IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

O.B., *et. al*., individually, and on behalf of a class,	)	
	)	No. 15-CV-10463
Plaintiffs,	)	
vs.	)	Judge: Charles P. Kocoras
	)	
FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	Magistrate: Michael T. Mason
Defendant.	)	

DEFENDANT NORWOOD'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

NOW COMES Defendant, FELICIA F. NORWOOD, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, by and through her attorney, LISA MADIGAN, Attorney General of Illinois, and submits her Response in Opposition to Plaintiffs' Motion for Class Certification, stating as follows:

I. STATEMENT OF FACTS.

Plaintiffs, O.B., C.F., J.M., and S.M., are Medicaid-eligible children who allege they have various disabling medical conditions. Complaint at ¶¶ 5-10; 21-24; 97-150.[1] All of the named Plaintiffs were approved to participate in the Illinois Department of Healthcare and Family Services' ("HFS") Medically Fragile Technology Dependent ("MFTD") Medicaid Waiver. Complaint at ¶ 99; 113; 125; 139. Each Plaintiff has been approved for Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") in-home shift nursing services. State law requires that children seeking Medicaid-funded in-home nursing services request prior

[1] On or about January 8, 2016, Sheila Scaro, mother of Plaintiffs, Sa.S. and Sh.S., informed the Division of Specialized Care for Children that the family has permanently relocated to Colorado. Their case has been cancelled. Defendant has moved to dismiss these Plaintiffs for want of a case or controversy.

authorization for such services from HFS and demonstrate the medical necessity for the services. Complaint at ¶¶ 74-75. When HFS grants prior approval for in-home shift nursing services it issues a written notice to the participant that either grants prior approval of a specific number of nursing hours per week, or grants approval of a specific monthly budget to enable the family to pay for nursing services. Complaint at ¶ 76.

Each named Plaintiff claims that HFS approved for him or her either a monthly budget for in-home shift nursing services in a certain amount, or approved a specific number of nursing hours per week. Complaint at ¶¶ 21-24; 99; 113; 125; 139. Each named Plaintiff alleges that he or she is unable to staff the full nursing hours that HFS approved. Complaint at ¶¶ 102; 115; 127; 141. All Plaintiffs allege that their inability to obtain nursing services is due to Defendant's systemic failure to comply with the Early and Periodic Screening, Diagnostic and Treatment ("EPSDT") component of the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(43); 1396d(r), the Defendant's alleged failure to provide in-home shift nursing services with reasonable promptness under 42 U.S.C. 1396a(a)(8), and Defendant's purported violations of the ADA and Rehabilitation Act, 42 U.S.C. § 12132; 29 U.S.C. § 794.

All Plaintiffs seek declaratory and injunctive relief. Complaint at p. 45. In particular, Plaintiffs seek preliminary and permanent injunctive relief "requiring Defendant to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment (in-home shift nursing services) to the Plaintiffs and Class." Complaint at p. 45, ¶ 5.

Plaintiffs seek an order certifying the following class:

> All Medicaid-eligible children under the age of 21 in the State of Illinois who have been approved for in-home shift nursing services by the Defendant, but who are not receiving in-home shift nursing services at the level approved by the Defendant, including children who are enrolled in a Medicaid Waiver program, such as the Medically Fragile Technology Dependent (MFTD) Waiver program,

> and children enrolled in the non-waiver Medicaid program, commonly known as the Nursing and Personal Care Services (NPCS) program.

Complaint at ¶ 28. Defendant opposes certification of any class. First, the Court cannot certify any class because the members are not ascertainable. Second, class treatment is inappropriate in light of the claims asserted. Neither the allegations of the Complaint nor Plaintiffs' Motion for Class Certification satisfies the criteria set forth in Fed. R. Civ. P. 23(a)(1)-(4) as construed in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). Finally, Plaintiffs fail to satisfy Fed. R. Civ. P. 23(b)(2) as construed in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011).

II. ARGUMENT.

A. The Court Cannot Certify Class Because The Members Are Not Ascertainable.

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the named parties only. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2550 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 493 (7th Cir. 2012) (citations omitted). A district court may certify a case for class action treatment only if it satisfies the four requirements of Fed. R. Civ. P. 23(a)(i)-(iv), *i.e.*, numerosity, commonality, typicality and adequacy of representation, together with one of the conditions of Rule 23(b). *Jamie S.*, 668 F.3d at 493; *Spano v. Boeing Co.*, 633 F.3d 574, 583 (7th Cir. 2011). The Seventh Circuit requires that a class be sufficiently definite so that its members are ascertainable. *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *Jamie S.*, 668 F.3d at 493-96 (one immediately obvious defect in this class is indefiniteness; the relevant criteria for membership are unknown and there is no way to know or readily ascertain who is a member of the class).

Ascertainability is an implied requirement of Rule 23(a). *Oshana v. Coca-Cola Bottling Co*., 225 F.R.D. 575, 580 (N.D. Ill. 2005) *affirmed* 472 F.3d 506 (2006); *Guillory v. American Tobacco Co*., 2001 WL 290603 * 2-3 (N.D. Ill. March 20, 2001). Proper identification of a class serves two purposes. First, it alerts the court and the parties to the potential burdens class certification may entail. *Oshana*, 225 F.R.D. at 580 (citing *Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981)). Second, proper class identification insures that those individuals actually harmed by defendant's allegedly wrongful conduct will be the recipients of the awarded relief. *Oshana*, *Id*. The Seventh Circuit, in addition, did not alter the ascertainability criteria described in this Response in Opposition in *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657-58, (7th Cir. 2015) (we decline to adopt heightened ascertainability and "will stick with our settled law"). The proposed class definition lacks ascertainability in three respects.

1. An Identifiable Class Does Not Exist Because The Class As Defined Is Indefinite And The Criteria By Which To Determine Class Membership Are Unknown.

A case is not suitable for class action treatment when the class definition fails to set forth the relevant criteria for membership in the class. *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 495-97 (7th Cir. 2012); *Adashunas v. Negley*, 626 F.2d 600, 603-05 (7th Cir. 1980). The most cursory review of the proffered definition leads to the conclusion that it is vague.

First, it is impossible to know what children who have been approved for in-home shift nursing services "are not receiving in-home shift nursing services at the level approved by the Defendant." Complaint at ¶ 28. *In Jamie S*., the Court vacated an order certifying a class that consisted of students who "are, have been, or will be denied or delayed entry or participation in the processes" that result in a proper IEP meeting. *Jamie S*., 668 F.3d at 495-500, 503. Relevant to Defendant's arguments here, *Jamie S*. held that the class lacked ascertainability because it

consisted of individuals who are unidentified and remain unidentified. *Jamie S.*, 668 F.3d at 495-96. The class definition also lacked any standards by which to determine membership in the class. *Jamie S.*, *Id*. Like the flaws in the *Jamie S.* and *Adashunas* class definitions, the Plaintiffs here pin inclusion in the class to children whose identities are unknown and remain unknown.

Second, a class definition like the Plaintiffs propose that puts no time limits on membership and that includes every Medicaid-eligible child who failed to receive a single authorized hour of in-home shift nursing is "breathtaking in its scope" and runs afoul of *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011). Everyone "in the history of Time" who, was, is or will be a Medicaid-eligible child not receiving the full nursing hours authorized is swept in to this class. *Spano*, *Id*.

Third, even if the administrative burden and cost to Defendant to review paid Medicaid claims data as Plaintiffs suggest at Paragraphs 78 and 79 of the Complaint were relatively nominal (which Defendant does not concede), that review does not identify children whose inability to receive 100% staffing was likely attributable to Defendant's purported violations of federal law. It only tells one that the allotted hours have not been billed in full for any number of reasons. As stated, the identification of class members insures that those individuals actually harmed by a defendant's alleged conduct will be the recipients of the awarded relief. *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 580 (N.D. Ill. 2005) *affirmed* 472 F.3d 506 (2006). No such assurances attach to Plaintiffs' proposed review methodology.

2. An Identifiable Class Does Not Exist Because The Court Must Undertake An Individual Inquiry Into The Facts And Merits Of Each Potential Class Member's Case.

A court cannot certify a class around whether Medicaid-eligible children failed to receive all of the authorized in-home nursing hours. *Jamie S.* also vacated the class certification order

because it defined membership by the Defendant's alleged illegal acts. *Jamie S.*, *Id.* at 496-97. Like the *Jamie S.* class definition, the definition proffered here both ties class membership to allegedly illegal acts by Defendant and builds in a tacit legal conclusion that each named Plaintiff and individual class member is entitled to 100% staffing every single time. Before this class can be certified, the Court must first determine the merits of Defendant's obligations respecting the so-called "EPSDT mandate" and "reasonable promptness" of the Medicaid Act. *Jamie S.* does not sanction such a procedure. *Jamie S.*, *Id.* The Plaintiffs' proposed class definition is the bottom-line liability issue for every putative class member. *Jamie S.*, *Id.* The proposed class definition also interjects causation issues about whether the shortened hours are attributable to Defendant's alleged acts or omission, or whether the shortened hours result from the acts or omissions of third parties not before the Court, such as nurses or nursing agencies.

Moreover, the Seventh Circuit disapproves of class definitions crafted around any defendant's purportedly illegal activities. It described the holding of *Alliance to End Repression v. Rochford*, 565 F.2d 975 (7th Cir. 1977) as a "relic of a time when the federal judiciary thought that structural injunctions taking control of executive functions were sensible. That time is past." *Jamie S.*, *Id.* at 496-97 (citing *Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008)). Like the indefiniteness of the *Jamie S.* class, *Jamie S.*, *Id.* at 496-97, no description of any discrete action on HFS Defendants' part in the class definition could pin down the identities of the putative *O.B.* class members. Like *Jamie S.*, the proposed injunction that Plaintiffs seek here is "powerful evidence" that Plaintiffs do not aim to stop a discrete act by HFS Defendants but, rather, want Defendant to undertake whatever steps Defendant believes are necessary to remediate perceived discriminatory or otherwise illegal features of an entire program. *Jamie S*, *Id.* at 497; Complaint at ¶ 17; and p. 45, ¶ 5; Plaintiffs' Motion for TRO at p. 6, ¶ A. An individualized merits inquiry

in order to determine class membership turns Rule 23 on its head because the court need rule on the merits before the class is certified. *Heffelfinger v. Electronic Data Systems Corp*., 2008 WL 8128621 * 10 n. 57 (C.D. Cal. January 7, 2008).

3. The Class Definition Creates An Impermissible Fail-Safe Class.

Plaintiffs' class definition is tied to Defendant's ultimate liability in the case. In that event, and because the class definition has been framed as a legal conclusion respecting Defendant's ultimate liability, the definition creates a fail-safe class. *Heffelfinger v. Electronic Data Systems Corp*., 2008 WL 8128621 * 10 (C.D. Cal. January 7, 2008) (citing *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980)). The proposed class is improper, and unfair to Defendant, because if the Plaintiffs lose the liability issue, the class does not exist and plaintiffs may pursue their own individual cases against Defendant again. *Genenbacher v. Centurytel Fiber Co*., 244 F.R.D. 485, 487-88 (C.D. Ill. 2007). The Seventh Circuit disapproves of fail-safe classes. *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980).

B. Plaintiffs Do Not Meet The Standards Of Rule 23(a).

A class may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The need for a rigorous analysis is for the defendant's protection because certification of a class can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit. *CE Design Ltd. v. King Architectural Metals, Inc*., 637 F.3d 721, 723 (7th Cir. 2011) (citations omitted). The named plaintiffs bear the burden of establishing that the Rule 23(a)(1)-(4) requirements are satisfied. *General Telephone,* 457 U.S. at 156. The named plaintiffs' failure to meet any one of them precludes certification of a class. *Harriston v. Chicago Tribune Co*., 992 F.2d 697, 703 (7th Cir. 1993) (citations omitted).

1. Plaintiffs Failed To Establish Numerosity.

Plaintiffs have not satisfied Fed. R. Civ. P. 23(a)(1). Plaintiffs asserted that "[a]t the time of the filing of the Complaint for Declaratory and Injunctive Relief, the Defendant failed to arrange for the delivery of in-home shift nursing services to the 4 named Plaintiffs." Plaintiffs' Memorandum of Law in Support of Class Certification at p. 6. Ms. Burt's Declaration regarding other allegedly hospitalized children is nothing more than her opinion. Plaintiffs' Motion for Class Certification, at Exhibit C-4, ¶ 16. Plaintiffs do not allege any facts regarding these unnamed children; they confine their Complaint to Ms. Burt's "information and belief." Complaint at ¶ 5. After this Complaint was filed, two of the named Plaintiffs, Sa.S. and Sh.S., permanently left the State of Illinois to reside with their parents in Colorado. Defendant has contemporaneously moved to dismiss these children as parties Plaintiffs. In light of the circumstances of Sa.S. and Sh.S., Plaintiffs' arguments regarding numerosity have further weakened.

Moreover, the class allegations of the Complaint imply that because 1200 children receive in-home shift nursing services from Defendant, that number alone satisfies Rule 23(a)(1). The Motion for Class Certification undercuts the Complaint by admitting that counsel only knows about the named Plaintiffs and two others. Plaintiffs' Motion for Class Certification at ¶ 6. Plaintiffs admit that they need discovery to establish numerosity. *Id.* There is no basis for the Court to conclude that joinder is impractical under Rule 23(a)(1) or to permit class discovery to commence.

2. Plaintiffs Fail to Establish Commonality.

Rule 23(a)(2) requires that the class claims involve "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement demands that the Plaintiffs

demonstrate that the class members possess the same interests and suffer the same injury. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982); *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 497 (7th Cir. 2012) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2556 (2011)). The class claims must depend upon a common contention and that common contention must be of such a nature that it is capable of class-wide resolution. *General Telephone*, 457 U.S. at 157-58; *Jamie S.*, *Id*. at 497 (citing *Wal-Mart*, 131 U.S. at 2551-52). The determination of the common contention's truth or falsity must resolve an issue that is central to the validity of each one of the claims in one stroke. *Jamie S.*, *Id*.

The purportedly common questions of law and fact as framed by Plaintiffs are simply descriptions of Defendant's ultimate liability under Plaintiffs' various theories of recovery. Plaintiffs' Motion for Class Certification at ¶ 7. Plaintiffs do not identify any common questions of fact. *Id*. They assert that the common questions of fact are "what policies and practices were instituted or permitted by Defendant. . ." to cause the short-staffing of cases. *Id*. It is not enough for Plaintiffs to say that Defendant violated the Medicaid Act or discriminated against them on the basis of their disabilities. These are not common questions under Rule 23(a)(2) as construed in *General Telephone of the Southwest v. Falcon*, 457 U.S. 147, 156-58 (1982) (the allegation that a defendant engaged in discrimination neither determines whether a class action may be maintained under Rule 23 nor defines the class that may be certified); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2551-57 (2011); *Jamie S.*, 668 F.3d at 497-98; *Harper v. Sheriff of Cook County*, 581 F.3d 511, 514-16 (7th Cir. 2009).

Plaintiffs nowhere alleged any policy or practice in which Defendant allegedly engages that operates to cause the same injury to the putative class members. Complaint at *passim*.

Plaintiffs merely allege that they are unable to find adequate nursing services. Complaint at ¶¶ 5; 7; 8; 9. Some of the nursing agencies allegedly declined to work for J.M. and S.M. because the nurses believe that Defendant's Medicaid reimbursement rates are low. Complaint at ¶¶ 8; 9. The other Plaintiffs do not attempt to supply any reasons causally connected to Defendant's alleged acts or omissions for their conclusory allegations that they are unable to secure adequate nursing hours. Complaint at ¶¶ 5; 7. The mothers of O.M. and G.A. similarly averred by way of their Declarations that they "have been unable to find any nursing agency to fully staff the nursing hours . . ." without supplying any facts why this is allegedly so. Plaintiffs' Motion for Class Certification at Exhibits C-7, ¶ 8; C-8, ¶ 8.

Finally, as in *General Telephone*, *Wal-Mart*, *Jamie S.* and *Harper*, even if Plaintiffs proved that one nursing agency declined to fully staff a case, such proof does not establish 1) that every other instance where a child received less than the authorized hours results from the same common policy or procedure of Defendant; and 2) that the nursing agency's acts are causally connected to Defendant's alleged discriminatory or otherwise illegal administration of the EPSDT component of the Medicaid program. Not one common question of law or fact is present here.

3. Plaintiffs Failed To Establish Typicality.

The typicality element of Fed. R. Civ. P. 23(a)(3) requires the plaintiff to show enough congruence between the named representative's claim and that of the unnamed class members to justify allowing the named party to litigate on behalf of the group. *General Telephone*, 457 U.S. at 157-58; *Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (a claim is typical if it arises from the same event or practice or course of conduct that give rise to the claims of the other class members). In *General Telephone*,

class was held to have been improperly certified because the class representative, an alleged victim of national origin discrimination in promotion, did not have a claim that was common with, and typical of, others who had allegedly suffered discrimination in hiring. *General Telephone*, 457 U.S. at 157-58. Moreover, one plaintiff's experience of allegedly illegal treatment at a defendant's hands is an insufficient basis on which to infer that such treatment is typical of the defendant's practices. *Id*. at 158. For the same reasons that commonality is lacking, Plaintiffs failed to establish typicality.

4. The Named Plaintiffs Failed To Establish That They Will Fairly And Adequately Represent The Class.

Rule 23(a)(4) requires the named class representative to fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). Two concepts lie within this element: 1) plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and 2) the named plaintiff must not have interests antagonistic to those of the class. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986). The presence of even an arguable defense against the named plaintiffs that is not applicable to the proposed class can vitiate the adequacy of the named plaintiff's representation. *Oshana v. Coca-Cola Bottling Co*., 225 F.R.D. 575, 583 (N.D. Ill. 2005) (citation omitted). There is also a constitutional dimension to this part of the inquiry. *Spano v. Boeing Co*., 633 F.3d 574, 586-87 (7th Cir. 2011). Absentee class members will not be bound by a final result if they were represented by someone who had a conflict of interest or who was otherwise inadequate. *Spano*, 633 F.3d at 587 (citations omitted).

Plaintiff have not carried their burden of establishing Rule 23(a)(4). Neither the Motion for Class Certification nor the Complaint supplies enough information to establish that the proposed class representatives' interests are aligned with those of the individuals they seek to represent pursuant to Rule 23(a)(4) as construed in *Amchem Products v. Windsor*, 521 U.S. 591,

625 (1997). Admittedly, the Plaintiffs want nurses to cover 100% of the hours that Defendant authorized. The fact that some named Plaintiffs believe that the nursing agencies would work for them if the Medicaid rates were higher does not supply the alignment of interests among all the putative class members. *See e.g.*, Complaint at ¶¶ 5(g); 8(a); 9(a); 13-16; 129; 143. Other evidence of record suggests that some individuals have concerns about the nurses apart from whether their pay is too low. While now the subject of Defendant's Motion to Dismiss, Sheila Scaro, mother of Sa.S. and Sh.S, opined that the nurses enrolled to provide services to Medicaid recipients are not qualified enough. Plaintiffs' Motion for Class Certification at Exhibit C-5, ¶ 13; C-6, ¶ 17. As previously stated, the mothers of O.M. and G.A., who are not named Plaintiffs, averred by way of their Declarations that they "have been unable to find any nursing agency to fully staff the nursing hours. . ." without supplying any facts why this is allegedly so. Plaintiffs' Motion for Class Certification at Exhibits C-7, ¶ 8; C-8, ¶ 8. Even if this Court could tinker with Medicaid reimbursement rates, adjusting those rates alone may not satisfy the Plaintiffs and class members.

C. Plaintiffs Fail To Meet The Requirements Of Rule 23(b)(2).

Rule 23(b)(2) permits the court to certify a case for class action treatment if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2557 (2011); *Kartman v. State Farm Ins. Co.*, 634 F.3d 883, 892-94 and n. 8 (7th Cir. 2011) (if a class is not cohesive enough for a uniform remedy, class certification is not appropriate). Rule 23(b)(2) is satisfied only when a single injunction or declaratory judgment would provide relief to each member of the class. *Wal-Mart*, *Id.* Rule 23(b)(2) does not permit class certification

when each class member would be entitled to a different injunction or declaratory judgment against the defendant. *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 498-99 (7th Cir. 2012) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2557 (2011)).

Claims for *individualized* relief do not satisfy Rule 23(b)(2). *Jamie S.*, 668 F.3d at 499 (emphasis in original) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2557 (2011)). Plaintiffs here have superficially structured their prayer for injunctive relief to appear to satisfy Rule 23(b)(2). Plaintiffs' Request for Relief asks the Court to:

> 4. Issue Preliminary and Permanent Injunctive relief enjoining the Defendant from subjecting the Plaintiffs and Class to practices that violate their rights under the Medicaid Act, the Americans with Disabilities Act and the Rehabilitation Act;
>
> 5. Issue Preliminary and Permanent Injunctive relief requiring the Defendant to arrange directly or through referral to appropriate agencies, organizations, or individuals, corrective treatment (in-home shift nursing services) to the Plaintiffs and Class;

Complaint at p. 45. Request for Relief No. 4 obviously turns on the need to first identify what alleged "practices" violated Plaintiffs' alleged "rights." Plaintiffs, as stated, do not know. *See* Response in Opposition at p. 9. Request for Relief No. 5 is nothing more than an injunction to require Defendant to comply with 42 U.S.C. § 1396(a)(a)(43); and d(r)(5). This injunction seeks an individualized remedy tailored to secure each putative class member's nursing services.

Plaintiffs' Complaint also reinforces the impropriety of certifying a Rule 23(b)(2) injunction class. As stated above, some Plaintiffs think that nursing agencies would work for them if the Medicaid reimbursement rates were higher. Complaint at ¶¶ 5(g); 8(a); 13-16; 129; 143. Some Plaintiffs, like O.B., think that an injunction issuing against Defendant can somehow force unwilling nursing agencies, who are not parties to this action, to accept medically complex and unstable clients. Complaint at ¶¶ 17; 21; 101; 102; 107. Some Plaintiffs, like C.F., have no

opinion what it will take to get their cases staffed. Complaint at ¶¶ 115; 116; 118. Even if Plaintiffs had alleged facts that established a causal connection between the acts of the nursing agencies and Defendant's purported violations of federal law, they have not alleged a discrete policy or practice on Defendant's part that can be remediated by one indivisible injunction. Furthermore, the proposed final remedy Plaintiffs seek is so vague, unspecific, and left to Defendant to construe, that Plaintiffs surely must be contemplating that many different injunctions will be required to vindicate their rights. *See* Complaint at ¶ 17; p. 45, ¶¶ 4-5; This use of the Court's equitable power runs afoul of *Wal-Mart* and *Jamie S*.

III. CONCLUSION.

WHEREFORE, for the foregoing reasons, HFS Defendants pray that Plaintiffs' Motion for Class Certification be denied.

Respectfully submitted,

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DATED: January 26, 2016

CERTIFICATE OF SERVICE

KAREN KONIECZNY, one of the attorneys of record for Defendant, hereby certifies that on January 26, 2016, I caused a copy of the foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** to be served by the Court's ECF/electronic mailing system upon ECF filing users, and that I shall comply with LR 5.5 as to any party who is not a filing user or represented by a filing user.

/s/ Karen Konieczny