No. 21-30580

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. A., BY AND THROUGH HIS MOTHER, P.A.; B. B., BY AND THROUGH HER MOTHER, P.B.; C. C., BY AND THROUGH HER MOTHER, P.C.; D. D., BY AND THROUGH HIS MOTHER, P.D.; E. E., BY AND THROUGH HIS MOTHER, P.E.; F. F., BY AND THROUGH HER MOTHER, P.F.,

Plaintiffs - Appellees

v.

COURTNEY N. PHILLIPS, DR., IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH; LOUISIANA DEPARTMENT OF HEALTH,

Defendants - Appellants

On Appeal from the United States District Court
for the Middle District of Louisiana,
Civil Action No. 3:19-CV-00770
Hon. Judge Brian A. Jackson

BRIEF OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

No. 21-30580

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. A., BY AND THROUGH HIS MOTHER, P.A.; B. B., BY AND THROUGH HER MOTHER, P.B.; C. C., BY AND THROUGH HER MOTHER, P.C.; D. D., BY AND THROUGH HIS MOTHER, P.D.; E. E., BY AND THROUGH HIS MOTHER, P.E.; F. F., BY AND THROUGH HER MOTHER, P.F.,

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Defendants - Appellants

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Plaintiffs-Appellees:

1. A.A., by and through his mother, P.A.
2. B.B., by and through her mother, P.B.

3. C.C., by and through her guardian ad litem, Loyola University of New Orleans College of Law Children's Law Clinic under the supervision of Professor Ramona Fernandez, pursuant to the district court's *Order Appointing Guardian Ad Litem for C.C.*, dated April 21, 2021. **ROA.751-752**.
4. D.D., by and through his mother, P.D.
5. E.E., by and through his guardian ad litem, Kimona Hogan of the Hogan Law Firm, pursuant to the district court's *Order Appointing Guardian Ad Litem for E.E.*, dated August 18, 2021. **ROA.933-934.**
6. F.F., by and through her mother, P.F.

B. Counsel for Plaintiffs-Appellees:

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4. Saima A. Akhtar
   NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE

5. Darin W. Snyder
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   O'MELVENY & MYERS LLP

C. Defendants-Appellants:

1. Dr. Courtney N. Phillips, in her official capacity as Secretary of the Louisiana Department of Health

2. The Louisiana Department of Health

D. Counsel for Defendants-Appellants:

1. Kimberly Ulasiewicz Boudreaux
   Rebecca Clement
   Ryan Romero
   Kimberly Sullivan
   LOUISIANA DEPARTMENT OF HEALTH

E. District Court Judge Rendering Decision Below:

The Honorable Judge Brian A. Jackson
United States District Court for the Middle District of Louisiana

/s/ Kimberly Ulasiewicz Boudreaux

Attorney of Record for Defendants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Counsel on behalf of the Defendants-Appellants requests the opportunity to present oral argument before this Honorable Court. Oral argument will allow the Court to propose questions to both parties and ultimately assist the Court in reaching its decision on the class certification appeal.

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INTRODUCTION

In the proceedings below, the district court failed to conduct a "rigorous analysis" into whether the requirements for class certification had been met, as required by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As a result of this failure, the district court made several critical errors in granting the motion for class certification, which was filed on behalf of the Named Appellees (hereinafter "Plaintiffs" or "Named Plaintiffs").

To begin with, the district court approved an unascertainable class: defining a class based on a child's need for "intensive home- and community-based services" ("IHCBS") requires an individualized analysis to determine class membership. Moreover, it is impossible to determine whether a child requires "IHCBS" because the term "IHCBS" is extremely vague and does not refer to a particular service or category of services. In addition, the district court erred in holding that the Plaintiffs' allegation that "LDH does not provide *any* IHCBS" satisfies the commonality requirement. **ROA.776** (emphasis in original). The problem with this holding is that the Plaintiffs' Second Amended Complaint does not actually allege that LDH does not provide "*any* IHCBS." Rather, the Second Amended Complaint alleges that *some* children are not receiving *enough* behavioral health services, *see*, *e.g.*, **ROA.392-393**, and that issue is *not* capable of classwide resolution because it

requires an individualized analysis of each child's needs and the services that each child is already receiving.

The district court also erred in holding that Plaintiffs met their burden of proving that they complied with Federal Rule of Civil Procedure ("Rule") 23(b)(2), which requires that all class members "have been harmed in essentially the same way" and that the relief requested is "specific" and "describe[s] in reasonable detail the acts required." *M.D. v. Perry*, 675 F.3d 832, 845 (5th Cir. 2012) (citations omitted). In this case, Plaintiffs' claims would require the Court to determine whether each child is receiving the "IHCBS" necessary to meet that child's needs. Additionally, Plaintiffs seek injunctive relief that would require the district court to determine what "IHCBS" are necessary "to correct or ameliorate" each child's condition, and which setting is "the most integrated setting appropriate" for each child's needs. **ROA.400 at ¶25; ROA 494**.

For foregoing reasons, the district court abused its discretion in certifying the class, and its decision should be reversed.

JURISDICTIONAL STATEMENT

Exercising subject matter jurisdiction under 28 U.S.C. § 1331 and § 1343(a)(3), the district court entered its class certification order on May 25, 2021. **ROA.753-783**. On September 20, 2021, this Court granted the opposed petition for permission to appeal under Rule 23(f), which was filed on behalf of Dr. Courtney N.

Phillips, in her official capacity as Secretary of the Louisiana Department of Health ("LDH"), and LDH (collectively "LDH"). **ROA.936**. This Court's jurisdiction is invoked under 28 U.S.C. § 1292(e) and Rule 23(f), which authorizes a permissive interlocutory appeal from an adverse class certification order, within the discretion of the appellate court. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1709 (2017).

STATEMENT OF THE ISSUES

Whether the district court abused its discretion and improperly certified this suit as a class action under Rule 23. Specifically:

1. Whether the district court erred in finding the proposed class ascertainable;
2. Whether the district court failed to perform the rigorous analysis that is required when satisfying Rule 23's prerequisites; and
3. Whether the district court erred in finding that the proposed class satisfied the requirements of Rule 23(a) and Rule 23(b)(2).

STATEMENT OF THE CASE

Plaintiffs consist of six minor children residing in Louisiana, who are all Medicaid recipients with diagnosed mental illnesses or conditions. **ROA.416 at ¶ 83**. Plaintiffs allege that LDH, as the State Medicaid Agency, fails to provide "IHCBS" on a consistent and statewide basis, as required by the Early and Periodic

Screening, Diagnostic, and Treatment ("EPSDT") provisions[1] and Reasonable Promptness provisions of the Medicaid Act. **ROA.394 at ¶ 5**. Plaintiffs assert that LDH's alleged failure to provide IHCBS causes the putative class to be at risk of unnecessary placement in hospitals and psychiatric institutions, in violation of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973. **ROA.394 at ¶ 5**. Through this suit, Plaintiffs seek prospective injunctive relief that orders LDH "to provide necessary IHCBS to correct or ameliorate their conditions and prevent their unnecessary institutionalization." **ROA.396 at ¶ 9**.

On May 25, 2021 the district court granted Plaintiffs' request for class certification under Rule 23(a) and Rule 23(b)(2). **ROA.753-783**. LDH opposed class certification on the basis that the class is not ascertainable and fails to satisfy the requirements of Rule 23(a) and Rule 23(b)(2). **ROA.586-614**. Ultimately, the district court amended the class definition as follows:

> All Medicaid-eligible youth under the age of 21 in the State of Louisiana (1) who have been diagnosed with a mental health or behavioral disorder, not attributable to an intellectual or developmental disability, and (2) for whom a licensed practitioner of the healing arts has recommended intensive home- and community- based services to correct or ameliorate their disorders. **ROA.753, 782-783**.

[1] The EPSDT mandate requires a State Medicaid Agency to provide to Medicaid-enrolled children under 21 years of age all healthcare, services, treatments, and other measures listed at 42 U.S.C. § 1396d(a) of the Medicaid Act, when necessary to correct or ameliorate unhealthful conditions discovered by screenings, regardless of whether they are covered by the State's Medicaid State Plan. *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 589 (5th Cir. 2004).

On June 8, 2021, LDH requested permission to appeal the district court's class certification order to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") pursuant to Rule 23(f). **ROA.798-858**. On September 20, 2021, this Court granted LDH's opposed Rule 23(f) petition. **ROA.936**. On October 21, 2021, the Fifth Circuit published the Record on Appeal and issued the briefing notice.

STANDARD OF REVIEW

On a Rule 23(f) appeal, the Court of Appeals reviews class certification decisions for an abuse of discretion. *Flecha v. Medicredit, Inc*., 946 F.3d 762, 766 (5th Cir. 2020) (citing *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 325 (5th Cir. 2008)). However, the Court of Appeals reviews *de novo* whether the district court applied the correct legal standards in determining whether to certify the class. *Id.*

SUMMARY OF THE ARGUMENT

The district court failed to conduct a rigorous analysis prior to resting on the class certification decision and instead, relied entirely on the allegations in the Second Amended Complaint, class certification pleadings, and third-party reports. As a result, the class lacks ascertainability and fails to meet standards required by Rule 23(a) and 23(b)(2).

The proposed class does not satisfy several prongs of Rule 23's requirements. For example, the class definition does not put LDH on notice as to the relevant

services or group of persons at issue in this suit. The class is not ascertainable because the class definition applies to those Medicaid children who have been recommended for "IHCBS." "IHCBS" is a vague term that does not refer to specific services. Providers do not order "IHCBS," and "IHCBS" is not defined by law. Moreover, Plaintiffs did not submit competent evidence to support their assertion that a numerous class of 47,500 similarly situated children exists in Louisiana.

The class also lacks commonality because Plaintiffs' claims do not depend upon a common contention that is capable of classwide resolution. Significantly, Plaintiffs do not seek to compel LDH to provide a specific service or challenge a specific LDH policy or practice applied uniformly to the class. Instead, Plaintiffs' common injury is the deprivation of "necessary and timely IHCBS." **ROA.400 at ¶ 24; ROA.401 at ¶ 28**. In reaching its decision on commonality, the district court relied heavily on an Illinois district court's decision in *N.B. v. Hamos*, 26 F. Supp. 3d 756 (N.D. Ill. 2014). **ROA.754 at n.1; ROA.769; ROA.770 at n.9; ROA.775; ROA.777; ROA.780; ROA.782**. The district court's class certification decision is in direct conflict with the binding precedent of this Circuit, such as *M.D.* and *Wal-Mart*, which established that commonality is not met when a common question must be answered separately for each class member based on individualized questions of fact and law, dependent on each member's particular situation.

For reasons intertwined with the lack of commonality in this case, the class also fails to satisfy the requirements of typicality and adequacy of representation. The dissimilarities among class members prevent typicality and the adequacy of representation, in addition to preventing commonality. Furthermore, the class fails to comply with Rule 23(b)(2) because no single classwide order could "provide relief to each member of the class." *See Wal-Mart*, 564 U.S. at 360. Plaintiffs seek a single order that commands LDH "to provide necessary IHCBS to correct or ameliorate [Plaintiffs'] conditions and prevent their unnecessary institutionalization." **ROA.396 at ¶ 9**. However, each Plaintiff has different conditions and service needs. Simply put, a one-size-fits-all solution could not remedy the varying harms allegedly suffered by the Plaintiffs. For these reasons, class certification was improper and should be reversed.

ARGUMENT

1. THE DISTRICT COURT ERRED IN APPROVING AN UNASCERTAINABLE CLASS.

"The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23." *John v. National Sec. Fire and Cas. Co*., 501 F.3d 443, 445 (5th Cir. 2007). "It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). A class must not only

exist, but it must be susceptible of precise definition. *John*, 501 F.3d at 445 n.3. The Fifth Circuit has held that where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings. *John*, 501 F.3d at 445.

a. The term "intensive home- and community-based services" in the class definition is not an identifiable term.

The proposed class, as defined, is not ascertainable because it is unclear what the term "IHCBS" represents. The meaning of IHCBS is integral to this suit because, according to Plaintiffs, IHCBS should be provided to Medicaid enrollees pursuant to the EPSDT mandate. Notably, the EPSDT provisions of the Medicaid Act[2] do not require states to provide "IHCBS," nor is "IHCBS" a well-established Medicaid "term of art." It remains unclear as to what types of services recommended by a doctor or licensed mental health professional would qualify as IHCBS. LDH cannot fairly defend this suit without a clearer definition of the services that they are allegedly not providing to the Plaintiffs.

Plaintiffs attempt to define the term "IHCBS" with references to other uncertain terms. **ROA.392-393 at ¶ 1**. Specifically, Plaintiffs define "IHCBS" as, "intensive care coordination, crisis services, and intensive behavioral services and

[2] *See generally,* Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*., also known as, "the Medicaid Act," and its corresponding federal regulations promulgated by the Centers for Medicare and Medicaid Services, 42 C.F.R. Ch. IV, Subch. C, Pt. 430.

supports that are necessary to correct or ameliorate [Plaintiffs'] mental illnesses or conditions." **ROA.392-393 at ¶ 1**. The district court adopted this definition. **ROA.754**. The terms "intensive care coordination," "crisis services," and "intensive behavioral services and supports" remain vague descriptors in their own right. Contrary to Plaintiffs' misleading allegations, these terms are not defined by federal law, state law, or the Louisiana Medicaid State Plan. **ROA.411 at ¶66; ROA.413 at ¶73; ROA.414-415 at ¶¶78-79**.

"Intensive care coordination" and "intensive behavioral services and supports" are not specific, billable behavioral health services ordered by a doctor or licensed mental health professional.[3] These are excessively broad terms that could refer to any type of service in the behavioral health realm. "Crisis services" may refer to some behavioral health services, like crisis intervention, psychotherapy for crisis, or crisis stabilization.[4] However, the reference to "crisis services" is open for interpretation without more specificity. Therefore, even a class definition that

[3] An example of a specific, billable specialized behavioral health service is psychosocial rehabilitation or community psychiatric support and treatment.

[4] *See* Louisiana Medicaid State Plan, Section 3.1, Attachment 3.1a, Item 4b, at p. 9d(1), https://ldh.la.gov/assets/medicaid/StatePlan/Sec3/Attachment3.1AItem4b.pdf (discussing "crisis intervention" and "crisis stabilization") (last visited November 30, 2021); Louisiana Medicaid's Specialized Behavioral Health Fee Schedule, https://www.lamedicaid.com/provweb1/fee_schedules/SBH_Fee.htm (listing CPT codes for crisis intervention, psychotherapy for crisis, and crisis stabilization) (last visited November 30, 2021). Louisiana Medicaid's Specialized Behavioral Health Fee Schedule lists specific, billable specialized behavioral services available to Medicaid enrollees.

pertains to "crisis services" remains "amorphous or imprecise" and does not meet the necessary standards for class certification. *John,* 501 F.3d at 445 n.3.

Additionally, the proposed definition of "IHCBS" is subjective and will take on a different meaning for each potential class member. For example, to determine whether a certain service falls under Plaintiffs' definition of "IHCBS," the Court would first have to look at each child on an individualized basis to determine: (1) the needs of the child; and (2) the services prescribed as medically necessary "to correct or ameliorate" each child's condition. **ROA.400 at ¶25**. Such a subjective term in the class definition should not stand. *See* MANUAL FOR COMPLEX LITIGATION § 21.222 at 1 (4th ed. 2005) ("The order defining the class should avoid subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against)").[5]

IHCBS is not the only term that lacks exactitude in the class definition. The district court also included the term "Medicaid-eligible youth" in the class definition, which is troublesome given that only "Medicaid-enrolled" children under 21 are entitled to services under the EPSDT mandate. *Hood*, 391 F.3d at 589. The presence of indefinite terms, like "IHCBS" and "Medicaid-eligible youth," demonstrate the lack of thoughtful precision used in constructing the class definition. A class

[5] The 4th edition of the MANUAL FOR COMPLEX LITIGATION, which was produced by the Federal Judicial Center, is available online at: https://www.uscourts.gov/sites/default/files/mcl4.pdf.

definition with an unconfined term, like "IHCBS," renders the scope of the class limitless and should not be certified. *See e.g.*, *Steimel v. Wernert*, 823 F.3d 902, 917-18 (7th Cir. 2016) (finding a class definition too vague when it failed to identity a particular group of persons and pertained to those "who require more [Medicaid waiver] services than are available each year through the waiver");

b. The Louisiana Legislative Auditor's 2018 Performance Audit on specialized behavioral health services does not make the term "intensive home- and community-based services" ascertainable.

The district court relied heavily on a 2018 Louisiana Legislative Auditor (LLA) Performance Audit on "specialized behavioral health (SBH) services"[6] in finding the term "IHCBS" to be ascertainable. More specifically, the district court concluded that LDH should be aware of the nature and scope of the term "IHCBS" because the LLA published a 2018 LLA Performance Audit regarding SBH services for Louisiana's Medicaid recipients (**ROA.768**) and "SBH Services are the functional equivalent of IHCBS, and specifically include psychosocial rehabilitation (PSR), assertive community treatment, therapy, and crisis intervention." **ROA.758** (internal quotations omitted). The district court further noted that, "LDH did not

[6] *See* Louisiana Legislative Auditor, *Access to Comprehensive and Appropriate Specialized Behavioral Health Services in Louisiana* (Feb. 14, 2018) (the "2018 LLA Performance Audit"), https://www.lla.la.gov/PublicReports.nsf/B99F834BF8F4AB908625823400758F9B/$FILE/000179B4.pdf.

object to the Louisiana Legislative Auditor's findings, or recommendations for improvement." **ROA.759**.[7]

However, the 2018 LLA Performance Audit does not even mention "IHCBS," let alone suggest that "SBH services" are synonymous with "IHCBS." Moreover, the term "SBH services" is vague itself and serves as an umbrella term in the audit.[8] Therefore, the district court erred in concluding that the 2018 LLA Performance Audit made the term "IHCBS" ascertainable.

It is unclear why the district court relied upon the 2018 LLA Performance Audit. The 2018 LLA Performance Audit was based upon information from informal "surveys" and interviews with "stakeholders" without reliance on data for the number of services covered.[9] For example, the district court cited to portions of the 2018 LLA Performance Audit wherein LLA notes that:

> **According to hospitals we surveyed** that have emergency departments, adequate community-based SBH services do not exist, emergency

[7] Neither federal nor state law require LDH to respond to a performance audit conducted by the LLA. Moreover, a lack of response from LDH does not amount to an admission of all findings and comments asserted by LLA. Instead, LDH voluntarily responds to LLA's recommendations to clarify, agree, or disagree with LLA's position. Furthermore, LDH's response to the 2018 LLA Performance audit in no way agreed that LDH does not provide Medicaid recipients with SBH services or that "adequate community-based SBH services do not exist." **ROA.759**. In fact, there are various SBH services available to Medicaid recipients, including community-based services.

[8] *See* 2018 LLA Performance Audit, *supra* n.5, at p.1 and n.1. "SBH services" refers to any service determined to be medically necessary by a physician or licensed mental health professional to reduce a disability resulting from an emotional or behavioral disorder and to restore the individual to his/her best possible functioning level in the community. *See e.g.*, LA. ADMIN. CODE TIT. 50, pt. XXXIII, § 2101(B) and LA. ADMIN. CODE TIT. 50, pt. XXXIII, § 2301(A).

[9] *See* 2018 LLA Performance Audit, *supra* n.5, at "Appendix B: Scope and Methodology," pp. B.1 – B.2.

> departments do not have adequate bed space to meet demand, and there is a lack of appropriate follow-up services upon release.[10] **ROA.781** (emphasis added).

Additionally, the 2018 LLA Performance Audit was based on outdated information, from as far back as 2010.[11] Moreover, the audit and its recommendations were not narrowly focused on the availability of SBH services to Medicaid-enrolled children. The 2018 LLA Performance Audit did not rely on current, relevant data regarding the existence of "IHCBS" for Medicaid-enrolled children, and it does not assist the parties or the Court in ascertaining the confines of the term "IHCBS." Therefore, the district court abused its discretion when it relied upon the 2018 LLA Performance Audit to justify its decision to define the class using the term "IHCBS."

2. THE DISTRICT COURT FAILED TO CONDUCT A RIGOROUS ANALYSIS BEFORE CERTIFYING THE CLASS.

The class action is an exception to the usual rule that litigation is conducted by and on behalf of individual named parties only. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013); *Wal-Mart*, 564 U.S. at 348. Therefore, the Court is required to make a "rigorous analysis" into whether the requirements for class certification have been met, and the Supreme Court has made clear that Rule 23 does not set forth a mere pleading standard. *Wal-Mart*, 564 U.S. at 350-351. Instead, "a party seeking

[10] *See* 2018 LLA Performance Audit, *supra* n.5, at p. 8.
[11] *See* 2018 LLA Performance Audit, *supra* n.5, at "Appendix B: Scope and Methodology," p. B.1 ("This audit primarily covered the time period of January 1, 2012, through December 31, 2016, although some analyses include information from fiscal years 2010 through 2017").

class certification must 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* at 350. The Supreme Court recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982). Frequently the rigorous analysis will entail some overlap with the merits of a plaintiff's underlying claim. *Wal-Mart*, 564 U.S. at 351.

Here, the district court accepted the Plaintiffs' allegations that support class certification as true, relying almost exclusively on outdated, third-party reports cited in the Complaint, rather than conducting a "rigorous analysis" of whether Plaintiffs had affirmatively demonstrated compliance with Rule 23. For example, in support of its conclusion that, "LDH's failure to make IHCBS available to children is hardly a secret," (**ROA.758**) the district court relies upon two reports advanced by the Second Amended Complaint—a November 2014 report by Mental Health America,[12] and the 2018 LLA Performance Audit.[13] **ROA.758-759**. The district court also references a 2017 LLA Performance Audit on the network adequacy of

[12] Mental Health America, *Parity or Disparity, The State of Mental Health in America 2015*, https://www.mhanational.org/sites/default/files/Parity%20or%20Disparity%20Report%20FINAL.pdf.
[13] *See* 2018 LLA Performance Audit, *supra* n.5.

specialized behavioral providers.[14] **ROA.758**. LDH respectfully asserts that the district court's reliance on the Second Amended Complaint, class certification pleadings, Mental Health America report, and LLA reports in reaching its class certification decision fails to amount to the "rigorous analysis" required when satisfying Rule 23's prerequisites. Moreover, the district court ignored the question of whether class certification was appropriate with respect to the ADA and Rehabilitation Act claims and, instead, focused entirely on the EPSDT claim. The absence of the district court's discussion on class certification related to the ADA and Rehabilitation Act claims further evidences the lack of rigorous analysis conducted.

The district court did not require evidentiary support. Instead, the district court presumed for the purposes of class certification that LDH has a policy of not providing "IHCBS" beyond medication management and counseling sessions. **ROA.754, 757, 776**. Courts must certify class actions based on proof, not presumptions. *See Falcon*, 457 U.S. at 160. Notably, the district court essentially embraced the same class definition approved by the *N.B* Court. *N.B.*, 26 F. Supp. at 776. In *N.B*, unlike the present matter, the defendants did not dispute the plaintiffs'

[14] Louisiana Legislative Auditor, *Network Adequacy of Specialized Behavioral Health Providers, Office of Behavioral Health, Louisiana Department of Health* (Oct. 18, 2017), https://www.lla.la.gov/PublicReports.nsf/E4DC58E4CFC93F01862581BC0062D8A8/$FILE/000166B0.pdf. This audit was not raised by the parties.

basic factual allegations in opposing class certification, which led the district court to adopt the facts alleged in the plaintiffs' second amended complaint. *Id.* at 760. The district court in this case adopted certain facts from the Second Amended Complaint, despite LDH's objections to the facts alleged. **ROA. 395-396 at ¶8; ROA.437-438 at ¶ 8; ROA.755**.

3. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS MET THEIR BURDEN TO SATISFY THE NUMEROSITY REQUIREMENT UNDER RULE 23(a)(1).

Numerosity is satisfied when "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). In deciding whether the numerosity requirement is satisfied, courts must not focus on sheer numbers alone but rather consider the geographical dispersion of class, ease with which class members may be identified, nature of action, and size of each plaintiff's claim. *In re TWL Corp.*, 712 F.3d 886, 894 (5th Cir. 2013). The Court should place little credence in the Plaintiffs' estimated size of the proposed class because the Plaintiffs did not reasonably or accurately estimate the number of potential class members. Plaintiffs boldly assert that the purported class consists of approximately 47,500 Louisiana Medicaid youth under the age of 21 based on LDH's Medicaid 2018 Annual Report.[15] **ROA.484.** "To arrive at this number, Plaintiffs *estimated* the number of

[15] Louisiana Department of Health, *Louisiana Medicaid 2018 Annual Report*, https://ldh.la.gov/assets/medicaid/AnnualReports/MedicaidAnnualReport2018_v4.pdf.

Medicaid-eligible children who need *specialized behavioral health services* in Louisiana." **ROA.484** (emphasis added).

Plaintiffs equate the term "SBH services" to "IHCBS," without explanation. Notably, Louisiana Medicaid's 2018 Annual Report makes no reference to "IHCBS." Then Plaintiffs state, without any legal or factual support, that any child who receives SBH services will "qualify as class members because they need or will need access to intensive home and community-based services for the treatment of their mental health conditions." **ROA.484-485**. As explained above, the term "SBH services" is amorphous itself and could refer to a plethora of services. Moreover, Plaintiffs' motion for class certification is devoid of any proof that children who receive a SBH service will automatically require "IHCBS" under the EPSDT mandate.

Essentially, Plaintiffs alerted the district court to following fact: in 2018 136,755 Medicaid beneficiaries (adults and children) received SBH services-only through their health plan with a Medicaid managed care organization. Plaintiffs then assume that thirty-five percent (35%) of that number (136,755) are children, and therefore approximately 47,500 potential class members exist. **ROA.484-485 at n.7**. As briefed in LDH's opposition to class certification, Plaintiffs' calculation of the potential class size is problematic and not based on data or logic. **ROA.594-595.** The pertinent question is this: does this information provide the Court with any evidence

regarding the number of Medicaid beneficiaries under age 21 who have been diagnosed with mental health conditions and recommended for "IHCBS"? LDH strongly urges that the answer to this pertinent question is "no."

The proposed class number (47,500) estimated by Plaintiffs is not supported by the Medicaid 2018 Annual Report, nor is it supported by any other evidence submitted by Plaintiffs. Furthermore, Plaintiffs displayed an awareness that the proposed class lacks numerosity, as their class certification motion requests discovery on the numerosity issue if LDH opposed numerosity. **ROA.485 at n.8**. Despite LDH's objection to numerosity (**ROA.593-596**), the district court did not order discovery on the numerosity issue. Instead, the district remarked that it was satisfied by the proof that the proposed class may include as many as 47,500 children throughout the state. **ROA.772-773**. In finding numerosity, the district court presumed, without any evidentiary support, that if a Medicaid child receives a SBH service, then the child requires "IHCBS" under the EPSDT mandate, and he/she does not receive any "IHCBS." **ROA.772**. The district court abused its discretion in finding numerosity within the class, as the class size alleged by Plaintiffs does not give the Court a substantiated estimate of the proposed class's numerosity and does not allow the Court to "find" facts favoring class certification. *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005).

4. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS MET THEIR BURDEN TO SATISFY THE COMMONALITY REQUIREMENT UNDER RULE 23(a)(2).

Rule 23(a)(2) requires a party seeking class certification to prove that the class has common "questions of law or fact." The class members' claims must depend upon a "common contention" that 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*, 564 U.S. at 350. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 350 (quoting *Falcon*, 457 U.S. 147 at 157). "This does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart*, 564 U.S. at 350. "What matters to class certification…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. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (citations omitted).

a. Plaintiffs have not demonstrated that the class has suffered the "same injury."

Plaintiffs cannot establish that all class members have suffered the "same injury," because the gravamen of their Second Amended Complaint is the allegation that *some* class members are not receiving *some* medically necessary behavioral health services in violation of federal law. *See, e.g.*, **ROA.392-393**. This is plainly

an individualized injury, the existence of which depends on, among other things, the individual class member's needs; which behavioral health services the individual class member is already receiving; and the reason(s) the individual is not receiving all medically necessary behavioral health services (if that is the case).

The district court brushed aside these objections, explaining that, "[a]ccording to Plaintiffs, LDH does not provide *any* IHCBS" and therefore every plaintiff has suffered the "same injury" as a result of LDH's "general policy" of not providing *any* IHCBS, "even if the recommended mental health interventions vary among class members." **ROA. 776** (emphasis in original); *see also,* **ROA.754, 757-758**. This was a critical error by the district court. The Second Amended Complaint alleges that LDH does not provide *some* medically necessary IHCBS to some class members, *not* that every class member suffered the "same injury" because IHCBS is denied to every class member. *See, e.g.*, **ROA.393 at ¶ 4** (alleging "gaps" in service availability); **ROA.394 at ¶ 5** (alleging IHCBS not provided "on a consistent and statewide basis"); **ROA.414 at ¶ 76** (alleging that some services are not available in certain "areas of the state"). Accordingly, the district court erred in concluding that the Plaintiffs allege the "same injury" across all class members.

b. The common questions will not generate common answers to drive the resolution of the litigation in one stroke.

As briefed in LDH's Rule 23(f) petition (**ROA.820-823**), Plaintiffs fail to affirmatively demonstrate that their proposed common injury—the deprivation of

"necessary and timely IHCBS" (**ROA.401 at ¶ 28**)—is capable of classwide resolution. To determine the merits of whether each class member receives "necessary and timely IHCBS," one must answer a series of questions that depend on the individualized circumstances of each child, such as: What are the needs of the child? What services are medically necessary to address the child's needs? Did the child receive those services? If not, why did the child not receive those services? For example, did the child not receive the services because Medicaid refused to pay, because there were not any providers willing to deliver the service in that area of the state (**ROA.394 at ¶ 5; ROA.414 at ¶ 76**), or because the child's parent forgot to take the child to appointments?

The district court adopted the following common questions from Plaintiffs' motion for class certification:

> (a) what mental health interventions LDH currently provides to Louisiana's Medicaid-eligible children diagnosed with mental health disorders; (b) whether these interventions are available to all qualified children; (c) whether the IHCBS Plaintiffs seek are required by the EPSDT provisions of the Medicaid Act; (d) if such interventions are required, whether LDH provides such interventions; (e) if such interventions are required, whether emergency room care and/or psychiatric institutionalization are appropriate substitutes for such interventions; and (f) if Defendants are failing to provide IHCBS under the Medicaid Act, whether that failure is also a prohibited form of discrimination on the basis of disability under the ADA and [Rehabilitation Act]. **ROA.774.**

These common questions identified by the district court are insufficient to establish commonality, either because they require individualized analyses and will yield

individualized answers or because their answers are not "apt to drive resolution of the litigation," *see Wal-Mart*, 564 U.S. at 350. **ROA.774.**

For example, one common question asks, "whether the IHCBS Plaintiffs seek are required by the EPSDT provisions of the Medicaid Act." **ROA.774**. To answer this question, one must conduct an individualized inquiry because services are only required by the EPSDT mandate if they are recommended as medically necessary for a specific child's circumstance. *Hood*, 391 F.3d at 589. Another common question asks, "if such interventions are required, [does] LDH [provide] such interventions." **ROA.774**. This question requires a patient-specific inquiry. For example, the Court would be forced to ask: Did Child A receive the services? Did Child B receive the services? And so on. The required individualized analyses that must be conducted to answer the common questions preclude commonality within the class. *Cf., e.g.*, *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 497-98 (7th Cir. 2012) (commonality not met when common question must be answered separately for each child based on individualized questions of fact and law, dependent on each child's particular situation); *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 31 (1st Cir. 2019) (commonality not met because "whether a given student's placement…violates the ADA by unlawfully segregating the student…will depend on that one student's unique disability and needs"); *AW v. Magill*, No. 2:17-1346-RMG, 2018 WL 6680941, at *3 (D.S.C. Aug. 21, 2018)

(commonality not met where the proposed class was fundamentally heterogeneous by virtue of each individual's evolving medical treatment and the proposed common injury of "unnecessary institutionalization" was not sufficient for a single proceeding to produce common answers that could resolve classwide issues).[16]

c. The class lacks commonality under the binding jurisprudence.

The district court's class certification decision was inspired by non-binding cases from other circuit courts. **ROA.754 at n.1**. Notably, the district court heavily relied upon the *N.B.* case in reaching the class certification decision. **ROA.754 at n.1; ROA.769; ROA.770 at n.9; ROA.775; ROA.777; ROA.780; ROA.782**. The district court's reliance on an Illinois district court case was misplaced and unaligned with the Fifth Circuit and Supreme Court precedent on commonality. *See M.D.*, 675 F.3d at 841-846 (holding the district court failed to perform the rigorous analysis in finding the proposed class satisfied the commonality requirement); *Flecha*, 946 F.3d at 767 (citing *Wal-Mart* 564 U.S. at 352) (finding the class lacked commonality when it was impossible to say that examination of all the class members' claims

[16] LDH cited to *Magill* in their opposition to class certification. **ROA.597-598, 605.** *Magill* is instructive to the instant matter, as those plaintiffs also alleged that the defendants failed to develop sufficient community health services and sought relief via a single injunctive order requiring that defendants make sufficient community mental health services available to the class in order to prevent institutionalization. The district court distinguished *Magill* from this suit because *Magill* did not involve claims regarding the Medicaid Act. **ROA.775 at fn. 13**. Additionally, the district court opined that commonality was met in the instant matter, unlike *Magill*. **ROA.775 at fn. 13**. While *Magill* is not binding on this court, the legal principles recited by the *Magill* Court regarding Rule 23(a) and Rule 23(b)(2)'s requirements align with this Court's precedent.

would produce a common answer to the common question); *Chavez v. Plan Benefit Servs., Inc*., 957 F.3d 542, 548 (5th Cir.2020) (finding the district court failed to resolve alleged differences among the class claims and explain why they did not prevent classwide resolution of the common issues); *Ward v. Hellerstedt*, 753 Fed.Appx. 236, 246 (5th Cir. 2018) (reversing and remanding class certification order where district court conducted inadequate analysis of commonality requirement). For example, in *M.D.*, the Fifth Circuit held that the district court failed to conduct the rigorous analysis required by Rule 23 in establishing commonality, noting that the members of a proposed class cannot establish that their claims can productively be litigated at once merely by alleging a violation of the same legal provision by the same defendant. *M.D.*, 675 F.3d at 840-841.

The declarations submitted by the Plaintiffs in support of class certification reveal the dissimilarities within the proposed class, as each child's diagnoses and circumstances greatly vary, which affect the child's prescribed treatments. **ROA.511-551.** However, the district court did not address the actual or potential differences in the purported class members' individual circumstances and claims. As this Court saw in *M.D.*, the district court "clearly rejected" the Plaintiffs' individualization argument but "insufficiently analyzed" it. *M.D.*, 675 F.3d at 842-843. The Fifth Circuit has made clear that "it is incumbent on the district court to consider and discuss the facts of this case, as well as the elements of [plaintiffs']

claims, prior to rejecting [defendants'] argument that dissimilarities among individual claimants obviate commonality." *Ward*, 753 Fed.Appx. at 246 (citing *M.D.*, 675 F.3d at 843-844).

The instant case is in direct conflict with *M.D.* and *Wal-Mart*, because the common questions identified by the Plaintiffs and district court (**ROA.488, 774**) will not "generate common answers apt to drive the resolution of the litigation." *M.D.*, 675 F.3d at 841 (citing *Wal-Mart*, 564 U.S. at 350). Similar to *M.D.*, the district court in this case *stated* that the common issues were capable of classwide resolution but did not actually describe how the determination of such common questions would resolve each class member's claims in one stroke. *See also, Chavez,* 957 F.3d at 549 ("[a]n issue is not 'capable of classwide resolution' just because the district court, without explanation, says it is"). The district court's ruling states, in pertinent part:

> ...According to Plaintiffs, LDH does not provide any IHCBS, opting instead to provide only basic outpatient counseling and medication management. If so, then every plaintiff has suffered the same injury as a result of LDH's general policy—even if the recommended mental health interventions vary among class members. This issue is resolvable on a class-wide basis...the injunctive relief Plaintiffs seek is specific, and can be fashioned in the form of a single injunction that would provide relief to each member of the class. Success on Plaintiffs' claims would necessarily require LDH to modify its policies to properly implement the Medicaid Act's EPSDT mandate. By their very nature, such policy changes would be generally applicable, and therefore would benefit all class members." **ROA.776, 779-780.**

The district court's above-reasoning does not meet the rigorous analysis standard required to "affirmatively demonstrate" the commonality requirement of Rule 23. The order fails to define with any specificity the class claims, class issues, or defenses. The district court also fails to describe how those claims could be tried on behalf of over 47,500 Medicaid children. The order is devoid of instruction regarding how LDH could modify its policy in a manner that would redress all of the individualized claims in one stroke. As this Court witnessed in *M.D.*, "the proposed class's proffered common issues stretch the notions of commonality by attempting to aggregate several amorphous claims of systemic or widespread conduct into one super-claim." *M.D.*, 675 F.3d at 844 (internal quotations and citations omitted). The instant super-claim asserted by Plaintiffs should be rejected under Rule 23, as the Supreme Court has made clear that all class members being part of the same allegedly defective "system" is insufficient to establish commonality. *Wal-Mart*, 564 U.S. at 350.

5. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS MET THEIR BURDEN TO SATISFY THE TYPICALITY REQUIREMENT UNDER RULE 23(a)(3).

As the Supreme Court has recognized, "the commonality and typicality requirements of Rule 23(a) tend to merge.'" *Wal-Mart*, 564 U.S. at 350 n.5. (quoting *Falcon*, 457 U.S. at 157-158 n.13). That is, the commonality and typicality requirements both address "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." *Id.* In other words, typicality under Rule 23(a)(3) "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Stirman v. Exxon Corp*., 280 F.3d 554, 562 (5th Cir. 2002).

Plaintiffs did not—and cannot—show that their claims are typical between the Named Plaintiffs. Therefore, Plaintiffs certainly cannot show that their claims are typical of those to be asserted on behalf of 47,500 other children. Plaintiffs' claims do not turn on a specific service or a policy or practice applied uniformly to them or the class members. Instead, Plaintiffs aver that they have all been deprived of "necessary and timely IHCBS" based on a variety of alleged failures by LDH. **ROA.401 at ¶ 28**. Additionally, Plaintiffs have failed to prove that the Named Plaintiffs and class members would benefit from the same remedial measures.

Plaintiffs are six Medicaid-enrolled children with differing medical diagnoses, service needs, and institutionalization histories. **ROA.511-551.** For example, B.B. has three mental health diagnoses, type 2 diabetes, and has never been institutionalized or juvenile justice involved. **ROA.479, 520-521, 523-524**. On the other hand, C.C. and E.E. have been institutionalized and juvenile justice involved. **ROA.480, 526-527, 529-531; ROA.482, 539-540, 542-544**. In comparing C.C. and

E.E. to one another, the differences in diagnoses and needs are evident. For example, C.C. is diagnosed with eight different mental health disorders, whereas E.E. alleges four different mental health disorders. **ROA.526 at ¶ 3; ROA.539 at ¶ 3**. The scope and level of services required by the EPSDT mandate for B.B., C.C., and E.E. will differ, depending on their conditions, recommendations of their physical health and behavioral health providers, and evolving necessities. Moreover, during this lawsuit, C.C. and E.E.'s parents relinquished their parental rights, either voluntarily or involuntarily. **ROA.669, 913**. This led to C.C. and E.E. being placed into the custody of the Louisiana Department of Children & Family Services ("DCFS"). **ROA.669, 913.** While in foster care, DCFS, and not LDH, is responsible for managing C.C. and E.E.'s Medicaid case. **ROA.688-689.** Therefore, C.C. and E.E.'s placement in foster care makes them critically diverse from the other Plaintiffs, like B.B., because LDH is no longer responsible for overseeing the management of their Medicaid cases.[17]

6. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS MET THEIR BURDEN TO SATISFY THE ADEQUACY OF REPRESENTATION REQUIREMENT UNDER RULE 23(a)(4).

The adequacy of representation requirement is a two-pronged inquiry, requiring evaluation of: (1) whether class counsel are qualified, experienced, and

[17] Plaintiffs' efforts to keep foster care children in this suit are futile because LDH cannot act on a proposed injunctive order that applies to foster care children who remain under the jurisdiction of the Department of Children & Family Services.

generally able to conduct the proposed litigation; and (2) whether plaintiffs' claims are sufficiently interrelated with and not antagonistic to the class claims as to ensure fair and adequate representation. *Berger v. Compaq Computer Corp*., 257 F.3d 475, 479-481 (5th Cir. 2001). LDH does not contest the designation of Plaintiffs' counsel as class counsel under Rule 23(g). However, Plaintiffs cannot satisfy the second prong of the adequacy requirement, although the Court need not reach this issue. Just as commonality and typicality merge, "[t]hose requirements…also tend to merge with the adequacy-of-representation requirement." *Wal-Mart*, 564 U.S. at 350 n.5 (quoting *Falcon*, 457 U.S. at 157-58 n.13). Accordingly, Plaintiffs' failure to meet commonality and typicality necessarily precludes the class from satisfying the adequacy of representation requirement. Even if the Court considered the adequacy of representation issues, the declarations submitted on behalf of the Named Plaintiffs do not demonstrate that they would be adequate representatives of the class. **ROA.511-551.** The services sought through an injunction would differ greatly for even the Named Plaintiffs. The declarations, as discussed above, show that the Named Plaintiffs have different medical needs, which prevents their interests and remedies from being sufficiently interrelated.

7. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS MET THEIR BURDEN TO SATISFY THE REQUIREMENTS OF RULE 23(b)(2).

The Fifth Circuit has interpreted the language in Rule 23(b)(2) to create two relevant requirements: (1) the relief requested "must be specific" and "describe in reasonable detail the acts required;" and (2) all class members' alleged injuries must be "cohesive," which means the "class members must have been harmed in essentially the same way." *M.D.*, 675 F.3d at 845, 848 (citations omitted). The Supreme Court has clarified that Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. *Wal-Mart*, 564 U.S. at 360.

a. The injunctive relief requested is not specific and does not describe in reasonable detail the acts required.

Through this suit, Plaintiffs seek injunctive relief requiring LDH "to take affirmative actions to provide or arrange for necessary IHCBS for all individual Plaintiffs and the Class in order to correct or ameliorate their significant mental health conditions." **ROA.400 at ¶25**. Plaintiffs generally request "a single order requiring [LDH] to provide [Plaintiffs] and the Class [with the] necessary IHCBS in the most integrated setting appropriate to their needs." **ROA.494**.

This requested injunctive relief fails to provide LDH with meaningful detail as to the actions required by LDH. The relief requested purports to apply to the entire class; however, that relief is framed at a high level of abstraction to obscure the fact

that a court cannot order a state to provide services to a child without analyzing the individual circumstances of that child's case. Put differently, even if the district court ordered the relief Plaintiffs seek *verbatim*, that would only beg the question: what exactly does the State need to provide to each child?

While "Rule 23(b)(2) does not require that every jot and tittle of injunctive relief be spelled out at the class certification stage," it does require "reasonable detail as to the acts required," *Yates v. Collier*, 868 F.3d 354, 368 (5th Cir. 2017) (citations omitted). The relief requested by Plaintiffs in this case does not rise to the moderate level of specificity anticipated by the reasonable detail standard. *See M.D.*, 675 F.3d at 848 ("Plaintiffs must make an effort to give content to what it would mean to provide adequate…or appropriate levels of services so that final injunctive relief may be crafted to describe in reasonable detail the acts required")(internal quotations omitted); *Yates*, 868 F.3d at 368 (inmates sufficiently identified their requested injunctive relief in reasonable detail when they requested prison officials sustain safe indoor temperatures of 88 degrees or lower); *Maldonado v. Ochsner Clinic Foundation*, 493 F.3d 521, 524-525 (5th Cir. 2007) (Rule 23(b)(2) certification was inappropriate where the plaintiffs sought to compel the defendants to provide "mutually affordable healthcare").

Here, the Plaintiffs' requested relief fails to: (1) specify the services at issue; (2) specify a LDH policy that violates the EPSDT mandate; or (3) describe in

reasonable detail the acts required by LDH. As this Court saw in *Maldonado,* Plaintiffs in the instant matter cannot provide reasonable detail as to the relief sought through injunction, which "highlights the fact that individualized issues here overwhelm class cohesiveness." *Maldonado*, 493 F.3d at 524.

b. The class members' alleged injuries are not cohesive.

Plaintiffs allege that they "have suffered the same injuries: all have been deprived of necessary and timely IHCBS in violation of the Medicaid Act." **ROA.401 at ¶ 28; ROA.494.** However, as discussed above, Plaintiffs cannot be harmed in the same way because "IHCBS" does not refer to a specific service. The service(s) each Plaintiff is allegedly lacking under the EPSDT mandate will differ for each child, depending on each child's individual conditions and provider recommendations. This means that each Plaintiff will allege different kinds of harm. Therefore, the courts cannot remedy Plaintiffs' varying alleged harms via a "single order." **ROA.779-780**. The Fifth Circuit has rejected similar attempts by other plaintiffs to side step the cohesiveness requirement by alleging an abstract harm in order to capture diverse claims under one umbrella. *See M.D.*, 675 F.3d at 846-848 (Rule 23(b)(2) was not satisfied because each class member would be entitled to a different injunction or declaratory judgment against the defendant); *Maldonado*, 493 F.3d at 524–25 (holding the district court did not abuse its discretion in denying class certification under Rule 23(b)(2) because individualized issues overwhelmed class

cohesiveness). Likewise, other circuits have rejected class certification requests under Rule 23(b)(2) when the relief requested must be specifically tailored to each class member to correct the alleged wrongful conduct of the defendant. *See Jamie S.*, 668 F.3d at 499 (explaining that a class cannot be certified "if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of…remedy are made"); *Shook v. Bd. of Cty. Commissioners of Cty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) (plaintiffs cannot avoid the Rule 23(b)(2) requirement by framing their requested relief "at a stratospheric level of abstraction"); *Magill*, 2018 WL 6680941 at *5 (rejecting plaintiffs' argument that a single injunctive order requiring the defendants to make sufficient community mental health services available would benefit the Class as a whole and "have the blanket effect that Rule 23(b)(2) requires"). Here, the proposed class fails to comply with Rule 23(b)(2) because it would be impossible to resolve in one proceeding the questions of whether and how LDH violated the rights of each class member under the EPSDT mandate. Accordingly, this Court should reverse the district court's decision.

CONCLUSION

LDH respectfully requests that this Honorable Court reverse the class certification order and remand the case with instructions to decertify the class.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2021, an electronic copy of the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. Notice of this filing will be sent by operation of this Court's electronic filing system in accordance with Federal Rule of Appellate Procedure 25(c)(2)(A) to the following counsel of record for Plaintiffs-Appellees:

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CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) and the page limit of FED. R. APP. P. 32(a)(7)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5th CIR. R. 32.2:

   This document contains 33 pages and 8,675 words. A principal brief may exceed 30 pages if it less than 13,000 words, pursuant to FED. R. APP. P. 32(a)(7)(A).

a) This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because:

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/s/ Kimberly Ulasiewicz Boudreaux

Attorney for: Defendants-Appellants, Dr. Courtney N. Phillips, in her official capacity as Secretary of the Louisiana Department of Health, and the Louisiana Department of Health

Date: November 30, 2021