

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 00-2116-CIV-MORENO/DUBÉ

FOSTER CHILDREN BONNIE L.,  
by and through her next friend  
Donald Haddock, et. al.,

Plaintiffs,

v.

JEB BUSH, as Governor of the  
State of Florida, et. al.,

Defendants.

FILED BY [Signature]  
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CLARENCE HADDOCK  
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**REPORT AND RECOMMENDATION**

THIS CAUSE is before this Court on the Motion for Certification of a Class and a Subclass filed by the Plaintiffs (D.E. #50) pursuant to an Order of Reference entered by the Honorable Federico A. Moreno, United States District Judge. This Court has reviewed the motion, the file in this cause and has heard argument of counsel.

**I. DISCUSSION**

The present motion seeks to have this Court certify a Plaintiff class consisting of all children who are currently or who will be in the custody of the Defendants as an alleged or adjudicated dependent child. Additionally, the Plaintiffs seek the certification of a sub-class consisting of all children who are Black or are perceived by Defendants as being Black who are currently or who will be in the custody of Defendants as an alleged or adjudicated dependent child.

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### **A. The Allegations of the Amended Complaint**

The Amended Complaint in this case seeks declaratory and injunctive relief pursuant to 42 U.S.C. §1983 based on various alleged violations of the rights of the Plaintiffs who are children in the Defendants' custody. The Amended Complaint asserts causes of action for Substantive Due Process (Count 1); Procedural Due Process (Count 2); Violations of the First, Ninth and Fourteenth Amendments (Count 3); Violation of the Adoption and Safe Families Act (Count 4); Violation of the Early and Periodic Screening, Diagnosis and Treatment provisions of Medicaid (Count 5) and Violation of Title VI of the Civil Rights Act of 1964 (Count 6).

The allegations of the Amended Complaint are set out in detail in the Report and Recommendation entered by this Court on the Motions to Dismiss and are incorporated herein. Additionally, the Amended Complaint contains "Class Action Allegations" (¶¶117-137), which are set forth below.

#### **(1) The System-Wide Class**

The Amended Complaint alleges that every child in the Florida foster care system is directly affected by the failure of the Defendants to comply with accepted professional standards and exercise competent judgment. These children routinely have their federally protected rights deliberately disregarded and are likely to be harmed. (¶ 118). According to the Amended Complaint, the Plaintiffs are members of the class they seek to represent, and each Plaintiff and each putative class member (with one possible exception) is currently in the Defendants' custody. Additionally, the class is so numerous (between 15,000 to 18,000) as to make joinder of all class members impracticable, and there are questions of law or fact common to the Plaintiffs and the members of the class they seek to represent. (¶¶119-121).

Specifically, the Amended Complaint indicates that common questions of fact include whether Defendants fail to provide safe, stable and secure foster care as required by law; whether the Defendants fail to provide legally required services including medical and educational services, and whether the Defendants fail to promptly take steps to secure a permanent, legally stable family for the children. (¶ 122). The issues of law common to the Plaintiffs include whether the Defendants' actions and inactions violate rights secured by the First, Ninth and Fourteenth Amendments to the United States Constitution and whether the Defendants violate the Adoption Assistance and Safe Families Act and the EPSDT provisions of the Social Security Act. (¶ 123).

The Amended Complaint also alleges that the claims of the Plaintiffs are typical of the claims of other class members. Specifically, each Plaintiff and class member is in need of adequate and safe foster care, relies on the Defendants for the provision of all care, treatment and services and are harmed by the failure of the Defendants to meet their obligations. Additionally, the relief addressed to the putative class members' claims will also address the claims and injuries of the individually named Plaintiffs. (¶ 121, 124).

According to the Plaintiffs, they will fairly and adequately represent the interests of the class and since the Defendants have acted and refused to act on grounds generally applicable to all class members, final injunctive and declaratory relief is appropriate with respect to the class as a whole. (¶ 125-126).

## **(2) Subclass of Black Foster Children**

In addition to the main claim, Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina seek to certify a subclass "of all children who are Black or are perceived by Defendants as being Black and are or will be in the custody of Defendants as an alleged

or dependent child.” (§ 128). The allegations relating to the subclass incorporate the allegations related to the system wide class and also set out facts specific to the claims. The subclass is described as too numerous for joinder (over 6,000 children) and the Plaintiffs allege that there are common questions of law and fact. (§131-132).

The common factual questions include whether Black foster children are treated differently because of their race or color and whether the Defendants use racially neutral criteria or methods in administering foster care and adoption services which have a disparate impact on Black children or defeat or impair the objectives of foster care and adoption services for Black foster children. (§133). Common questions of law cited by the Plaintiffs include whether the treatment of Black foster children constitutes illegal discrimination in violation of Title VI and whether the racially neutral criteria or methods used by the Defendants illegally discriminate against Black foster children in violation of Title VI. (§ 134).

The Amended Complaint alleges that the legal claims and injuries suffered by the Plaintiffs are typical and representative of the putative subclass and the relief addressed to the subclass members claims and injuries will also address the claims and injuries of the Plaintiffs. (§135). Additionally, the Plaintiffs will fairly and adequately represent the interests of the subclass and since the Defendants have acted and refused to act on grounds generally applicable to all subclass members, final injunctive and declaratory relief is appropriate with respect to the subclass as a whole. (§ 136-137).

### **B. The Applicable Standard**

In order to allow for class certification, the moving party must show that the requirements of Rule 23(a), Federal Rules of Civil Procedure and one of the alternative requirements of Rule

23(b) have been met. Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997).

Rule 23(a) provides as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the 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.

Under Rule 23(b)(2), the following additional requirement must be met to maintain a class action:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

The four prerequisites to class certification under Rule 23(a) are commonly referred to as “numerosity, commonality, typicality and adequacy of representation.” Prado-Steiman v. Bush, 221 F.3d 1266, 1278 (11th Cir. 2000). The requirements of commonality and typicality both focus on the issue of whether there is a sufficient connection between the legal claims brought by the named class representatives and those of the individual class members. Id. In order to satisfy the commonality requirement, the class action must involve issues that are susceptible to class wide proof. Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001). The party seeking class certification can meet the requirement of typicality by showing “a strong similarity of legal theories... despite substantial factual differences.” Prado-Steiman, 221 F.3d at 1279.n. 14, quoting, Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985).

Prior to the certification of a class, “the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.” Prado-Steiman, 221 F.3d

at 1279. In making this determination, “each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.” *Id.* at 1280, quoting, *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987). Furthermore, in making the certification determination, the court should insure that it does not certify a class which overlaps with certified classes in other related pending litigation. *Id.* at 1282.

### **C. The Motion for Certification**

The arguments raised by the Defendants in opposition to the motion for class certification focus on standing and the typicality and commonality elements addressed above. Specifically, the Defendants contend that the class certification sought in this case should be denied since many of the claims are barred by prior and pending litigation and that the named Plaintiffs lack standing to bring many of the claims asserted.

The Defendants rely on the presence of three earlier filed suits to support their argument that the class certification sought by the Plaintiffs should be denied. The three cases, *M.E. v. Chiles*, 90-1008-CIV-MOORE; *A-F v. Chiles*, 90-2416-CIV-KEHOE and *Ward v. Kearney*, 98-7137-CIV-MORENO, all dealt with complaints brought by children in the custody of the Department, and each sought specific remedies based on alleged wrongs.

In their supplemental filing (D.E. #163 at p. 3), the Plaintiffs concede that the main class and sub-class should be certified absent the members of the *Ward* class (children in District 10), thus, the impact of this case does not have to be addressed.

The *A-F* case resulted in a settlement and a final order of dismissal by Judge Kehoe in July, 1995. The Defendants contend that the claims of any child in state custody prior to the dismissal are barred by the prior case, and note that the allegations of the Amended Complaint do not clearly show

that the claims now brought by these children arose prior to the dismissal. The Plaintiffs counter that the settlement of A-F specifically contemplated bringing future actions for new claims such as the relief sought in the Amended Complaint, which focus on injuries which the children are experiencing now or under the threat of experiencing in the future.

A review of the record before this Court shows that the settlement reached in A-F would bar any claim which arose prior to July, 1995, but would not preclude the certification of a class including members who were in custody prior to that date, but whose claims arose after that date. The allegations of the Amended Complaint assert on-going violations, and to the extent such violations occurred after July, 1995, they should be properly included in this action.

The Plaintiffs in M.E., have certified a class consisting of "all children who are now or in the future will be in the legal or physical custody of the State of Florida, including children who are dependent or delinquent, whom the State knows or should know have a need for mental health services or developmental services." While there are some similarities between the relief sought in M.E. and that sought in the present case, the relief sought here is clearly beyond the scope of mental health services. Thus, there should be no blanket preclusion of class certification based on M.E. However, it does appear that there may be individual cases where the relief sought would be available in the M.E. action. Therefore, any claims for mental health and developmental services should be addressed in M.E. rather than in the present case.

The Defendants also assert that many of the class members and many of the claims should be excluded due to lack of standing. This argument is based on the Defendants' underlying contention that the claims should be looked at district by district rather than statewide. However, the Amended Complaint in this case clearly alleges that the problems sought to be remedied are

system-wide and are the result of policies and procedures administered on a statewide level by state officials. These allegations are sufficient to allow for a state wide class, thus vitiating the standing argument.

The Defendants also raise an argument relating to the need for individualized factual proof for each of the claims. However, this Court finds that the factual distinctions do not preclude a finding that the requirements for class certification has been met. In the present case, the injuries are claimed to have been brought about by practices which impact all of the children and the requested relief is applicable to the named Plaintiffs and the putative class members. This allows for a finding that the requirements of commonality and typicality have been met.

Accordingly, based on the foregoing, it is the recommendation of this Court that the following class be certified in this cause:

All children who are currently or will be in the custody of the Florida Department of Children and Families as an alleged or adjudicated dependent child, **excluding** the following: (a) children who reside in Broward/District 10; (b) children who were in the custody of the Department prior to July 24, 1995, but only for claims which arose prior to that date and (c) any claims for the failure to provide mental health and/or developmental services.

Additionally, this Court finds that the Plaintiffs have shown the necessary elements for the certification of a subclass. The arguments raised by the Defendants directed toward the likelihood of success of the claim are not determinative of whether the class should be certified. See, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); Walco Investments v. Thenen, 168 F.R.D. 315, 329 (S.D. Fla. 1996). Accordingly, this Court recommends that the following subclass be certified in this cause:

All children who are Black or identified by the Defendants as Black, who are currently, or will be in the custody of the Florida Department



of Children and Families as an alleged or adjudicated dependent child, **excluding** the following: (a) children who reside in Broward/District 10; (b) children who were in the custody of the Department prior to July 24, 1995, but only for claims which arose prior to that date and (c) any claims for the failure to provide mental health and/or developmental services.

## **II. CONCLUSION AND RECOMMENDATION**

Based on the foregoing, it is the recommendation of this Court that the Motion for Certification of a Class and a Subclass (D.E. #50) be **GRANTED in part and DENIED in part** as set out above.

Pursuant to Local Magistrate Rule 4(b), the parties have 10 days from service of this Report and Recommendation to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. Loconte v. Dugger, 847 F.2d 745 (11<sup>th</sup> Cir.1988), cert. denied, 488 U.S. 958 (1988); R.T.C. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11<sup>th</sup> Cir. 1993).

**DONE AND ORDERED** this 9<sup>th</sup> day of May, 2001.

  
ROBERT L. DUBÉ  
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Federico A. Moreno  
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