Joseph Mais (005470)
Shane Swindle (011738)
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
T: (602) 351-8000
F: (602) 648-7000
jmais@perkinscoie.com
sswindle@perkinscoie.com

Daniel J. Adelman (011368)
Anne C. Ronan (006041)
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
514 West Roosevelt Street
Phoenix, Arizona 85003
T: (602) 258-8850
F: (602) 258-8757
danny@aclpi.org
aronan@aclpi.org

Attorneys for Plaintiffs

Harry Frischer (admitted *pro hac vice*)
Aaron Finch (admitted *pro hac vice*)
Daniele Gerard (admitted *pro hac vice*)
CHILDREN'S RIGHTS, INC.
88 Pine St., Suite 800
New York, New York 10005
T: (212) 683-2210
F: (212) 683-4015
hfrischer@childrensrights.org
afinch@childrensrights.org
dgerard@childrensrights.org

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

B.K. by her next friend Margaret Tinsley, et al.

Plaintiffs,

v.

Gregory McKay, in his official capacity as Director of the Arizona Department of Child Safety, et al.

Defendants.

No. 2:15-cv-00185-PHX-ROS

Plaintiffs' Motion and Memorandum of Points and Authorities in Support of Certification of the Medicaid Subclass

ORAL ARGUMENT REQUESTED

(Assigned to the Honorable Roslyn O. Silver)

Table of Contents

Table of Authorities

CASES

STATUTES

RULES

I. Motion for Class Certification

Named Plaintiff B.K., by her Next Friend and through her attorneys, respectfully moves the Court for an order pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure certifying a subclass of children who are or will be in the legal custody of the Arizona Department of Child Safety ("DCS") due to a report or suspicion of abuse or neglect and who are entitled to early and periodic screening, diagnostic, and treatment ("EPSDT") services under the federal Medicaid statute.

II. Introduction and Procedural History

This action concerns the policies and practices of DCS and the Arizona Heath Care Cost Containment System ("AHCCCS")[1] that subject thousands of Arizona children in foster care to the denial of medically necessary health care. Defendants have long neglected to address the systemic failures that cause such defects, including inadequate access to all necessary medical, dental, and behavioral health care services; failure to coordinate care among the various state agencies and private providers that are required to provide necessary care to foster children; inadequate array of therapeutic services; and the failure to ensure that there are sufficient providers of behavioral health services to meet the critical needs of foster children.

In September 2017, the Court granted Plaintiffs' motion for class certification, certifying three classes under Fed. R. Civ. P. 23(b)(2): (1) a general class of children who

[1] Defendant Gregory McKay is the Director of DCS and defendant Jami Snyder is Director of AHCCCS. Collectively Director McKay and Director Snyder are referenced as "Defendants."

are or will be in the legal custody of DCS due to a report or suspicion of abuse or neglect (the "General Class"), (2) a subclass of children in the General Class who are not placed in the care of an adult relative or person who has a significant relationship with the child (the "Non-Kinship Subclass"), and (3) a subclass comprised of all members of the General Class who are entitled to EPSDT services under the federal Medicaid statute (the "Medicaid Subclass"). (Order, Sept. 29, 2017 (Dkt. No. 363) ("Class Certification Order").) Defendants appealed.

A Ninth Circuit panel reviewed the grant of class certification and affirmed the certification of the General Class and the Non-Kinship Subclass, finding that both satisfied the requirements of Rule 23(a) and Rule 23(b)(2). (Opinion, Apr. 26, 2019 (Dkt. No. 418) ("Ninth Circuit Opinion").) However, the panel vacated certification of the Medicaid Subclass and remanded for further consideration of the commonality requirement under Rule 23(a). The panel found that the commonality requirement can be satisfied in this case if there is a "common risk of a future violation that flows from the same state-wide policy or practice" but declined to "supplant [this Court's] discretion" by making a factual finding that every subclass member was subject to such a risk. (*Id*. at 36-37.)[2]

On February 27, 2018, long before issuing its decision on class certification, the

[2] Importantly, the panel did not disagree with this Court's factual findings. To the contrary, when considering class certification of the General Class, the panel agreed that B.K. had sufficiently demonstrated that she is "subject to statewide policies and practices that apply equally to every member of the class." (Ninth Circuit Opinion at 23 (holding that the district court did not abuse its discretion in determining that the named plaintiff was typical of the General Class).)

Ninth Circuit stayed further proceedings in this case in connection with its decision to hear Defendants' interlocutory appeal. (Order, Feb. 27, 2018 (Dkt. No. 412).) In the 14 months between Plaintiffs' original motion for class certification and the staying of further proceedings, the parties exchanged additional discovery, including merits expert reports. Last month, following its decision on Defendants' appeal, the Ninth Circuit lifted the stay. (Order, June 11, 2019 (Dkt. No. 420).) Plaintiffs thus now bring this motion owing to discovery available as of the day the case was stayed.[3]

This Court should recertify the Medicaid Subclass. DCS and AHCCCS have failed to ensure adequate and timely provision of necessary medical services mandated by the federal Medicaid statute, creating a significant risk of an imminent future violation of that statute for youth in the State's foster care system who are eligible for Medicaid. (*See* Ninth Circuit Opinion at 36.)

III. Defendants' Obligations Under Medicaid

Approximately 95% of the children in foster care in Arizona are eligible for

[3] Much of that discovery was analyzed by Plaintiffs' experts in their most recent expert reports, which provide further evidence that Defendants' practices put the Medicaid Subclass at risk of being denied required Medicaid services in violation of the statute. (*See* Dkt. No. 392-1, Expert Rep. of Marci White, MSW, Dec. 5, 2017 ("White Rep."); Dkt. No. 407-4, Rebuttal Expert Rep. of Marci White, MSW, Feb. 5, 2018 ("White Rebuttal Rep."); Dkt. No. 392-3, Expert Rep. of Steven D. Blatt, M.D., Dec. 5, 2017 ("Blatt Rep."); Dkt. No. 407-2, Rebuttal Expert Rep. of Steven D. Blatt, M.D., Feb. 5, 2018 ("Blatt Rebuttal Rep."); Dkt. No. 392-4, Expert Rep. of Paul Zurek, Ph.D., Dec. 5, 2017 ("Zurek Rep."); Dkt. No. 401-1, Supp. Exhibits to the Rep. of Paul Zurek, Ph.D., Feb. 5, 2018 ("Zurek Supp."); Dkt. No. 392-5, Expert Rep. of Arlene Happach, Dec. 5, 2017 ("Happach Rep."); Dkt. No. 407-3, Rebuttal Expert Rep. of Arlene Happach, Feb. 5, 2018 ("Happach Rebuttal Rep."); Dkt. No. 392-2, Expert Rep. of Lenette Azzi-Lessing, Dec. 5, 2017 ("Azzi-Lessing Rep."); Dkt. No. 407-1, Rebuttal Expert Rep. of Lenette Azzi-Lessing, Feb. 5, 2018 ("Azzi-Lessing Rebuttal Rep.").)

Medicaid.[4] Under Medicaid, Arizona is required to provide EPSDT services to all of these eligible children. "States must ensure that EPSDT services provided are 'reasonably effective,' and, while they may delegate provision of such services to other organizations, 'the ultimate responsibility to ensure treatment remains with the state.'" (Ninth Circuit Opinion at 33 (citing *Katie A., ex rel. Ludin v. Los Angeles Cty.*, 481 F.3d 1150, 1159 (9th Cir. 2007).) EPSDT services include "screening, medical, vision, dental, and hearing services as well as other necessary health treatment services." (Class Certification Order at 17 (citing 42 U.S.C. §§ 1396d(r)(1)-(5); 1396a(a)(43)(C)).) The scope of such services is extremely broad. They include "any medical or remedial services . . . for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functioning level." *Rosie D. v. Romney*, 410 F.Supp.2d 18, 54 (D. Mass. 2006) (citing 42 U.S.C. § 1396d(a)(13)). Like all Medicaid services, EPSDT services must be provided with "reasonable promptness."[5] In short, the EPSDT provisions of Medicaid require that eligible children "get the health care they need when they need it – the right care to the right child at the right time in the right setting," which is "the goal of the EPSDT provision."[6]

---

[4] (*See* Dkt. No. 238-1, Ex. 33 at DCS-00121026, CMDP QMPI Strategic Reporting Committee Quarterly Meeting Minutes, August 19, 2014.)

[5] Centers for Medicare & Medicaid Services, U.S. Dep't of Health & Human Services., EPSDT – A Guide for States: Coverage in the Medicaid Benefit for Children and Adolescents at 32 (June 2014), https://www.medicaid.gov/medicaid/benefits/downloads/epsdt_coverage_guide.pdf (hereinafter "EPSDT Guide") (citing Section 1902(a)(8) of the Social Security Act).

[6] *Id.* at 1.

AHCCCS, as the state agency charged with administering Arizona's Medicaid program, is responsible for ensuring that Arizona meets this requirement. AHCCCS is responsible for maintaining a network of behavioral and mental health care providers to treat Medicaid-eligible foster children as well as maintaining a network of physical and dental providers for those children.[7] AHCCCS is also responsible for ensuring that children are screened for medical needs at appropriate times. And AHCCCS has an "obligation to see that the services are provided when screening reveals that they are medically necessary." *Katie A.*, 481 F.3d at 1158.

DCS, as the state agency that runs Arizona's child welfare system, is charged with the custody and the care of foster children. DCS is required by statute to provide comprehensive medical and dental services and to determine the most efficient and effective way to provide medical care and behavioral health treatment to children in foster care.[8] DCS caseworkers are also integral to the process of ensuring that each child receives necessary health care services. Caseworkers are required to assess a child's physical health and dental needs, and have the ultimate responsibility for ensuring that the children receive the services they need. (Happach Rep. at 21-23.)[9] They are responsible for participating in the development of behavioral health treatment plans and monitoring to ensure timely behavioral health services are delivered. (Happach Rep. at

[7] *See* A.R.S. § 36-2906; 42 U.S.C. § 1396a(a)(1).
[8] (Class Certification Order at 2-3 (citing A.R.S. § 8-512)); Dkt. No. 238-1, Ex. 36 at DCS-00116161-62, DCS Annual Progress and Services Report for FFY 2017.)
[9] (Dkt. No. 238-2, Ex. 39 at DCS-00133148, DCS Policy and Procedure Manual Chapter 3, Section 2.5: Out of Home Care Planning, Health Care Planning, Contact and Visitation Plan); *see* A.R.S. § 8-512(A).)

21-22; White Rep. at 8.)

Because AHCCCS and DCS do not satisfy these responsibilities, however, Arizona is failing to fulfill its obligation under the Medicaid statute to provide adequate and timely physical, dental, and behavioral health care to Medicaid-eligible foster children. As we show below, these problems result from Defendants' failure to coordinate among various agencies and workers; Defendants' failure to maintain an adequate number of service providers, particularly with regard to behavioral health services; and overburdened caseworkers who do not have time to attend to the medical needs of foster children.

The data confirm that children in foster care do not get the EPSDT services to which they are entitled under the Medicaid statute. After conducting an analysis of data maintained by DCS, Plaintiffs' expert Paul Zurek found that many foster children have not received mandated physical and dental EPSDT examinations. Specifically, more than 31% of the children in foster care received 50% or fewer of the EPSDT tests required. (Zurek Rep. at 8 & Ex. 4.) In 2016 and 2017, more than one-third of the required EPSDT tests were not provided, and more than 46% of children who entered foster care failed to receive a well-child examination. (Zurek Supp. at Ex. 2, 10.)[10] Paul Zurek also determined that many children in foster care experience lengthy delays before receiving necessary follow-up care identified in EPSDT examinations. (Zurek Rep. at 11-12 & Ex.

[10] As a part of the screening services required by EPSDT, "[a]ll infants, children and adolescents should receive regular well-child check-ups of their physical and mental health, growth, development, and nutritional status." EPSDT Guide at 36.

14.) In July 2015, 56% of referrals were not completed after an average of 163 days. (*Id.*)

Plaintiffs' expert Dr. Steven Blatt also reviewed Arizona's provision of medical and dental care to foster youth and determined that the state failed to provide adequate access. (*See generally* Blatt Rep.) The EPSDT requirement covers regular screening services designed to identify health and developmental issues as early as possible.[11] Yet Dr. Blatt's analysis showed that 33% of foster children failed to either receive a required EPSDT exam within 30 days of entering care (for those children who entered care during the examination period) or receive an annual well-child exam (for those who were in care during the entire examination period). (Blatt Rep. at 4.) Furthermore, the evidence indicates that "children in foster care did not receive necessary screenings for developmental delays." (*Id.* at 7.) Though EPSDT services cover proper immunizations,[12] Dr. Blatt found that for the first two quarters of 2017, less than 30% of eligible two-year-olds received required immunizations. (Blatt Rep. at 9.) Dental care is also among the services required by EPSDT,[13] yet 43% of children in foster care failed to receive a required dental exam. (Blatt Rep. at 4.) It is clear that Defendants are "fail[ing] to ensure that children in foster care receive routine comprehensive medical and dental care as required by EPSDT and best practice." (*Id.*)

Defendants likewise fail to provide children in foster care with the behavioral health services required by the Medicaid statute. The EPSDT provision requires periodic

[11] EPSDT Guide at 4.
[12] EPSDT Guide at 4.
[13] EPSDT Guide at 13.

mental health screenings for all children enrolled in Medicaid and any treatment or service necessary to "correct or ameliorate" mental illnesses and conditions discovered by screening.[14] Such treatment for mental health issues may include "hospital and clinic services, physician services, and services provided by a licensed professional such as a psychologist."[15] Plaintiffs' expert Marci White reviewed Arizona's behavioral and mental health provisions to children in foster care and determined that "[o]n a system-wide basis, children are not getting medically necessary services, and Defendants are not keeping track of whether children receive those services." (White Rep. at 9.)

Ms. White concluded that there is an inadequate array of behavioral and mental health services for children in foster care, including a lack of therapeutic foster homes. (*Id.* at 23-25.)[16] The inadequate array of services creates barriers to accessing necessary care. For example, Ms. White found "delays in accessing behavioral health services, including specialized, trauma based therapy that children in foster care so desperately need." (*Id.* at 27.) Ms. White characterized the extensive delays in the provision of necessary care as "red flags that the behavioral health system in Arizona is highly dysfunctional and does not meet the needs of children in foster care." (*Id.* at 31.)

Furthermore, Ms. White found that Defendants' failure to coordinate behavioral

[14] 42 U.S.C. § 1396d(r)(5); EPSDT Guide at 2, 4.
[15] EPSDT Guide at 10.
[16] Therapeutic foster homes provide services to children whose "behavioral health needs are of such a critical nature that in the absence of such services, the child may be placed in a more restrictive setting, like a hospital, residential treatment center . . . or therapeutic group home." (White Rep. at 23.) Defendants also have a practice of prematurely removing children from therapeutic foster homes, resulting in further trauma. (*Id*. at 26.)

health services results in children not getting necessary services. (*Id.* at 33.) She identified serious deficiencies in the Child and Family Team (CFT) process, whereby a team of individuals knowledgeable about the child's life develop a services plan to address behavioral needs. (*Id.*) Ms. White found that the CFT process was hampered by insufficient clinical oversight, limited participation of case managers, service plans that are based on services available and not necessary services, and a lack of systematic monitoring. (*Id.* at 34.) Even logs maintained by DCS show that there are "significant gaps in care." (*Id.* at 36.) The logs have frequent entries showing that "services were unavailable, that necessary coordination was not occurring, and that there were substantial delays in receiving services." (*Id*.)

DCS's overburdened caseworkers further compound these systemic failures. DCS has repeatedly acknowledged that its caseworkers are laden with unmanageable caseloads. (Happach Rep. at 26.) Plaintiffs' expert Arlene Happach found that Arizona's children were not receiving adequate quality of care due to inattention to caseload standards. (*Id.* at 27.) Particularly in situations where treatment requires a caseworker's consent, a caseworker's inability to participate in the process can create unnecessary delay. (*See* White Rep. at 35.) Even a 2016 annual DCS review found that caseworkers could not adequately ensure that children's medical needs were met, specifying that "efforts to assess the physical health needs of children were inadequate in a third of the cases and efforts to assess dental health needs were inadequate in 43% of the cases." (Happach Rep. at 27.) Plaintiffs' expert Marci White also found that caseworkers' excessive caseloads are "a significant factor contributing to the failure to provide

necessary and timely behavioral health services to children in foster care." (White Rep. at 39.) These excessive caseloads prevent caseworkers from adequately performing critical roles in obtaining EPSDT services for foster children.

IV. Legal Standard for Class Certification

To obtain certification, Plaintiffs must demonstrate that:

> (1) their class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or 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.

Fed. R. Civ. P. 23(a). Upon satisfying these four requirements, the party seeking class certification must also satisfy one of the sub-sections of Rule 23(b)—in this case, Rule 23(b)(2), which requires 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[.]" A party seeking class certification must "'affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.'" *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) (emphasis omitted). However, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184,

1195 (2013). Here, substantial evidence demonstrates that plaintiffs are in compliance with Rule 23.[17]

V. The Medicaid Subclass Should Be Recertified

A. Plaintiffs Satisfy the Commonality Requirement

1. The Commonality Standard

The Medicaid Subclass satisfies the commonality requirement of Rule 23(a), which necessitates that the Subclass's claims must "depend upon a common contention" whose resolution "will resolve an issue that is central to the validity of each of the claims in one stroke." *Parsons*, 754 F.3d at 675 (internal citation and quotation marks omitted); *see* Fed. R. Civ. P. 23(a)(2). In its decision in this case, the Ninth Circuit held that certification of the Medicaid Subclass would be appropriate upon a showing that the Subclass is subject to policies or practices that allegedly "expose every child in the subclass to a significant risk of an imminent future Medicaid violation." (Ninth Circuit Opinion at 36.) The existence of such a policy or practice suffices to demonstrate commonality because whether the common policy or practice does in fact pose a significant risk of an imminent future Medicaid violation is a question whose answer will necessarily resolve all the Subclass's claims in one stroke. (*See id.* at 36 n.5.)

[17] In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court applied "significant proof" as one way to "bridg[e] the gap" in proving evidence of systemic discrimination. 131 S.Ct. at 2553. As the Ninth Circuit noted in *Parsons*, "[c]ourts have taken different views of whether *Wal-Mart's* significant proof standard applies to all class certification decisions or only to claims alleging systemic discrimination." 754 F.3d at 684 n.29. In any case, Plaintiffs have provided "significant proof" here of compliance with Rule 23. *See id.*

Here, there is substantial evidence that the Medicaid Subclass is subject to such practices, including:

- Defendants' practice of failing to provide an adequate array of behavioral health and therapeutic services for members of the Medicaid Subclass;
- Defendants' practice of failing to coordinate behavioral health services for members of the Medicaid Subclass;
- Defendants' practice of failing to provide Medicaid Subclass members with timely mental health services;
- Defendants' practice of failing to provide members of the Medicaid Subclass with timely well-child visits and immunizations; and
- Defendants' practice of ineffectively coordinating and monitoring physical and dental health care.

These practices create a significant uniform risk that Subclass members will not receive necessary physical, dental, and behavioral health services, in violation of the Medicaid statute. This Court already recognized statewide practices of Defendants that affect the provision of physical and dental EPSDT services to the Medicaid Subclass, including excessive DCS caseworker caseloads and ineffective coordination and monitoring of physical and dental services by DCS. (Class Certification Order at 17.) Furthermore, Plaintiffs' experts have offered considerable evidence that Defendants' practices put all Medicaid-eligible foster children at significant risk of being denied necessary physical and dental health care.

As illustrated above, Paul Zurek and Dr. Steven Blatt both found that sizeable numbers of foster children are not receiving mandated EPSDT examinations. (*See supra*

§ 3.)[18] Dr. Blatt concluded that DCS has consistent practices of failing to provide children with medical and dental assessments upon entering care, failing to provide regular and routine preventative care to children in care, and failing to ensure that medical and dental needs are met throughout children's time in care. (Blatt Rep. at 3.) These practices not only create a substantial risk of harm to the Medicaid Subclass, they also put each member of the Subclass at risk of not receiving appropriate and timely physical and dental care in violation of the EPSDT provision of the Medicaid statute.

With respect to behavioral health care, this Court also recognized several practices that detrimentally affect the provision of mental and behavioral services to children in foster care, including ineffective coordination of care between DCS and AHCCCS contractors, AHCCCS contractors' incomplete and out-of-date service plans, a shortage of therapeutic foster care placements and services maintained by AHCCCS and DCS, a shortage of residential treatment center placements maintained by AHCCCS, a shortage of behavioral health providers maintained by AHCCCS, excessive DCS caseworker caseloads, and DCS's overuse of congregate care for children with unmet mental health needs. (Class Certification Order at 17-18.)

Plaintiffs' expert Marci White concluded that Defendants' failure to ensure adequate behavioral health care services for foster children is "systemic" and that "[c]hildren in foster care simply do not get the behavioral health services they need."

[18] As this Court noted, while it is "not necessary to assess the merits of whether Defendants violated the Medicaid Act beyond the question of class certification," the expert reports "offer reliability and significant information to show state-wide practices exist." (Class Certification Order at 18 n.5.)

(White Rep. at 44.) "Defendants do not maintain the structure and systems essential to ensure that children in foster care receive the services they need when they need them. Defendants do not maintain a sufficient array of behavioral health services for these children. Defendants do not coordinate the provision of services." (*Id.*) Such practices create a common and significant risk to each member of the Subclass of a future Medicaid violation by failing to ensure the mental and behavioral health care required by the EPSDT provision.

B. Named Plaintiff B.K.'s Claims Are Typical

Under Rule 23(a)(3), a plaintiff may represent a class if her "claims or defenses" are "typical of the claims or defenses of the class." A named plaintiff's claims are typical if they are "reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons*, 754 F.3d at 685 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

B.K. is a 14-year-old girl who has regularly struggled to get access to adequate health care, including medically necessary EPSDT services. She suffers from significant psychiatric diagnoses and mental health needs of which Defendants have long been aware. (Azzi-Lessing Rep. at 1.) Plaintiffs' expert Lenette Azzi-Lessing reviewed the case file of Named Plaintiff B.K. and determined that Defendants caused harm to her by failing to provide needed mental, behavioral, and physical health care.

Due to B.K.'s difficult mental health needs, on multiple occasions, caretakers and clinicians recommended that she be placed in a therapeutic foster home, where foster parents receive additional training and supports to handle particularly troubling

behaviors. (*See* Azzi-Lessing Rep. at 11, 13, 18, 39.) Unfortunately, again and again, such placements were not available in a timely manner. (*Id.*) Ms. Azzi-Lessing concluded that this failure to provide needed care stemmed from Arizona's lack of "an adequate array of placement settings and behavioral health services for children in foster care" and that B.K.'s access to therapeutic programs was "inappropriately restricted." (*Id.* at 40; *see also* White Rep. at 43 (noting that as a result of Defendants' systemic failures to maintain a sufficient array of therapeutic placement alternatives, B.K. did not receive behavioral health services at the time she needed them).) B.K. was "placed in a series of placements that could not meet her needs," and "B.K. disrupted from each one, and each set of disrupted relationships fueled B.K.'s difficulties in the following placement." (Azzi-Lessing Rep. at 43.)

Ms. Azzi-Lessing also found that the State repeatedly failed to address B.K.'s multiple, severe psychiatric disorders. Though at times B.K. received behavioral coaching, counseling, and other services, "[t]here is no evidence that these services were well coordinated, meaning they were less likely to be effective, and may have, at times, worked at cross purposes." (*Id.* at 42-43.) B.K. also did not receive consistent psychotherapy, and group staff sometimes completely failed to transport her to her therapy appointments. (*Id.* at 53-55.) B.K.'s frequent placement changes exacerbated the issue, such that one therapist expressed concern that she kept "falling through the cracks." (*Id.* at 55.) One doctor noted the lack of coordination between B.K.'s foster parents, coaches, and her counselor, which he felt hampered the effectiveness of these services. (*Id.* at 54.) Defendants' failure to "maintain a sufficient array of behavioral

health services" and "coordinate the provision of services" resulted in B.K. not receiving the behavioral health care she needed. (*See* White Rep. at 44.)

Defendants also failed to "effectively manage and coordinate the delivery of physical . . . health care services" to B.K. (*See* Blatt Rep. at 2.) For example, it took over two and a half years to receive an evaluation by an orthopedist despite a limp, difficulty walking, pain, and falls. (Azzi-Lessing Rep. at 2, 57.) When she was finally brought to an orthopedist, B.K. was fitted with orthotic insoles to help her walk correctly. (*Id.* at 16.)

Evidence indicates that B.K.'s injuries stem from policies and practices of Defendants. Every member of the Medicaid Subclass is subject to the same policies and practices that result in delayed or inadequate access to necessary physical, dental, and behavioral health services. As detailed *supra* in Section 3, Plaintiffs' experts Dr. Steven Blatt and Paul Zurek each found that significant numbers of children in foster care do not receive necessary EPSDT physical and dental medical care and Plaintiffs' expert Marci White found that Defendants have failed to ensure that children in foster care receive necessary mental and behavioral health services. These reports indicate that the practices that led to failures in care for B.K. broadly reach the Medicaid Subclass as a whole, and subject each member of the Subclass to the same risk of inadequate and untimely care.[19]

[19] Additionally, the Ninth Circuit found that B.K.'s allegations of Defendants' failures to ensure adequate physical and mental health care and the medical and placement evidence in the record were, together, sufficient to support standing. (Ninth Circuit Opinion at 31.) The expanded evidence now in the record and detailed above clearly establishes that B.K. has experienced significant delays in access to health care, including in obtaining orthopedic services and appropriate therapeutic treatment. B.K. remains in care, and therefore there is "a sufficient likelihood that [s]he will again be wronged in a similar way." *See Haro v. Sebelius*, 747 F.3d 1099, 1108 (9th Cir. 2014) (quotation marks and

C. The Medicaid Subclass Satisfies the Numerosity and Adequacy of Representation Requirements and Rule 23(b)(2)

1. Plaintiffs Satisfy the Numerosity and Adequacy of Representation Requirements

This Court held that the Medicaid Subclass met the numerosity and adequacy of representation requirements of Rule 23(a) and the Ninth Circuit declined to address those findings on appeal. The Medicaid Subclass is clearly sufficiently numerous and the Named Plaintiff and counsel meet the adequacy of representation standard.

Numerosity is generally satisfied when a proposed class has 40 members. *See, e.g.*, *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010). Based on data made available during discovery, there are thousands of children in the Medicaid Subclass.[20] Thus, plainly, these classes are "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

The adequacy of representation requirement is satisfied where (1) the named plaintiffs and their counsel do not have any conflict of interest with other class members and (2) the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *Hanlon,* 150 F.3d at 1020. B.K. and her counsel "do not have conflicts of interest with other class members since [B.K.] seek[s] to improve structural deficiencies that affect children in DCS custody." (Class Certification Order at 20); s*ee*

---

citation omitted). This risk is redressable by an injunction ordering Directors to abate the policies and practices that have caused the inadequate access to health care. *See id*. at 1108-09 (finding that injunctive relief would redress the plaintiff's injury).

[20] (*See* Dkt. No. 238-1, Ex. 33 at DCS-00121026, CMDP QMPI Strategic Reporting Committee Quarterly Meeting Minutes, August 19, 2014.)

also Marisol A. v. Giuliani, 126 F.3d 372, 378 (2d Cir. 1997) (holding the requirement satisfied where plaintiffs sought "broad based relief which would require the child welfare system to dramatically improve the quality of all of its services").[21] There can be no doubt that B.K., her counsel, and the Next Friends have already and will continue to prosecute this action vigorously on behalf of each class.[22] Plaintiffs therefore meet the requirements of Rule 23(a)(1) and (a)(4).

2. Plaintiffs Satisfy Rule 23(b)(2)

This Court previously found that the Medicaid Subclass satisfies Rule 23(b)(2), which requires 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." (*See* Class Certification Order at 20-21 (citing Fed. R. Civ. P. 23(b)(2)).) This requirement is "'unquestionably satisfied'" when the putative class seeks "uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." (*Id.* at 20 (citing *Parsons*, 754 F.3d at 688).) The rule will "ordinarily be satisfied when plaintiffs have described the general contours of an injunction that would provide relief to the

[21] This Court has already determined that there is no conflict between the Next Friends and the members of the class. (Dkt. Nos. 156 and 162.)

[22] The Court has previously appointed Children's Rights, Perkins Coie LLP, and Arizona Center for Law in the Public Interest as class counsel in this action. (Class Certification Order at 22.) Plaintiffs' counsel continue to meet the requirements of Rule 23(g) and should be appointed again to represent the Medicaid Subclass. (*See* Dkt. No. 235, Declaration of Harry Frischer in Support of Plaintiffs' Motion for Class Certification, Nov. 29, 2016; Dkt. No. 236, Declaration of Joseph E. Mais in Support of Plaintiffs' Motion for Class Certification, Nov. 29, 2016; Dkt. No. 237, Declaration of Anne Ronan in Support of Plaintiffs' Motion for Class Certification, Nov. 28, 2016.)

whole class." *Parsons* at 689 n.35.

Here, Plaintiffs' claims "challenge Defendants' common set of policies and practices involving health care services and the placement of children in the foster care system." (Class Certification Order at 21.) Plaintiffs do not seek individual adjudications of each members' Medicaid claims, but rather "seek to remedy" the "'risk of exposure' created by subjecting children in foster care to [Defendants'] policies and practices." (*Id.*) Plaintiffs seek an injunction on behalf of the Medicaid Subclass to "develop and implement, as soon as practical, a plan to eliminate" the risk of violation of the Medicaid statute stemming from Defendants' inadequate policies and practices. *See Parsons*, 754 F.3d at 687 (internal quotations omitted) (holding that the district court did not abuse its discretion in determining that plaintiffs satisfied Rule 23(b)(2) where plaintiffs requested similar injunctive relief to reduce a risk of harm and specified issues that any plan should be required to address). Such classwide injunctive relief may include, among other requirements, an injunction to hire more caseworkers in order to "meet health care delivery deadlines in a manner that ensures the plaintiffs receive timely medical evaluations and care." (Ninth Circuit Opinion at 26.) Thus, Rule 23(b)(2) is satisfied.

VI. Conclusion

As stated above, the Court should certify the Medicaid Subclass.

Respectfully submitted this 31st day of July, 2019.

CHILDREN'S RIGHTS, INC.

By: s/ Aaron Finch
Harry Frischer
Aaron Finch
Daniele Gerard
88 Pine Street, Suite 800
New York, New York 10005

PERKINS COIE LLP
Joseph Mais
Shane Swindle
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
Daniel J. Adelman
Anne C. Ronan
514 West Roosevelt Street
Phoenix, Arizona 85003

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal to the following CM/ECF registrants:

Robert Ellman
rle@elgarizona.com
ELLMAN LAW GROUP LLC
3030 North Central Avenue, Suite 1110
Phoenix, Arizona 85012

Daniel P. Quigley
dquigley@CDQLaw.com
Cindy C. Albracht-Crogan
ccrogan@CDQLaw.com
Stacey F. Gottlieb
sgottlieb@CDQLaw.com
Lauren M. LaPrade
llprade@CDQLaw.com
COHEN DOWD QUIGLEY P.L.C.
The Camelback Esplanade One
2425 East Camelback Road, Ste. 1100
Phoenix, Arizona 85016

Attorneys for Defendant Gregory McKay

Logan T. Johnston
ltjohnston@live.com
JOHNSTON LAW OFFICES, P.L.C.
1402 E. Mescal Street
Phoenix, Arizona 85020

Daniel P. Struck
dstruck@strucklove.com
Nicholas D. Acedo
nacedo@strucklove.com
Timothy J. Bojanowski
tbojanowski@strucklove.com
Dana M. Giallonardo
dgiallonardo@strucklove.com
STRUCK LOVE BOJANOWSKI & ACEDO, P.L.C.
3100 W. Ray Road, Suite 300
Chandler, Arizona 85226-2473

Catherine D. Plumb
plumblawoffice@gmail.com
LAW OFFICES OF CATHERINE DODD PLUMB, P.L.C.
17225 N. 16th Place
Phoenix, Arizona 85022

Attorneys for Defendant Jami Snyder

s/ Aaron Finch