Case No. 21-30580

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

BRIEF OF APPELLEES

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Attorneys for Plaintiffs-Appellees

CERTIFICATE OF INTERESTED PERSONS

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 disqualifications or recusal.

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 22, 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**.

Undersigned counsel certifies that the Hogan Law Firm has no parent corporation and that no corporation directly or indirectly holds 10% or more of the ownership interest in the Hogan Law Firm; and,

6. F.F., by and through her mother, P.F.

Counsel for Plaintiffs-Appellees

1. Sophia Mire Hill, Lauren Winkler, and Will Bardwell of Southern Poverty Law Center.

   Undersigned counsel certifies that Southern Poverty Law Center has no parent corporation and that no corporation directly or indirectly holds 10% or more of the ownership interest in Southern Poverty Law Center.

2. Ronald Lospennato and Evelyn Chuang of Disability Rights Louisiana.

   Undersigned counsel certifies that Disability Rights Louisiana has no parent corporation and that no corporation directly or indirectly holds 10% or more of the ownership interest in Disability Rights Louisiana.

3. Kimberly Lewis and Abigail Coursolle of National Health Law Program.

   Undersigned counsel certifies that National Health Law Program has no parent corporation and that no corporation directly or indirectly holds 10% or more of the ownership interest in National Health Law Program.

4. Saima A. Akhtar of National Center for Law and Economic Justice.

Undersigned counsel certifies that National Center for Law and Economic Justice has no parent corporation and that no corporation directly or indirectly holds 10% or more of the ownership interest in National Center for Law and Economic Justice.

5. Darin W. Snyder and Kristin M. MacDonnell of O'Melveny & Myers, LLP. Undersigned counsel certifies that O'Melveny & Myers, LLP has no parent corporation and that no corporation directly or indirectly holds 10% or more of the ownership interest in O'Melveny & Myers, LLP.

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.

Counsel for Defendants-Appellants

1. Kimberly Ulasiewicz Boudreaux, Rebecca Clement, Ryan Romero, and Kimberly Sullivan, of the Louisiana Department of Health.

District Court Judge

1. The Honorable Brian A. Jackson
   U.S. District Court for the Middle District of Louisiana

/s/ Sophia Mire Hill
Attorney for Plaintiffs-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Counsel on behalf of Plaintiffs-Appellees ("Plaintiffs") concurs that oral argument would aid in the efficient resolution of the issues before the Court in this appeal.

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BRIEF OF APPELLEES

THE HONORABLE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Plaintiffs-Appellees ("Plaintiffs") are six Medicaid-eligible children residing across Louisiana who are diagnosed with mental health or behavioral health conditions. As alleged in the Second Amended Complaint ("SAC"), Defendants-Appellants ("Defendants")—the Louisiana Department of Health ("LDH") and its Secretary—have failed to provide Plaintiffs and similarly-situated children and

youth across Louisiana with the legally mandated services needed to treat their conditions. **ROA.392-435**. Because Defendants do not make these services available, Plaintiffs' and the Class's mental and behavioral health needs are left untreated. Without treatment in their homes and communities, Plaintiffs' and the Class's health conditions deteriorate, and they cycle in and out of emergency rooms, psychiatric facilities, and the juvenile justice system, often located far from their families and communities.

The Medicaid Act's Early and Periodic, Screening, Diagnostic, and Treatment ("EPSDT") provisions require the state agency administering the Medicaid program to "arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment" that a Medicaid-eligible child needs based on a screening. 42 U.S.C. § 1396a(a)(43)(C); *see generally id*. at § 1396a(a)(43)(A) & (B). EPSDT is a "robust" benefit for Medicaid-eligible children and youth under age 21, designed to ensure that each child receives the preventive and responsive treatment they need.[1]

Under the EPSDT mandate, a Medicaid-administering agency, like LDH and its Secretary, must provide or arrange for all "necessary health care, diagnostic

[1] CTRS. FOR MEDICARE & MEDICAID SERVS., EPSDT-A GUIDE FOR STATES: COVERAGE IN THE MEDICAID BENEFIT FOR CHILDREN AND ADOLESCENTS 1 (June 2014), *available at* https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/epsdt_coverage_guide_29.pdf (last visited, December 28, 2021).

services, treatment, and other measures described in subsection (a) to correct or ameliorate . . . mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 U.S.C. § 1396d(r)(5) (referring to services listed in § 1396d(a)). EPSDT-covered services broadly encompass all services identified as medically necessary by a health professional. 42 U.S.C. § 1396d(a)(13) ("other diagnostic, screening, preventative, and rehabilitative services, including . . . any medical or remedial services [provided in a facility, a home, or other setting] recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level").

As alleged in the SAC, the integration mandate found in Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504") also require public entities such as the Defendants to ensure that individuals receive their services in the least restrictive setting to avoid unnecessary institutionalization. **ROA.394, 404-408**. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999). For far too long, LDH and its Secretary have fallen short of this charge at the expense of Louisiana's children and their families.

In 2019, Plaintiffs, on behalf of themselves and a putative class of similarly-situated children and youth, brought suit against LDH and its Secretary in her official

capacity. Plaintiffs contend that Defendants are violating the Medicaid EPSDT provisions by failing to provide for intensive home and community based (mental health) services ("IHCBS")—defined as intensive care coordination, crisis services, and intensive behavioral services and supports—for Medicaid-eligible children and youth in Louisiana. **ROA.392-435**. When Plaintiffs' conditions do not improve or when their conditions worsen, they become unnecessarily institutionalized, re-institutionalized, or at serious risk of institutionalization (**ROA.392-435, 499-551**) in violation of the ADA and Section 504. **ROA.392-435**; **ROA.475**.

Plaintiffs seek an injunction on behalf of the certified class to require Defendants to comply with the Medicaid Act's EPSDT mandates by, "establish[ing] and implement[ing] policies, procedures, and practices to ensure the provision of intensive home and community-based mental health services to Plaintiffs and the Class . . . in the most integrated setting appropriate to their needs." **ROA.433-34**.

Following full briefing, the district court granted class certification on May 25, 2021. **ROA.753-783**. In certifying the class, the district court refined the class definition. The class certified by the district court consists of:

> 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.782-83**.

Defendants ask this Court to overturn certification. However, Defendants fail to show that the district court abused its discretion in applying the legal standards for class certification under Fed. R. Civ. P. 23 or that it made a clearly erroneous assessment of the evidence. Without compelling legal or factual grounds for overturning class certification, Defendants throw every argument at the wall. But none stick.

In fact, the district court properly weighed the evidence presented by the parties and applied the correct legal standards. The evidence shows, among other things, that there are nearly 55,000 Louisiana children requiring mental health interventions who do not receive them. **ROA.758**. Multiple audits of Defendants' Medicaid-funded mental health system performed by the Louisiana Legislative Auditor ("LLA") found that LDH's performance is "dismal" because LDH does not ensure professional licensure requirements of its providers, and its limited data makes it impossible to accurately determine which services were rendered. **ROA.758**. Moreover, the district court relied on the LLA's findings that LDH does not provide comprehensive and appropriate services to its enrollees. Specifically, the district court noted:

- Louisiana ranks last in the nation in terms of children and youth who need mental health interventions but do not receive them. In 2015, [there were] 54,563 children requiring mental health services [who] were denied interventions.
- LDH fails to provide SBH Services [specialized behavioral health services] to Medicaid recipients, causing Medicaid recipients to

> seek SBH Services from emergency rooms: "adequate community-based SBH services do not exist, emergency departments do not have adequate bed space to meet demand, and there is a lack of appropriate follow-up services upon release."
> - LDH does not maintain a designated crisis receiving center. . . .
> - Fewer than 1 percent of Medicaid recipients with a mental health disorder receive case management services, resulting in lack of coordination among providers and fragmented care.
> - Budget cuts have decreased LDH's ability to pay for SBH Services and have led to delays in providing substitute services. **ROA.759** (citing the LLA's 2018 Audit).

Notably, when "given the chance to respond [to the LLA's audits], LDH did not object to these findings or recommendations for improvement." **ROA.759**. Additionally, the district court meticulously recounted the typical experiences of each of the six named plaintiffs, detailing their respective attempts to access community-based mental health services, their cycling in and out of institutions, their geographic dispersion, their limited financial means, and their inability to pursue individual cases if the class is not certified. **ROA.760-64**, **772-73**.

Indeed, rather than exhibiting a "flawed" or "fleeting" analysis, as Defendants argue, the district court's exacting 31-page order included findings derived from years of reports and audits, as well as Defendants' own acknowledgement of its failures. This Court should affirm the district court's decision.

Jurisdictional Statement

Plaintiffs do not contest this Court's jurisdiction, although they continue to urge this Court to dismiss the appeal because Defendants' request for appellate

review did not raise a novel or unsettled area of law, and Defendants have not argued that the decision to certify the class is likely dispositive of the litigation. FED. R. CIV. P. 23(f); *see also Seeligson v. Devon Energy Prod. Co., L.P.*, 804 F. App'x 304, 305 (5th Cir. 2020) (internal citations and quotations omitted).

Statement of the Issues

1. Did the district court properly find the class ascertainable, where (a) the class definition relies on objective criteria, and (b) the same or substantially similar class definitions have been used by other geographically diverse courts to certify classes of Medicaid-eligible children seeking services to which they are entitled under the EPSDT provisions of the Medicaid Act?
2. Did the district court conduct a rigorous analysis when it granted class certification based on publicly-available documents, reports from the Louisiana Legislative Auditor, the pleadings, 21 sworn declarations from the plaintiffs and other fact witnesses, and Defendants' own admissions of its systemic service deficiencies in failing to deliver mental health services to eligible children?
3. Did the district court properly certify a plaintiff class under Fed. R. Civ. P. 23(a)(1)-(4) and (b)(2) upon review of publicly-available documents, reports from the Louisiana Legislative Auditor, the pleadings, 21 sworn

declarations from the plaintiffs and other fact witnesses, and Defendants' own admissions of its systemic service deficiencies in failing to deliver mental health services to eligible children?

Statement of the Case

Plaintiffs do not dispute Defendants' recitation of the posture of this appeal.

Summary of the Argument

This appeal is based solely on Defendants' disagreement with the district court's decision to grant class certification, and not upon any showing that the district court abused its discretion. Defendants did not brief, nor can they show, *how* the district court abused its discretion in certifying the class. Rather, Defendants lodge a series of conclusory legal statements that the district court "erred," continue to press the baseless claim that they do not know the meaning of the term "IHCBS," diminish compelling evidence from their fellow governmental entities upon which the district court relied, and generally contort case law, Plaintiffs,' and the district court's words.

Defendants' slapdash attack on every element of the district court's Rule 23 analysis raises doubt as to the weight of any one argument. However, it appears that Defendants' main arguments include (1) the class is not ascertainable due to the inclusion of "vague terms" (**Defs.' Br. 15-22, 26, 35, 39-41**); (2) the district court's analysis was not rigorous (**Defs.' Br. 22-25, 32-33, 35**); (3) an individualized inquiry

will be necessary to determine whether a child belongs in the class (**Defs.' Br. 15, 16, 19, 28-34, 36-38, 40-42**); and (4) the district court relied on nonbinding case law (**Defs.' Br. 15, 32-35**).

But the district court's decision must stand. After conducting a rigorous analysis, the district court certified a class of Medicaid-eligible children and youth who are entitled to, but not receiving, necessary IHCBS recommended by a licensed practitioner of the healing arts. The district court correctly found that this matter was suitable for class treatment because these common injuries—not receiving services from Defendants where they are deemed medically necessary by a licensed practitioner of the healing arts—were capable of resolution with a single injunction.

An injunction would require Defendants to establish and "implement policies, procedures, and practices to ensure the provision of intensive home and community-based mental health services to Plaintiffs and the Class . . . in the most integrated setting appropriate to their needs." **ROA.433-34**. The district court acted within its discretion and correctly certified the class. This Court should affirm the district court's decision.

Argument

I. Standard of Review

The Court of Appeals reviews the district court's decision to certify a class for abuse of discretion. FED. R. CIV. P. 23(f); *see also M.D. ex rel Stukenberg v. Perry*,

675 F.3d 832, 836 (5th Cir. 2012). A district court abuses its discretion when it bases its ruling on an "erroneous view of the law or a clearly erroneous assessment of the evidence." *Yates v. Collier*, 868 F.3d 354, 359 (5th Cir. 2017) (citing *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584 (5th Cir. 2003)) (internal quotations omitted).

Under the clearly erroneous standard of review, if the district court's account of the evidence is plausible after considering the record in its entirety, the appellate court will not reverse, even if it would have weighed the evidence differently. *Id*. at 363 (citing *In re Omega Protein*, 548 F.3d 361, 367 (5th Cir. 2008)) (internal quotations omitted). To find there was a clearly erroneous assessment of the evidence, there must be a "definite and firm conviction that a mistake has been committed." *Id*. at 363 (citations and internal quotations omitted). "This deference [given to the district court] stems from a 'recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation.'" *Id*. at 360 (quoting *Perry*, 675 F.3d at 836). The only role of the *de novo* standard of review is to determine whether the district court applied the correct legal standards. *Id.*

II. The class is ascertainable as defined.

To succeed under Rule 23, a class must be adequately defined and clearly ascertainable. *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). An identifiable class exists if its members can be ascertained by reference to objective

criteria. *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639-40 (5th Cir. 2012); *see also Seeligson v. Devon Energy Prod. Co., L.P.,* 753 F. App'x 225, 230 (5th Cir. 2018) ("[T]he court need not know the identity of each class member before certification; ascertainability requires only that the district court be able to identify class members at some stage of the proceeding.") (citing *Frey v. First Nat'l Bank Sw.*, 602 F. App'x 164, 168 (5th Cir. 2015)) (internal quotations omitted). A class is "clearly ascertainable" if its membership is "capable of being determined" without regard to the administrative feasibility of the determination. *Cherry v. Domestic Corp.*, 986 F.3d 1296, 1303 (11th Cir. 2021). "[C]lass definitions generally need to identify a particular group, harmed during a particular time frame, in a particular location, in a particular way" and should be defined "in terms of conduct (an objective fact) rather than state of mind." *Mullins v. Direct Digital, L.L.C.*, 795 F.3d 654, 660 (7th Cir. 2015).

The class in this case encompasses:

> 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**.

This definition specifies a series of objective criteria that enable the district court to identify each class member: (a) eligibility for a means-tested public health insurance program ("Medicaid-eligible"); (b) age ("youth under the age of 21"); (c)

geographic location ("the State of Louisiana"); (d) qualifying condition ("diagnosed with a mental health or behavioral disorder, not attributable to an intellectual or developmental disability"); and (e) recommendation for treatment ("recommended intensive home- and community- based services (IHCBS) to correct or ameliorate their disorders"). The primary components of the class definition identify a particular group, in a particular location, and particular material conditions applying to those individuals. The criteria do not call for speculation, nor do they require an analysis of state of mind.

A. Class members are identifiable based on the recommendation of a licensed practitioner of the healing arts.

Contrary to Defendants' assertion (**Defs.' Br. at 17, 19**), neither Defendants nor the district court need to undertake an inquiry into the "needs of the child" or the particular IHCBS required to determine class membership. Under the class definition, a "licensed practitioner of the healing arts" will have recommended the most appropriate services for each class member diagnosed with a mental health or behavioral disorder. **ROA.768-769**. To know whether any particular child is a class member, the district court need only confirm whether there exists a recommendation from a licensed practitioner of the healing arts based on a diagnosed condition.

Further, that different class members will need different amounts, duration, or scope of IHCBS does not render the definition unascertainable. The class definition's reliance on a licensed practitioner's recommendation for a child

ensures that "the individualized analysis is complete, and has resulted in a determination that such interventions are 'medically necessary,' and therefore required under the Medicaid Act." **ROA.769**. District courts around the country have approved similarly-worded class definitions as ascertainable. *E.g.*, *N.B. v. Hamos*, 26 F. Supp. 3d 756, 764 (N.D. Ill. Feb. 13, 2014) (although "diagnosis of mental and behavioral disorders is plainly an individualized and child-specific undertaking," the proposed class was ascertainable because "the class definition . . . presupposes such a diagnosis as a condition of class membership"); *O.B. v. Norwood,* No. 15 C 10463, 2016 WL 2866132, at *1 (N.D. Ill. May 17, 2016) (class of "[a]ll Medicaid-eligible children under the age of 21 in the State of Illinois who have been approved for in-home shift nursing services" is ascertainable); *see also S.R., by & through Rosenbauer v. Pa. Dep't of Hum. Servs.*, 325 F.R.D. 103 (M.D. Pa. Apr. 3, 2018) (class of children with diagnosed mental health disabilities satisfied requirements for certification in action alleging department failed to provide them with mental health services in an integrated setting); *M.H. v. Berry*, No. 1:15-CV-1427-TWT, 2017 WL 2570262, at *3 (N.D. Ga. June 14, 2017) ("[A]n inquiry into whether each putative class member is receiving all medically necessary hours is very fact specific," but finding certification appropriate since "every [Medicaid] participant is subject to the policies and practices the Plaintiff is challenging").

B. The term IHCBS and its component parts are identifiable.

Contrary to Defendants' assertions, the reference to IHCBS does not render the class definition improper. **Defs.' Br. at 18-22**. IHCBS is a well-recognized umbrella term that encompasses an established array of services. This term is "capable of determination," as evidenced by the fact that other courts and Medicaid programs use and understand it. *Cherry*, 986 F.3d at 1304. Multiple courts have approved class definitions including the phrase IHCBS or variations on it. *See, e.g.*, *Hamos*, 26 F. Supp. 3d at 769 ("intensive home- and community-based services"); *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 30-31 (D. Mass. Jan. 26, 2006); *see also T.R. et al. v. Dreyfus*, No. 2:09-cv-01677-TSZ, Dkt. 60 at 2 (W.D. Wash. July 23, 2010) ("intensive home and community-based services") (attached hereto as Tab 1).

The term has been used by the U.S. Department of Health & Human Services to describe the array of behavioral health services needed by children with severe emotional disturbances.[2] The Centers for Medicare and Medicaid Services, the federal agency that administers Medicaid, designated "intensive in-home services" as a core behavioral health service for "children, youth, and young adults with

[2] U.S. HEALTH & HUM. SERVS., PUBLIC FINANCING OF HOME AND COMMUNITY SERVICES FOR CHILDREN AND YOUTH WITH SERIOUS EMOTIONAL DISTURBANCES: SELECTED STATE STRATEGIES (2006), available at https://aspe.hhs.gov/reports/public-financing-home-community-services-children-youth-serious-emotional-disturbances-selected-1 (last visited December 28, 2021).

significant mental health conditions."[3] Other state Medicaid programs use the term, or close variations of it, to describe the array of services they provide to children with mental health or behavioral health conditions.[4] In light of this well-documented

[3] SAMHSA & CMCS, JOINT CMCS AND SAMHSA INFORMATIONAL BULLETIN: COVERAGE OF BEHAVIORAL HEALTH SERVICES FOR CHILDREN, YOUTH, AND YOUNG ADULTS WITH SIGNIFICANT MENTAL HEALTH CONDITIONS 1,4 (2013), available at https://www.medicaid.gov/federal-policy-guidance/downloads/cib-05-07-2013.pdf (last visited December 28, 2021).

[4] For example, other states have included these services in their Medicaid State Plans. *See, e.g.*, Letter from Richard R. McGreal, Ctrs. Medicaid & CHIP Servs., to John Polanowicz, Mass. Exec. Off. Health & Hum. Servs. (Nov. 14, 2013) (approving state plan amendment to "increase[] the payment rates for Intensive Care Coordination (ICC) Services through Targeted Case Management for individuals under age 21 with serious emotional disturbance"), available at https://www.medicaid.gov/sites/default/files/State-resource-center/Medicaid-State-Plan-Amendments/Downloads/MA/MA-13-015-Ltr.pdf (last visited December 28, 2021); Letter from Anne Marie Costello, Ctrs. Medicaid & CHIP Servs., to Marie Matthews, Montana Dept. Pub. Health & Hum. Servs. (Dec. 1, 2021) (amending state plan to include "crisis services" as part of the intensive outpatient therapy benefit for children and youth under age 21), available at https://www.medicaid.gov/medicaid/spa/downloads/MT-21-0024.pdf (last visited December 28, 2021). States have also defined these services in state policy manuals. *See, e.g.*, CALIFORNIA DEPT. HEALTH CARE SERVS., MEDI-CAL MANUAL 23-30 (2018) (defining "intensive care coordination" and setting service criteria), available at https://www.dhcs.ca.gov/Documents/ChildrensMHContentFlaggedForRemoval/Manuals/Medi-Cal_Manual_Third_Edition.pdf (last visited December 28, 2021); OPTUM, IDAHO MEDICAID SUPPLEMENTAL CLINICAL CRITERIA 12-13 (2021) (describing the eligibility and authorization criteria for "crisis services"), available at https://www.optumidaho.com/content/dam/ops-optidaho/idaho/docs/NetworkProviders/GuidelinesandPolicies/Idaho%20Medicaid%20Supplemental%20Clinical%20Criteria%20(Revised%20CALOCUS-CASII%2011%2021%20Clean).pdf (last visited December 28, 2021); WASHINGTON HEALTH CARE AGENCY, WASHINGTON STATE WRAPAROUND WITH INTENSIVE SERVICES (WISE): SERVICE DELIVERY, POLICY, PROCEDURE AND RESOURCE MANUAL 34-36 (2021) (description of and coverage criteria for Medicaid funded "Intensive Services Provided in Home and Community Settings"), available at https://www.hca.wa.gov/assets/billers-and-providers/wise-wraparound-intensive-services-manual.pdf (last visited December 28, 2021). States have also developed billing protocols for them. *See, e.g.,* CALIFORNIA DEPT. HEALTH CARE SERVS., MEDI-CAL MANUAL 30 (2018) (billing criteria for "intensive care coordination"), available at https://www.dhcs.ca.gov/Documents/ChildrensMHContentFlaggedForRemoval/Manuals/Medi-Cal_Manual_Third_Edition.pdf (last visited December 28, 2021); GEORGIA DEPT. BEHAVIORAL HEALTH & DEV. DISABILITIES, PROVIDER MANUAL FOR COMMUNITY BEHAVIORAL HEALTH PROVIDERS 77-83 (2021) (billing and coverage criteria for "intensive customized care coordination"), available at http://dbhdd.org/files/Provider-Manual-BH.pdf (last visited December

understanding, Defendants' emphasis on the district court's citation to the LLA's 2018 Performance Audit on specialized behavioral health services (SBH) (**Defs.' Br. at 20-22**) misses the point on ascertainability. The term IHCBS is ascertainable in its own right.

In addition, the component parts of IHCBS—"intensive care coordination," "crisis services," and "intensive behavioral services and supports"—are not vague terms. **Defs.' Br. at 18**. Numerous courts have used these terms in the Medicaid context. For example, the District Court for the District of Columbia recently held that the putative class stated a claim that D.C. had failed to provide its members with "intensive community-based services" to which they were entitled under the Medicaid Act, specifically by failing to provide them with "(1) intensive care coordination; (2) intensive behavioral support services; and (3) mobile crisis services." *M.J. v. D.C.*, 401 F. Supp. 3d 1, 14 (D.D.C. July 25, 2019); *see also Rosie D.*, 410 F. Supp. 2d at 31 ("[T]he actual services falling under the rubric of 'intensive home-based services' [are] comprehensive assessment, effective service coordination, and adequate in-home behavioral supports."); *Katie A., ex rel. Ludin v. Los Angeles Cnty.*, 481 F.3d 1150, 1153 n.5 (9th Cir. 2007) ("intensive case

28, 2021); OHIO DEPT. MEDICAID, MEDICAID BEHAVIORAL HEALTH STATE PLAN SERVICES PROVIDER REQUIREMENTS & REIMBURSEMENT MANUAL 75 (2021) (billing requirements and codes for "Intensive Home Based Treatment (IHBT)"), available at https://bh.medicaid.ohio.gov/Portals/0/12-23-2021%20BH%20Manual%20FV%201_20_1.pdf (last visited December 28, 2021).

management," "behavioral support services" and "crisis planning and intervention" are part of the array of services that must be covered by Medicaid programs under EPSDT).

Ascertainability does not require services to be "specific, billable behavioral health services ordered by a doctor or licensed mental health professional," and Defendants cite no cases suggesting a class definition must meet this elevated standard. **Defs.' Br. at 18**. Ascertainability merely requires that the district court be "able to identify class members at some stage of the proceeding." *Frey*, 602 F. App'x at 168 (citations and internal quotations omitted). Plaintiffs have amply satisfied that requirement.

But even if Defendants correctly stated the standard, Plaintiffs have also shown that IHCBS are specific and coverable (*i.e.,* billable) under Medicaid. The fact that Defendants have failed to develop service definitions and claiming procedures to bill for these services is exactly the problem. Defendants cannot avoid class certification by arguing that their failure to develop policies and billing codes renders the term IHCBS unascertainable. Such an argument undermines the very obligations of the EPSDT mandate, which places responsibility of providing for screening, diagnosis, and treatment services directly on the state Medicaid agency.

Finally, though the class definition here is precise and ascertainable, precision is not essential in this case: "[a] precise class definition is not as critical where

certification of a class for injunctive or declaratory relief is sought under rule 23(b)(2)." *In re Monumental Life Ins.*, 365 F.3d 408, 413 & n.6 (5th Cir. 2004) (citations omitted). Here, because the class has been certified under Rule 23(b)(2), notice and opt-out procedures do not apply. The Sixth Circuit has found that "ascertainability is a requirement tied almost exclusively to the practical need to notify absent [Rule 23(b)(3)] class members and to allow those members a chance to opt-out and avoid the potential collateral estoppel effects of a final judgment," outcomes that are inapplicable in Rule 23(b)(2) class actions. *Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016). The Sixth Circuit concluded that "[t]he Advisory Committee's notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context." *Id*. at 541-42 (noting that "[a]t least three of our sister circuits have held that 'ascertainability' is inapplicable to Rule 23(b)(2)"); *see also Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004); *McCuin v. Sec'y of Health and Hum. Servs.*, 817 F.2d 161, 167 (1st Cir. 1987); *Battle v. Pa.,* 629 F.2d 269, 271 n. 1 (3d Cir. 1980); *cf. In re Monumental Life Ins.*, 365 F.3d at 413 (5th Cir. 2004) ("Where notice and opt-out rights are requested, however, a precise class definition becomes just as important as in the rule 23(b)(3) context.").

C. The phrase "Medicaid-eligible youth" is appropriate and ascertainable.

Finally, Defendants take issue with the phrase "Medicaid-eligible youth," arguing that "only 'Medicaid-enrolled' children under 21 are entitled to services under the EPSDT mandate." **Defs.' Br. at 19** (citing *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 589 (5th Cir. 2004)).[5] Defendants' argument entirely misses the point; the term "Medicaid-eligible" undoubtedly can be ascertained by reference to objective criteria. *See generally* LOUISIANA MEDICAID ELIGIBILITY MANUAL (La. Dep't of Health) (2021), available at https://ldh.la.gov/page/1681 (last visited December 28, 2021) (defining Louisiana's Medicaid eligibility).

III. The district court conducted a rigorous analysis before certifying the class.

Defendants contend that the district court failed to perform a rigorous analysis before certifying the class under Rule 23, (**Defs.' Br. at 22-25, 32-33, 35**), but their argument demonstrates the exact opposite. The district court grounded its class certification decision not just in the pleadings but also in the accompanying declarations and recent state audit reports from the LLA. **Defs.' Br. at 23-24**; **ROA.757-64**, **772-73.**

[5] Defendants misread *Hood*. The language, "Medicaid-enrolled", appears nowhere in *Hood*. *Hood* is clearly about Medicaid-eligible children's entitlement to EPSDT services, and the case is plainly consistent with the present matter. 391 F.3d 581.

This Court recently provided guidance on what constitutes a "rigorous analysis." *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 545-47 (5th Cir. 2020). A rigorous analysis exists when it "detail[s] with sufficient specificity how the plaintiff has met the requirements of Rule 23." *Id.* at 545 (citing *Vizena v. Union Pac. R.R.*, 360 F.3d 496, 503 (5th Cir. 2004)) (internal quotations omitted). This often requires the district court to "probe behind the pleadings" and consider the merits of the case because the class certification decision is usually "enmeshed" with factual issues. *Id.* at 546 (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) & *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)) (internal quotations omitted). A district court fails to perform the necessary rigorous analysis when it merely "review[s] the complaint," "take[s] the facts as the party seeking the class presents them," and determines that "the case *seems* suitable for class treatment." *Chavez*, 957 F.3d at 546 (citing *Spano v. Boeing Co.*, 633 F.3d 574, 583 (7th Cir. 2011)) (emphasis in original, internal quotations omitted).

Here, the district court's opinion falls definitively within the requirements for a "rigorous analysis." The district court did not merely review the SAC, take Plaintiffs' allegations as true, and determine that the case seemed appropriate for class treatment. Rather, as Defendants acknowledge, the district court discussed and

ultimately relied on three publicly-available reports[6]—two of which were authored by the State itself. These reports found, among other things, that "Louisiana does not always provide Medicaid recipients with comprehensive and appropriate [specialized behavioral health] services." **ROA.759**. Defendants never objected to this evidence, nor have they disputed the facts found in the state audit reports. **ROA.759** (stating, "Notably, when given the chance to respond, LDH did not object to the Legislative Auditor's findings, or recommendations for improvement."). These reports constitute "evidentiary support" establishing that the district court did not merely "presume" Defendants had a policy of not providing IHCBS. **Defs.' Br. at 24**. Beyond these reports, the district court also relied on Plaintiffs' 21 supporting declarations in arriving at its well-reasoned 31-page decision. **ROA.760-64**.

The district court's analysis is a far cry from the "fleeting" analysis in *Chavez*, which was rooted primarily in the plaintiff's allegations in the complaint. 957 F.3d at 548. Here, the district court considered the pleadings, briefings, supporting declarations, state audits, and a third-party report in arriving at a lengthy opinion. The analysis was therefore rigorous. *See, e.g., Brown v. Nucor Corp.*, 785 F.3d 895, 903 (4th Cir. 2015) (discussing that analysis is "rigorous" under Rule 23 when the

[6] These are (1) a November 2014 report by Mental Health America; **ROA.758 fn. 2** and (2) two performance audits in 2017 and 2018 conducted by the Louisiana Legislative Auditor evaluating the accessibility of Medicaid mental health services in Louisiana. **ROA.758-759, fn. 3 & 4**. Defendants call these reports "outdated," but they are not, particularly considering that the complaint in this matter was filed in 2019.

district court engages in a "detailed evaluation" of "anecdotal and statistical evidence"); *Postawko v. Mo. Dep't of Corrs.*, 910 F.3d 1030, 1040 (8th Cir. 2018) (concluding that the district court conducted a rigorous analysis by examining medical records and "consider[ing] inconsistencies" between plaintiff's and defendant's evidence).

Further, the class definition's similarity to that in *Hamos* does not establish a lack of rigor. **Defs.' Br. at 24-25**. As discussed *infra* Section IV(B), *Hamos* is another EPSDT case that found class certification appropriate. The similarities between the class definitions in this case and *Hamos* stem from the similarities in the facts of these cases. But these similarities in no way establishes that the district court failed to conduct a rigorous analysis.

Finally, Defendants complain that the district court's analysis does not pass muster because it focused more on the EPSDT claim and less on the ADA and Section 504 claims. Defendants cite no cases for this argument. But in any event, the facts and allegations used to support the EPSDT claim also support the ADA and Section 504 claims. Thus, the plaintiffs, the class, and their facts are the same for each of their claims, and as explained in the sections *infra*, the district court assessed each element of Rule 23. For all these reasons, Defendants' argument that the district court failed to conduct a rigorous analysis should be rejected.

IV. The district court did not abuse its discretion in finding Plaintiffs satisfied Rule 23(a).

The district court did not abuse its discretion when it found that Plaintiffs satisfied Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements. Each is discussed below.

A. The district court correctly held that Plaintiffs satisfied numerosity when it relied on estimates from Defendants' own Medicaid enrollment data.

Numerosity requires the proposed class to be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). When determining numerosity, "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)). To evaluate practicability, courts should consider factors such as "the sheer size of the class and whether the class will include future members." *Id*. (citing *Zeidman*, 651 F.2d at 1039). "[N]o strict threshold" exists, however, and "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) (citation omitted); *see Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999). Moreover, "reasonable estimate[s] of the number of purported class members" are sufficient. *Pederson v. La. State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000) (quoting *Zeidman,* 651 F.2d at 1038) (internal quotations omitted). Here, the

district court adopted Plaintiffs' estimate that the class includes approximately 47,500 Louisiana Medicaid-eligible children and youth under the age of 21. The district court arrived at this figure by using Plaintiffs' calculations derived from data reported in Defendants' Medicaid 2018 Annual Report.[7] **ROA.484**. This estimated number of class members far exceeds the numerical threshold.

Instead of demonstrating how the district court failed to conduct a satisfactory analysis of numerosity, Defendants reframe their ascertainability arguments, addressed *supra* Section II, and their commonality and typicality arguments discussed *infra* Section IV(B)-(C). **Defs.' Br. at 26-27**. The only original argument Defendants make as to numerosity is to criticize the district court's method of calculation. But the district court made clear that it was relying on Defendants' own Medicaid enrollment data, (**ROA.594-595**; **Defs.' Br. at 26)** noting that:

> Plaintiffs arrived at their estimate by first determining what percentage of Louisiana's Medicaid recipients are children and youths between the ages of 6 and 20—using data from LDH's Medicaid 2018 Annual Report (the "2018 Report")—and then applying that percentage to the

[7] "To arrive at this number, Plaintiffs estimated the number of Medicaid-eligible youth who require specialized behavioral health services in Louisiana." **ROA.484**. "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). . . . Of this total, 597,404 are child and youth Medicaid beneficiaries between the ages of 6 and 20. 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. 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). . . . 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." **ROA.484-85 fn. 7** (citations omitted).

> number of Louisiana Medicaid recipients covered for SBH Services *only*—again based on the 2018 Report. **ROA.771-772** (emphasis in original).

To attack Plaintiffs' numerosity evidence, Defendants misinterpret Plaintiffs' reliance on the use of SBH data to estimate the number of children and youth who would need IHCBS and are therefore class members. **Defs.' Br. at 26**. The term SBH or "specialized behavioral health" services is one developed and relied on by Defendants as part of their own Medicaid program manual to mean: "mental health services and substance use/addiction disorder services, specifically defined in [Defendants'] Medicaid State Plan and/or applicable waivers." *See* LOUISIANA DEPARTMENT OF HEALTH BEHAVIORAL HEALTH SERVICES PROVIDER MANUAL, CHAPTER TWO OF THE MEDICAID SERVICES MANUAL 11 (issued March 14, 2017; last revised December 21, 2021), https://www.lamedicaid.com/provweb1/providermanuals/manuals/BHS/BHS.pdf (last visited December 28, 2021); *see also* La. Admin. Code tit. 50, Pt. XXXIII, § 2101 (2021) (defining, "specialized behavioral health services rendered to children with emotional or behavioral disorders are those services necessary to reduce the disability resulting from the illness and to restore the individual to his/her best possible functioning level in the community").

The number of children receiving SBH services is relevant to determining numerosity because the class members are all children and youth who have been

diagnosed with a mental health or behavioral disorder, and children already receiving SBH will need IHCBS when their condition requires it. Because Defendants do not provide for IHCBS within their system, children receiving SBH cannot obtain or access IHCBS if and when they need them. Thus, all children and youth receiving SBH are current or future class members because if and when they need IHCBS to correct or ameliorate their mental health or behavioral disorder/condition based on a recommendation from a licensed practitioner, the services are not available as legally required. Moreover, the number of children receiving SBH is so large that even if only a small percentage of SBH recipients need IHCBS, the class would still far exceed the numerosity threshold. For example, even if only ten percent of the children and youth receiving a SBH service require IHCBS, the total number of Medicaid beneficiaries between the ages of 6 and 20 who require IHCBS would be more than 4,700.

Defendants do not challenge or dispute the other factors relevant to numerosity, including the presence of future class members, the geographical dispersion of the class, and that class members lack the financial resources to bring suit individually. **ROA.485-486, 593-596, 772-773** (stating, "Plaintiffs have put forth evidence that class members are dispersed throughout the state, and are without means to pursue individual cases in the event a class is not certified."); *see also Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (finding numerosity's

practicability of joinder considers the ease of identifying its members and their geographic dispersion); *see also Pitts*, 2011 WL 2193398, at *3-4 (stating that numerosity's practicability of joinder must consider whether the "class members lack the financial resources necessary to bring suit individually in order to vindicate their rights," and the geographical dispersion of the class). Accordingly, the district court did not abuse its discretion in finding numerosity because the class size far exceeds 40 (*see Lewis*, 324 F.R.D. at 168) and joinder is practicable given the class's financial resources and geographical dispersion.

B. The district court did not abuse its discretion when it found that Plaintiffs meet commonality under Rule 23(a)(2).

To show commonality, Plaintiffs must allege that there are "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). 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*, 564 U.S. at 350. "What matters to class certification" is the capacity "to generate common *answers* apt to drive the resolution of the litigation." *Id*. (internal quotations omitted) (emphasis in original); *see also In re Deepwater Horizon*, 739 F.3d 790, 812 (5th Cir. 2014) ("[E]ven a single common question will do.") Here, the district court correctly concluded Rule 23(a)(2) was met when it said:

> In this case . . . the central, common contention is whether there exists a system-wide failure to provide interventions that are prescribed, and therefore, required of the Louisiana Department of Health under the Medicaid Act's EPSDT mandate. **ROA.775** (internal citations omitted).

The district court did not abuse its discretion, and the finding regarding commonality should be affirmed.

i. The district court did not abuse its discretion in determining that all class members suffer the same injury.

Defendants assert that Plaintiffs' medical differences equate to different injuries sufficient to defeat commonality. **Defs.' Br. at 30-31, 33-34, 36-38**. This is a reprise of the argument made before the district court below and is simply not correct. "Defendants' objection fails because it is founded on the misplaced notion that class relief will require individualized, judicially monitored, mental health assessments to determine class members' eligibility for EPSDT services, when, in fact, such assessments have already been performed by the class members' physicians." **ROA.774-775**. Thus, the district court found, even if the recommended health interventions vary among children in the class, Defendants' policy of not providing IHCBS results in the same injury to all—denial of medically necessary services and unnecessary institutionalization or serious risk, thereof. **ROA.754, 76**. Defendants' failure to provide for these services violates the statutory and regulatory mandates of the Medicaid program, the ADA, and Section 504 for all class members. "This issue is resolvable on a class-wide basis." **ROA.776**.

This Court has repeatedly found that members of the class can be subject to common conduct by Defendants and suffer different outcomes without jeopardizing commonality. *See, e.g.*, *In re Deepwater Horizon*, 739 F.3d at 810-11 ("[T]he legal requirement that class members have all 'suffered the same injury' can be satisfied by an instance of the defendant's injurious conduct, even when the resulting injurious effects—the damages—are diverse.") (internal citations and quotations omitted); *Ward v. Hellerstedt*, 753 Fed. Appx. 236, 245 (5th Cir. 2018) ("commonality may exist even where the plaintiffs' alleged damages are diverse"). *Steering Comm. v. BP Expl. & Prod*. (*In re Deepwater Horizon*), 785 F.3d 1003, 1016 (5th Cir. 2015) (finding commonality even if some members of the class did not actually suffer a loss).

Defendants cite the SAC to suggest that the district court's finding—that every plaintiff has suffered the "same injury"—is based on conflicting allegations. **Defs.' Br at 28-29**. Defendants assert that the following sentiments cannot both be true: (1) LDH does not provide *any* IHCBS (**ROA.754-758, 776**); and (2) LDH has "implemented a fragmented, inadequate, and uncoordinated mental health system for Louisiana Medicaid children and youth with gaps in service coverage, availability, accessibility; a lack of coordination between and among behavioral health providers and child serving systems; and minimal medication management with infrequent counseling." **ROA.393**. Defendants posit that a fragmented mental

health system with gaps is still functionally providing some children and youth with some services, and the district court's reliance on Plaintiffs' allegedly conflicting allegations was an error.

But the district court made no error. There is no conflict here: As stated in the SAC, Defendants' mental health system is fragmented, inadequate, and uncoordinated (**ROA.393**), and that system fails to cover IHCBS. **ROA.754-58, 776**. Within and because of that fragmented and uncoordinated system, all Medicaid-eligible children and youth with mental health or behavioral health conditions share a common injury when they are unable to access the specific set of medically necessary IHCBS to which they are entitled. The notion that Plaintiffs may have individualized needs or different outcomes as a result of that common injury does not defeat commonality. *In re Deepwater Horizon*, 739 F.3d at 801-802, 810; *see also Ward*, 753 Fed. Appx. at 245 (5th Cir. 2018).

ii. The district court did not abuse its discretion in finding commonality because the court found common questions and common answers.

Common questions will lead to common answers that will resolve the litigation in one stroke. *Wal-Mart*, 564 U.S. at 350. As the district court noted, it will consider multiple common questions of fact and law applicable to the proposed class, including:

> (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 RA. **ROA.774**.

Defendants' main argument seems to be that the common questions identified by the district court require individualized analyses that will yield individualized answers. **Defs.' Br. at 30-31**. For example, Defendants claim that question (c)—whether the IHCBS Plaintiffs seek are required by the EPSDT provisions of the Medicaid Act—will require an investigation into whether each service is medically necessary for each child. **Defs.' Br. at 31**. Not so. This question posits whether, under the EPSDT provisions of the Medicaid Act, Defendants must make available specific IHCBS when such services are recommended by a licensed practitioner of the healing arts.[8] This is a common question of law; no individualized analysis is necessary. *See Hood,* 391 F.3d 581. The same applies to the district court's question (f), which addresses Defendants' legal responsibilities under the ADA and Section

[8] Defendants similarly argue that question (d)—if such interventions are required, whether LDH provides such interventions—requires a patient-specific inquiry into whether each child has received services. **Defs.' Br. at 31**. Again, this is wrong. As the court noted, the central, common question is whether there exists a system-wide failure to provide interventions required by the Medicaid Act's EPSDT mandate. **ROA.775**.

504. Moreover, the answer to these questions will determine in one stroke whether Plaintiffs prevail or lose on their EPSDT, Medicaid, and the ADA/Section 504 claims. Certification is appropriate based on these common questions alone.

Defendants pose a series of questions that they believe will be necessary to answer to determine "whether each class member receives 'necessary and timely IHCBS'" **Defs.' Br. 30**. Specifically, Defendants ask, "What are the needs of the child?" and "What services are medically necessary to address the child's needs?" **Defs.' Br. at 30**. But again, under the class definition, a licensed practitioner of the healing arts makes those decisions; Defendants have the responsibility only to provide or arrange for all Medicaid-covered services, including IHCBS, that are recommended as necessary to correct or ameliorate the child's mental health or behavioral health condition. As the district court noted (**ROA.775**), the central issue of whether Defendants systematically fail to do so is common to all class members and will drive the resolution of the litigation. *See Lane v. Campus Fed. Credit Union*, No. 16-CV-37-JWD-EWD, 2017 WL 3719976, at *4 (M.D. La. May 16, 2017) (citing *Perry*, 675 F.3d at 839-40) ("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.").

Defendants also proffer alleged individualized questions about whether the child did not receive services because "Medicaid refused to pay," "because there

were not any providers willing to deliver the service in that area of the state," "or because the child's parent forgot to take the child to the appointment." **Defs.' Br. at 30**. These questions are not relevant to the claims raised in this complaint or the relief it seeks. Instead, the SAC challenges Defendants' lack of systemwide policies and procedures to ensure that children and youth can receive necessary home and community based services. Plaintiffs seek prospective injunctive relief requiring Defendants to put those policies in place. The hypothetical, individualized questions Defendants pose have little bearing on these requests. Here, as in *Yates v. Collier*, individual variations among class members do not defeat commonality because Defendants' failure to ensure availability of medically necessary IHCBS poses an unacceptable risk of harm to each and every class member. 868 F.3d at 362-63; *see also M.D. by Stukenberg v. Abbott,* 907 F.3d 237, 271 (5th Cir. 2018) (upholding a Rule 23(b)(2) class certification because "the State's policies with respect to caseload management, monitoring, and oversight violate plaintiffs' right to be free from a substantial risk of serious harm on a class-wide basis").

Defendants rely on three cases to support their position on commonality; however, these cases are easily distinguishable. **Defs.' Br. at 31-32**. *Jamie S. v. Milwaukee Pub. Sch*., 668 F.3d 481, 497-98 (7th Cir. 2012) and *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 31 (1st Cir. 2019), denied class certification to students seeking class status under the IDEA and 504, because, as

alleged, the facts involved a number of different aspects of the IDEA that could be violated (*e.g.*, Child Find, due process, Free Appropriate Public Education, etc.), meaning there is no common injury that could be resolved in a single stroke. By contrast, as alleged in this matter, the EPSDT provisions at issue are uniformly violated for all class members because the Defendants are failing to establish policies and procedures to arrange for IHCBS when recommended by a licensed practitioner of the healing arts. **ROA.408-10, 416-17**. No individualized analysis is required because the deprivation of IHCBS "ha[s] already occurred and the relevant criteria for class membership has already been determined" based on objective criteria. **ROA.775**.

The district court rejected the relevance of *A.W. v. Magill*, No. 2:17-1346-RMG, 2018 WL 6680941 (D.S.C. Aug. 21, 2018), the Defendants' third case, because, in *A.W.*, inquiry into individual injury was necessary and that case did not involve Medicaid or EPSDT claims. In *Magill*, an individualized inquiry was necessary to determine class membership. But that is not the case here, as the individualized inquiry has already been determined. **ROA.775**. Instead, the district court relied on a case more analogous to the one at hand—*Hamos*—a class action involving children with mental health conditions who alleged violations of the Medicaid Act and anti-discrimination law when the state Medicaid agency

defendants failed to provide for the necessary policies and procedures to ensure necessary IHCBS. *Hamos*, 26 F. Supp. 3d 756.

In sum, the common question in this case is "whether there exists a system-wide failure to provide interventions when those interventions are prescribed, and therefore, required of LDH under the Medicaid Act's EPSDT mandate." **ROA.775**. And the common answer will result in resolution of the litigation in one single stroke: an injunction requiring Defendants to develop policies and procedures to ensure coverage of services that have been recommended by a licensed practitioner of the healing arts to Medicaid-eligible children and youth.

iii. The district court correctly applied Fifth Circuit precedent.

Defendants argue that the district court's decision is "misaligned" with the precedent on commonality. Contrary to Defendants' argument, the district court's decision to grant class certification is consistent with this Court's decisions in *Perry,* 675 F.3d 832 (5th Cir. 2012); *Flecha v. Medicredit, Inc.*, 946 F.3d 762 (5th Cir. 2020); *Ward*, 753 Fed. Appx. 263 (5th Cir. 2018); and *Chavez,* 957 F.3d 542 (5th Cir. 2020).

The district court's commonality analysis is wholly consistent with *Perry*. **Defs.' Br. at 32-35**. In *Perry*, this Court noted that simply because plaintiffs alleged violations of the same legal provision does not necessarily mean that the issues were resolvable on a classwide basis. 675 F.3d at 840. That is not a problem here.

The district court acknowledged that Plaintiffs have suffered violations of the same legal provisions *and* that their claims could be productively litigated together because Plaintiffs have a common contention: "whether there exists a system-wide failure to provide interventions that are prescribed and, therefore, required of LDH under the Medicaid Act's EPSDT mandate" that is "resolvable on a class-wide basis" **ROA.775-76**. Moreover, "[t]his class wide allegation supersedes any individual claim that LDH has failed to provide specific community-based interventions to a specific child, and can only be remedied by class wide relief, not one-off 'fixes' for the Named Plaintiffs." **ROA.781-82**.

Defendants try—and fail—to analogize the instant matter to the "super-claim" identified in *Perry*. 675 F.3d at 848 (noting a super-claim exists when a class of foster care children challenged various conditions of their custody, including amorphous constitutional and statutory claims against an entire foster care system where liability could conceivably be shared amongst multiple actors). **Defs.' Br. at 35**. Unlike *Perry,* this matter involves a single state agency defendant and its secretary who are statutorily responsible for administering and supervising the Louisiana Medicaid program. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10; *see also* La. Rev. Stat. Ann. § 36:251. And here, unlike in *Perry,* Plaintiffs bring three related but independent claims that: (1) Defendants fail to provide for IHCBS in violation of the Medicaid Act, and (2) this failure violates the ADA and Section 504, which

"are interpreted *in pari materia*." *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011).

Next, Defendants cite to *Flecha v. Medicredit, Inc.*, 946 F.3d 762 (5th Cir. 2020). **Defs.' Br. at 32**. In *Flecha*, a 23(b)(3) class action, this Court decertified a class defined as all people who received the same threatening collection letter. Because the defendants intended to pursue collection actions against some, but not all, recipients of the letter, and because the statute only penalized empty threats, the defined class could not demonstrate a uniform policy of illegal conduct. *Id.* at 767. But the present case is factually and legally dissimilar from *Flecha*. Here, Defendants subject all class members to the same policy and practice of not providing for IHCBS.

Defendants also posit that the district court's decision suffers a *Ward* problem. **Defs.' Br. at 33**. In *Ward*, the district court did not provide a factual basis for its analysis or explain how the questions were capable of resolution on a class-wide basis. *Ward,* 753 F. App'x at 245-46. Here, however, the district court engaged in the requisite analysis. The district court considered the facts and claims, reviewed the declarations, independent audits, publicly-available reports, and found that Plaintiffs had met their burden in showing a "common behavior by the defendant toward the class." *Id*. at 249 (internal quotations omitted). In the present case, the district court observed that there were six common questions of law and fact that

directly related to Defendants' practices or policies and that those six questions applied to all members of the class. **ROA.774**. Moreover, the district court explained how this matter was resolvable on a classwide basis: with a single order requiring Defendants to provide Plaintiffs and the class necessary IHCBS in the most integrated setting appropriate to their needs. **ROA.776, 779-80, 782**. The district court's analysis here is not the same as *Ward.*

Defendants next rely on *Chavez* (**Defs.' Br. at 32-33**), which decertified a class that had defined the common questions too vaguely and analyzed them too "conclusionally." 957 F.3d at 548. Further, in *Chavez*, this Court found that the lower court failed to explain how the claims could be resolved in one stroke, and that it neglected to consider the asserted differences among class members. *Id.* at 548-549. Plaintiffs have already explained how the district court considered common questions, *see supra* Section IV(B)(ii), how the claims could be resolved in one stroke, *see supra* Section IV(B)(ii), and addressed the insignificant factual differences among class members, *see infra* Section IV(C). This case is distinct from *Chavez*, where the district court did none of these things.

Finally, Defendants complain that the district court relied too much on *Hamo*s and that *Hamos* is "misplaced and unaligned" with Fifth Circuit precedent. **Defs.' Br. at 32**. Again, Defendants provide no explanation for how *Hamos* departs from Fifth Circuit precedent. **Defs.' Br. at 32-35**. Consistent with Fifth Circuit case law,

Hamos rigorously analyzed the elements of Rule 23(a) and Rule 23(b)(2) before granting class certification. What Defendants perceive as an overreliance on *Hamos* is merely the district court's recognition of the case's factual and legal similarities to the instant matter. This does not amount to an abuse of discretion.

C. The district court did not abuse its discretion when it correctly found that Named Plaintiffs' claims are typical of the class.

Fed. R. Civ. P. 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "[T]he critical inquiry is whether the class representative[s'] claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Stirman v. Exxon Corp.,* 280 F.3d 554, 562 (5th Cir. 2002) (citation omitted). The test "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Mullen,* 186 F.3d at 625 (citing *Lightbourn v. Cnty. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)) (internal quotations omitted). Similarity is key, not identicality. "[T]here need only exist a sufficient nexus between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Ault v. Walt Disney World Co*., 692 F.3d 1212, 1216 (11th Cir. 2012) (quotation marks, alterations, and citations omitted). Further, "[t]his nexus exists if the claims or defenses of the class and the class representative arise from the same event or

pattern or practice and are based on the same legal theory." *Id.* (citation and internal quotations omitted). The typicality and commonality requirements tend to merge, as both are guideposts for determining whether a class action is efficient 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*, 564 U.S. at 349 & n.5. Typicality is met where the harm to the named plaintiffs and the harm to the proposed class members arise from the same illegal conduct.

In the instant matter, due to Defendants' failure to abide by the EPSDT mandates of the Medicaid Act, Plaintiffs are not receiving medically necessary treatment services; as a result, Plaintiffs' untreated conditions place them at unnecessary and serious risk of institutionalization. Typicality is met because all members of the plaintiff class experience the same deprivation of rights and the remedy is "declaratory and injunctive relief requiring LDH to fulfill its federal mandate to provide for IHCBS to Plaintiffs and the Class." **ROA.777**.

In contesting the district court's findings on typicality, Defendants raise only factual discrepancies, not dissimilarities in the legal and remedial theories. Defendants' argument that the district court abused its discretion in finding typicality fails. For example, Defendants argue that B.B. has never been institutionalized and is, therefore, not like her fellow named plaintiffs. **Defs.' Br. at 36-37**. As Plaintiffs stated in their SAC, B.B. was "at risk of institutionalization," like all the other named

Plaintiffs.[9] **ROA.397, 419-20, 520-21, 523-24**. Scores of *Olmstead* cases have aggregated class members who are institutionalized and who are "are serious at risk of institutionalization." *Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 264 (D.N.H. Sept. 17, 2013) (certifying class of "[a]ll persons with serious mental illness who are unnecessarily institutionalized in . . . or are at serious risk of unnecessary institutionalization in these facilities"); *Steward v. Janek*, 315 F.R.D. 472, 493 (W.D. Tex. May 20, 2016) (certifying class of "[a]ll Medicaid-eligible persons over twenty-one years of age with intellectual or developmental disabilities or a related condition . . . who currently or will in the future reside in nursing facilities . . . ."); *see also Murphy v. Piper*, No. 16-2623 (DWF/BRT), 2017 WL 4355970, at *16 (D. Minn. Sept. 29, 2017) (certifying class of "[a]ll individuals age 18 and older who are eligible for and have received a Disability Waiver, live in a licensed Community Residential Setting, and have not been given the choice and opportunity to reside in the most integrated residential setting appropriate to their needs").

[9] Defendants' argument is also moot, as B.B. was institutionalized in a psychiatric hospital in November 2020. Notably, Defendants seemed unaware of their hospitalization even though Defendants authorized B.B.'s institutionalization. This evidence was not before the district court as it occurred after Plaintiffs filed their Second Amended Complaint. This evidence is therefore not in the record before this Court. Plaintiffs can provide that evidence should the Court find it necessary.

Next, Defendants argue that B.B. (who has three mental health diagnoses), C.C. (who has eight mental health diagnoses), and D.D. (who has four mental health diagnoses) are too diverse and will have different recommendations based on their conditions and evolving necessities. **Defs.' Br. 36-37**. Once again, Defendants miss the mark. This case is not about B.B.'s, C.C.'s, or D.D.'s individual conditions or diagnoses. It is about Defendants' uniform failure to fulfill and ensure the EPSDT provisions of the Medicaid Act for the named plaintiffs and similarly-situated class members who are diagnosed with a mental health or behavioral disorder.

Finally, Defendants argue that class members like C.C. and E.E., who are presently in foster care, are different from children living with biological or adopted family, and that this fact destroys typicality. **Defs.' Br. at 36-37**. This is a distinction without a difference and in no way changes Defendants' legal obligation to provide for IHCBS services. Whether a child is Medicaid-eligible due to her placement in foster care or whether she is eligible for other reasons, Defendants' legal obligation remains the same. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(I); La. Admin. Code tit. 50, Pt. XXXIII, § 103 (2021); *see also* **ROA.691-698**, Letter from Defendants (stating, "Specialized behavioral health services are provided to Medicaid-enrolled youth, based on medical necessity, regardless of whether the youth is placed in a TFC home [foster care] or their parents' home.").

Defendants know that individual variations in diagnoses, medical needs, and placements do not destroy typicality. Were that the case, then no class action, particularly one involving children or people with disabilities, could ever be certified. But courts have repeatedly certified such classes. *See Bennet v. Dart,* 953 F.3d 467 (7th Cir. 2020) (certifying class of people with varying physical disabilities who required varying accessibility measures); *see also Pitts*, 2011 WL 2193398 (certifying class of individuals with varying disabilities who require various in-home supports and services from LDH to remain at home and in the community); *Chisholm v. Jindal*, No. CIV. A. 97-3274, 1998 WL 92272, at *7 (E.D. La. Mar. 2, 1998) (certifying class of EPSDT children diagnosed with various developmental disabilities who are awaiting varying services from LDH that would prevent their institutionalization).[10] Defendants' attempts to destroy typicality by raising superficial factual differences amongst the named plaintiffs must be rejected.

[10] Defendant LDH has, on multiple occasions, stipulated to class certification with a class of individuals with diverse disabilities. *See, e.g.*, *A.J. v. La. Dep't of Health, et al*. No. 3:19-cv-00324, Dkt. 21, (M.D. La Aug. 26, 2019), available at https://healthlaw.org/wp-content/uploads/2020/02/21-Class-Cert-Order.pdf (certifying class of Medicaid children with varying disabilities who require but are not receiving from LDH in-home nursing services); (attached hereto as Tab 2); *see also Barthelemy v. La. Dep't of Health & Hosps.,* No. CIV.A. 00-1083, Dkt. 15, (E.D. La. Oct. 19, 2000) (certifying class of "all persons with disabilities" who have applied for but are not receiving various services from LDH and therefore, "are" or "are at imminent risk of" institutionalization) (attached hereto as Tab 3).

D. The district court did not abuse its discretion when it held that Plaintiffs satisfied adequacy of representation under Rule 23(a)(4).

Rule 23 requires that "the representative parties will fairly and adequately protect the interests of the class" (FED. R. CIV. P. 23(a)(4)), a requirement that examines: (1) "the zeal and competence of the representative[s'] counsel"; and (2) "the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees." *Feder v. Elec. Data Sys. Corp*. 429 F.3d 125, 130 (5th Cir. 2005) (quoting *Berger v. Compaq Comput. Corp.,* 257 F.3d 475, 479 (5th Cir. 2001)) (internal quotations omitted). Adequacy, in the Rule 23(a) context, concerns "class representatives, their counsel, and the relationship between the two." *Stirman*, 280 F.3d at 563 (quoting *Berger*, 257 F.3d at 479) (internal quotations omitted); *see also Ward*, 753 F. App'x at 247. The "adequacy inquiry also serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent." *Feder*, 429 F.3d at 130 (quoting *Berger*, 257 F.3d at 479-80) (internal quotations omitted); *see also Pitts*, 2011 WL 2193398, at *6.

Defendants do not dispute the adequacy of Plaintiffs' counsel or the willingness of the named plaintiffs to serve as class representatives. **Defs.' Br. at 38; ROA.602, 778**. Instead, Defendants misstate and misapply the standard for adequacy. **Defs.' Br. at 37-38**. Rather than analyzing whether the named plaintiffs are suitable representatives of the class, Defendants restate their commonality and

typicality arguments. **Defs.' Br. at 37-38**; **ROA.602-603**. Plaintiffs refer this Court to Plaintiffs' commonality and typicality sections of this brief to address these arguments. *See supra* Section IV(C)-(D).

The declarations relied upon by the district court demonstrate that the named plaintiffs are willing and able to actively participate in the litigation and protect the interests of the class; that they have experience attempting unsuccessfully to navigate the Medicaid system; and that they are aware of no conflicts that would preclude their fair and honest representation of the class. **ROA.492, 511-551**. Plaintiffs share common interests of the class to advocate for IHCBS and to avoid the serious risk of unnecessary institutionalization. **ROA.492, 511-551**. In sum, their interest in addressing Defendants' systemic failures to ensure necessary and timely IHCBS unify Plaintiffs and the class. The relief Plaintiffs seek would benefit the class despite differences in circumstances that do not create a conflict. **ROA.492, 636, 650-651**; *see also* **ROA.778** (stating, "Plaintiffs and the class . . . are united by a common interest in obtaining mental health interventions that are rightfully theirs under the Medicaid Act's EPSDT mandate, and the ADA's and RA's integration mandates," "[t]he remedies Plaintiffs seek would unquestionably benefit all class members," and "there is no foreseeable conflict between the Named Plaintiffs' interests and those of the class."). The district court correctly held that Plaintiffs

satisfied their burden regarding adequacy of representation, and Defendants have not shown otherwise.

V. The district court correctly found that Rule 23(b)(2) was satisfied.

Rule 23(b)(2) permits class certification when the defendant "has acted or refused to act on 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). "Rule 23(b)(2) certification is available if three requirements are satisfied: (1) class members must have been harmed in essentially the same way; (2) injunctive relief must predominate over monetary damage claims; and (3) the injunctive relief sought must be specific." *Yates*, 868 F.3d at 366 (internal quotations marks omitted). "[Rule 23(b)(2)] is clear that claims seeking injunctive or declaratory relief are appropriate for (b)(2) class certification." *In re Rodriguez*, 695 F.3d 360, 366 (5th Cir. 2012) (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir 1998)).

Rule 23(b)(2) class actions are the primary vehicle for addressing ongoing deprivations of civil rights, including violations brought under Medicaid and the ADA. *See Brown v. District of Columbia*, 928 F.3d 1070, 1083 (D.C. Cir. 2019) (quoting *Wal-Mart*, 564 U.S. at 361: "[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture."); *see also DL v. District of Columbia*, 860 F.3d 713, 726 (D.C.

Cir. 2017) ("Rule 23(b)(2) exists so that parties and courts, especially in civil rights cases like this, can avoid piecemeal litigation when common claims arise from systemic harms that demand injunctive relief.").

Here, Plaintiffs sue to address ongoing violations of their civil rights, and do not seek monetary damages. The district court correctly found Rule 23(b)(2) satisfied because 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." **ROA.779-780**. Contrary to Defendants' assertion (**Defs.' Br. at 40, 42**), Plaintiffs do not require or seek individualized injunctions on behalf of specific class members.

A. Defendants' failure to provide or ensure access to IHCBS impacts all class members.

The district court correctly certified the class because Defendants subject all class members to the same harm—denial of Medicaid coverage for medically necessary services—even though different class members may receive different amounts of services within the scope of IHCBS. Under Rule 23(b)(2), the court must assess "whether the *defendant's* conduct applies generally to the class," not the extent of injury each class member endured. *Yates*, 868 F.3d at 367 (emphasis in original) (internal quotations omitted); *see also Prantil v. Arkema, Inc.*, 986 F.3d 570, 580 (5th Cir. 2021); *Sykes v. Mel S. Harris & Assocs., LLC*, 780 F.3d 70, 97 (2d Cir. 2015) (noting the relief is not required to "be identical, only that it be

beneficial"). Thus, the 23(b)(2) inquiry "centers on the defendants' alleged unlawful conduct, not on individual injury." *In re Rodriguez*, 695 F.3d at 365.

Defendants' failure to ensure access to medically necessary IHCBS constitutes a violation of every class member's statutory rights under the EPSDT mandate of the Medicaid Act, the ADA, and Section 504. As the district court correctly recognized, "LDH's alleged policy of *not* providing IHCBS harms all class members essentially the same way: they are denied their rightful mental health care in violation of the Medicaid Act's EPSDT mandate, and the ADA's and RA's [Section 504's] integration mandates." **ROA.779**. The specific result of this deprivation may vary among class members because of differing medical needs, but the overarching harm remains singular and uniform. As the district court noted:

> Plaintiffs' core allegation is that IHCBS *cannot* be provided to *any* class member because LDH maintains a blanket policy of *not* providing such services. This classwide allegation supersedes any individual claim that LDH has failed to provide specific community-based interventions to a specific child, and can only be remedied by classwide relief, not one-off "fixes" for the Named Plaintiffs. **ROA.781-782** (emphasis in original).

As in *Rodriguez*, the requested injunction implicates only Defendants' conduct, without reference to the needs of individual class members. 695 F.3d at 366-67 (injunction against Countrywide mortgage properly barred imposition and collection of foreclosure-related fees even though different class members owed different fees).

Rule 23(b)(2) treatment is appropriate where, as here, a court can order a "single injunction or declaratory judgement" that will "provide relief to each member of the class." *Wal-Mart,* 564 U.S. at 360. The requested declaratory and injunctive relief will be "final . . . to the class as a whole." FED. R. CIV. P. 23(b)(2). As the district court correctly determined, this litigation presents a single legal injury suitable for classwide resolution under Rule 23(b)(2).

Contrary to Defendants' argument, the district court need not identify specific medical needs and issue individualized injunctions for each class member. **Defs.' Br. at 41**. Under the class definition, a licensed practitioner of the healing arts determines the specific services that are needed for children with a diagnosed condition (**ROA.769**), and the district court need only order Defendants to ensure that the policies and procedures are in place to ensure that the Medicaid program covers the recommended services in a community setting. As the district court stated:

> Should Plaintiffs prevail, LDH will necessarily be required to modify its policies to properly implement the Medicaid Act's EPSDT mandate. Such policy changes would be generally applicable—*not* based on "a patient-specific inquiry" (because all such individualized determinations required in this case will have already been made)—and would benefit all class members. **ROA.782**.

For these reasons, Defendants' argument regarding Rule 23(b)(2) fails.

B. The injunctive relief requested is specific and describes in reasonable detail the acts required by Defendants.

Defendants misstate this Court's holdings as to the specificity required in a request for injunctive relief. **Defs.' Br. at 39-41**. Plaintiffs must "give content to the injunctive relief they seek so that final injunctive relief may be crafted to describe in reasonable detail the acts required." *Yates*, 868 F.3d at 367 (citing *Perry*, 675 F.3d at 848) (internal quotations omitted). But Plaintiffs need not spell out "every jot and tittle of injunctive relief" at the class certification stage. *Id*. at 368.

Here, Plaintiffs seek: (1) a declaration that Defendants' conduct violates the EPSDT provisions of the Medicaid Act, the Americans with Disabilities Act, and the Rehabilitation Act; and (2) a permanent injunction mandating Defendants "establish and implement policies, procedures and practices" to ensure provision of IHCBS in the most integrated setting, as required by these particular statutes. **ROA.433-434**. An injunction that "order[s] a defendant to obey a specific law" provides all the specificity required at the class certification stage. *In re Rodriguez*, 695 F.3d at 369. The precise contours of Defendants' responsibilities in implementing such relief can be "given greater substance and specificity at an appropriate stage in the litigation through fact-finding, negotiations, and expert testimony." *B.K. v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019) (citations and internal quotations omitted).

This case is not like *Maldonado*, where the plaintiffs sought an injunction to provide "mutually affordable health care" but failed "to identify any way to determine what a reasonable or mutually affordable rate is." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007) (internal quotations omitted). Here, Plaintiffs have identified the medical (mental health) services Defendants must provide for: those recommended by a licensed practitioner of the healing arts. Because class members have a uniform right to receive such services under the EPSDT provisions of the Medicaid Act, the court can issue a single injunction to remedy Defendants' ongoing failure to provide such services without investigating any particular class member's individualized circumstances.

Plaintiffs have provided a sufficient framework at this phase of the litigation for the district court to identify the scope of a singular injunction needed to remedy the class members' injuries. If Plaintiffs prevail, the remedy is clear—the court will issue a single injunction requiring Defendants to revise its internal mechanisms for administration of the Medicaid program so that Defendants provide qualified children and youth with access to the IHCBS when recommended by a licensed practitioner of the healing arts. Altering Defendants' program will benefit all class members because all class members will gain access to the specific services recommended by such a qualified provider for the treatment of their particular condition. This Court has made clear that Rule 23(b)(2) certification makes sense

when "the State engages in a pattern or practice of agency action or inaction—including a failure to correct a structural deficiency within the agency." *Perry*, 675 F.3d at 847-48. The Court should affirm the district court's order granting class certification.

Conclusion

Defendants fail to show that the district court abused its discretion in its application of the legal standards for class certification or that it made a clearly erroneous assessment of the evidence.

The district court's ruling granting class certification should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that an electronic copy of the foregoing document was filed on December 30, 2021, with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit via the Court's ECF filing system. I further certify that service will be accomplished by the Court's ECF system on the following counsel of record for Defendants-Appellants:

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/s/ Sophia Mire Hill
Attorney for: Plaintiffs-Appellees

Date: December 30, 2021

Case No. 21-30580

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.

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On Appeal from the United States District Court
for the Middle District of Louisiana
Civil Action No. 3:19-cv-00770

APPENDIX TO APPELLEES' BRIEF

Unpublished Opinions	Tab no.
T.R. et al. v. Dreyfus, No. 2:09-cv-01677-TSZ, (W.D. Wash. July 23, 2010)	1
A.J. v. La. Dep't of Health, et al. No. 3:19-cv-00324, (M.D. La Aug. 26, 2019	2
Barthelemy v. La. Dep't of Health & Hosps., No. CIV.A. 00-1083, Dkt. 15, (E.D. La. Oct. 19, 2001)	3

TAB 1

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

T.R.., by and through his guardian and next friend, R.R.; S.P., by and through her mother and next friend, D.H.; C.A., by and through her mother and next friend, A.A.; T.F., by and through her father and next friend, D.F.; P.S., by and through his mother and next friend, W.S.; T.V., by and through his guardian and next friend. C.D.; G.B., by and through her mother and next friend, L.B.; E.H. by and through his mother and next friend, C.H.; E.D., by and through his mother and next friend, A.D.; and L.F.S., by and through his mother and next friend, B.S.,

Plaintiffs,

v.

SUSAN N. DREYFUS, not individually, but solely in her official capacity as Secretary of the Washington State Department of Social and Health Services,

Defendant.

No. 2:09-cv-01677-TSZ

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

THIS MATTER comes before the Court on Plaintiffs' Motion for Class Certification, docket no. 28.

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Plaintiffs and Defendant have stipulated that certification of the following class is currently appropriate:

> All persons under the age of 21 who now or in the future:
>
> (1) meet or would meet the State of Washington's Title XIX Medicaid financial eligibility criteria;
>
> (2) are determined and documented by a licensed practitioner of the healing arts operating within the scope of their practice as defined by Washington state law, to have a mental illness or condition, or had a screen or an assessment been conducted by such practitioner, would have been determined and documented to have a mental illness or condition;
>
> (3) have a functional impairment, which substantially interferes with or substantially limits the ability to function in the family, school or community setting; and
>
> (4) for whom intensive home and community based services coverable under Title XIX Medicaid and eligible for Federal Financial Participation, have been, or would have been recommended by a licensed practitioner in order to correct or ameliorate a mental illness or condition.

The Parties' stipulation reserves rights to challenge class certification and the class definition based upon ongoing discovery.

The Court finds that certification of the proposed class is appropriate under Federal Rule of Civil Procedure 23(a) in that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." The Court also finds that the allegations of the proposed class satisfy the requirement of Federal Rule of Civil Procedure 23(b)(2) that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Court therefore GRANTS plaintiffs' motion

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for class certification, docket no. 28, and CERTIFIES the class as defined by the parties' stipulation.

The representative named plaintiffs are T.R., by and through his guardian and next friend, R.R.; S.P., by and through her mother and next friend, D.H.; C.A., by and through her mother and next friend, A.A.; T.F., by and through her father and next friend, D.F.; P.S., by and through his mother and next friend, W.S.; T.V., by and through his guardian and next friend. C.D.; G.B., by and through her mother and next friend, L.B.; E.H. by and through his mother and next friend, C.H.; E.D., by and through his mother and next friend, A.D.; and L.F.S., by and through his mother and next friend, B.S.

The Court appoints Disability Rights Washington, the National Health Law Program, the National Center for Youth Law, and Perkins Coie as class counsel.

This order is without waiver of any right of any party to move to modify this order. Defendant may file motions seeking to decertify the class, remove any of the named plaintiffs, or to amend the class definition, as the issues or facts in the case are further identified or developed, and to challenge the designation of multiple law firms if it appears that such designation is unnecessarily increasing the cost of litigation or is otherwise interfering with the efficient management of this case. Plaintiffs are not required to provide notice to the unnamed class members.

DATED this 23rd day of July, 2010.

Thomas S. Zilly
United States District Judge

70787-0001/LEGAL18270932.1

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TAB 2

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

A.J., a minor child by and through his mother, DONNELL CREPPEL, ET AL.

CIVIL ACTION

VERSUS

REBEKAH GEE, in her official capacity as secretary of the Louisiana Department of Health, ET AL.

NO.: 19-CV-00324-BAJ-EWD

ORDER

Considering the parties' **Stipulation Regarding Class Certification (Doc. 15)**, and for good cause shown:

IT IS ORDERED that the class is defined as:

> All current and future Medicaid recipients under the age of twenty-one (21) in Louisiana who are certified in the Children's Choice Waiver, the New Opportunities Waiver, the Supports Waiver, or the Residential Options Waiver who are also prior authorized to receive extended home health services or intermittent nursing services which do not require prior authorization, but are not receiving some or all of the hours of extended home health services or intermittent nursing services as authorized by Defendants.

IT IS FURTHER ORDERED that pursuant to Fed. R. Civ. P. 23(g), the Advocacy Center and National Health Law Program is appointed to serve as class counsel.

Baton Rouge, Louisiana, this 23rd day of August, 2019.

JUDGE BRIAN A. JACKSON
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

TAB 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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LORETTA G. WHYTE
CLERK

LEE BARTHELEMY, et al.	*	CIVIL ACTION NO. 00-1083
	*	
Plaintiffs,	*	SECTION N-3
	*	
v.	*	JUDGE CLEMENT
	*	
LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS, and DAVID HOOD, Secretary, Louisiana Department of Health and Hospitals,	*	MAGISTRATE JUDGE AFRICK
	*	
	*	CLASS ACTION
	*	
Defendants.	*	

STIPULATION AND ORDER

WHEREAS Plaintiffs Lee Barthelemy et al. have filed a Motion for Class Certification in this action on August 30, 2000;

WHEREAS Defendants Louisiana Department of Health and Hospitals et al. do not oppose the motion provided that the proposed definition of the class be revised as follows:

> All persons with disabilities who are receiving Medicaid-funded services in nursing facilities, or who are at imminent risk of being admitted to a nursing facility to receive such services, who have applied for Medicaid-funded services in the community through one or more of the Medicaid-funded home and community-based waivers administered by Defendants, who have not been determined ineligible for such community-based services, and who have not received such Medicaid-funded community-based services.

WHEREAS Plaintiffs do not object to this revision;

NOW THEREFORE, having considered, pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, the requirements of numerosity, common questions of law and fact, typicality of plaintiffs' claims to those of the class, plaintiffs' capacity to provide fair

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and adequate representation of class interests, and general applicability to the class of the challenged actions, the Court CERTIFIES a class consisting of

> All persons with disabilities who are receiving Medicaid-funded services in nursing facilities, or who are at imminent risk of being admitted to a nursing facility to receive such services, who have applied for Medicaid-funded services in the community through one or more of the Medicaid-funded home and community-based waivers administered by Defendants, who have not been determined ineligible for such community-based services, and who have not received such Medicaid-funded community-based services.

AND APPOINTS Lee Barthelemy, Aaron Liller, Claude Callagan, Carolyn Netterville, Richard Nagle, and Darlene Williams as class representatives.

SO ORDERED this 18 day of October, 2000.

Edith Brown Clement, U.S.D.J.

It is so stipulated:

For Plaintiffs Lee Barthelemy et al.

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