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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Margaret Tinsley, et al.,

Plaintiffs,

v.

Charles Flanagan, et al.,

Defendants.

No. CV-15-00185-PHX-ROS

ORDER

Named Plaintiffs B.K., B.T., A.C.-B., M.C.-B., D.C.-B., and J.M. (“Named Plaintiffs”), minors in the custody of the Arizona foster care system, filed a motion to certify this matter as a class action with subclasses under Rule 23(b)(2). (Doc. 234.) Defendants Gregory McKay and Thomas Betlach opposed. (Docs. 245, 248.) And Named Plaintiffs replied. (Doc. 254.) For the following reasons, the Court will grant the motion for class certification.

I. BACKGROUND

Named Plaintiffs filed this civil rights class action on behalf of children in the Arizona foster care custody, claiming the Arizona foster care system violates the U.S. Constitution and the federal Medicaid Act. (Doc. 37.) They allege Arizona’s failure to remedy problems within its system exposed them and all other foster children to harm or unreasonable risk of harm while in the state’s care, in violation of their federal rights. (*Id.*)

A. Role of Child Welfare Agencies

1 “The primary purpose of [Arizona Department of Child Safety (“DSC”)] is to
2 protect children.” A.R.S. § 8-451(B). In Arizona, DSC has significant control over
3 foster children. It is charged with placing children in safe living environments and
4 coordinating with the Arizona Health Care Cost Containment System (“AHCCCS”) and
5 others to provide children with court-ordered healthcare and other services aimed at
6 promoting the safety and well-being of all children. *See* A.R.S. §§ 8-451(B)(2), (4); 8-
7 457; 8-512. If a juvenile court assigns custody of a removed child to DCS, the agency
8 may subsequently place the child with a parent or relative, in a licensed foster home,
9 therapeutic foster care, group home, or a residential treatment facility. A.R.S. § 8-
10 514(A), (B).

11 DCS and its subdivisions determine the eligibility and licensing procedures for
12 foster parents and foster homes, and maintain responsibility for providing training and
13 supervision of such homes. A.R.S. §§ 8-503(A)(4)(b)-(h); 8-509; 8-516. DCS is
14 responsible for investigating all allegations and risks of harm involving children,
15 including those in foster homes. *See* A.R.S. §§ 8-503(A)(4)(i); 8-453(A)(19); 8-456.
16 And DSC may deny an application, suspend, or revoke a foster parent’s license for
17 violations of state statutes governing child welfare. A.R.S. § 8-506.

18 “If a child [is] removed from the child’s home and placed in out-of-home
19 placement, guardianship or adoptive placement, the [DCS must] make reasonable efforts
20 to place that child with the child’s siblings or, if that is not possible, to maintain frequent
21 visitation or other ongoing contact between the child and the child’s siblings unless a
22 court determines . . . [either] would be contrary to the child’s or a sibling’s safety or well-
23 being.” A.R.S. § 8-513(D). A child in foster care also has a “right to maintain contact
24 with friends and other relatives unless the court has determined that contact is not in the
25 child’s best interests.” A.R.S. § 8-513(C).

26 For all children in DCS custody, DCS collaborates with AHCCCS and others to
27 “provide comprehensive medical and dental care,” A.R.S. § 8-512(A), and to “determine
28 the most efficient and effective way to provide comprehensive medical, dental and

1 behavioral health services, including behavioral health diagnostic, evaluation and
2 treatment services for children who are provided [comprehensive medical and dental]
3 care [].” A.R.S. § 8-512(B).

4 **B. Second Amended Complaint (“SAC”)**

5 The 53-page SAC contains factual allegations concerning the existence of
6 uniform, statewide policies and practices in the foster care system and recounts in detail
7 the experiences of several Named Plaintiffs who range from three to fourteen years of age
8 in foster care custody. (Doc. 37.) The SAC details how the Named Plaintiffs allegedly
9 did not receive necessary physical and/or mental healthcare, were separated from siblings
10 who were also in the foster care system, experienced frequent relocations and school
11 transfers, and did not receive early and periodic screening, diagnostic, and treatment.
12 (*Id.*) Many allegedly suffered ill-prepared, neglectful, and abusive foster parents and
13 inattentive caseworkers. (*Id.*)

14 Named Plaintiffs claim their experiences were caused by a number of “structural
15 and operational failures” which expose all children in the foster care system to a
16 substantial risk of harm that “continue[s] to plague the state’s child welfare system.”
17 (Doc. 37 at 4.) These failures include (1) severe shortage in physical, mental, and
18 behavioral health services available to children in foster care; (2) widespread failure to
19 conduct timely investigations of reports that children have been maltreated while in foster
20 care custody; (3) severe shortage of family foster homes; and (4) widespread failure to
21 engage in basic child welfare practices for maintaining family relationships. (*Id.*)

22 Two Defendants remain in this matter: (1) Director of the DSC, Gregory McKay,
23 who is responsible for managing the state’s child welfare system; and (2) Thomas
24 Betlach, Director of the AHCCCS, which administers and supervises the state’s Medicaid
25 program. (*See* Docs. 37, 188.) Named Plaintiffs maintain these individuals are
26 responsible for administering the foster care system and they have been aware of but have
27 failed to address the problems outlined in the SAC. (Doc. 37 at 4-5.) Named Plaintiffs
28 seek declaratory and injunctive relief for alleged violations of their substantive due

1 process rights under the Fourteenth Amendment and their rights under the Medicaid
2 statute. (*Id.* at 24-45.)

3 **C. Named Plaintiffs' Motion**

4 Named Plaintiffs seek to certify one general class and two subclasses. (Doc. 234
5 at 11-12.)¹ First, Named Plaintiffs seek to assert constitutional claims on behalf of a
6 general class of children who are or will be in the legal custody of DCS due to a report or
7 suspicion of abuse or neglect ("General Class"). (*Id.* at 11.) Second, Named Plaintiffs
8 seek to assert constitutional claims on behalf of a subclass of all children in the General
9 Class who are not placed in the care of an adult relative or person who has a significant
10 relationship with the child ("Non-Kinship Subclass"). (*Id.*) Third, Named Plaintiffs seek
11 to assert a statutory claim on behalf of a subclass comprised of all members of the
12 General Class who are entitled to early and periodic screening, diagnostic, and treatment
13 ("EPSDT") services under the federal Medicaid statute ("Medicaid Subclass"). (*Id.*)
14 This subclass alleges that AHCCCS, the agency responsible for administering the
15 Medicaid program in Arizona, and DCS, which provides physical and dental care
16 services for Medicaid eligible children in foster care through an interagency agreement
17 with AHCCCS, violated the Medicaid statute. (*Id.* at 11-12.) Moreover, Named
18 Plaintiffs seek to appoint their counsel as Class Counsel. (*Id.* at 44.) In support of their
19 motion to certify, Named Plaintiffs submitted nearly ninety exhibits, including expert
20 reports by multiple specialists in child welfare systems and health care services, excerpts
21 of deposition transcripts, internal DCS documents and progress assessments, thousands of
22 pages of documents obtained through discovery, and Named Plaintiffs' sealed medical
23 files. (Docs. 238, 286.)

24 **II. ANALYSIS**

25 Named Plaintiffs' certification request is governed by Rule 23 of the Federal Rules
26

27 ¹ Named Plaintiffs alleged five causes of action in this lawsuit, and they have since
28 voluntarily dismissed the fifth cause of action. (Doc. 217.) For the purposes of this
motion, Plaintiffs only seek to certify a general class and two subclasses with regard to
the remaining four.

1 of Civil Procedure. *See* Fed. R. Civ. P. 23. Class certification is governed by Federal
2 Rule of Civil Procedure 23. Plaintiffs bear the burden of demonstrating they meet Rule
3 23’s requirements. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th
4 Cir. 2001). District courts have broad discretion in determining whether to certify a
5 class. *Id.*

6 Under Rule 23(a), a party seeking certification of a class or subclass must satisfy
7 four prerequisite requirements: (1) numerosity, (2) commonality, (3) typicality, and (4)
8 adequacy of representation. Fed. R. Civ. P. 23(a)(1)-(4). If they satisfy the initial
9 requirements, Named Plaintiffs’ proposed class and subclasses must also satisfy the
10 requirements of one of the subsections of Rule 23(b), “which defines three different types
11 of classes.” *See Leyva v. Medline Ind., Inc.*, 716 F.3d 510, 512 (9th Cir. 2013). Here,
12 Named Plaintiffs seek to certify their proposed class and subclasses pursuant to Rule
13 23(b)(2), which requires that “the party opposing the class has acted or refused to act on
14 grounds that apply generally to the class, so that final injunctive relief or corresponding
15 declaratory relief is appropriate respecting the class as a whole.” *See* Fed. R. Civ. P.
16 23(b)(2).

17 To determine whether a party has met the requirements of Rule 23, the Supreme
18 Court in *Wal-Mart Stores, Inc. v. Dukes* (“*Wal-Mart*”) explained “Rule 23 does not set
19 forth a mere pleading standard.” 564 U.S. 338, 350 (2011). A plaintiff seeking class
20 certification must “affirmatively demonstrate his compliance with [] Rule [23]—that is,
21 he must be prepared to prove that there are *in fact* sufficiently numerous parties, common
22 questions of law or fact, etc.” *Id.* (emphasis in original). “Similarly, a party must
23 affirmatively prove that he complies with one of the three subsections of Rule 23(b).”
24 *Parsons v. Ryan*, 754 F.3d 657, 674 (9th Cir. 2014).

25 Certification is proper only if “the trial court is satisfied, after a rigorous analysis,
26 that the prerequisites of Rule 23(a) have been satisfied.” *Wal-Mart*, 564 U.S. at 350-51.
27 “Although we have cautioned that a court’s class-certification analysis must be ‘rigorous’
28 and may ‘entail some overlap with the merits of the plaintiff’s underlying claim . . . ,

1 Rule 23 grants courts no license to engage in free-ranging merits inquiries at the
2 certification stage.” *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568
3 U.S. 455, 465-66 (2013) (quoting *Wal-Mart*, 564 U.S. at 351). As the Supreme Court in
4 *Amgen* explained, it “totally misapprehend[s] the essential point” of this case law to
5 suggest that certification is improper unless plaintiffs are able to prove that the common
6 question “will be answered in their favor.” *See id.* at 468.

7 McKay and Betlach offer a variety of arguments against certification. McKay
8 argues Named Plaintiffs do not have standing, Named Plaintiffs fail to satisfy the
9 commonality and typicality requirements under Rule 23(a), and Named Plaintiffs’ request
10 is an inappropriate injunctive relief under Rule 23(b)(2). (Doc. 245 at 3.) Betlach joins
11 in the challenge over whether Named Plaintiffs have standing. (Doc. 248 at 3.)
12 However, Betlach also argues the lawsuit is moot and opposes Named Plaintiffs’ motion
13 to certify the Medicaid Subclass in this case for failure to meet the commonality,
14 typicality, and Rule 23(b)(2) requirements. (Doc. 248 at 10-16.) The Court will address
15 each argument in turn.

16 **a. Jurisdictional Issues**

17 1. Mootness

18 Betlach² argues that because four of the named Named Plaintiffs (M.C-B, D.C-B,
19 A.C-B, and J.M) have been adopted, they are no longer in foster care custody and this
20 lawsuit should be dismissed as moot.³ (Doc. 245 at 20; Doc. 248 at 14.) This argument

21
22 ² McKay’s opposition brief also implicitly raises a mootness argument. (Doc. 245
23 at 7, 20.) McKay attests that because the state is already making plans to eliminate the
24 substantial risk of serious harm, there is no longer an ongoing harm to be enjoined and
25 “there is no need to order [the state of] Arizona to improve its foster-care system.” (*Id.* at
26 20.) Even though McKay cited to statistics suggesting that the state of Arizona’s foster
27 care system has improved since the filing of the lawsuit, these statistics do not establish
28 Defendants were not, are not, and will not be in violation of Plaintiffs’ federal rights.
Moreover, the merits of this lawsuit involve whether DSC’s policies and practices
constitute ongoing constitutional and statutory violations. Thus, DSC’s unilateral
allegation that DSC is well on its way to fixing each alleged constitutional and statutory
issue does not render Plaintiffs’ claims moot.

³ Betlach raised his mootness and standing arguments in the context of the
typicality issue. (Doc. 248 at 13.) The Court will engage in a discussion of typicality
below, but because standing and mootness are threshold jurisdictional issues and also

1 is not persuasive.

2 Although four of the Named Plaintiffs have been adopted, there are still two
3 Named Plaintiffs who can represent the class, B.T. and B.K. Thus, the mootness
4 argument fails at the outset. But even if all Named Plaintiffs permanently leave the foster
5 care system, the “capable of repetition, yet evading review” exception to the mootness
6 doctrine would apply. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090-92 (9th Cir.
7 2011). Children in the foster care system are inherently transitory. A child could be
8 adopted, a child could find a permanent guardian, and a child could also return to the
9 foster care system if the adoption or guardianship does not work out. Any of these could
10 happen before a civil rights class action reaches judgment and because being part of the
11 foster care system is a significant fact in this litigation, the “capable of repetition, yet
12 evading review” exception to the mootness doctrine applies. Thus, the Court will not
13 dismiss this lawsuit based on mootness.

14 2. Standing

15 Both McKay and Betlach challenge Named Plaintiffs’ standing. (Doc. 245 at 3-4;
16 Doc. 248 at 12-13.) McKay alleges four of the Named Plaintiffs (M.C.-B., D.C.-B.,
17 A.C.-B., and J.M.) have been adopted, and he argues B.T. and B.K. have not shown
18 “individualized harm.” (Doc. 245 at 4.) In opposing the certification of the Medicaid
19 Subclass, Betlach also argues it is not enough to speculate that each plaintiff is “at risk”
20 of a violation when Named Plaintiffs have failed to offer any evidence that any of the
21 Named Plaintiffs actually suffered an EPSDT violation. (Doc. 248 at 14.)

22 To establish standing, a plaintiff must show he “(1) suffered an injury in fact, (2)
23 that is fairly traceable to the alleged conduct of the defendant, and (3) that is likely to be
24 redressed by a favorable judicial decision.” *Spokeo v. Robbins*, 136 S. Ct. 1540, 1547
25 (2016). “To establish injury in fact, a plaintiff must show that he or she suffered an
26 invasion of a legally protected interest that is concrete and particularized and actual or
27 imminent, not conjectural or hypothetical.” *Id.* at 1548. “For an injury to be

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distinct from typicality, the Court will discuss the jurisdictional arguments first.

1 ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’” *Id.*
2 (internal citation omitted). “A ‘concrete’ injury must be ‘*de facto*’; that is, it must
3 actually exist.” *Id.* “Although tangible injuries are perhaps easier to recognize, . . .
4 intangible injuries can nevertheless be concrete.” *Id.* at 1549 (internal citation omitted).

5 First, McKay’s first standing argument is based on the assertion that four of the
6 Named Plaintiffs have been adopted. (Doc. 245 at 4.) Although other circuit courts have
7 found that plaintiffs not in foster care custody lack standing to pursue constitutional
8 claims, *see, e.g., 31 Foster Children v. Bush*, 329 F.3d 1255, 1267 (11th Cir. 2003), this
9 is not a sufficient basis for dismissing the entire lawsuit. Standing exists if at least one
10 named plaintiff meets the requirements. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970,
11 979 (9th Cir. 2011). Here, even if four of the six Named Plaintiffs have been adopted
12 since the lawsuit has been filed, two Named Plaintiffs still remain.

13 Second, without identifying specifics to support his argument, McKay
14 conclusorily argues the remaining two Named Plaintiffs have not shown “individualized
15 harm or that they have not received the services for any of the putative classes seeking
16 certification.” (Doc. 245 at 4.) However, McKay’s argument overlooks the seven pages
17 in the SAC dedicated to outlining the injuries B.T. and B.K. personally suffered as well
18 as the many exhibits submitted in support of Named Plaintiffs’ motion which
19 demonstrate the personal and individual harm they suffered.

20 For example, B.K. is a twelve-year-old girl who has spent more than half of her
21 life in state foster care. (Doc. 37 at 6.) She was removed from her mother’s home and
22 placed in state foster care custody multiple times. (*Id.*) When B.K. came into state care
23 for a third time, B.K. had bruises on her head from abuse by her mother, and she was
24 diagnosed with posttraumatic stress disorder, a mood disorder, psychosis, and anxiety.
25 (*Id.*) The state separated B.K. from all of her siblings and placed her in a group home on
26 “emergency shelter” status. (*Id.*) Although this was supposed to be a short-term
27 placement, B.K. remained in a group home for more than two years. (*Id.* at 6-7.) While
28 in state custody at a group home, the state child welfare agency failed to do the

1 following: (1) ensure she obtained glasses that she needed to see properly; (2) discover
2 she was walking with a limp; (3) make sure she received the shoes she needed; (4) make
3 sure she got to see a dentist for a toothache she had for multiple months; (5) ensure she
4 received necessary mental health services especially when she said she heard voices were
5 telling her to hurt people or that someone would die; (6) ensure she would be able to get
6 to her health appointments; and (7) ensure she received uninterrupted services. (*Id.* at 7-8.)
7 These facts indicate B.K. personally suffered harm from not receiving a variety of health
8 care services, from being placed in a group home away from her siblings, and from not
9 receiving the EPDST services in a prompt manner. Thus, B.K. has shown she suffered
10 individualized and personal harm sufficient to establish standing for the General Class,
11 the Non-Kinship Subclass, and the Medicaid Subclass.

12 Similarly, B.T. is a sixteen-year-old boy who has spent half his life in Arizona's
13 foster care custody. (*Id.* at 11.) B. T. had been shuffled through multiple institutional
14 settings, separated from his sibling and denied sibling visitation, and deprived of
15 necessary mental health care. (*Id.* at 11-15.) B.T. also attempted suicide multiple times.
16 (*Id.* at 15.) A month after being taken into state foster care, B.T. had a psychological
17 evaluation indicating he needed therapeutic treatment, but he had to wait six months
18 before his first therapy session. (*Id.* at 11.) A few months after being placed in state
19 foster care with one of his brothers, B.T. was removed from the group home, separated
20 from his brother, and placed into a kinship foster home with a paternal aunt. (*Id.* at 12.)
21 He spent six months in his kinship foster home with a paternal aunt before any visits with
22 his older brothers. (*Id.*)

23 Over the course of a decade, B.T. was denied health care services, separated from
24 his siblings, and denied EPDST services numerous times. In August 2006, B.T.'s aunt
25 told the state child welfare agency B.T. was not receiving the counseling he needed and
26 requested an updated psychological evaluation. (*Id.*) But none was conducted. (*Id.*)
27 When his aunt told the agency that she could no longer care for B.T. because they were
28 not providing him with the mental health evaluation and services he needed, the agency

1 moved B.T. to an emergency foster home rather than providing those services. (*Id.*)

2 In October 2006, B.T. was temporarily placed with a foster family and he
3 threatened to kill himself and his temporary foster family. (*Id.*) Yet, he still did not
4 receive regular therapy. (*Id.*) Instead the agency only responded by removing the six-
5 year-old B.T. from the home and placing him in a group home. (*Id.*) The state child
6 welfare agency received reports that B.T. was struggling emotionally in the group home.
7 (*Id.*) Even after another psychological evaluation was requested for B.T., the state did
8 not schedule it until months later and did not provide him with any counseling in the
9 interim. (*Id.*) An evaluation indicated he needed individual therapy and prescribed
10 psychotropic medication. (*Id.*) A psycho-educational evaluation was recommended but
11 never conducted. (*Id.*)

12 Just a month after B.T. was placed in a pre-adoptive home with one of his brothers
13 in January 2008, the family reported to the state B.T.'s need for more intensive
14 counseling and a more suitable counselor. (*Id.*) B.T. and his brother were adopted in
15 August 2008, but taken back to state foster care in March 2011. (*Id.* at 13.) Shortly after
16 this happened, B.T. reported his adoptive father had beat him with a belt, and the state
17 immediately separated B.T. from his brother, placing the two boys in different non-
18 therapeutic group homes. (*Id.*) The group home reported B.T. needed counseling, but he
19 did not receive any counseling while at this group home. (*Id.*) Within a month of being
20 back in the state's foster care system, B.T. was hospitalized in an acute care mental health
21 facility for two weeks, and the state returned B.T. back to the group home after the
22 hospitalization. (*Id.*) B.T.'s mental health then worsened, he was approved for a
23 therapeutic Home Care Training to Home Care Client ("HCTC") placement, but one was
24 not available for him. (*Id.*) B.T. then ran away, spent a night at a juvenile detention
25 center, and then moved to a new group home hours away from his prior placement
26 because his prior group home had already filled his bed with another child. (*Id.*)

27 In July 2011, B.T. was moved to a HCTC home, but did not receive trauma
28 therapy and did not receive a psycho-sexual evaluation until October 2011. (*Id.*) When

1 the state finally began looking for a HCTC placement for B.T. six months later, the state
2 was unable to find one and moved him to a non-therapeutic group home/shelter in August
3 2012. (*Id.*) He threatened to kill himself three times while in this non-therapeutic
4 congregate care placement. (*Id.* at 14.) When the shelter reported to the state that B.T.
5 needed a higher level of care in November 2012, the state moved him the following
6 month to a therapeutic group home. (*Id.*) But when B.T.’s suicidal thoughts continued,
7 the state moved him back to the earlier non-therapeutic group home/shelter in January
8 2013. (*Id.*)

9 In June 2013, B.T. had another incident where he grabbed the steering wheel of a
10 van driven by group home staff and said “I want us all to die.” (*Id.*) On that same day,
11 the state’s therapeutic team overseeing his health services reported the following: “with a
12 few exceptions, B.T. is doing well over the last 2 weeks.” (*Id.*) After this suicide
13 attempt, B.T.’s psychiatrist recommended he be placed in a residential treatment facility.
14 (*Id.*) While the request was pending, the state moved him to the following: (1) a
15 therapeutic group home far away, (2) another therapeutic group home in September 2013,
16 (3) a non-therapeutic family foster home in March 2014, (4) a non-therapeutic foster
17 home in July 2014, (5) a shelter in October 2014, and (6) another therapeutic group home
18 even though he received approval for a therapeutic HCTC placement in November 2014.
19 (*Id.* at 14-15.) Up until September 2014, he had one therapy session, and he threatened to
20 commit suicide again in December 2014. (*Id.*)

21 These facts indicate B.T. personally suffered harm from not receiving a variety of
22 health care services (including physical and mental health services), from being placed in
23 a group home away from his siblings, and from not receiving the EPDST services in a
24 prompt manner. Thus, B.T. has shown he suffered sufficient personal harm to establish
25 standing for the General Class, the Non-Kinship Subclass, and the Medicaid Subclass.

26 Third, Betlach alleges B.T. and B.K. have not alleged harm as a result of being
27 deprived of their rights under the Medicaid statute. (Doc. 248 at 14.) A district court
28 “must determine that at least one named class representative has Article III standing to

1 raise each class subclaim.” *Prado-Steinman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279.
2 However, as discussed above, B.T. and B.K. presented evidence they personally suffered
3 harm from not receiving the necessary health care diagnostic services and treatment
4 necessary to correct physical and mental conditions in a prompt manner. Thus, B.T. and
5 B.K. have standing to challenge whether the DSC’s and the AHCCCS’s policies and
6 practices violate the Medicaid statute, and the Court will not dismiss this case based on
7 standing.

8 **b. Class Certification**

9 Defendants McKay and Betlach do not dispute that Named Plaintiffs meet the
10 requirements of numerosity and adequacy of representation (*see* Doc. 245 at 1; Doc.
11 248), and the Court also agrees Named Plaintiffs have satisfied their burdens with regard
12 to these prerequisites. Defendants argue Named Plaintiffs have not satisfied the
13 commonality and typicality prerequisites as well as the requirements under Rule 23(b)(2).
14 The Court will analyze each but will focus its analysis on the prerequisites in dispute.

15 1. Numerosity under Rule 23(a)(1)

16 Rule 23(a)(1) requires the proposed class be “so numerous that joinder of all
17 members is impracticable.” Fed. R. Civ. P. 23(a). There is no specific number that
18 satisfies the numerosity requirement. *Gen. Tel. Co. of the Nw., Inc. v. Equal Emp’t*
19 *Opportunity Comm’n*, 446 U.S. 318, 330 (1980). Here, Named Plaintiffs have produced
20 evidence indicating that in 2016 there were over 18,000 children in the General Class,
21 over 10,000 children in the Non-Kinship Subclass, and over 17,000 children in the
22 Medicaid Subclass. (Doc. 238-1, Ex. 31 at DSC-00132510, Ex. 32 at AH 0000673, Ex.
23 33 at DSC-00121026.) Defendants do not contest this issue, and the Court finds this
24 prerequisite has been satisfied.

25 2. Commonality under Rule 23(b)(2)

26 Rule 23(a)(2) requires there be “questions of law or fact common to the class.”
27 Fed. R. Civ. P. 23(a)(2). This provision requires plaintiffs “demonstrate that the class
28 members ‘have suffered the same injury,’” not merely violations of “the same provision

1 of law.” *Wal-Mart*, 564 U.S. at 350 (internal citation omitted). Commonality is satisfied
2 where plaintiff’s claims depend on a “common contention” that is “capable of classwide
3 solution—which means that determination of its truth or falsity will resolve an issue that
4 is central to the validity of each one of the claims in one stroke.” *Id.* “What matters to
5 class certification . . . is not the raising of common ‘questions’—even in droves—but,
6 rather the capacity of a classwide proceeding to generate common *answers* apt to drive
7 the resolution of the litigation.” *Id.* (internal citation omitted).

8 Post-*Wal-Mart*, the Ninth Circuit recognized “Plaintiffs need not show that every
9 question in the case, or even a preponderance of questions, is capable of classwide
10 resolution.” *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013).
11 “Where the circumstances of each particular class member vary but retain a common core
12 of factual or legal issues with the rest of class, commonality exists.” *Evon v. Law Offices*
13 *of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (internal citation omitted).
14 Specifically, members of the proposed class need not share every single fact in common
15 but “common questions may center on ‘shared legal issues with divergent factual
16 predicates or a common core of salient facts coupled with disparate legal remedies.’”
17 *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (internal citation
18 omitted). “To assess whether the putative class members share a common question, . . .
19 we must identify the elements of the class members’[] case-in-chief.” *Parsons*, 754 F.3d
20 at 676 (internal citation omitted).

21 a. *Claims at Issue for Class Certification*

22 In the Named Plaintiffs’ case, the state functions as the *de facto* parent of a child
23 in foster care. *Tamas v. Dep’t of Social & Health Servs.*, 630 F.3d 833, 843 (9th Cir.
24 2010); *see also Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en
25 banc) (“The state’s action in assuming the responsibility of finding and keeping the
26 [foster] child in a safe environment placed an obligation on the state to insure the
27 continuing safety of that environment.”) Here, Named Plaintiffs seek to pursue three
28 constitutional substantive due process claims through the General Class and the Non-

1 Kinship Subclass. (Doc. 234 at 11.) Specifically, DSC’s practices deprived the General
2 Class of their right to adequate and timely physical, dental, and mental health care (Cause
3 of Action I) and to timely investigations into allegations of abuse and neglect while in the
4 state’s custody (Cause of Action III). (*Id.*) And DSC’s practices deprived the General
5 Class of their right to placement in a living environment that protects their physical,
6 mental, and emotional safety, and well-being (Cause of Action IV). (*Id.*) Because these
7 claims arise as constitutional substantive due process claims, the Court will discuss these
8 claims together when analyzing the commonality prerequisite. Further, Named Plaintiffs
9 also pursue a statutory claim through the Medicaid Subclass, alleging the practices of the
10 DSC and the AHCCCS deprived the Medicaid Subclass of early and periodic screening,
11 diagnostic, and treatment services required under the federal Medicaid statute. (*Id.*)

12 b. *Constitutional Substantive Due Process Claims*

13 First, to establish a due process claim, state officials must act with such deliberate
14 indifference to the liberty interest that their actions “shock the conscience.” *Tamas*, 630
15 F.3d at 844. Conduct that “shocks the conscience” is “deliberate indifference to a known
16 or so obvious as to imply knowledge of danger.” *Id.* (internal citation omitted). “[T]he
17 deliberate indifference standard, as applied to foster children, requires a showing of an
18 objectively substantial risk of harm and a showing that the officials were subjectively
19 aware of facts from which an inference could be drawn that a substantial risk of serious
20 harm existed and that either the official actually drew that inference or that a reasonable
21 official would have been compelled to draw that inference.” *Id.* at 845 (concluding the
22 “analysis [in the foster care context] is identical to the subjective deliberate indifference
23 component [] articulated in prisoner cases and includes by implication the objective
24 component requiring the existence of a substantial risk of serious harm”).

25 Here, Named Plaintiffs identified several state-wide practices affecting the
26 proposed General Class: failure to provide timely access to health care (including
27 comprehensive evaluations, timely annual visits, semi-annual preventative dental health
28 care, adequate health assessments, and complete immunizations); failure to coordinate the

1 delivery of physical and dental care services; ineffective coordination and monitoring of
2 physical and dental services by DCS; DCS's overuse of congregate care for children with
3 unmet mental health needs; excessive DCS caseworker caseloads; failure to initiate
4 investigations in a timely manner after reports of abuse; failure to document a timely
5 "safety assessment" after initiating an investigation; failure to meet deadline for closing
6 investigations; and delays in important investigative steps. (Doc. 234 at 26-27.)

7 Based on these policies and practices, Named Plaintiffs assert that common
8 questions capable of resolution on a classwide basis involve questions including whether
9 DCS's practices subject the General Class to a substantial risk of harm in violation of
10 Fourteenth Amendment rights by (1) failing to provide physical and dental health care,
11 (2) failing to provide mental and behavioral health care, or (3) failing to conduct timely
12 investigations into reports when children have been abused or neglected while in foster
13 care. (Doc. 234 at 17.)

14 Named Plaintiffs also identified the following practices affecting the Non-Kinship
15 Subclass: DCS's excessive use of emergency shelters and group homes, unnecessary
16 separation of siblings, and placement of children far from home. (Doc. 234 at 31-35;
17 Doc. 254 at 15.) Based on these practices, Named Plaintiffs contend there are common
18 questions regarding whether DCS's practices (1) subject Non-Kinship Subclass members
19 to a substantial risk of harm in violation of substantive due process; (2) fail to maintain an
20 adequate number of foster home placements; (3) place children in appropriate settings
21 (e.g., shelters or congregate placements) resulting in physical and psychological harm; (4)
22 improperly separates children from siblings; and (5) place children far from home
23 communities making visits from biological family difficult. (Doc. 234 at 32.)

24 McKay and Betlach argue that commonality is not met in this action because "the
25 diversity of needs of children in care require[s] an individual determination." (Doc. 245
26 at 4; *see also* Doc. 248 at 11.) While one child's medical diagnosis or placement
27 assessment may differ from the next, the deliberate indifference standard involves Named
28 Plaintiffs showing an objective substantial risk of harm based on the state's policies and

1 practices and the officials' subjective awareness of their risk. Specifically, central to
2 each claim is whether children in state foster care custody are exposed to statewide
3 practices governing overall conditions of health care services or placement decisions
4 resulting in a substantial risk of serious future harm to which the defendants were
5 deliberately indifferent. Here, Named Plaintiffs correctly identified that the Ninth
6 Circuit's opinion in *Parsons* is instructive for the commonality analysis.

7 In *Parsons*, the Ninth Circuit upheld a district court's order granting class
8 certification where plaintiffs sued the Arizona Department of Corrections ("ADC") for
9 mass deficiencies and outlined a number of specific, uniform, statewide policies and
10 practices that exposed all ADC inmates to a substantial risk of harm. *Parsons*, 754 F.3d
11 at 662. The Ninth Circuit found all ADC inmates were exposed to "specified statewide
12 ADC policies and practices that govern the overall conditions of health care services and
13 confinement," and this exposure resulted in "a substantial risk of serious future harm to
14 which the defendants were deliberately indifferent." *Id.* at 678. The Ninth Circuit also
15 found the identified practices were "the 'glue' that h[e]ld[] together the putative class . . .
16 either each of the policies and practices is unlawful as to every inmate or it is not." *Id.*

17 Similar to *Parsons*, the putative class and subclass members here also set forth
18 numerous common contentions whose truth or falsity can be determined in one stroke:
19 whether the specified statewide policies and practices to which they are all subjected by
20 the DSC expose them to a substantial risk of harm. Here, Named Plaintiffs identified
21 several statewide practices that affect the General Class and Non-Kinship Subclass.

22 The inquiry here does not require the Court to determine the effect of the policies
23 and practices upon any individual class member (or class members) or to undertake an
24 individualized determination. Even if health issues may differ, every child in the DSC
25 custody is necessarily subject to the same medical, mental health, and dental care policies
26 and practices of the DSC in the same way that the inmates in *Parsons* were subjected to
27 the policies and practices of the ADC. Any one child could easily fall ill, be injured,
28 need treatment, require a diagnostic, need emergency care, crack a tooth, or require

1 mental health treatment. And any child in the foster care system would be subjected to
2 the DCS's policies regarding placement decisions. Thus, every single child in the foster
3 care system faces a substantial risk of serious harm if DCS policies and practices fail to
4 adhere to constitutional requirements. *See Parsons*, 754 F.3d at 679.

5 c. *Statutory Claim under the Medicaid Act*

6 Under the Medicaid Act, a state must have a plan for medical assistance that
7 provides for EPSDT services for individuals who are eligible for Medicaid. 42 U.S.C. §§
8 1396a(a)(10)(A); 1396d(a)(4)(B); 1396a(a)(43); 1396d(r). EPSDT services refer to
9 screening, medical, vision, dental, and hearing services as well as other necessary health
10 treatment services. 42 U.S.C. §§ 1396d(r)(1)-(5); 1396a(a)(43)(C). Children in state
11 foster care are eligible beneficiaries of Medicaid services. 42 U.S.C. §
12 1396a(a)(10)(A)(i)(I).⁴ Thus, Medicaid-eligible children in foster care have a right to
13 EPSDT services and the state Medicaid agency, such as AHCCCS, has "an obligation to
14 see that the services are provided when screening reveals that they are medically
15 necessary for a child." *Katie A. ex rel. Ludin v. Los Angeles Cty.*, 481 F.3d 1150, 1158
16 (9th Cir. 2007).

17 Named Plaintiffs identified several statewide practices affecting the proposed
18 Medicaid Subclass: excessive DCS caseworker caseloads, ineffective coordination of
19 mental and behavioral health care between DCS and AHCCCS contractors, AHCCCS
20 contractors' incomplete and out-of-date service plans, ineffective coordination and
21 monitoring of physical and dental services by DCS, shortage of therapeutic foster care
22 placements and services maintained by AHCCCS and DCS, shortage of residential
23 treatment center placements maintained by AHCCCS, shortage of behavioral health
24 providers maintained by AHCCCS, and DCS's overuse of congregate care for children

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26 ⁴ According to the SAC, Arizona has an EPSDT Periodicity Schedule which
27 describes when certain health examinations and services need to be provided, and DCS
28 and AHCCCS have policies requiring examinations and services in specific situations.
(Doc. 37 at 32-34.) Named Plaintiffs do not appear to challenge the written policies, but
rather conclude through personal experiences and expert findings that the DCS and
AHCCCS's actual practices did not comply with the written policies. Thus, Named
Plaintiffs challenge the routine practice of failing to provide statutorily required services.

1 with unmet mental health needs. (Doc. 254 at 11; *see also* Doc. 234 at 13-27.)

2 Based on these practices, Named Plaintiffs assert there are common questions as
3 to whether these practices by AHCCCS and DCS (1) failed to provide timely and
4 adequate access to preventative medical, dental, and mental health screening and
5 diagnostic services; (2) failed to coordinate care to ensure timely medically necessary
6 physical, dental, and mental health treatment to address healthcare needs; and (3) failed
7 to build and maintain an adequate capacity and infrastructure of mental health providers
8 and therapeutic placements to assure that mental health needs are timely addressed.
9 (Doc. 234 at 29).

10 Similar to the constitutional claims, central to the claim here is the question of
11 whether practices by DSC and AHCCCS failed to adhere to the Medicaid statute. Even if
12 a child's specific medical diagnosis may differ, however, whether the foster care system's
13 practices establish a pattern of non-compliance arise from statewide policies and
14 practices by DSC and AHCCCS.

15 Betlach argues that with regard to the Medicaid Subclass, Named Plaintiffs failed
16 to meet the commonality requirement because "they woefully fail to offer any evidence
17 that AHCCCS has actually violated the EPSDT provisions." (Doc. 248 at 11-12.)
18 However, "[m]erits questions may be considered to the extent—but only to the extent—
19 that they are relevant to determining whether the Rule 23 prerequisites for class
20 certification are satisfied." *Amgen*, 568 U.S. at 466; *see also Stockwell v. City & Cty. of*
21 *San Francisco*, 749 F.3d 1107, 1112 (9th Cir. 2014) (holding that the opinion in *Amgen*
22 demonstrates commonality does not require showing the putative class will prevail on
23 whatever common questions it identifies); *Messner v. Northshore Univ. HealthSystem*,
24 669 F.3d 802, 811 (9th Cir. 2012) ("[T]he court should not turn the class certification
25 proceedings into a dress rehearsal for the trial on the merits."); *Ellis*, 657 F.3d at 983 n.8
26 (emphasizing "whether class members could actually prevail on the merits of their
27 claims" is not a proper inquiry in determining "whether common questions exist").⁵

28 ⁵ In any case, Named Plaintiffs' briefing and expert reports offer reliability and

1 Thus, Named Plaintiffs satisfy the commonality requirement.

2 3. Typicality under Rule 23(a)(3)

3 Rule 23(a)(3) requires that “the claims or defenses of the representative parties are
4 typical of the claims or defenses of the class.” Fed. R. Civ. P 23(a)(3). A named
5 plaintiff’s claims are typical of the class under Rule 23(a)(3) if they are “reasonably
6 coextensive with those of the absent class members; they need to be substantially
7 identical.” *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016) (citation
8 omitted). The Ninth Circuit in *Parsons* stated that this test is met where the named
9 plaintiffs demonstrate their “injury is a result of a course of conduct that is not unique to
10 any of them,” and they allege that their “injury follows from the course of conduct at the
11 center of the class claims.” 754 F.3d at 685.

12 Here, B.T. and B.K. are children in DSC custody. It is alleged that both of them
13 have been and are exposed to a substantial risk of serious harm by the challenged DSC
14 and AHCCCS policies and practices. Thus, the Named Plaintiffs allege “the same or [a]
15 similar injury” as the rest of the putative class; they allege this injury is a result of a
16 course of conduct that is not unique to any of them and the injury follows from the cause
17 of conduct at the center of the class claims. Since every child in the foster care system
18 under state custody is highly likely to require medical care and housing placement, each
19 Named Plaintiff is similarly positioned to all other children with respect to exposure to
20 the Defendants’ policies and practices. In *Parsons*, the Ninth Circuit explicitly rejected
21 arguments in this context about how named plaintiffs may have in the past suffered
22 varying injuries or how they may currently have different health care needs. *Parsons*,
23 754 F.3d at 686. The Court held Rule 23(a)(3) requires only that their claims be “typical”
24 of the class and not that they be identically positioned to each other or to every class

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significant information to show state-wide practices exist. Although it is not necessary to
assess the merits of whether Defendants violated the Medicaid Act beyond the question
of class certification, Plaintiffs also offer evidence showing DCS and AHCCCS violated
Plaintiffs’ statutory rights by failing to do the following: (1) detect and treat medical and
dental needs, (2) provide annual well-child physicals, (3) provide semi-annual dental
check-ups, and (4) provide timely immunizations. (Reply at 5-10.)

1 member. *Ellis*, 657 F.3d at 985 n.9 (finding that typicality is not defeated by different
2 factual scenarios when they result in a claim of the same nature). Thus, Named Plaintiffs
3 satisfy typicality.

4 4. Adequacy of Representation under Rule 23(a)(4)

5 Rule 23(a)(4) requires the “representative parties will fairly and adequately protect
6 the interests” of each of the classes that Named Plaintiffs seek to certify. Fed. R. Civ. P.
7 23(a)(4). To determine whether this prerequisite is satisfied, the court asks two
8 questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with
9 other class members and (2) will the named plaintiffs and their counsel prosecute the
10 action vigorously on behalf of the class?” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
11 1020 (9th Cir. 1998). Here, the Named Plaintiffs and their counsel do not have conflicts
12 of interest with other class members since Named Plaintiffs seek to improve structural
13 deficiencies that affect children in DCS custody. And Named Plaintiffs assert they will
14 continue to prosecute this action vigorously on behalf of each class member. Defendants
15 also do not contest this issue. Thus, this requirement is satisfied.

16 5. Injunctive and Declaratory Relief under Rule 23(b)(2)

17 Certification under this rule requires that “the party opposing the class has acted or
18 refused to act on grounds that apply generally to the class, so that final injunctive relief or
19 corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R.
20 Civ. P. 23(b)(2). Rule 23(b)(2)’s primary role is the certification of civil rights cases like
21 this one. *Parsons*, 754 F.3d at 688 (stating Rule 23(b)(2)’s requirements are
22 “unquestionably satisfied” when the putative class seeks “uniform injunctive or
23 declaratory relief from policies or practices that are generally applicable to the class as a
24 whole”).

25 Courts have invoked Rule 23(b)(2) to certify classes of foster children seeking
26 declaratory and injunctive relief for alleged widespread violations in the foster care
27 system. *See, e.g., Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (affirming
28 class certification on behalf of a class of Medicaid-eligible foster children); *DG ex rel.*

1 *Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010) (affirming the district court’s
2 finding that the proposed class satisfied Rule 23(b)(2)’s “generally applicable” and
3 cohesiveness requirements).

4 Defendants argue this requirement has not been met because the remedies sought
5 by Named Plaintiffs are “too abstract” and are so generic that relief could be afforded to
6 every class member only if the Court tailored an injunction as to each one. (Doc. 245 at
7 7; Doc. 248 at 15.) However, Named Plaintiffs’ claims challenge Defendants’ common
8 set of policies and practices involving health care services and the placement of children
9 in the foster care system. And although Betlach contends certification of the Medicaid
10 Subclass will implicate individualized adjudications, Named Plaintiffs are claiming that
11 Defendants’ policies are impermissible under the statute—not that a specific plaintiff
12 should have received a particular diagnosis or treatment instead of another. *See Perez-*
13 *Olano v. Gonzalez*, 248 F.R.D. 248, 259 (C.D. Cal. 2008) (finding the Rule 23(b)(2)
14 requirements met when the legality of defendants’ conduct involved defendants’ common
15 set of policies that are applied to a category of in-custody minors). In other words, the
16 harm Named Plaintiffs seek to remedy is the “risk of exposure” created by subjecting
17 children in foster care to DSC’s and AHCCCS’s policies and practices—not the harm an
18 individual child suffers from a misdiagnosis. Thus, this requirement is satisfied.

19 **c. Appointment of Counsel**

20 Named Plaintiffs seek to appoint Perkins Coie LLP, Arizona Center for Law in the
21 Public Interest, and Children’s Rights, Inc. as class counsel. (Doc. 37 at 35; Doc. 234 at
22 44.) Class counsel must fairly and adequately represent the interests of the class. Fed. R.
23 Civ. P. 26(g)(4). In appointing class counsel, the court must consider: (i) the work
24 counsel has done in identifying or investigating potential claims in the action; (ii)
25 counsel’s experience in handling class actions, other complex litigation, and the types of
26 claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the
27 resources that counsel will commit to representing the class. Fed. R. Civ. P.
28 26(g)(1)(A)(i)-(iv). The Court may also consider anything else “pertinent to counsel’s

1 ability to fairly adequately represent the interests of the class” and “may order potential
2 class counsel to provide information on any subject pertinent to the appointment and to
3 propose terms for attorney’s fees and nontaxable costs.” Fed. R. Civ. P. 23(g)(1)(B)-(C).
4 Rule 23(g) also instructs, “[i]f more than one adequate applicant seeks appointment, the
5 court must appoint the applicant best able to represent the interests of the class.” Fed. R.
6 Civ. P. 23(g)(2).

7 Named Plaintiffs seek the appointment of a law firm and two legal organizations
8 as class counsel. (Doc. 234 at 44.) Despite the strictures of Rule 23(g), given the size of
9 the proposed class, it is not unreasonable to appoint multiple counsel in this case. Here,
10 Plaintiffs’ counsel satisfies the four requirements under Rule 26(g)(4). First, counsel
11 conducted an exhaustive investigation the Arizona child welfare system, safety, health,
12 and well-being of children in DSC custody. (Doc. 234 at 44.) Counsel interviewed
13 dozens of stakeholders across the state and spent hundreds of hours obtaining and
14 reviewing relevant information. (*Id.*) Second, counsel also have a wealth of experience
15 in complex litigation and in representing children in the custody of state child welfare
16 systems. (*Id.*) Third, counsel are well-versed and have extensive experience in the law
17 and claims at issue here and have handled numerous civil rights lawsuits in federal court.
18 (*Id.*) Fourth, counsel are prepared to continue funding this litigation through its
19 resolution and will continue to dedicate the resources required to zealously represent the
20 class and subclasses of children. (*Id.*; Docs. 235, 236, 237.) Moreover, McKay and
21 Betlach do not object to the appointment of counsel. (*See* Doc. 245 at 1 n.3.) Thus, the
22 Court will appoint Named Plaintiffs’ counsel as class counsel.

23 Accordingly,

24 **IT IS ORDERED** Named Plaintiffs’ motion for class certification (Doc. 234) is
25 **GRANTED in part**. The Court certifies the General Class, the Non-Kinship Subclass,
26 and the Medicaid Subclass as follows:

27 General Class: All children who are or will be in the legal custody of DCS due to a
28 report or suspicion of abuse or neglect.


1 Non-Kinship Subclass: All members in the General Class who are not placed in
2 the care of an adult relative or person who has a significant relationship with the child.

3 Medicaid Subclass: All members of the General Class who are entitled to early
4 and periodic screening, diagnostic, and treatment services under the federal Medicaid
5 statute.

6 **IT IS FURTHER ORDERED** Named Plaintiffs B.K., by her next friend
7 Margaret Tinsley, and B.T. , by his next friend Jennifer Kupiszwewski, are appointed as
8 Class Representatives for the General Class, the Non-Kinship Subclass, and the Medicaid
9 Subclass.

10 **IT IS FURTHER ORDERED** Named Plaintiffs’ request to appoint Perkins Coie
11 LLP, Arizona Center for Law in the Public Interest, and Children’s Rights, Inc. as Class
12 Counsel is **GRANTED**.

13 Dated this 29th day of September, 2017.

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17 Honorable Roslyn O. Silver
18 Senior United States District Judge
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