

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

A.A., by and through his mother, P.A.; B.B.,	*	CIVIL ACTION NO.:
by and through her mother, P.B.; C.C., by and	*	
through her mother, P.C.; D.D., by and through	*	JUDGE:
his mother, P.D.; E.E., by and through his	*	
mother, P.E.	*	MAGISTRATE:
<i>Plaintiffs,</i>	*	
v.	*	CLASS ACTION
	*	
REBEKAH GEE, in her official capacity, as	*	
Secretary of the Louisiana Department of	*	
Health, and the LOUISIANA DEPARTMENT	*	
OF HEALTH	*	
<i>Defendants.</i>	*	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

I. INTRODUCTION

Defendants Rebekah Gee, in her official capacity as Secretary of the Louisiana Department of Health (LDH), and LDH, are failing to provide a comprehensive and accessible public behavioral health system for Medicaid-eligible children and youth in Louisiana. Rather than providing the intensive care coordination, crisis services, and intensive behavioral services and supports (collectively referred to as “intensive home and community-based services” or IHCBS), required by the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) and Reasonable Promptness provisions of the Medicaid Act (*See* 42 U.S.C. §§ 1396d(r), 1396a(a)(10)(A), 1396a(a)(43); 1396d(a)(4)(B); and a(a)(8)), Defendants’ Medicaid system offers an inconsistent and scattershot collection of services that do not sufficiently treat or ameliorate the mental health conditions of Plaintiffs A.A., B.B., C.C., D.D., and E.E. (Plaintiffs) or members of the proposed class (the Class). Further, Defendants’ ongoing failure to provide these IHCBS causes Plaintiffs and the Class to be at serious risk of unnecessary placement in

hospitals and psychiatric institutions, in violation of Title II of the Americans With Disabilities Act (Title II) and Section 504 of the Rehabilitation Act of 1973 (Section 504) . 42 U.S.C. § 12132; 29 U.S.C. § 794a.

Accordingly, Plaintiffs hereby seek entry of an Order, pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2) and Local Civil Rule 23, certifying a class consisting of:

All Medicaid-eligible youth under the age of 21 in the state of Louisiana who are diagnosed with a mental illness or condition, not attributable to an intellectual or developmental disability, and who are eligible for, but not receiving, intensive home and community-based services (mental health) provided with sufficient frequency, intensity, and duration to allow them to remain in their homes and home communities.

II. DEFENDANTS' STATUTORY AND REGULATORY MANDATE TO PROVIDE IHCBS TO PLAINTIFFS AND THE CLASS

Defendant, LDH is the single state agency that administers Louisiana's Medicaid program. L.S.A.-R.S. 36:251. As Secretary of LDH, Dr. Gee must ensure that LDH complies with all relevant laws and regulations. *See* 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10. These duties are non-delegable. *Id.*

Federal law requires states participating in Medicaid to operate their Medicaid program pursuant to a state Medicaid plan (State Plan). States must cover certain mandatory services in their State Plan, including EPSDT services for children and youth under the age of 21. 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r). The Medicaid Act requires states to provide covered services (or "make medical assistance available") including mental health services provided pursuant to the EPSDT mandate, to Medicaid beneficiaries when medically necessary, with "reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). Even when a particular service or treatment for youth is not included in a State Plan, a state must

nevertheless provide that service or treatment if it is listed in Section 1396d(a) and necessary to correct or ameliorate the child's condition. 42 U.S.C. § 1396a(a)(43)(C); 42 C.F.R. § 441.57.

Additionally, under Title II and Section 504 and their implementing regulations, LDH is the "public entity" charged with administering the Medicaid program, and must administer the program in a manner that does not result in the unnecessary segregation of Plaintiffs and the Class, or the risk thereof, from their communities and to hospitals and psychiatric institutions. *See* 42 U.S.C. § 12131-32; *Olmstead v. L.C.*, 527 U.S. 581 (1999).

III. FACTUAL ALLEGATIONS

A. Class Allegations

Defendants are not, and have not been, providing a comprehensive and accessible behavioral health care system that would enable Plaintiffs and Class members to receive the desperately needed services. Decl., Heather Kindschy, MSW (Exh. 1). In November 2014, Mental Health America released its annual report, in which it ranked Louisiana last in the nation (51st out of the 50 states and the District of Columbia) in providing access to mental health care for children with a mental illness or condition.¹ In February 2018, the Louisiana Legislative Auditor released a performance audit evaluating the accessibility of mental health services for adult and children Louisiana Medicaid beneficiaries, concluding that "Louisiana does not always provide Medicaid recipients with comprehensive and appropriate specialized behavioral health services."² According to the most recent (2017-2018) National Survey of Children's Health conducted by the Health Resources and Services Administration of the U.S. Department of Health and Human Services, 62.6% of all Louisiana children between the ages of 3 through 17

¹ *Parity of Disparity: The State of Mental Health* 2015, at 32, <https://www.mhanational.org/sites/default/files/Parity%20or%20Disparity%202015%20Report.pdf>.

² *Access to Comprehensive and Appropriate Specialized Behavioral Health Services*, at 7 (February 14, 2018) [https://www.la.gov/PublicReports.nsf/B99F834BF8F4AB908625823400758F9B/\\$FILE/000179B4.pdf](https://www.la.gov/PublicReports.nsf/B99F834BF8F4AB908625823400758F9B/$FILE/000179B4.pdf).

who have been diagnosed with a mental illness or condition, have not received mental health treatment or counseling.³

B. Plaintiffs' Allegations

Plaintiffs A.A., B.B., C.C., D.D., and E.E. are Louisiana Medicaid recipients residing throughout Louisiana who have been diagnosed with multiple mental illnesses or conditions, and are suffering tremendously as a result of Defendants' failure to fulfill their federal mandate to provide necessary IHCBS throughout Louisiana.

A.A. is an 11-year old Louisiana Medicaid recipient residing in East Baton Rouge Parish. Decl., P.A. (Exh. 2). Despite having multiple mental illnesses, experiencing psychiatric crises, and being recommended by his providers for IHCBS, A.A. has never received crisis services. *Id.* He has been institutionalized six (6) times at psychiatric facilities, with his first institutionalization occurring in 2014. *Id.* Before and after each time he was institutionalized, A.A. only received minimal and inadequate outpatient counseling and medication management. *Id.* A.A. has been suspended multiple times from school, was recently expelled, and continues to struggle with maintaining positive relationships with his peers and family. *Id.* Unable to access IHCBS, A.A. is at serious risk of being unnecessarily institutionalized and separated from his family and community again.

B.B. is a 13-year old Louisiana Medicaid recipient residing in Caddo Parish. Decl., P.B. (Exh. 3). Despite having multiple mental illnesses and experiencing psychiatric crises, B.B. has never been recommended for IHCBS because such services are unavailable and/or do not exist: all she has received is inadequate outpatient counseling and medication management. *Id.* Lacking intensive care coordination, B.B.'s mother has attempted by herself to locate providers to provide IHCBS, to no avail. *Id.* B.B.'s condition continues to decline, particularly causing strife between

³ <https://www.childhealthdata.org/browse/survey/results?q=7286&r=20> (last viewed Oct. 29, 2019).

her mother and her younger brothers. *Id.* Unable to access IHCBS, institutionalization for B.B., and separation from her family, is imminent. *Id.*

C.C. is a 12-year old Louisiana Medicaid recipient residing in Terrebonne Parish. Decl., P.C., (Exh. 4). Despite having multiple mental illnesses, experiencing psychiatric crises, and being recommended by her providers for IHCBS, C.C. has never received crisis services. *Id.* She has been institutionalized three (3) times at psychiatric facilities, her first as a Louisiana Medicaid recipient occurring in September 2013, and with her most recent institutionalization in late 2018 lasting for over 100 days. *Id.* Before and after each time she was institutionalized, C.C. only received inadequate mental health services, including outpatient counseling, infrequent and sporadic mental health rehabilitation services such as community psychiatric support and treatment (CPST) and psychosocial rehabilitation (PSR), and occasional medication management. *Id.* As a result of receiving inadequate mental health services, C.C. is juvenile-justice involved, and continues to struggle with maintaining positive relationships with her peers and family. *Id.* Unable to access IHCBS, C.C. is at serious risk of being unnecessarily institutionalized and separated from her family again. *Id.*

D.D. is a 13-year old Louisiana Medicaid recipient residing in Rapides Parish. Decl., P.D. (Exh. 5). Despite having multiple mental illnesses and experiencing multiple psychiatric crises, D.D. has never received crisis services. D.D. has previously been juvenile-justice involved, has been suspended multiple times from school, and has even been expelled as a result of his failure to obtain needed mental health services. *Id.* Unable to access IHCBS, D.D. is at serious risk of being unnecessarily institutionalized and separated from his family— an option that is even more complicated by D.D. requiring constant medical attention because he has a pacemaker, thereby

making the techniques used in institutional placement even more harmful and less appropriate for him.

E.E. is a 12-year old Louisiana Medicaid recipient residing in Pointe Coupee Parish. Decl., P.E. (Exh. 6). Despite having multiple mental health diagnoses, experiencing psychiatric crises, and being recommended by his providers for IHCBS, E.E. has never received crisis services. *Id.* He has been institutionalized seven (7) times at psychiatric facilities, his first institutionalization occurring in 2013, and his most recent occurring earlier this year. *Id.* Before and after each time he was institutionalized, E.E. only received inadequate outpatient counseling and occasional medication management. *Id.* As a result of his inability to obtain needed IHCBS, E.E. is juvenile-justice involved, has been suspended multiple times from school and expelled, and continues to struggle with maintaining positive relationships with his peers and family. *Id.* Unable to access IHCBS, E.E. is at serious risk of being unnecessarily institutionalized and separated from his family again.

Due to Defendants' failure to provide necessary IHCBS, Plaintiffs and the Class continue to deteriorate and face repeated hospitalizations, encounters with the juvenile justice system and are at serious risk of unnecessary institutional placement. *See* Decl., G.A. (Exh. 7); Decl., G.B. (Exh. 8). For some families, Defendants' failures to provide such necessary services have influenced their decision to move to another state, in part to seek accessible IHCBS for their child. *See* Decl., G.C. (Exh. 9).

IV. ARGUMENT

Class certification is appropriate where the threshold requirements of Rule 23(a) and any of the requirements of subsections (b) (1), (2), or (3) are satisfied. Fed. R. Civ. P. 23; *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007) (citing *Amchem Prods., Inc. v.*

Windsor, 521 U.S. 591, 614 (1997)). ““By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.”” *Teta v. Chow (In Re TWL Corp.)*, 712 F.3d 886, 894 (5th Cir. 2013) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010)). A district court has broad discretion when deciding a motion for class certification. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998). In its analysis, the court need not fully consider the merits of the plaintiffs’ claims at the certification stage, but may permissibly look past the pleadings to the record and any other completed discovery when deciding whether a class should be certified. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974); *Adickes v. Hellerstedt*, 753 F. App’x 236, 244 (5th Cir. 2018). Here, Plaintiffs’ proposed class meets the requirements of Rules 23(a) and (b)(2).

a. The Proposed Class Satisfies the Requirements for a Class Action Suit Under Rule 23(a).

i. Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of individual members into one suit is impracticable. In evaluating the numerosity element, the “the primary consideration for courts is the practicality of joining the members of a proposed class.” *Pitts*, 2011 WL 2193398 at * 3 (citing *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir.1981)).

This court considers several factors in assessing “practicality,” including “the sheer size of the class and whether the class will include future members.” *Pitts*, 2011 WL 2193398 at * 3. “Although there is no strict threshold, classes containing more than 40 members are generally large enough to warrant certification.” *Lewis v. Cain*, 324 F.R.D. 159, 167–68 (M.D. La. Feb. 26, 2018) (J. Dick) (granting class certification in a prison conditions class action alleging, among

other claims, a violation of Title II and Section 504). According to data obtained from the Louisiana Medicaid 2018 Annual Report produced by Defendants,⁴ the Class consists of approximately 47,500 Louisiana Medicaid-eligible children and youth under the age of 21 with a mental illness or condition, a significant number of whom are children and youth with severe emotional disturbances, as of January 2018. Plaintiffs thus easily meet the threshold numerical requisite for a federal class action.

That joinder is impracticable here is further supported by the presence of future Class members, as more Louisiana youth under the age of 21 will become Medicaid-eligible and be diagnosed with mental health disorders or conditions. Courts have repeatedly recognized that the existence of unknown future members supports class certification. *See Phillips v. Joint Legislative Comm. on Performance & Expenditure Review of State of Miss.*, 637 F.2d 1014, 1022 (5th Cir. Unit A Feb. 1981) (finding that “joinder of unknown individuals is ‘certainly impracticable.’”); *see also e.g., Cain*, 324 F.R.D. at 168 (“the fluid nature of a plaintiff class . . . counsels in favor of certification of all present and future members”); *Pitts*, 2011 WL 2193398 at *4 (“ . . . there are countless potential future members of the class who have not yet qualified for [the Medicaid service] who may wish to preserve their rights.”).

Additionally, “the Fifth Circuit has repeatedly noted that ‘the number of members in a

⁴ LDH, *Louisiana Medicaid 2018 Annual Report*
http://ldh.la.gov/assets/medicaid/AnnualReports/MedicaidAnnualReport2018_v4.pdf

According to the 2018 Annual Report, there are a total of 1,720,038 Medicaid beneficiaries enrolled in the state’s five managed care organizations (MCOs). *See* Table 28, at 50, “Healthy Louisiana Enrollment per Plan by Age Group, Health Plan and Gender”. Of this total, 597,404 are child and youth Medicaid beneficiaries between the ages of 6 and 20. *Id.* Therefore, of all Louisiana Medicaid beneficiaries enrolled in the state’s five MCOs, 35% are children and youth Medicaid beneficiaries between the ages of 6 and 20. *Id.*

Further, there are a total of 136,755 Medicaid beneficiaries of all ages enrolled in the state’s five MCOs who require specialized behavioral health services (SBH services). *See* Table 27, at 49 “Healthy Louisiana Enrollment per Plan by Region and Type of Service.” According to the 2018 Annual Report, “SBH services are mental health services. . . specifically defined in the Medicaid State Plan. . .” *Id.* at 55. Therefore, multiplying 136,755 by 35% produces a total number of 47,497 Medicaid beneficiaries between the ages of 6 and 20 who require specialized behavior services.

proposed class is not determinative of whether joinder is impracticable.’” *Cain*, 324 F.R.D. at 167–68 (quoting *In re TWL Corp.*, 712 F.3d 886, 894 (5th Cir. 2013)). Consideration is also given to intertwining factors including, (a) the ease of identification of class members, (b) the geographical dispersion of the class, the nature of the action (see *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980)), and (c) whether the “class members lack the financial resources necessary to bring suit individually in order to vindicate their rights” (*Pitts*, 2011 WL 2193398 at *4 (M.D. La. June 6, 2011)).

Here, the Class is geographically diverse, as reflected by Plaintiffs, who each reside in a different parish throughout the state. See P.A. Decl. (Exh. 2); P.B. Decl. (Exh. 3); P.C. Decl. (Exh. 4); P.D. Decl. (Exh. 5); and P.E. Decl. (Exh. 6). Also, given that the Class consists of Medicaid eligible youth with psychiatric disabilities and limited financial resources, they will “face barriers to obtaining counsel or otherwise vindicating their interests in access to community-based care and relief from discrimination.” See *Steward*, 315 F.R.D. at 480; see also *Pitts* (finding class of Louisiana Medicaid-eligible persons with disabilities seeking personal care services to “lack the financial resources necessary to bring suit individually in order to vindicate their rights” and holding that the “numerosity” requirement is satisfied.); see also *In re TWL Corp.*, 712 F.3d at 894 (Fifth Circuit explaining that courts also consider the “judicial economy arising from the avoidance of a multiplicity of actions.”). Under such circumstances, joinder of the claims by the entire Class is impracticable.

Accordingly, Plaintiffs sufficiently meet their burden to establish numerosity.

ii. Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class” in order to establish class certification. Plaintiffs’ claims “must depend upon a common contention

... of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.” *Lightbourn v. Co. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (citations omitted)). “What is significant with respect to a commonality determination is “not the raising of common questions—even in droves—but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Adickes v. Hellerstedt*, 753 F. App’x 236, 245 (5th Cir. 2018) (citing *Yates v. Collier*, 868 F.3d 354, 359 (5th Cir. 2017)).

A common question is one which, when answered as to one class member, is answered to all. “Even where individual class members may not be identically situated, commonality exists where a question of law linking class members is substantially related to the resolution of the litigation.” *Lane v. Campus Fed. Credit Union*, No. 16-CV-37-JWD-EWD, 2017 WL 3719976, at *4 (M.D. La. May 16, 2017), citing *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839-40 (5th Cir. 2012). “[T]he only consideration at the class certification stage is whether the issues are appropriate for class-wide litigation,” not whether the plaintiffs will win on the merits. *Dockery v. Fischer*, 253 F. Supp. 3d 832, 846 (S.D. Miss. 2015) (citations omitted). *See also In re Deepwater Horizon*, 739 F.3d at 811 (“the principal requirement of *Wal-Mart* is merely a single common contention that enables the class action ‘to generate common *answers* apt to drive the resolution of the litigation’”; and therefore, “these ‘common answers’ may indeed relate to the injurious effects experienced by the class members, but they may also relate to the defendant’s injurious conduct.”), citing *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012).

Here, Defendants, through their policies, practices, and procedures, are not fulfilling their federal mandate to provide Plaintiffs and the Class with the necessary IHCBS to treat their mental health conditions. Common questions among Plaintiffs and the Class include: (a) whether Defendants are providing necessary and timely IHCBS to Plaintiffs and the Class consistent with the EPSDT and Reasonable Promptness requirements of the Medicaid Act; (b) whether Defendants are failing to provide Plaintiffs and the Class with services in the most integrated setting appropriate to their needs, thereby resulting in unnecessary institutionalization or the serious risk thereof; and (c) whether Defendants utilize criteria or methods of administration in their Medicaid program that otherwise have the effect of discriminating against Plaintiffs and members of the Class.

Other courts have found similar classwide questions sufficient to meet the commonality requirement. In *S.R. v. Pa. Dep't of Human Servs.*, 325 F.R.D. 103, 109 (M.D. Pa. 2018), for example, the court rejected the defendant's argument that a proposed class of EPSDT-eligible Medicaid recipients should not be certified due to the individualized nature of their claims. The Court observed that "in determining whether [defendant] has policies or practices that fail to provide the members with necessary services, there will of course be some factual considerations that are individualized for each member. . . . [h]owever, the main question of whether [defendant] provides a sufficient array of services to meet the needs of dependent children with mental health disabilities or whether DHS has failed to establish contracts to provide for these placements or services are classwide questions of fact." *Id.* The court observed that its holding was consistent with *Wal-Mart*, as the class before it was not seeking "individualized awards of damages" but rather "injunctive relief that would require systemic reform." *Id. See also, e.g., I.N. v. Kent*, No. C 18-03099 WHA, 2019 U.S. Dist. LEXIS 60306, at *6 (N.D. Cal. Apr. 7, 2019)

(finding commonality where plaintiffs alleged that defendants failed to arrange for approved in-home nursing services as required by EPSDT and where plaintiffs' parents had to instead rely on their own efforts to find nurses with little to no help); *N.B. v. Hamos*, 26 F. Supp. 3d 756, 776 (N.D. Ill. 2014) (finding common questions support certification of class of children who have been “diagnosed with a mental health or behavioral disorder and . . . for whom a licensed practitioner of the healing arts has recommended intensive home- and community-based services to correct or ameliorate their disorders.”); *M.H. v. Berry*, No. 1:15-CV-1427-TWT, 2017 U.S. Dist. LEXIS 90999, at *15-16 (N.D. Ga. June 13, 2017) (finding common questions where Plaintiff “challenge[d] broad policies and practices that apply to each member of [the State’s EPSDT Program]”); *C.f. O.B. v. Norwood*, 170 F. Supp. 3d 1186, 1200 (N.D. Ill. 2016) (“Proper common questions thus appear to include . . . whether treatment found to be ‘medically necessary,’ and therefore mandatory for the state to provide, is nevertheless unavailable in Illinois,” and “whether there is system-wide failure to provide services that already have been prescribed and that, therefore, the EPSDT program requires the State to provide.”).

As in these precedents, Plaintiffs here seek an injunction requiring Defendants to fulfill their federal mandate to provide IHCBS to Plaintiffs and the Class. Accordingly, Plaintiffs have met their burden to demonstrate that commonality exists among Plaintiffs and the Class.

iii. Typicality

Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Typicality “focuses on the similarity between the named plaintiffs’ legal and remedial theories and the theories of those whom they purport to represent.” *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999), citing *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997). The typicality and commonality

requirements tend to merge as both are guideposts determining whether a class action is economical and whether the named plaintiffs' claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *Wal-Mart Stores*, 564 U.S. at 349 n.5.

Here, the claims and remedies asserted by Plaintiffs are typical of the claims and remedies asserted by Class members. Plaintiffs and Class members are all Medicaid-eligible youth under the age of 21, with mental illnesses or conditions, who require IHCBS as determined necessary by a qualified provider in order to correct or ameliorate a mental illness or condition. The remedies sought by Plaintiffs are the same remedies that would benefit Class members: an injunction requiring Defendants to take affirmative actions to provide or arrange for necessary IHCBS for all individual Plaintiffs and Class members in order to correct or ameliorate their significant mental health conditions. These are precisely the facts that other courts have found to support typicality in similar cases. In *N.B. v. Hamos*, 26 F. Supp. 3d at 771, for example, the Court held Plaintiffs had established typicality where "they all suffer from mental illness and/or behavioral or emotional disorders . . . [and were] alleged to have been denied access to IHCBS based on the failure of the [Defendant] to make them available, in violation of EPSDT and the integration mandate." *See also, e.g., S.R. v. Pa. Dep't of Human Servs.*, 325 F.R.D. at 110-11; *I.N. v. Kent*, No. C 18-03099 WHA, 2019 U.S. Dist. LEXIS 60306, at *6.

Plaintiffs here have thus met their burden to establish typicality.

iv. Adequacy of Representation by Plaintiffs and Counsel for Plaintiffs

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The adequacy determination requires "an inquiry into [1] the zeal and

competence of the representative[s'] counsel and . . . [2] the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of the absentees[.]” *Feder v. Electronic Data Systems Corp.*, 429 F.3d 125, 130 (5th Cir. 2005) (quoting *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001)).

Plaintiffs and their next friends are adequate representatives of the Class because they have expressed an overwhelming willingness and ability to actively participate in the litigation and to protect the interests of the Class. *See* P.A. Decl. (Exh. 2); P.B. Decl. (Exh. 3); P.C. Decl. (Exh. 4); P.D. Decl. (Exh. 5); and P.E. Decl. (Exh. 6). Plaintiffs actively share the interests of the Class in advocating for the IHCBS required by the Medicaid Act and in avoiding the serious risk of being unnecessarily institutionalized in violation of Title II and Section 504. *Id.* In addition, Plaintiffs and their families are all dedicated to working toward systemic changes to the Defendants’ policies, procedures, and practices so that all children with mental illnesses or conditions participating in the state’s Medicaid program will be able to access the services to which they are entitled. *Id.* The Plaintiffs’ families are experienced in attempting to navigate the Medicaid system as it relates to their children. *Id.* They have spent the entirety of the Plaintiffs’ lives fighting for their children. *Id.* The relief sought by Plaintiffs will benefit other Medicaid-eligible youth throughout the state who require IHCBS to address their mental health needs (the Class). *See Hayes v. Eaton Group Attorneys, LLC*, 2019 WL 427331 * at 4 (M.D. La. Feb. 4, 2019) (J. deGravelles) (finding that plaintiff met adequacy requirement because she is “part of the class and possess[es] the same interest and suffer[ed] the same injury as class members.”), *quoting Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594-95 (1997).

Counsel for Plaintiffs, Southern Poverty Law Center (SPLC), the National Health Law Program (NHLP), the National Center for Law and Economic Justice (NCLEJ), Advocacy

Center, and O'Melveny & Meyers, LLP (collectively, "Proposed Class Counsel"), are also adequate class representatives. Each has extensive experience litigating complex, federal class actions lawsuits under Rule 23(b)(2). *See* Decl., Victor M. Jones (Exh. 10); Decl. Kimberly Lewis (Exh. 11); Decl. Travis England (Exh. 12); Decl. Debra J. Weinbger (Exh. 13); and Decl. Darin Snyder (Exh. 14). SPLC and Advocacy Center have conducted a multi-year investigation into the systemic and widespread deficiencies of the mental health system, interviewing the families of Louisiana Medicaid-eligible youth with mental illness, children's mental health practitioners, and disability rights advocates throughout Louisiana. *See* Jones Decl. (Exh. 11). Further, SPLC, NHeLP, NCLEJ, and Advocacy Center have extensive experience litigating Rule 23(b)(2) class actions under the Medicaid Act, Title II, and Section 504. *See* Jones Decl. (Exh. 10); Lewis Decl. (Exh. 11); England Decl. (Exh. 12); Weinberg Decl. (Exh. 13).

Accordingly, Plaintiffs and counsel for Plaintiffs are adequate representatives of the Class.

b. The Putative Class Satisfies the Requirements of Rule 23(b)(2)

In addition to the requirements of Rule 23(a), Plaintiffs and Class members must satisfy Rule 23(b)(2) to qualify for class certification. Under Rule 23(b)(2), class certification is appropriate where the party opposing the class has acted or refused to act on the grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. Fed. R. Civ. P. 23(b)(2). In analyzing Rule 23(b)(2), the Fifth Circuit looks to whether (1) class members have been harmed in essentially the same way; (2) whether the injunctive relief [predominates] over monetary damage claims; and (3) whether the injunctive relief sought [is] specific. *Yates v. Collier*, 868 F.3d 354, 366 (5th Cir. 2017) (internal citations and quotations omitted)). If a "single injunction or declaratory judgment

can provide relief to each member of the class,” then Rule 23(b)(2) is met. *Dukes*, 564 U.S. at 360. Indeed, a “[Rule] 23(b)(2) class action suit is an effective weapon for an across-the-board attack against systemic abuse.” *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975).

Plaintiffs and the Class clearly meet all three elements. As previously discussed, Plaintiffs and Class members have suffered the same injury: all have been deprived of necessary and timely IHCBS in violation of the Medicaid Act. Due to this failure, they are also at serious risk of unnecessary institutionalization in violation of Title II and Section 504. Second, neither Plaintiffs nor the Class seek monetary relief. Thus, the question of predominance is inapplicable.

Finally, the injunctive relief sought by Plaintiffs and the Class is sufficiently specific and can be achieved with a single order requiring Defendants to provide necessary IHCBS. To be sure, “Rule 23(b)(2) does not require that every jot and tittle of injunctive relief be spelled out at the class certification stage. It requires only ‘reasonable detail’ as to the ‘acts required.’” *Yates*, 868 F.3d at 368 (quoting *M.D. ex rel. Stukenberg*, 675 F.3d at 848).

This case fits well within a Rule 23(b)(2) action because the Defendants’ illegal policies and practices affect all members of the Class as well as Plaintiffs, the remediation of which is well-suited for and requires declaratory and injunctive relief. Indeed, it is commonplace for courts to certify classes under Rule 23(b)(2) in cases where Medicaid recipients seek to enforce their rights to benefits. *See Doe by Doe v. Chiles*, 136 F.3d 709, 712 (11th Cir. 1998); *Marisol v. Guiliani*, 126 F.3d 372, 378 (2d Cir. 1997); *Baby Neal*, 43 F.3d at 64; *Hampe v. Hamos*, 2010 U.S. Dist. LEXIS 125858, * 19 (N.D. Ill. 2010); *Memisovski v. Maram*, 2004 U.S. Dist. LEXIS 16722 (N.D. Ill. 2004); *Fields v. Maram*, 2004 U.S. Dist. LEXIS 16291 (N.D. Ill. 2004); *Boulet v. Cellucci*, 107 F. Supp. 2d 61, 81 (D. Mass. 2001); *Benjamin H. v. Ohl*, 1999 U.S. Dist. LEXIS 22454, **11-12 (S.D.W.V. Oct. 8, 1999). *See also Bzdawka v. Milwaukee Co.*, 238 F.R.D. 469,

476 (E.D. Wis. 2006) (class of elderly disabled persons in claim under ADA integration mandate). In a granting class certification in a similar case in Illinois, the court stated:

Plaintiffs seek [class-wide relief] to remedy the systems in place that allegedly fail and/or prevent the arrangement of medically necessary EPSDT services in violation of the Medicaid Act, and which allegedly segregate, threaten to segregate, or otherwise discriminate against Plaintiffs in violation of the Rehabilitation Act, the ADA, and their integration mandates. Such relief would benefit the entire class. And ... no individual determinations are necessary to grant it, since the medical necessity of the services in question has already been determined for each class member by HFS. Certification under Rule 23(b)(2) is therefore appropriate.

O.B. v. Norwood, No. 15 C 10463, 2016 WL 2866132, at *5 (N.D. Ill. May 17, 2016). In the instant case, the Plaintiffs claim that the Defendants failed to arrange for the delivery of IHCBS in violation of the Medicaid Act, ADA, and the Rehabilitation Act. Accordingly, the Plaintiffs have satisfied the requirements of Rule 23(b)(2).

V. The Court Should Designate Plaintiffs' Counsel as Class Counsel Under Rule 23(g).

When a class is certified, the court must appoint class counsel. In appointing class counsel, the Court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class; Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

For the same reasons that counsel for Plaintiffs are adequate representatives of the Class (as discussed *supra* V.(a).(iv.)), Plaintiffs' counsel are qualified to serve as counsel for the Class.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the Motion for Class Certification under Federal Rule of Civil Procedure 23, so that tens of thousands of

Louisiana's Medicaid-eligible youth with mental illnesses may receive the intensive home and community-based services and systemic relief to which they are entitled by federal law.

Further, Plaintiffs respectfully request this Court appoint Proposed Class Counsel as counsel to represent the certified class.

Respectfully submitted this 7th day of November, 2019

A.A., B.B., C.C., D.D., and E.E.
By and through their parents

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