately represent the interests of all members of the putative class, common issues do not predominate among putative class members, and that a class action is not the superior method for resolving this litigation.

Plaintiffs do not address the substantial evidence of a conflict between the plaintiffs and the putative class which supported the Superior Court's finding that plaintiffs do not adequately represents the interests of the putative class. Nor can they; plaintiffs represent a lobby that is openly hostile to the care provided in California's Developmental Centers ("DCs").[1] Their ideology reduces to this: "community" - good; "institution" - bad. Their class action advances a view that "community care" is appropriate for the entire putative class, even for those who are profoundly retarded and medically fragile, and even where the families, conservators and professionals most familiar with an individual believe that ***2** "community" care offers fewer life opportunities, and more danger, than a DC.

The issues raised in this suit are not new. A debate has raged in this country over the course of many years regarding how

best to treat, care for, and accommodate persons with mental retardation and/or developmental disabilities. On one side are those, such as the named plaintiffs and their counsel, Protection & Advocacy, Inc. ("PAI"), who insist that large institutionalized care is by definition inhumane, unnecessarily restrictive, and violative of human rights. They seek to end all institutional care in America and advocate placement of all persons with developmental disabilities in small, community-based programs. On the other side are those, such as organizational intervenors California Association of State Hospitals / Parents' Council for the Retarded ("CASH/PCR") and California Association for the Retarded ("CAR"), who believe that a "continuum" of care matched to the individual's needs offer *by far* the best and safest environment.

Plaintiffs failed to meet their burden of showing that they will adequately represent the interests of the putative class as a whole. Plaintiffs' burden of establishing cohesiveness within the class is especially high because their complaint seeks only injunctive relief. Rather than address this burden and the evidence presented to the Superior Court demonstrating the conflict between the named plaintiffs and the putative class and the due process concerns raised thereby, plaintiffs ask this Court ***3** to apply a simplistic, blunt numerical test for adequacy of representation which is not supported by California law.

Moreover, substantial evidence supports the trial court's finding that individual issues of fact will necessarily predominate in individual challenges to the Individual Program Plan ("IPP") process. Plaintiffs failed to prove that the alleged wrongful conduct by defendants is occurring on a class-wide basis. Indeed, substantial evidence was presented in the proceeding below that DC residents are not suffering deprivations of fundamental rights such that class-wide relief is appropriate.

Finally, plaintiffs failed to carry their burden of demonstrating the superiority of a class action. As the Superior Court found, a class would not provide substantial benefits to the putative class or the court.

The ruling of the Superior Court denying class certification should be affirmed.

II. *FACTUAL BACKGROUND.*

A. *Identity Of The Intervenors.*

1. Individual Intervenors Live In California DCs And Want To Remain In The Placement Recommended By Their IPP.

Individual Intervenors reside in California's Developmental Centers and have been recommended for DC placement pursuant to individualized, semi-annual or annual IPPs. (8JA2029, 8JA2031, 8JA2039, 8JA2062, 8JA2073 & 8JA2079.) Individual Intervenors desire to remain in a DC ***4** setting in accordance with the IPP recommendation because their needs are best met in such an environment.[2] Individual Intervenors oppose plaintiffs' position that nearly all individuals with developmental disabilities are best suited to live in a community care setting. Intervenors further disagree that the IPP process is fundamentally flawed in favor of DC residence or that parents and conservators are able to unduly influence placement decisions.

2. Organizational Intervenors Represent Developmentally Disabled Individuals And Their Family Members, Friends, And Conservators.

CASH/PCR, created in 1973, is a California non-profit organization dedicated to advocating for persons with mental retardation and other developmental disabilities. (8JA2039.) CASH/PCR's members include conservators, family members and concerned friends of California DC residents, as well as family members of those who used to live in California DCs but now live in the community. (8JA2062.) Its members work in close contact with the Department of Developmental Services (DDS) and with the staff of California DCs. (8JA2039.) Of the approximately 3,000 residents in California DCs, *nearly half have* family members or ***5** conservators who are members of CASH/PCR or affiliated organizations. (8JA2040.)

CAR is a California non-profit whose mission is to advocate for all persons with developmental disabilities and their families, enabling them to choose from a full spectrum of service options, including both congregate and community care. (8JA2058.) CAR believes that all persons with developmental disabilities should have a choice in where and how they live, work, and play. (*Id.*) CAR's 11 local units represent approximately 10,000 parents, friends, and family members of persons with mental retardation. (*Id.*)

B. *The Conflict Between The Plaintiffs And The Class.*

This lawsuit is part of the national debate regarding how best to treat, care for, and accommodate persons with mental retardation and other developmental disabilities. In this action, plaintiffs purport to represent the following class of individuals:

> All California residents with a developmental disability, as defined in Welfare and Institutions Code section 4512(b), who are (or become) institutionalized, and those who are at risk of being institutionalized, in congregate residential facilities having a capacity of 16 or more individuals.

(4JA1052; 4JA0967.) On this appeal, plaintiffs assert that the interests of all class members are "aligned." (AOB at 53.) Similarly, in the proceedings below, plaintiffs claimed that the named plaintiffs "have no interests that conflict with or are antagonistic to those of the class," nor do any "conflicts exist which could hinder the named plaintiffs' ability to ***6** pursue the litigation vigorously on behalf of the class." (6JA 1543-44 & 4JA0970.) These claims are false; plaintiffs do not speak for all. As members of the putative class and representatives with a direct interest in the rights of members of the putative class, Intervenors emphatically deny that plaintiffs represent the interests of the entire putative class. (8JA2040; 8JA2059 & 8JA2073.)[3]

1. The Order Granting The Intervenors Leave To Intervene.

On November 20, 2002, Intervenors filed a Motion to Intervene to protect the interests of DC residents and their parents and guardians. (1JA0077-249.) Plaintiffs vigorously opposed the Motion, and expressly acknowledged the direct and substantial conflict between the Intervenors and the plaintiffs: "The organizations' and parent representatives' interests *are potentially and actually, in conflict with the interests of the plaintiffs and the putative plaintiff class."* (1JA0265) (emphasis added). On January 28, 2003, the Superior Court granted the Motion to Intervene, stating:

Intervenors are granted leave to file a complaint in intervention that addresses issues within the parameters of the complaint. Intervenors may not advance new claims or suggest new class definitions for their proposed new claims. If appropriate, the complaint in intervention may simply seek to ensure that the legal rights of parents and guardians to participate in the planning process and the ability of professionals to ***7** recommend placement in developmental centers are not adversely affected by any judgment in this action....

The reasons for the intervention outweigh any opposition by the parties presently in the action.

(2JA0546) (emphasis added).

Despite the clear scope of the Superior Court's Order, which permitted Intervenors to "address issues within the parameters of the Complaint," (*id.*) the named plaintiffs mischaracterize the order, claiming that the intervention is limited to "ensur[ing] that the legal rights of parents and guardians to participate in the planning process and the ability of professionals to

recommend placement in development centers are not adversely affected by any judgment in this action." (*See* AOB at 21.)[4] (Alteration in the original.) This argument reflects a misunderstanding of California law with respect to intervention. Once the Superior Court granted intervention, Intervenors became an *independent party* to the action, *with all of the same rights as any other party.* Cal. Civ. Proc. Code § 387; *Deutschmann v. Sears. Roebuck, & Co.,* 132 Cal. App. 3d 912, 916 (1982). While plaintiffs may wish that the Superior Court did not grant the Motion to Intervene, this is neither the appropriate time nor forum to ***8** request reconsideration of that motion. *See* Cal. Civ. Proc. Code § 1008. The argument is nothing more than further evidence of plaintiffs' concerted effort to silence the voices of members of the putative class who oppose plaintiffs' "community-only" viewpoint. Indeed, the purpose of the intervention is precisely to take issue with plaintiffs' representation of the facts, their view of what the law mandates, and to thereby prevent the outcome sought by plaintiffs which would unquestionably and adversely impact a significant portion of the putative class.

2. Plaintiffs Do Not Fairly Represent The Class They Purport To Represent.

Plaintiffs insist that large institutionalized care is by definition inhumane, unnecessarily restrictive, and violative of human rights. They seek to end all institutional care in California, and advocate placement of all persons with developmental disabilities in small, community-based programs. (4JA0978-80.) Intervenors, on the other hand, believe that a "continuum of care" tailored to the needs of the individual is more appropriate. (8JA2029-30; 8JA2039; 8JA2059; 8JA2064; 8JA2073; 8JA2082.) Intervenors accept that some developmentally disabled individuals are able to function in community settings and should be given that opportunity, but know that others are so profoundly impaired that a DC with centralized, constant protection and care is essential. (8JA2030-31; 8JA2062-63; 8JA2073; 8JA2081-82.)

***9** Plaintiffs oppose institutional care and seek to move nearly all individuals with developmental disabilities into small community settings. Plaintiffs' bias is revealed in their claims that nearly all current DC residents could live in the "community" if given proper support. (4JA0942, 4JA0981-82.) Plaintiffs rely upon the following contentions: (1) a majority if not all DC residents, with the proper supports, could prosper in integrated community settings; (2) DC residents are not given understandable information on community services and supports to enable them to make meaningful choices; (3) assessment and planning are inadequate and often based on criteria other than individual needs and choices; (4) community services and supports are often not provided in a timely manner, despite IPP recommendations or court orders; (5) DC residents are institutionalized due to defendants' failure to develop adequate community resources, including those for people with dual diagnosis, behavioral issues and enduring medical needs; and (6) institutionalization adversely impacts DC residents' quality of life. (AOB 15-16, 29-30, & 42-43.)

The evidence presented to the Superior Court in the proceedings below establishes that every single one of these broad assertions is wrong or highly questionable. (8JA2027; 8JA2030-31; 8JA2040-41; 8JA2058-59; 8JA2064; 8JA2069-70.) In most cases, current residents whose IPP recommends DC placement should remain in a DC setting. This is true whether or not improved community care settings become available, ***10** because the DC remains the least restrictive, most appropriate and safest environment available to match these current residents' needs (subject to IPP re-evaluations). (8JA2027; 8JA2029; 8JA2031; 8JA2039; 8JA2062; 8JA2069-70; 8JA2073; 8JA2079.)

C. Community Care Is Not Appropriate For All Individuals *With Developmental Disabilities.*

Community placement may bring about severe deterioration in the lives of persons who have been moved from the DCs. (8JA2030; 8JA2063; 8JA2079-80.) Those with profound disabilities need the continuous presence of licensed and well-trained professional personnel (medical doctors, psychologists, social workers, and psychiatric technicians) that DCs provide. (8JA2026; 8JA2030-31; 8JA2062-64; 8JA2068-69; 8JA2073; 8JA2081-82.) Community care settings seldom provide highly-trained staff, freedom of movement in a campus-like setting, social activities, a work training center, a school, a canteen, and numerous opportunities for organized activities that are available in California's DCs. (*Id.*) And importantly, the displacement of developmentally disabled individuals to community care settings can have disastrous effects.

(8JA2025-26; 8JA2040; 8JA2044-56; 8JA2059; 8JA2063; 8JA2067-68.) Personal experience has thus proven to the Individual Intervenors and their families that the DCs often offer the most appropriate and least restrictive environment, with a better quality of life than is possible in a community facility.

***11** Plaintiffs' core allegation is that the government defendants have violated the Lanterman Act and other state and federal laws intended to prevent the unnecessary institutionalization of people with disabilities. This allegation ignores the essence of individualized IPPs which, beneficially, enable access as required to the unique service-providing capabilities encompassed within DCs. As participants in the IPP process, Intervenors disagree that it is somehow flawed in a way that results in the unnecessary institutionalization of persons with developmental disabilities. (8JA2030; 8JA2040-41; 8JA2058-59; 8JA2064; 8JA2073-74.)

D. *The Denial Of Class Certification.*

Plaintiffs filed their motion for class certification on September 29, 2005. (4JA1051-6JA1503.) After oral argument, the court took the matter under submission, and thereafter denied class certification by order dated December 30, 2005. (14JA3606-22.) After discussing the many factors relevant to determination of whether to approve or deny class certification under Section 382 of the California Code of Civil Procedure, the Superior Court stated in its ruling:
The trier of fact cannot avoid the reality that each IPP is individualized in its development, content, and implementation, and this would restrict the use of sampling or statistical proof at trial. The Court finds that the presence of the Intervenors demonstrates that different class members have different goals, suggesting that claims should be made on an individual basis. Finally, the Legislature created the fair hearing procedure under Welfare and Institutions Code 4701-4716 and there is no indication that it is not an effective means for individuals to seek relief ***12** (14JA3619.) With respect to adequacy of representation, the Superior Court found that "Plaintiffs have not demonstrated either (1) they will adequately represent the interests of all the members of the proposed class or (2) the interests of the Intervenors can be adequately protected by their presence in this case." (14JA3617.)

III. STANDARD OF REVIEW.

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." *Linder v. Thrifty Oil Co.,* 23 Cal. 4th 429, 435 (2000). The trial court's denial of class certification should not be disturbed absent a showing of abuse of discretion. The appellate court's task on appeal is not to determine in the first instance whether the requested class is appropriate, but rather whether the trial court has abused its discretion in denying certification. *See* *Caro v. Procter & Gamble Co.,* 18 Cal. App. 4th 644, 655 (1993). Appellate courts should not overturn trial court rulings without a showing of a "clear case of abuse" and a "miscarriage of justice." *Blank v. Kirwan,* 39 Cal. 3d 311, 331 (1985). Discretion is "abused" only when, in its exercise, the trial court "exceeds the bounds of reason, all of the circumstances before it being considered." *Denham v. Super. Ct.,* 2 Cal. 3d 557, 566 (1970).

Absent other error, "a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation].' " ***13** *Linder,* 23 Cal. 4th at 435-36 (quoting *Richmond v. Dart Indus., Inc.,* 29 Cal. 3d 462, 470 (1981)) (alteration in original). "So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld." *Caro,* 18 Cal. App. 4th 655 (quoting *Dean Witter Reynolds, Inc. v. Super. Ct.,* 211 Cal. App. 3d 758, 764-65 (1989)) (alteration in original). " 'Any valid pertinent reason stated will be sufficient to uphold the order.' " *Linder,* 23 Cal. 4th at 436 (quoting *Caro,* 18 Cal. App. 4th at 656).

IV. *DISCUSSION.*

A. The Trial Court Did Not Abuse Its Discretion In Finding That Plaintiffs Failed To Meet Their Burden Of Proving A "Well Defined Community Of Interest" Necessary To *Demonstrate Adequacy Of Representation.*

In order to maintain a class action, plaintiffs have the burden of demonstrating (1) an ascertainable class, and (2) a well-defined community of interest among the class members. *See* Cal. Civ. Proc. Code § 382; *Sav-on Drug Stores. Inc. v. Super. Ct.,* 34 Cal. 4th 319, 326 (2004). The "community of interest" requirement requires plaintiffs to demonstrate, among other things, that (1) the class representatives can adequately represent the class and their claims are typical of the class, and (2) common questions of law or fact predominate over individual issues. *See id.* In order to demonstrate the requisite community of interest, plaintiffs must show that the class representatives' claims are *not inconsistent* with the claims of the other members of the class, and that the proposed class ***14** representatives' interests are *not antagonistic* to the remainder of the class. *J.P. Morgan & Co., Inc. v. Super. Ct.,* 113 Cal. App. 4th 195, 212 (2003). Moreover, plaintiffs must show that questions of law and fact common to the class *predominate* over questions affecting the individual members, and that upon careful weighing of the burdens and benefits, substantial benefits will accrue to both the litigants and the court from class treatment. *Id.* at *211; see also Lockheed Martin Corp. v. Super. Ct.,* 29 Cal. 4th 1096, 1104 (2003). Plaintiffs' burden is high: they must conclusively satisfy the pertinent criteria. *Caro,* 18 Cal. App. 4th at 654. As discussed below, the Superior Court did not abuse its discretion in finding that the named plaintiffs failed to carry their burden of establishing this "community of interest," making class action treatment of the claims presented inappropriate.

1. The Named Plaintiffs' Burden Of Establishing Adequacy Is Especially High Because The Complaint Seeks Injunctive Relief Only.

Where, as here, the named plaintiffs seek injunctive and declaratory relief which, if awarded, would flow to the class as a whole, it is particularly important for the named plaintiffs to prove adequacy of representation. In such cases, the court is not required to order plaintiffs to provide individual members of the class with notice and the opportunity to opt out. *See, e.g., Holmes v. Cal. Nat'l Guard,* 90 Cal. App. 4th 297, 309 n.8 (2001). For these reasons, class actions seeking only injunctive and declaratory relief require more cohesiveness than class actions seeking ***15** damages. *See, e.g., Barnes v. American Tobacco Co.,* 161 F.3d 127, 142-43 (3d Cir. Pa. 1998) (discussing *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997)).

Accordingly, the Superior Court in the proceedings below expressly found that it was appropriate to "pay closer attention to the adequacy analysis because individual absent class members would not be permitted to opt out of the class and seek inconsistent injunctive relief ...." (14JA3609.) Based on the evidence presented by the Intervenors, the Superior Court made the following ruling with respect to adequacy:

> The Court concludes that Plaintiffs have *not* demonstrated either (1) they will adequately represent the interests of all the members of the proposed class or (2) the interests of the Intervenors can be adequately protected by their presence in this case.

(14JA3617) (emphasis added). Plaintiffs mischaracterize this finding of the Superior Court, stating that "the Superior Court

found the Intervenors to be adequately protected by their participation in the action." (AOB at 50.) In fact, the opposite is true. In finding that the named plaintiffs failed to establish the heightened degree of cohesiveness required for class actions seeking injunctive relief, the Superior Court expressly recognized that "because this case concerns systemwide injunctive relief, the Intervenors cannot elect to opt-out of the class." (14JA3617.)

***16 2. The Named Plaintiffs Do Not Fairly And Adequately Represent The Interests Of The Putative Class And, In Fact, Their Interests Directly And Substantially Conflict With The Interests Of Other Putative Class Members.**

"[A] conflict that goes to the very subject matter of the litigation will defeat a party claim of representative status." *Richmond,* 29 Cal. 3d at 470. "Thus, *a finding of adequate representation will not be appropriate* if the proposed class representative's interests are antagonistic to the remainder of the class." JP. Morgan, 113 Cal. App. 4th at 212 (emphasis added). This determination must be made on a case-by-case basis: "rather than articulating any specific test, we have always maintained that 'a determination of whether a particular plaintiff can fairly protect the rights of the group he purports to represent is necessarily dependent upon the facts and circumstances of each case.' " *Daar v. Yellow Cab Co.,* 67 Cal. 2d 695, 710 (1967) (citation omitted).

The evidence presented in the proceedings below demonstrated that the named plaintiffs clearly do not possess the same interest as the Intervenors and the putative class as a whole. Individual plaintiffs represent a discrete, small segment of the diverse viewpoints within the overall putative class. Plaintiffs' disingenuous claim that there is no conflict between the proposed class representatives and the putative class members is belied by their own statements. Indeed, in their opposition to the Motion to Intervene, plaintiffs admitted the existence of a direct and substantial conflict between the Intervenors and the plaintiffs, stating:

> ***17** The organizations' and parent representatives' interests *are potentially and actually in conflict with the interests of the plaintiffs and the putative plaintiff class.*

(1JA0265) (emphasis added). Plaintiffs' current claim that the interests of all class members are "aligned" or that the interests of the Intervenors and the named plaintiffs are not "diametrically opposed" (AOB at 53) is both disingenuous and false.

In the proceedings below, plaintiffs made no attempt to hide their opposition to institutional care. To the contrary, plaintiffs stated their intention to move nearly every individual currently living in a DC into a community care facility. (6JA1538-40.) The substantial evidence supporting the Superior Court's decision that plaintiffs failed to demonstrate that they would fairly and adequately represent the interests of the putative class includes the following:

(1) The needs of the individual Intervenors and the needs of the children represented by the organizational Intervenors are best met in the DCs. (8JA2029-30, 8JA2040-41, 8JA2058-59, & 8JA2064.)

(2) The Intervenors disagree with plaintiffs' contention that the IPP process is unconstitutional or unlawful. (8JA2030, 8JA2040-41, 8JA2058-59, 8JA2064, & 8JA2073-74.)

In addition to this conflict going to the very subject matter of the litigation, plaintiffs' counsel have been patently antagonistic toward members of the putative class. (8JA2072, 8JA2080-81, & 8JA2084-91.) Plaintiffs' hostility reflects an inability to even-handedly represent the ***18** diverse views within the putative class. Denial of class certification was appropriate because, as the Superior Court found, plaintiffs did not establish their adequacy as class representatives.

3. The Named Plaintiffs Ask This Court To Ignore The Conflicts Between The Named Plaintiffs And The Proposed Class And Apply An Overly Simplistic Quantitative Test For Adequacy Of Representation.

Plaintiffs' burden of establishing adequacy of representation is a basic due process requirement. *See, e.g.,* *Hansberry v. Lee,* 311 U.S. 32, 45 (1940) ("Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."). *Hansberry* is a classic example of the type of disqualifying conflict that can arise between representatives and some class members. In that plaintiff was seeking to enforce a racially restrictive covenant on behalf of a class of landowners, some of whom were sympathetic to enforcing the covenant and others who wanted to resist its application. The Supreme Court held that an action to enforce an agreement cannot be brought on a class basis on behalf of persons allegedly bound by the agreement if some of them do not wish to have it enforced.

The adequacy of representation requirement is not a quantitative matter of comparing the number of named representatives or Intervenors to ***19** the size of the putative class as a whole. Instead, the Superior Court must conduct a qualitative analysis of the interests of the named plaintiffs and identify conflicts or antagonism within the class. Rather than meaningfully address the evidence presented by the Intervenors, the named plaintiffs, purporting to rely on *Richmond v. Dart Industries, Inc.,* 29 Cal.3d 462, (1981), ask this Court to ignore the evidence demonstrating conflicts and antagonism within the class and mechanically apply a quantitative analysis. This is inconsistent with the Superior Court's order, which found that plaintiffs did not adequately represent the interests of the putative class. This basic prerequisite to maintaining a class action cannot be ignored.

Richmond, which involved a claim for damages rather than injunctive relief, can be further distinguished from the facts of this case. As stated above, class actions seeking only injunctive and declaratory relief require more cohesiveness than class actions seeking damages. Moreover, the Superior Court expressly found that, because plaintiffs seek only injunctive relief, plaintiffs failed to demonstrate that intervention would adequately protect the interests of the Intervenors. The Superior Court appropriately considered all of these factors in exercising its discretion to deny plaintiffs' motion for class certification.

Plaintiffs' attempt to diminish the viewpoint of the Intervenors is not only illogical and an attempt to distract this Court from the conflict recognized by the Superior Court, but is also indicative of how they have treated putative class members who do not share their "community only" ***20** agenda. According to plaintiffs, the Intervenors comprise "less than 1/10 of 1% of the approximately 7,775 class members." (AOB at 51.) This statement is contrary to the unrebutted evidence before the Superior Court. (8JA2040.) Moreover, as plaintiffs concede, this action was brought by "16 Californians with developmental disabilities who are institutionalized or at risk of institutionalization, on behalf of themselves and approximately 7,775 similarly situated Californians." (AOB at 19.) Applying plaintiffs' logic, plaintiffs consist of only 16 individuals, which constitutes only 2/10 of 1% of the purported 7,775 class members. Unless they otherwise satisfy the requirements for maintaining a class action, plaintiffs do not obtain representative status simply by asserting claims in a complaint which, as the Superior Court found here, do not fairly and adequately represent the interests of the putative class as a whole.

4. Plaintiffs Attempt To Distract The Court By Claiming That Intervenors Seek To Challenge The *Richard S.* Injunction.

In their Opening Brief, plaintiffs misguidedly attack CASH/PCR and CAR, the intervening organizations, by implying that their membership seeks to "unilaterally veto" class members' preferences or IPP team recommendations concerning community placement. (AOB at 51.) The injunction in *Richard S. v. Department of Developmental Services* ordered that a family member's, conservator's or legal representative's preference for institutional rather than community care was not to be considered "conclusive" or to prevail over the contrary views of all other qualified and ***21** interested personnel on the IPP team. Effectively, the *Richard S.* injunction denied these people a veto over community placement; it did not affect the rights of such people to participate in the decision, nor their right to appeal a decision with which they disagree.

This argument does nothing to assist plaintiffs in carrying their burden of demonstrating adequacy, and is nothing more than

an example of plaintiffs' open hostility to anyone opposing community placement of DC residents. Moreover, this argument is a rehash of arguments presented to the Superior Court more than three years ago on the Motion to Intervene. (2JA0522.) As a substantive matter, the organizational intervenors have neither claimed nor sought the right to veto IPP team decisions. Instead, the Intervenors seek to be able to continue to participate in the IPP process and to challenge, when necessary, team determinations contrary to their interests, as required by law. *See* Cal. Welf. & Inst. Code §§ 4512(j), & 4646(d)-(f), & 4700 *et seq.*

B. The Superior Court Did Not Abuse Its Discretion In Finding That Plaintiffs Failed To Demonstrate That *Common Factual Issues Predominate.*

In addition to failing to meet Section 382's fair-and-adequate representation requirement, plaintiffs also failed to carry their burden of producing evidence to demonstrate the predominance of common questions of law and fact. To show a community of interest among class members, the class representative "must show that questions of law or fact common to the class 'predominate' over the questions affecting the individual ***22** members." *J.P. Morgan,* 113 Cal. App. 4th at 215. " '[E]ach member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment.' " *Id.* at 216 (quoting *City of San Jose v. Super. Ct.,* 12 Cal. 3d 447, 460 (1974)) (second alteration in original).

Plaintiffs claim that the Superior Court ignored their argument that a common allegation of a governmental defendant's general or systemic policy, procedure, or practice is discriminatory or illegal is sufficient to prove commonality of claims. The cases cited by the plaintiffs in support of this proposition either did not involve an intervening party that opposed class certification, or did not arise in the context of class certification. They thus do not address the impropriety of certifying a class when a significant portion of the putative class opposes the relief sought. Instead, plaintiffs focus only on whether the unique circumstances of each individual class member may defeat commonality. While this is certainly part of the inquiry, the Court must also consider the Intervenors' fundamental opposition to the relief plaintiffs seek, purportedly on Intervenors' behalf.

1. Plaintiffs Failed To Establish That The Allegedly Common Violations Or Injuries Occur On A Class-Wide Basis.

Here, the proposed class lacks the requisite community of interest both with respect to proving the basic violations alleged in the Complaint, and the resultant injury to the putative class. Plaintiffs argue that the requisite community of interest exists based on their contention that the 16868/1069053.2 22 ***23** "Defendants, through their common policies and practices, acts, and omissions, have prevented class members from receiving the appropriate assessments, supports and services needed to live in non-institutional settings." (AOB at 28.) Plaintiffs then argue that each representative plaintiffs rights have been violated by this conduct and, because both the representative plaintiffs and the rest of the putative class are subject to defendants' policies and practices which the representative plaintiffs claim are wrongful, there must be a class-wide violation. Plaintiffs' attempt to extrapolate from the named plaintiffs, who PAI undoubtedly hand-picked because they support plaintiffs' point of view, to the class as a whole is improper and contradicted by the evidence before the Court.

Specifically, the Intervenors presented evidence to the Superior Court in the proceedings below that DC residents are not suffering deprivations of fundamental rights such that class-wide relief is appropriate. (8JA2027; 8JA2030; 8JA2040-41; 8JA2058-59; 8JA2064; 8JA2069; 8JA2073-74.) Additionally, the Intervenors disagree with plaintiffs' contention that there is a flaw in the IPP process that favors DC placement or prevents class members from obtaining adequate information. (8JA2040-41.) Contrary to plaintiffs' contentions, the Ninth Circuit recently affirmed that "California's commitment to the deinstitutionalization of those Developmental Center residents for whom community integration is desirable, achievable and unopposed, is genuine, comprehensive and reasonable," and that "California's 'plan is ***24** comprehensive, effective, and moving at a reasonable pace.' " *Sanchez v. Johnson,* 416 F.3d 1051, 1067 (9th Cir. 2005). When the IPP team recommends DC placement, it is the result of thoughtful consideration by a team, including numerous professionals.

(8JA2031; 8JA2040-41; 8JA2064; 8JA2073.) For the Intervenors, the DCs are the least restrictive, most appropriate, and, indeed, the best possible environment. (8JA2027; 8JA2030-31; 8JA2062-64; 8JA2069; 8JA2081-82.)

Since plaintiffs cannot demonstrate that the alleged violations and resultant injury occur on a class-wide basis, the question of whether such violations and injuries occur in a particular case is necessarily an individualized inquiry. There is substantial disagreement within the putative class as to whether defendants have violated the Lanterman Act and other provisions of federal and state law. Accordingly, the Superior Court's order denying certification is supported by substantial evidence, and class treatment is inappropriate.

2. The *Olmstead* Decision Provides No Support For Class Treatment Of The Violations And Injuries Alleged By Plaintiffs.

Plaintiffs selectively cite *Olmstead v. L.C.,* 527 U.S. 581, 600 (1999), in support of their argument that allowing individuals to remain in California's DCs is a form of unlawful discrimination based on disability, and that "[c]ommunity placements can be found when Defendants comply with the law." (AOB at 4-6.) Under the law, and as the Superior Court determined, the question of whether an individual with a developmental ***25** disability currently residing in a DC *could* live in the community necessarily depends on that individual's specific circumstances and needs. Plaintiffs' selective citation to the *Olmstead* opinion does not create any issue of law or fact that is common to the class.

In *Olmstead,* the United States Supreme Court held that community placement could only be required in the following circumstances:

> [W]hen the State's treatment professionals determine that such placement is appropriate, *the affected persons do not oppose such treatment,* and the placement can be *reasonably accommodated, taking into account tile resources available to the State and the needs of others with mental disabilities.*

Id. at 607 (emphasis added). In reaching this conclusion, the Court emphasized several points, including:
•There is no "federal requirement that community-based treatment be imposed on patients who do not desire it." *Id.* at 602;

•"[N]othing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.* at 601-02; and

•"Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program." *Id.* at 602.

Here, IPP teams have determined that community placement is inappropriate for a large, definite percentage of the putative class. Intervenors, both individual and organizational, oppose transfers of DC ***26** residents into the community over the objections of the individual or his or her representative.

Moreover, the consideration of whether community placement for any putative class member can be "reasonably accommodated," taking into account both available resources and the needs of DC residents who desire to remain in their DC, can only be determined on an individual basis. Plaintiffs neglect to take into account the needs of other DC residents, particularly those whose preference is to continue living in a DC. Equally significant, plaintiffs charge that services in the community are inadequate at present. Nevertheless, plaintiffs seek to certify a class in an attempt to advance their pro-community agenda without regard to whether an appropriate placement for a particular individual is available in the

community. As has been the experience of Intervenors and others similarly situated in the past, such ill-advised placements can result in regrettable, and sometimes even tragic, results. (8JA2030; 8JA2041; 8JA2063; 8JA2079-80.)

It is thus beyond dispute that, under the law, even if plaintiffs' allegations were true (and they are not), the determination of whether the government has complied with *Olmstead* can only be considered on an individual basis.

27 C. The Superior Court's Order Denying Class Certification Is Consistent With Other Decisions Denying Class Certification Where The Evidence Demonstrates A Conflict Of Interest Between The Named Plaintiffs And *Other Members Of The Putative Class.

In cases in which parents of developmentally disabled persons, and organizations representing such persons, have successfully intervened, class certification has been denied. (*See, e.g., People First of Wash. Inc. v. Rainier Residential Habilitation Ctr.,* No. C96-5906FDB (May 1, 1997), Order Den. Mot. for Class Certification (8JA2172-76); *Baldridge by Stockley v. Clinton,* 139 F.R.D. 119 (E.D. Ark. 1991) (8JA2127-37.))

In *People First of Washington,* Friends of Rainier, an organization comprised of parents, friends, and family members of residents of Washington's Rainier Residential Habilitation Center, successfully intervened. In its Order Denying Class Certification, the Court stated:

> [T]he prerequisites to a class action, enumerated in Fed. R. Civ. P. 23(a) do not appear to be satisfied, particularly as to whether the claims of the representative parties are typical of the putative class and whether the representative parties will fairly and adequately protect the interests of the class. Neither do the elements outlined in Fed R. Civ. P. 23(b) appear to be satisfied, particularly as to whether the defendants have acted or refused to act on grounds generally applicable to the class.

(8JA2172-73.)

Several advocacy groups whose interests are apparently aligned with the named plaintiffs submitted an *amicus curiae* brief in which they contend that "federal courts have granted class certification in a wide variety of disability rights and community integration cases despite ***28** opposition by some individuals." (*Washington Protection and Advocacy Amici* brief at 16.)[5] This argument fails for a number of reasons. Perhaps most telling is the fact that the Washington Protection and Advocacy *amici* conveniently omit from their discussion the cases denying class certification when families successfully intervened. The named plaintiffs also presented most of the authorities relied upon by *amici* in the proceedings below, so the Superior Court was aware of these authorities in denying the motion for class certification. (6JA1429-61 & 6JA 1534.)

Moreover, the argument that other courts have granted class certification in disability rights cases is irrelevant since the Superior Court expressly found that the named plaintiffs failed to meet the requirements for class certification because they failed to demonstrate that they will adequately represent the interests of all the members of the proposed class. As discussed in Section III above, the named plaintiffs' burden on appeal is to show that the Superior Court abused its discretion in denying the motion for class certification. Thus, the exercise of discretion by other courts in diverse factual settings has no bearing on the Superior Court's decision here. For example, in one of the cases cited by the People First of Washington *Amici, Caroline C. v. Johnson,* 174 F.R.D. 452 (D. Neb. 1996), ***29** although the trial court granted a motion for class certification, there was no evidence of a conflict between the named plaintiffs and the rest of the class. *Caroline C.,* 174 F.R.D. at 466 ("While defendants speculate that the interests of the class might conflict at some point in the litigation, they offer no evidence, other than speculation, of such a conflict."). Here, the substantial evidence of a conflict between the named

plaintiffs and other members of the putative class submitted by Intervenors clearly supported the Superior Court's finding.

The other cases cited by the Washington Protection and Advocacy *Amici* similarly do not support their argument. None of the trial court decisions cited in support of their argument that class certification is "routinely granted" arose in a context similar to the instant appeal. *See Messier v. Southbury Training School,* 183 F.R.D. 350 (D. Conn. 1998); *Wyatt v. Poundstone,* 169 F.R.D. 155 (M.D. Ala. 1995); *Vecchione v. Wohlgemuth,* 80 F.R.D. 32 (E.D. Pa. 1978). The Washington Protection and Advocacy *Amici* rely primarily on *Vecchione,* which arose in the context of a motion to approve a proposed settlement, not a contested motion for class certification. In addition, *Vecchione* did not involve a successful intervention, nor did any party raise a conflict of interest issue sufficient to defeat the adequacy of representation requirement, as occurred in this case.

Wyatt, which involved the denial of a motion for decertification rather than denial of a motion for class certification, is similarly inapposite. ***30** In *Wyatt,* the court denied the motion to decertify the class based on its finding that the class members seeking decertification were adequately represented in the litigation by defendants. *Wyatt,* 169 F.R.D. at 162. *Messier* involved the denial of a motion for intervention, based in large part upon an earlier ruling in the case limiting the relief plaintiffs could permissibly seek. It says nothing about the issue presented to this Court.

Here, the Superior Court expressly found that "Plaintiffs have not demonstrated either (1) they will adequately represent the interests of all the members of the proposed class or (2) the interests of the Intervenors can be adequately protected by their presence in this case." (14JA3617.) This finding is supported by substantial evidence, and this Court should not disturb the Superior Court's proper exercise of discretion in denying certification.

D. Plaintiffs Did Not Meet Their Burden Of Establishing That A Class Action Would Substantially Benefit The Litigants And The Court And Would Be Preferable To *Individual Actions.*

The primary purposes of the class action procedure are judicial economy and efficiency. Because "of the accompanying dangers of injustice or of the limited scope within which [class actions] serve beneficial purposes.... [the California Supreme Court] has consistently admonished trial courts to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the court." *City of San Jose,* 12 Cal. 3d at 459; ***31** *Daar,* Cal. 2d at 713 ("substantial benefits resulting from class litigation, both to the litigants and to the court, should be found before the imposition of a judgment binding on absent parties can be justified."). "The burden of such a showing falls on plaintiff." *City of San Jose,* 12 Cal. 3d at 460.

Here, the trial court's discretionary order denying certification should be affirmed. Based on all the evidence before the court, class certification was properly denied because plaintiffs did not meet their burden of demonstrating substantial benefits of a class action to the litigants, the court, or potential class members.

1. The Dual Functions Of A Class Action Are Not Served Where Redress Is Adequate By Way Of Individual Claims.

The California Supreme Court has observed that the "dual functions" of a class action are to "eliminate[] the possibility of repetitious litigation and provide[] small claimants with a method of obtaining redress of claims which would otherwise be too small to warrant individual litigation." *Richmond,* 29 Cal.3d at 469. The Superior Court correctly focused on the incentives already present under the Lanterman Act for disabled persons to seek relief when they disagreed with their IPPs and treatment. (14JA3618); *see* Cal. Welf. & Inst. Code §§ 4701-4716. California courts have similarly focused on adequate remedies for individuals seeking redress in denying class certification. "Plaintiffs action 'is singularly ill-suited for prosecution as a class action' " where "plaintiffs individual action provides ... a sufficient vehicle to remedy any wrong [he] may have suffered as a ***32** result of defendant['s] conduct." *Fuhrman v. Cal. Satellite Sys.,* 179 Cal. App. 3d 408, 425 (1986) (citations omitted).

2. Class Treatment Would Not Serve The Interest Of The Court.

Proceeding by way of class action must also be of substantial benefit *to the court.* *City of San Jose,* 12 Cal. 3d at 459; *Linder,* 18 Cal. 3d at 435. In this case, imposing a class action on behalf of all persons "who are (or become) institutionalized, and those who are at risk of being institutionalized" is of no benefit to the Alameda County Superior Court. Placing DC admission, discharge, and review decisions under direct superintendence of the Superior Court would be burdensome, cumbersome, and unduly expensive. The end result would be less flexibility in taking appropriate measures in individual cases as needs arise.

The process for admission and discharge of eligible residents of California's DCs remains properly under the control of the State's own professionals and the interdisciplinary teams. The Superior Court, and other courts throughout the State, remain accessible in individual cases to address unique and particular issues which may arise. *See, e.g.,* Cal. Welf. & Inst. Code §§ 4701-4716.

33 V. *CONCLUSION.

The trial court did not abuse its discretion in denying class certification. We respectfully submit that the Order Denying Certification must be upheld.

Footnotes

1 The California Department of Developmental Services currently operates five DCs, and two smaller state-operated community facilities.

2 Plaintiffs purport to represent not only the approximately 3,000 developmentally disabled individuals who presently live in California's DCs, but also "some 4, 600" developmentally disabled individuals "living in other institutions." (Appellant's Opening Brief ("AOB") at 6.) Unlike the individuals who currently live in DCs and desire to remain in the DC setting, the individuals currently living in "other institutions" who desire to preserve the status quo have no representation in this litigation.

3 In addition to this conflict, which plaintiffs expressly admitted in the proceedings below, Intervenors pointed to concrete examples of plaintiffs' hostility toward the Intervenors in the proceedings below. (8JA2072; 8JA2080-81.)

4 Although they are not parties to this action, the proposed brief of *amicus curiae* Washington Protection and Advocacy System, National Disability Rights Network, Mental Health Advocacy Project, and Public Interest Law Firm of the Law Foundation of Silicon Valley, and Disability Rights Education and Defense Fund (hereinafter collectively referred to as "Washington Protection and Advocacy Amici") parrots this mischaracterization of the superior court's order. (*See* proposed Washington Protection and Advocacy Amici Brief at 15.)

5 In the proceedings below, the named plaintiffs argued that classes are "routinely certified in civil rights litigation seeking declaratory and injunctive relief on behalf of institutionalized persons." (6JA 1534.) Plaintiffs fail to raise the issue on appeal and have therefore waived the argument. *See Stoll v. Shuff,* 22 Cal. App. 4th 22, 25 n. 1 (1994).