UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

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., and **F.F.**, by and through her mother, P.F.	*	CIVIL ACTION NO.: 19-CV-770-BAJ-SDJ
	*	JUDGE BRIAN A. JACKSON
	*	MAGISTRATE SCOTT D. JOHNSON
Plaintiffs,	*	CLASS ACTION
v.	*	
REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health, and the LOUISIANA DEPARTMENT OF HEALTH	*	
Defendants.	*	

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

I. INTRODUCTION

Defendants Dr. Courtney N. Phillips[1], 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. Instead of 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),

[1] Plaintiffs substitute Dr. Courtney N. Phillips for Dr. Rebekah Gee. On November 7, 2019, Dr. Rebekah Gee was sued in her official capacity only. Dr. Gee resigned from her position as Secretary of the Louisiana Department of Health in January 2020. On or about April 17, 2020, Dr. Phillips began serving as the successor Secretary of the Louisiana Department of Health. Pursuant to Fed. Rule of Civ. Pro. 25(d), an action does not abate when a public officer who is a party in an official capacity resigns. Rather, the officer's successor is automatically substituted as a party.

1396a(a)(43); 1396d(a)(4)(B); and 1396a(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., E.E., and F.F. (Plaintiffs) or members of the proposed class (the Class). Resultantly, Plaintiffs and the Class deteriorate in their homes and cycle in and out of emergency rooms, psychiatric facilities, and the juvenile justice system, often far from their families and community. When their conditions do not improve or worsen, they become unnecessarily institutionalized or at risk of institutionalization. Thus, 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, necessary intensive home and community based (mental health) services.

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. The Secretary of LDH 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 programs pursuant to a state Medicaid plan (State Plan). States must cover certain mandatory services in

their State Plans, 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 written into the State Plan, a state must nevertheless provide that service or treatment if it is listed in Section 1396d(a) and it is 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 in Louisiana. It must administer the program in a manner that does not result in or risk the unnecessary segregation of Plaintiffs and the Class from their communities and into hospitals and psychiatric institutions. *See* 42 U.S.C. §§ 12131-12132; *Olmstead v. L.C.*, 527 U.S. 581 (1999).

III. FACTUAL ALLEGATIONS

A. Class allegations

Defendants have consistently and systematically failed to provide a comprehensive and accessible behavioral health care system, as required by federal Medicaid statutes and regulations, that would enable Plaintiffs and Class members to receive 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.[2] Mental Health America's 2020 report was equally concerning, finding that Louisiana ranked 41st in providing access to mental health care for youth and adults.[3] In February 2018, the Louisiana Legislative Auditor released a performance audit evaluating the accessibility of Medicaid mental health services for adults and children in Louisiana and concluded that "Louisiana does not always provide Medicaid recipients with comprehensive and appropriate specialized behavioral health services."[4] According to the most recent National Survey of Children's Health conducted by the Health Resources and Services Administration of the U.S. Department of Health and Human Services (2017-2018), 62.6% of all Louisiana children between the ages of 3 through 17 who have been diagnosed with a mental illness or condition have not received mental health treatment or counseling.[5]

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. 2); Decl., G.B. (Exh. 3). For some families, Defendants' failures to provide such necessary services have

[2] *Parity of Disparity: The State of Mental Health* 2015, at 33, https://www.mhanational.org/sites/default/files/Parity%20or%20Disparity%202015%20Report.pdf (last viewed September 16, 2020).

[3] *Overall Ranking 2020*, Mental Health America, available at https://www.mhanational.org/issues/ranking-states#four (last viewed September 16, 2020).

[4] *Access to Comprehensive and Appropriate Specialized Behavioral Health Services*, at 7 (February 14, 2018), available at https://www.lla.la.gov/PublicReports.nsf/B99F834BF8F4AB908625823400758F9B/$FILE/000179B4.pdf. (last viewed September 16, 2020).

[5] *2017-2018 National Survey of Children's Health, National Outcomes Measures*, Data Resource Center for Child and Adolescent Health, available at https://www.childhealthdata.org/browse/survey/results?q=7286&r=20 (last viewed September 16, 2020).

influenced their decision to move to another state, in part, so that they can access IHCBS for their children. *See* Decl., G.C. (Exh. 4).

Despite the desperate need for sufficient services to meet the behavioral health needs of youth in Louisiana's Medicaid population and the legal necessity of providing such services, Defendants have failed to operate the state Medicaid program in a manner that comports with these legal requirements. Thus, Defendants' system jeopardizes the health and well-being of Plaintiffs and the Class through unnecessary and traumatic hospitalization and criminal justice intervention when no other options are available.

B. Plaintiffs' allegations

Plaintiffs A.A., B.B., C.C., D.D., E.E., and F.F. 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 the state.

A.A. is a 12-year old Louisiana Medicaid recipient residing in East Baton Rouge Parish. Decl., P.A. (Exh. 5); Supp. Decl., P.A. (Exh. 6). Despite having multiple mental illnesses, experiencing psychiatric crises, and being recommended by his providers for IHCBS, A.A. has yet to receive the full scope of IHCBS he needs. *Id*.

A.A. has been institutionalized six (6) times at psychiatric facilities, with his first institutionalization occurring in 2014. *Id.* Before and after each of these institutionalizations, A.A. received minimal and inadequate outpatient counseling and medication management. *Id.* A.A.'s mother navigated Louisiana's Medicaid system on her own to try to secure the mental health services A.A. needed. *Id.* As the sole coordinator of his care, she has scheduled his appointments, responded to crises the best she knew how, and worked with the school staff on his behavior plans.

Id. The counseling A.A. received during this time was poor, and at one point, counselors stopped showing up for A.A.'s appointments all together. *Id*.

In August 2019, A.A.'s mother took it upon herself to refer A.A. to Louisiana's Medicaid waiver program, the Coordinated System of Care. *Id*. In this program, A.A. and his mother have met with a wrap-around facilitator, and A.A. has received weekly counseling, but this program has not met the intensity of his needs. *Id*. A.A. has faced multiple crises at school, and the only options available to A.A.'s mother have been to keep her son in a hospital or care for him at home on her own without adequate assistance. *Id*. A.A. continues to struggle in school and to maintain positive relationships with his peers and family. *Id.* Unable to access IHCBS, A.A. is at serious risk of being excluded from school and being unnecessarily institutionalized and separated from his family and community again. *Id*.

B.B. is a 14-year old Louisiana Medicaid recipient residing in Caddo Parish. Decl., P.B. (Exh. 7); Supp. Decl., P.B. (Exh. 8). Despite having multiple mental illnesses and experiencing psychiatric crises, B.B. has never been recommended for IHCBS because such services are unavailable in her community. All she has received is inadequate outpatient counseling and medication management. *Id*. Because B.B. lacks intensive care coordination, B.B.'s mother has attempted to locate providers on her own to provide IHCBS; however, she has not been able to locate any in her area. *Id.* B.B.'s condition continues to decline, causing strife between her mother and her younger brothers. *Id.* Most recently, B.B. experienced a significant mental health setback after a recent incident involving her father and learning about potential modifications of his visitation rights. *Id*. Unable to access IHCBS, institutionalization for B.B. and separation from her family is a serious fear. *Id*.

C.C. is a 14-year old Louisiana Medicaid recipient residing in Terrebonne Parish. Decl., P.C. (Exh. 9); Supp. Decl., P.C. (Exh. 10). Despite having multiple mental illnesses, experiencing psychiatric crises, and being recommended by her providers for IHCBS, C.C. has never received these needed services. *Id*. She has been institutionalized three (3) times at psychiatric facilities, with 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: inadequate 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.*

In summer 2019, C.C. began receiving some family therapy; however, when her therapist resigned, C.C.'s services terminated prematurely. Neither the providing agency nor the wrap-around facilitator found a replacement for her. Furthermore, C.C.'s managed care organization (MCO) did not intervene to address the termination of her services or the unused pre-authorized therapeutic hours. Several months later, and only after C.C.'s mother made a request, the family therapy was restarted, but the gap resulted in lost progress for their family. Since November 2019, C.C. has become more physically aggressive with her parents. *Id*. This past March, C.C. experienced a crisis. With no crisis services, C.C.'s father was forced to leave work early to de-escalate the crisis. *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 14-year old Louisiana Medicaid recipient residing in Rapides Parish. Decl., P.D. (Exh. 11); Supp. Decl., P.D. (Exh. 12). Despite having multiple mental illnesses and experiencing multiple psychiatric crises, D.D. has never received crisis services, intensive care coordination or the behavioral services and supports that his mental health conditions require. *Id*. 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, which could be life-threatening for him. D.D. requires constant medical attention because of his pacemaker. *Id*. The techniques used to restrain children in institutional placements create more risk to him than other children because of his heart condition. Furthermore, if he is institutionalized during the current global pandemic, the congregate nature of institutionalization increases the likelihood of his exposure to the COVID-19 virus, and his underlying condition would jeopardize his recovery. The need for D.D. to access intensive behavioral supports and services and crisis services is urgent. *Id*. These services will help D.D. and his mother manage his behaviors so that they don't have to fear his institutionalization.

D.D.'s mother is currently coordinating his physical and mental health treatments and his services at school because D.D. does not have a care coordinator. *Id*. This work is complex and occupies much of her time and energy. *Id*. D.D. and his mother urgently need intensive care coordination services. These services would ensure that D.D. receives the treatment and care he needs for both his physical and behavioral health, and they would take the burden off of his mother from attempting to provide a service for which she is not trained. As a Medicaid beneficiary, D.D. is entitled to this care.

E.E. is a 14-year old Louisiana Medicaid recipient residing in Pointe Coupee Parish. Decl., P.E. (Exh. 13); Supp. Decl., P.E. (Exh. 14). Despite having multiple mental health diagnoses, experiencing multiple and recurrent psychiatric crises, and being recommended by his providers for IHCBS, E.E. has never received crisis services, intensive care coordination, or behavioral supports to meet his needs. *Id*.

E.E. has been institutionalized more than seven (7) times at psychiatric facilities, his first institutionalization occurring in 2013, and his most recent occurring a little over a week ago. *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.'s family feels they have no other option but to call the police to respond to E.E.'s escalating needs. *Id*. 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 in a psychiatric facility or jail and separated from his family again.

F.F. is a nine-year-old Louisiana Medicaid recipient living in Orleans Parish. Decl., P.F. (Exh. 15); Supp. Decl., P.F. (Exh. 16). Despite having multiple mental health diagnoses, experiencing multiple and increasingly frequent psychiatric crises, and being recommended for additional, more intensive, and coordinated IHCBS, F.F. has never received the needed services. *Id*. F.F.'s mental health conditions continue to worsen, and her family is becoming exasperated. *Id*. As a result, F.F. has been institutionalized far from home three times, as recent as August 2020. *Id*. She struggles to have meaningful and positive relationships with her family, including her younger brother. *Id*. Unable to access needed IHCBS, F.F.'s family is attempting to place her in a long-term, therapeutic, institutional day program where she will receive all of her educational

programing. *Id*. This program is a last resort for F.F. and her family because it segregates her from her nondisabled peers at school and places her in a hospital setting for most of the day. *Id.*

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, 613-614 (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)).

While a district court has broad discretion when deciding a motion for class certification, the Court must engage in a rigorous analysis when deciding certification. *See Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 408 (5th Cir. 1998); *Chavez v. Plan Benefit Servs., Inc.,* 957 F.3d 542, 545 (5th Cir. 2020). 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, 178 (1974); *Adickes v. Hellerstedt,* 753 F. Appx 236, 244 (5th Cir. 2018). The court should seek to "'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination[.]'" *Chavez,* 957 F.3d at 545 (citing *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020)).

Here, Plaintiffs' proposed class meets the rigorous 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 v. Greenstein*, No. 10–635–JJB–SR, 2011 WL 2193398, at *3 (M.D. La. June 6, 2011) (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, 168 (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).

Using data obtained from Defendants' 2018 Medicaid Annual Report,[6] Plaintiffs believe that the Class consists of approximately 47,500 Louisiana Medicaid-eligible children and youth under the age of 21. To arrive at this number, Plaintiffs estimated the number of Medicaid-eligible children who need specialized behavioral health services in Louisiana.[7] These children qualify as

[6] The Louisiana Medicaid 2018 Annual Report is the most recent Medicaid report published by Defendants as of the date of this filing. *See* LDH, *Louisiana Medicaid 2018 Annual Report*, available at http://ldh.la.gov/assets/medicaid/AnnualReports/MedicaidAnnualReport2018_v4.pdf (last accessed September 16, 2020).

[7] *See* LDH, *Louisiana Medicaid 2018 Annual Report*, available at http://ldh.la.gov/assets/medicaid/AnnualReports/MedicaidAnnualReport2018_v4.pdf (last accessed September 16, 2020).

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

Class members because they need or will need access to intensive home and community-based services for the treatment of their mental health conditions. The range of services (including amount and duration) that these children need may change over time, but Defendants must always make the full array of IHCBS available to them. *See, e.g.*, *S.R. v. Pa. Dep't of Human Servs.*, 325 F.R.D. 103, 109 (M.D. Pa. 2018). Thus, Plaintiffs easily meet the threshold numerical requisite for a federal class action.[8]

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.'") (citing *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974)); *see also 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.").

---

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. Assuming SBH services are required by people of all ages at similar rates, 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.

[8] In the event that Defendants argue that numerosity is lacking, Plaintiffs request that they be permitted discovery on the issue.

Additionally, "the Fifth Circuit has repeatedly noted that 'the number of members in a 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 (*see Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980)), (b) whether the "class members lack the financial resources necessary to bring suit individually in order to vindicate their rights," and (c) the geographical dispersion of the class. *See Pitts*, 2011 WL 2193398, at *3–4 (M.D. La. June 6, 2011)).

Given that the Class consists of Medicaid eligible youth with psychiatric disabilities/mental health conditions 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 v. Janek*, 315 F.R.D. 472, 480 (W.D. Tex. May 20, 2016); *see also Pitts*, 2011 WL 2193398, at *4 (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.

Finally, the Class is geographically diverse, as reflected by Plaintiffs, who each reside in a different parish throughout the state. *See* P.A. Decl. (Exh. 5); Supp. P.A. Decl. (Exh. 6); P.B. Decl. (Exh. 7); Supp. P.B. Decl. (Exh. 8); P.C., Decl. (Exh. 9); Supp. P.C., Decl. (Exh. 10); P.D. Decl. (Exh. 11); Supp. P.D., Decl. (Exh. 12); P.E. Decl. (Exh. 13); Supp. P.E. Decl. (Exh. 14); P.F. Decl. (Exh. 15); and Supp. P.F. Decl. (Exh. 16).

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). "[W]hat 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, 361 (5th Cir. 2017)).

A common question is one which, when answered as to one class member, is answered as 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 classwide litigation," not whether the plaintiffs will win on the merits. *Dockery v. Fischer*, 253 F. Supp. 3d 832, 848 (S.D. Miss. 2015) (citations omitted). *See also In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014) (". . . 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, or lack or deficiencies thereof, are not fulfilling their federal mandate to provide Plaintiffs and the Class with the necessary IHCBS to treat their mental health conditions. The injuries of the proposed class members all derive from precisely the same course of conduct of Defendants: the systematic failure or refusal to provide sufficient and necessary IHCBS that would enable Plaintiffs to receive appropriate and critically needed supports in their homes and communities. This failure or refusal by Defendants violates the statutory and regulatory mandates of the Medicaid program.

Common questions among Plaintiffs and the Class include: (a) whether Defendants are providing necessary IHCBS to Plaintiffs and the Class consistent with the EPSDT requirements of the Medicaid Act; (b) whether Defendants are timely providing necessary IHCBS to Plaintiffs and the Class consistent with the Reasonable Promptness requirements of the Medicaid Act; (c) whether Defendants are failing to provide Plaintiffs and the Class with services in the most integrated setting appropriate to their needs; (d) whether Defendants' policies, practices, and procedures, or lack or deficiencies thereof, result in the unnecessary institutionalization or serious risk of institutionalization of Plaintiffs and the Class; and (e) whether Defendants utilize criteria or methods of administration in their Medicaid program that otherwise have the effect of discriminating against Plaintiffs and the Class on the basis of their disabilities. These common questions of law and fact directly relate to Defendants' practices, policies, and procedures, or lack or deficiencies thereof, as they apply to all 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.*, for example, the court rejected the defendants' argument that a proposed class of EPSDT-eligible Medicaid recipients should not be certified due to the individualized nature of their claims. 325 F.R.D. at 108-110. The Court observed that:

> [I]n 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. at 109. 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.'") (citing *Hamos*, 26 F.Supp.3d at 772).

Here, Plaintiffs seek an injunction requiring Defendants to fulfill their federal mandate to provide IHCBS to Plaintiffs and the Class. The questions of law and fact presented by Plaintiffs are consistent with similar EPSDT cases in which courts have granted class certification. Plaintiffs have met their burden to demonstrate that commonality exists among 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 the Class are all Medicaid-eligible youth under the age of 21, with mental illnesses or conditions. All Plaintiffs and Class members require IHCBS in order to correct or ameliorate their mental illnesses or conditions, and Defendants have failed to make IHCBS available to them in violation of the EPSDT and Reasonable Promptness mandates of the Medicaid Act. As a result, Plaintiffs and Class members are at risk of institutionalization in violation of the *Olmstead* mandate. The remedies sought by Plaintiffs are the same that would

benefit Class members. Plaintiffs seek an injunction requiring Defendants to take affirmative actions to: (a) provide or arrange for necessary and timely IHCBS that corrects or ameliorates Plaintiffs' and Class members' significant mental health conditions; and (b) ensure that Plaintiffs and the Class receive mental health services in the most integrated setting appropriate to their needs so that Defendants do not discriminate against them because of their mental health conditions.

Using these same factors, courts have found typicality to exist among plaintiff representatives and class members. In *N.B. v. Hamos*, 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 intensive community-based services based on the failure of the [Defendant] to make them available, in violation of EPSDT and the integration mandate." 26 F. Supp. at 771; *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.

Typicality is met where the harm to the named plaintiffs and the harm to the proposed class members arise from the same illegal conduct by defendants. In this case, Plaintiffs and the Class suffer the same harm due to the same reasons. Because of Defendants' failures, Plaintiffs are not receiving treatment and services to which they are entitled under Medicaid, and Plaintiffs suffer from the unnecessary institutionalization and/or risk thereof.

Plaintiffs and Class Plaintiffs have 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: (a) "'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'"; and (b) the "'zeal and competence of the representatives' counsel'". *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. All have expressed a willingness and ability to actively participate in the litigation and to protect the interests of the Class. *See* P.A. Decl. (Exh. 5); Supp. P.A. Decl. (Exh. 6); P.B. Decl. (Exh. 7); Supp. P.B. Decl. (Exh. 8); P.C., Decl. (Exh. 9); Supp. P.C., Decl. (Exh. 10); P.D. Decl. (Exh. 11); Supp. P.D., Decl. (Exh. 12); P.E. Decl. (Exh. 13); Supp. P.E. Decl. (Exh. 14); P.F. Decl. (Exh. 15); and Supp. P.F. Decl. (Exh. 16). 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 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.* Plaintiffs' families are experienced in attempting to navigate the Medicaid system as it relates to their children. *Id.* They have spent the entirety of 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 (i.e. the Class). *See Hayes v. Eaton Group Attorneys, LLC*, 2019 WL 427331 at * (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, 625-26 (1997)).

Counsel for Plaintiffs, Southern Poverty Law Center (SPLC), the National Health Law Program (NHeLP), the National Center for Law and Economic Justice (NCLEJ), Disability Rights Louisiana (formerly known as the Advocacy Center), and O'Melveny & Meyers, LLP (collectively, "Proposed Class Counsel"), are also adequate Class representatives. Each has extensive experience litigating complex, federal class action lawsuits under Rule 23(b)(2). *See* Decl., Neil Ranu (Exh. 17); Decl. Kimberly Lewis (Exh. 18); Decl. Britney Wilson (Exh. 19); Decl. Ronald Lospennato (Exh. 20); and Decl. Darin Snyder (Exh. 21). SPLC and Disability Rights Louisiana have conducted a multi-year investigation into the systemic and widespread deficiencies of the mental health system. *See* Decl. Ranu (Exh. 17); Decl. Lospennato (Exh. 20). They interviewed the families of Medicaid-eligible youth with mental illness, children's mental health practitioners, and disability rights advocates throughout Louisiana. *Id*. Further, SPLC, NHeLP, NCLEJ, and Disability Rights Louisiana have extensive experience litigating Rule 23(b)(2) class actions under the Medicaid Act and federal anti-discrimination laws. *See* Ranu Decl. (Exh. 17); Lewis Decl. (Exh. 18); Wilson Decl. (Exh. 19); Lospennato Decl. (Exh. 20).

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

b. The proposed Class satisfies the requirements of Rule 23(b)(2)

In addition to the requirements of Rule 23(a), Plaintiffs 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 would provide relief to each member of the class," then Rule 23(b)(2) is met. *Wal-mart Stores*, 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 of Rule 23(b)(2). As previously discussed, Plaintiffs and Class have suffered the same injuries: 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 seeks 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 Plaintiffs and the Class necessary IHCBS in the most integrated setting appropriate to their needs. 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. Defendants' illegal policies, practices, and omissions affect all members of the Class, including Plaintiffs, and the remedy for Defendants' illegal conduct 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 for and by Kanter v.*

Casey, 43 F.3d 48, 64 (3d Cir. 1994); *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 a 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, Plaintiffs claim that Defendants fail to arrange for the delivery of IHCBS in violation of the Medicaid Act, ADA, and the Rehabilitation Act. The harms, claims, and remedies recited by Plaintiffs are similar to those that other courts have found sufficient to meet the requirements of Rule 23(b)(2). In keeping with this precedent, 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, this 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* IV.(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 Renewed Motion for Class Certification under Federal Rule of Civil Procedure 23. Further, Plaintiffs respectfully request this Court appoint Proposed Class Counsel as counsel to represent the certified class.

Respectfully submitted this 18th day of September 2020,

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

/s/ Neil Ranu
Neil S. Ranu, LA Bar No. 34873, T.A.
Sophia Mire Hill, LA Bar No. 36912
Lauren Winkler, LA Bar No. 39062
Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000
New Orleans, LA 70170
Phone: (504) 486-8982
Facsimile: (504) 486-8947
neil.ranu@splcenter.org
sophia.mire.hill@splcenter.org
lauren.winkler@splcenter.org

/s/ Kimberly Lewis
Kimberly Lewis, CA Bar No. 144879
Abigail Coursolle, CA Bar No. 266646
National Health Law Program
3701 Wilshire Boulevard, Suite 750
Los Angeles, CA 90010
Phone: (310) 204-6010
lewis@healthlaw.org
coursolle@healthlaw.org
Admitted Pro Hac Vice

/s/ Britney R. Wilson
Britney R. Wilson, NY Bar No. 5426713
National Center for Law and Economic Justice
275 Seventh Avenue, Suite 1506
New York, NY 10001-6860
Phone: (212) 633-6967
Facsimile: (212) 633-6371
wilson@nclej.org
Admitted Pro Hac Vice

/s/ Ronald Lospennato
Ronald Lospennato, LA Bar No. 32191
Evelyn Chuang, LA Bar No. 38993
Disability Rights Louisiana
8325 Oak Street
New Orleans, LA 70118
Phone: (504) 522-2337
Facsimile: (504) 522-5507
rlospennato@disabilityrightsla.org
echuang@disabilityrightsla.org

/s/ Darin W. Snyder
Darin W. Snyder, CA Bar No. 136003
Kristin M. MacDonnell, CA Bar No. 307124
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
Phone: (415) 984-8700
Facsimile: (415) 984-8701
dsnyder@omm.com
kmacdonnell@omm.com
Admitted Pro Hac Vice

Counsel for Plaintiffs and class members