

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWAYNE B., by his next friend, John
Stempfle; et al.,

Case No. 06-13548

Plaintiffs,

Honorable Nancy G. Edmunds

v.

JENNIFER GRANHOLM, et al.,

Defendants.

**ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND
APPOINTMENT OF CLASS COUNSEL [2]**

This lawsuit seeks class-wide declaratory and injunctive relief to remedy alleged ongoing failures of Michigan's Governor, the Director of Michigan's Department of Human Services ("DHS"), the Director of DHS Operations, and the Director of DHS Children's Services (collectively "Defendants") to care for and protect Michigan's foster children and to provide them and their families the child welfare services required by the United States Constitution and federal law. This matter is before the Court on Plaintiffs (hereinafter "Plaintiff Children")'s motion for class certification and appointment of class counsel. Plaintiff Children ask this Court to certify a class defined as "all children who are now or will be in the foster care custody of Michigan's Department of Human Services ("DHS") in in-home or out-of-home placements," pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), to approve the named Plaintiffs as representative Plaintiff Children, and to appoint named Plaintiffs' counsel as class counsel. Because Plaintiff Children have satisfied the

requirements of Rules 23(a) and 23(b)(2), this Court grants Plaintiffs' motion for class certification and appointment of class counsel.

I. Background

Plaintiff Children allege that Michigan, with nearly 19,000 children in foster care custody, has the seventh largest foster care population in the nation. As their legal custodians, Plaintiff Children assert, Defendants are required by the First, Ninth, and Fourteenth Amendments to the United States Constitution and federal law¹ to protect their safety and well-being and to find them permanent homes. Plaintiff Children also seek to enforce their federal procedural due process rights to the benefits of certain entitlements conferred by the Adoption Assistance Act and certain Michigan statutory provisions.

Plaintiff Children further allege that Defendants' conduct with respect to each named Plaintiff reflects systematic violations of some or all of the federal constitutional and statutory rights of Michigan's foster children. (See Plfs.' Br. at 2-3, providing examples.) Moreover, it is alleged that each named Plaintiff has suffered and continues to suffer harm as a result of multiple constitutional deprivations and statutory violations stemming from a foster care system that is poorly resourced and managed. Collectively, Plaintiff Children assert, the named Plaintiffs' experiences illustrate and represent the profound systemic failings of Michigan's foster care system and the ongoing harms suffered by Plaintiff Children while in Defendants' care.

¹Specifically, the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 620-29(i) and 670-679(b) (hereinafter "Adoption Assistance Act"), and regulations promulgated under the Adoption Assistance Act.

Plaintiff Children's complaint alleges that the constitutional deprivations and statutory violations that each named Plaintiff has suffered, and continues to suffer, are typical of the harms being inflicted upon thousands of foster children throughout Michigan. These claims are based upon allegations that Defendants (1) fail to perform caseworker visits essential for the safety of foster care children, (2) place children in unlicensed kinship homes, (3) maintain an inadequate number and array of foster care placements to meet Plaintiff Children's needs, (4) jail foster care children who run from inappropriate placements, (5) fail to provide adequate foster care maintenance payments, (6) move children repeatedly, undermining their stability and security, (7) cause children in DHS custody to languish without adequate permanency services, (8) fail to deliver adequate medical and educational services to children in DHS custody, and (9) fail to prepare teens in foster care for life as adults. (Pls.' Br. at 4-5.) Plaintiff Children's action seeks to stop these and other systemic legal violations and the harms to foster children that are directly caused by Defendants. Finally, because these violations affect all class members, Plaintiff Children seek system-wide declaratory and injunctive relief to stop these violations and to ensure Defendants' compliance with their constitutional and federal statutory obligations.

II. Standard of Review

Plaintiff Children bear the burden of showing that Rule 23's requirements for class certification have been satisfied. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996). As observed by the Sixth Circuit, "[t]he district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based upon the particular facts of the case,

should not be overturned absent a showing of abuse of discretion.” *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

When deciding a motion for class certification, courts do not examine the merits of the plaintiffs’ underlying claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). “A Rule 23 determination is wholly procedural and has nothing to do with whether a plaintiff will ultimately prevail on the substantive merits of its claim.” *Little Caesar Enter. v. Smith*, 172 F.R.D. 236, 241 (E.D. Mich. 1997). Courts also assume that the substantive allegations of the complaint are true and that cognizable claims are stated. *Eisen*, 417 U.S. at 178. “[W]hen a court is in doubt as to whether to certify a class action, it should err in favor of allowing a class.” *Little Caesar*, 172 F.R.D. at 241.

III. Analysis

A. Rule 23(a)'s Requirements for Class Certification Are Satisfied

Federal Rule of Civil Procedure 23(a) contains four prerequisites that must be met before a court may certify a class. These are known as the numerosity, commonality, typicality, and adequacy requirements. The Court considers each in turn and concludes that Plaintiff Children have shown that all four requirements of Rule 23(a) are satisfied.

1. Numerosity

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). This is not a difficult burden to satisfy. Plaintiffs need not prove the exact size of the proposed class, but rather must demonstrate only that the number is sufficiently large so as to make joinder impracticable. “When class size reaches substantial proportions . . . , the impracticability requirement is usually satisfied by numbers alone. *Am. Sys., Inc.*, 75 F.3d at 1079. See also *Bacon v. Honda of Am. Mfg.*,

Inc., 370 F.3d 565, 570 (6th Cir. 2004) (observing that the “sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1)”), *cert denied*, 543 U.S. 1151 (2005).

In this case, Plaintiff Children propose a class of 19,000 children who are now or will be in the foster care custody of Michigan’s DHS in in-home or out-of-home placements. This is a number well beyond that where joinder would be practical. Accordingly, the numerosity requirement of Rule 23(a) is satisfied. See *Bacon*, 370 F.3d at 570. Defendants’ arguments to the contrary impermissibly examine the merits of the plaintiffs’ underlying claims. See *Eisen*, 417 U.S. at 177.

2. Commonality

The commonality prerequisite of Rule 23(a)(2), requiring that “there be questions of law or fact common to the class,” is also satisfied. All that is required is that Plaintiff Children show that there are some common questions; not a predominance of common questions as required under Rule 23(b)(3). It is “qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class.” *In re Am. Sys.*, 75 F.3d at 1080 (internal quotes and citation omitted).

Here, Plaintiff Children allege that systemic deficiencies in Defendants’ foster care system – including a severe shortage of foster homes, dangerously high caseloads, poor monitoring of child safety, poor planning and services to move children into permanent homes, inadequate payments to foster care providers and fiscal waste – have resulted and continue to result in severe harms to Plaintiff Class members and constitute violations of the Class members’ federal constitutional and statutory rights. A few of the questions of fact common to all Class members include whether Defendants failed to provide Plaintiff

Children with (1) safe, appropriate and stable foster care placements as required by law and reasonable professional standards, (2) services necessary to keep them safe and properly cared for, and to prevent them from deteriorating physically, psychologically, or otherwise while in state custody as required by law and reasonable professional standards, (3) timely and appropriate services necessary to ensure that they are either safely reunited with their families or promptly freed for adoption and placed in a permanent home as required by law and reasonable professional standards, and (4) supports necessary to maintain family relationships, including the provision of parent and sibling visits as required by law and reasonable professional standards. (See Compl. ¶ 82.)

A few of the questions of law common to all Class members include whether Defendants' actions and inactions violate Plaintiff Children's (1) right to be free from harm as guaranteed under the Substantive Due Process Clause of the Fourteenth Amendment, (2) right to mandated foster care and adoption services and foster care maintenance payments as provided under the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, (3) rights guaranteed under the First, Ninth, and Fourteenth Amendments, (4) rights to procedural due process guaranteed under the Fourteenth Amendment, and (5) rights, as third-party beneficiaries, to the Title IV-E and Title IV-B state plans entered into between the state of Michigan and the federal government. (See Compl. ¶ 83.)

Similar claims, questions of fact and law were at issue in *Baby Neal v. Casey*, 43 F.3d 48 (3d Cir. 1994), where foster children in Philadelphia alleged systemic deficiencies that they claimed interfered with the provision of child welfare services as required by the Constitution, federal, and state law. The Court in *Baby Neal* observed that “[c]hallenges

to a program's compliance with the mandates of its enabling legislation, even where plaintiff-beneficiaries are differently impacted by the violations, have satisfied the commonality requirement." *Id.* at 56. It further observed that, because the plaintiff class was seeking injunctive relief as opposed to a damage award, the case did not "involve an individualized inquiry" and rather "present[ed] common questions satisfying Rule 23(a)(2)." *Id.* at 57 (internal quote and citation omitted). "Indeed, (b)(2) classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct." *Id.* (citing cases).

Rejecting arguments similar to those raised by Defendants here, the *Baby Neal* Court observed that "[i]nsofar as the children challenge the scheme for the provision of child welfare services, their claims share a common legal basis." *Id.* at 61. It then concluded that "the plaintiffs' attack on the DHS's systemic deficiencies in providing legally mandated child care services" was "a sufficiently common legal basis to support class certification here." *Id.* "The fact that all plaintiffs are subject to the risk of deprivation of services to which they are currently entitled (or which they may at some point in the future require) suffices to support their common claim against DHS." The same analysis and result apply here. Factual and legal commonality is inherent in cases such as this which present a class challenge to a common course of conduct by a unitary executive agency. To the extent the decision in *Carson P. v. Heineman*, Case No. 05-3241 (D. Neb. Jan. 19, 2007), holds otherwise, this Court finds that the decision, based on its adoption and approval of a magistrate judge's report and recommendation, unpersuasive.

3. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). As the Sixth Circuit observed in *In re American Medical Systems*, "a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys.*, 75 F.3d at 1082 (internal quote and citation omitted). "A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." *Id.* (citing 1 *Newberg on Class Actions*, § 3-13, at 3-75). Here, the named Plaintiffs advance the same legal and remedial theories as the putative class. Again, the *Baby Neal* decision is illustrative. There, the court reasoned that because "the common theme of attacking DHS's systemwide failure to comply with its legal mandates is equally central to the claims of the named plaintiffs as it is to the claims of the absentees," the typicality requirement of Rule 23(a) is satisfied. *Baby Neal*, 43 F.3d at 63. The *Baby Neal* Court further observed, "[i]t bears remembering that the plaintiffs here seek only injunctive and declaratory relief; there are no other claims that could compromise the named plaintiffs' pursuit of the class claims." *Id.* "Because there are no individual claims as such, the differences among the plaintiffs do not affect the central claim that DHS violates a variety of the children's (putative class members') constitutional and statutory rights by failing to provide mandated welfare services." *Id.* The Court further observed that, similar to most cases seeking class certification under Rule 23(b)(2) as opposed to Rule 23(b)(3), the "dangers that the typicality requirement was intended to avoid" are absent; i.e., "that the named plaintiffs have unique interests that might motivate

them to litigate against or settle with the defendants in a way that prejudices the absentees." *Id.* at 63. For the same reasons asserted in *Baby Neal*, this Court concludes that Plaintiff Children have satisfied the typicality requirement.

Defendants' arguments against typicality are rejected. Defendants assert that "the vast majority of the putative class receives appropriate services, treatment, and placement." (Defs.' Resp. at 11.) This argument ignores that Plaintiff Children's common theme of attacking DHS's systemwide failure to comply with its legal mandates is equally central to the claims of the named plaintiffs as it is to the claims of the absent class members. *See Baby Neal*, 43 F.3d at 63 (finding the typicality requirement met after observing that "[a]t any one time, the plaintiffs do not suffer from precisely the same deficiency, but they are all alleged victims of the systemic failures"; "they each potentially face all of the system's deficiencies.").

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is essential to due process as a final judgment is binding on all class members. *See Hansberry v. Lee*, 311 U.S. 32, 42 (1940). To satisfy this requirement, Plaintiff Children must show that: (1) the representatives' interests do not conflict with the class members' interests, and (2) the representatives and their attorneys are able to prosecute the action vigorously.

The named Plaintiffs in this action satisfy the adequacy requirement because their interests do not conflict with those of absent class members. They seek broad declaratory and injunctive relief addressing systemic problems in a unitary executive agency that will provide all Class members with the protection, care, treatment, and services to which all

are equally entitled under the Constitution and federal law. All Class members share the same federal statutory and constitutional rights and a common interest in a child welfare system that meets its legal obligations to keep them safe from harm. Appropriate remedial relief will ensure that Defendants meet their legal obligations to all Class members in all counties of the State, irrespective of relative costs. This Court is persuaded that Plaintiff Children satisfy the no-conflict portion of the adequacy requirement and rejects Defendants' arguments to the contrary.

Moreover, Plaintiff Children have retained experienced and competent counsel to protect the interests of the Class. Plaintiff Children are represented by attorneys associated with both the advocacy organization, Children's Rights, and the law firm of Dykema Gossett PLLC. Children's Rights is a privately funded, non-profit organization with extensive experience in complex class action litigation involving child welfare systems. Attorneys at Children's Rights have represented foster children in class actions around the nation. (See Pls.' Br. at 16, n.7 citing cases.) This Court is convinced that Plaintiff Children's counsel are able to prosecute the action vigorously. Defendants' arguments to the contrary are rejected.

Having determined that Plaintiff Children satisfy all the requirements under Rule 23(a), the Court now considers whether the requirements of Rule 23(b)(2) are satisfied.

B. Class Certification is Warranted Under Rule 23(b)(2)

Rule 23(b)(2) requires that the opposing party's conduct or refusal to act must be "generally applicable" to the class, "thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P.

23(b)(2). A putative class, such as the Class here, that seeks declaratory and injunctive relief on grounds that are generally applicable to the Class, typifies the circumstances that satisfy Rule 23(b)(2). See, e.g., *Baby Neal*, 43 F.3d at 64 (observing that "[a]n order forcing the DHS to comply with their statutory and constitutional mandates would constitute relief generally applicable to the entire putative class," and concluding that "the violations alleged here are precisely the kinds targeted by Rule 23(b)(2).").

As discussed above, Plaintiffs seek relief from Defendants' systemic failures to provide and maintain the legally mandated services, processes, and placements critical to the safety and well-being of putative Class members in Michigan's foster care system. These failures generally affect all Class members, and the declaratory and injunctive relief sought here is intended to provide class-wide relief. Accordingly, this Court concludes that class certification is warranted under Rule 23(b)(2).

C. Appointment of Class Counsel

Rule 23(g) provides that "[a]n attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making its appointment, the Court considers: (1) "the work counsel has done in identifying or investigating potential claims in the action," (2) "counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the present action," (3) "counsel's knowledge of the applicable law," and (4) "the resources counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(C).

This Court concludes that Plaintiff Children's counsel will fairly and adequately represent the interests of the putative Class. Plaintiffs' counsel have identified and thoroughly investigated all claims in this action over a two-year period; are competent and

experienced in litigating complex class actions and similar claims; have comprehensive knowledge of the applicable law; and have committed sufficient resources to the prosecution of this matter in a thorough and expeditious manner.

III. Conclusion

For the above-stated reasons, Plaintiff Children's motion for class certification and appointment of class counsel is GRANTED.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: February 15, 2007

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on February 15, 2007, by electronic and/or ordinary mail.

s/Carol A. Hemeyer
Case Manager