UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No.: 12-60460-CIV-ZLOCH/HUNT

A.R., by and through her next friend,
SUSAN ROOT, *et al.*,

Plaintiffs,

v.

ELIZABETH DUDEK, in her official capacity as Secretary of the Agency for Health Care Administration, *et al.*,

Defendants.
_____/

UNITED STATES OF AMERICA

Plaintiff,

v.

STATE OF FLORIDA

Defendant.
_____/

REPORT AND RECOMMENDATION

This cause is before this Court on Plaintiffs' Second Renewed Motion for Class Certification, filed on April 3, 2015. ECF No. 329. On October 9, 2014, the Honorable William J. Zloch referred to the undersigned United States Magistrate Judge all pretrial motions for report and recommendation or disposition. ECF No. 275; see also 28

U.S.C.A. § 636(b); S.D. Fla. L.R., Mag. R. 1. On July 14, 2015, the undersigned held a hearing on the motion for class certification. ECF No. 386. Having heard oral argument and having carefully reviewed Plaintiffs' Motion, the Response and Reply thereto, the entire case file, and the applicable law, and being otherwise duly advised in the premises, it is hereby recommended that Plaintiffs' Renewed Motion for Class Certification be DENIED, as more fully set forth herein.

I. BACKGROUND

In this putative class action, Plaintiffs—A.R., C.V., M.D., C.M., B.M., A.G., T.H., T.F., L.J., and A.C[1]—are children who have been diagnosed as medically fragile[2] or children who need skilled care services[3] through Florida's Medicaid program. On March

[1] Since the commencement of this action, Plaintiffs T.F., L.J., and A.C. have died. See ECF Nos. 147, 245, 260.

[2] "Medically Fragile" means a person

> who is medically complex and whose medical condition is of such a nature that he is technologically dependent, requiring medical apparatus or procedures to sustain life, e.g., requires total parental nutrition (TPN), is ventilator dependent, or is dependent on a heightened level of medical supervision to sustain life, and without such services is likely to expire without warning.

Fla. Admin. Code. R. 59G-1.010(165). "'Medically Complex" means that a person has chronic debilitating diseases or conditions of one or more physiological or organ systems that generally make the person dependent upon 24-hour-per-day medical, nursing, or health supervision or intervention." Id. R. 59G-1.010 (164).

[3] Florida Administrative Code Rule 59G-4.290(3) provides, in part, as follows:

> (3) Skilled Services Criteria.
>
> > (a) To be classified as requiring skilled nursing or skilled rehabilitative services in the community or in a nursing facility, the recipient must require the type of medical, nursing or rehabilitative services specified in this subsection.
> >
> > (b) Skilled Nursing. To be classified as skilled nursing service, the service must meet all of the following conditions:
> >
> > 1. Ordered by and remain under the supervision of a physician;
> > 2. Sufficiently medically complex to require supervision, assessment, planning, or intervention by a registered nurse[;]
> > 3. Required to be performed by, or under the direct supervision of, a registered nurse or other health care professionals for safe and effective

13, 2012, Plaintiffs filed the instant action against Defendants Elizabeth Dudek, in her official capacity as Secretary for the Agency for Health Care Administration ("AHCA");[4] Harry Frank Farmer, Jr., in his official capacity as the State Surgeon General and Secretary of the Florida Department of Health ("FDOH");[5] Kristina Wiggins, in her official capacity as Deputy Secretary of the FDOH and Director of Children's Medical Services;[6] and eQHealth Solutions Inc. ("eQHealth").[7] On August 23, 2012, Plaintiffs filed their Second Amended Complaint (hereinafter, the "Complaint"), which is the operative pleading in this case. ECF No. 62. Plaintiffs seek injunctive and declaratory relief against Defendants.

At the time of the Complaint A.C., A.R., C.V., M.D., C.M., B.M., and T.F. were "at risk" Plaintiffs who live at home but were at risk of unnecessary institutionalization in nursing facilities. ECF No. 62 at 23–32. T.H., L.J., and A.G. were institutionalized Plaintiffs who had been placed in nursing facilities. ECF No. 62 at 18–22. However, no Plaintiffs are currently institutionalized. ECF No. 237 at 13.

> performance;
> 4. Required on a daily basis;
> 5. Reasonable and necessary to the treatment of a specific documented illness or injury; and
> 6. Consistent with the nature and severity of the individual's condition or the disease state or stage.

Fla. Admin. Code R. 59G-4.290(3)(a)–(b).

[4] The AHCA is designated as "the single state agency authorized to make payments for medical assistance and related services under Title XIX of the Social Security Act." § 409.902, Fla. Stat. (2014).

[5] John Armstrong, M.D., is the current State Surgeon General and Secretary of the FDOH.

[6] Cassandra G. Pasley is the current Director of Children's Medical Services.

[7] eQhealth makes medical-necessity determinations on behalf of AHCA and acts as a witness for AHCA in all fair-hearing proceedings resulting from decisions and actions made by eQHealth. On January 30, 2015, Defendant eQHealth Solutions Inc. and Plaintiffs filed a Joint Stipulation of Dismissal with Prejudice, and this Court entered a subsequent Final Order of Dismissal as to eQHealth. ECF No. 321–22.

The Complaint alleges that Defendants are denying Medicaid services to Plaintiffs, including private-duty nursing ("PDN") services, due to the adoption of "uniform policies, practices, and regulations to reduce [PDN] services." ECF No. 62 at ¶¶ 18–19. Plaintiffs further claim that Defendants "failed and continue to fail to provide medically necessary services in home and community settings to Medicaid recipient children in Florida." ECF No. 62 at ¶ 20.

Based on the pleaded facts, Plaintiffs ask this Court to declare that Defendants' policies, regulations, actions, and omissions are unnecessarily institutionalizing Plaintiffs and class members or putting Plaintiffs and class members at risk of being placed into segregated facilities, in violation of Title II of The Americans With Disabilities Act, 42 U.S.C. §§ 12131–12165 (the "ADA"); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (the "Rehabilitation Act"); The Medicaid Act, 42 U.S.C. §§ 1396–1396v ("Medicaid"); The Nursing Home Reform Amendments to the Medicaid Act, 42 U.S.C. § 1396r (the "NHRA"); Early and Periodic Screening Diagnostic, and Treatment Services, 42 U.S.C. § 1396d(r) ("EPSDT Provisions"); and 42 U.S.C. § 1983. ECF No. 62 at ¶ 21. Plaintiffs also seek a permanent injunction requiring Defendants to (1) "stop segregation of medically fragile children who are unnecessarily institutionalized in nursing homes and to provide integrated community services;" and (2) "perform adequate Level I and Level II PASSR reviews to institutionalized children and to provide such services as determined by the Level II screening[.]" ECF No. 62 at 46. Furthermore, Plaintiffs ask this Court to order Defendants to (1) "provide [PDN] services that will allow the Plaintiffs and Plaintiff class members to live in their homes and communities;" and (2) "cease the practice of denying or reducing Plaintiff and Plaintiff

[c]lass members' services at recertification where there has been no change in the medical necessity of such services[.]"[8] ECF No. 62 at 46. Each Medicaid recipient is provided services for a specific certification period. ECF No. 62 at ¶ 84. Services can be approved for up to 180 days, and the review process occurs at least every six months. ECF No. 62 at ¶ 85.

The Complaint sets forth allegations of an "Institutionalized Plaintiffs and Sub Class," ECF No. 62 at 3, and an "At-Risk Plaintiffs and Sub-Class," ECF No. 62 at 3. However, on November 27, 2012, Plaintiffs filed their first Motion for Class Certification seeking certification of the following class: "All current and future Medicaid recipients in Florida under the age of 21, who are (1) institutionalized in nursing facilities, or (2) medically complex or fragile and at risk of institutionalization in nursing facilities." ECF No. 95 at 1. Plaintiffs submitted forty-four exhibits in support of their motion, consisting mostly of affidavits from parents or guardians of medically fragile children whose services have been reduced. ECF No. 95–96. After a hearing on the motion, this Court denied the motion without prejudice to refile after class-specific discovery was conducted. ECF No. 203. This Court determined that the record was not sufficiently developed for this Court to be able to discern whether this case is premised on systemic policy issues or individualized errors in the application of legal policies. ECF No. 203 at 5.

On February 19, 2013, Defendants filed a motion to dismiss the Complaint arguing that Plaintiffs' claims were moot because Defendants changed the challenged

[8] Plaintiffs also sought an "[a]ward of compensatory services . . . to ameliorate or remediate the conditions resulting from the Defendants' failure to provide the medically necessary services," as well as attorneys' fees and costs. ECF No. 62 at 46. However, the undersigned recently recommended, by separate Report and Recommendation, that Plaintiffs should not be able to obtain "compensatory services" because there is no basis in law for this relief under Plaintiffs' causes of action.

policies. ECF No. 117. After full briefing on the issues, this Court denied Defendants' motion for two reasons. ECF No. 175. First, this Court held that most of the changes on which Defendants relied were not final because the changes were still subject to an objection period before becoming finalized. ECF No. 175 at 14–15. Second, this Court determined that notwithstanding any changes that may become finalized, Defendants had not cured at least one important provision that was relevant to Plaintiffs' case. Specifically, this Court held that the State had not changed the regulatory definition of "medically necessary" or "medical necessity" as prescribed in Rule 59G-1.010(166)(a) of the Florida Administrative Code. ECF No. 175 at 19.

On July 22, 2013, the United States filed an action against the State of Florida—challenging the same State policies and procedures—seeking injunctive and declaratory relief, as well as compensatory damages.[9] United States v. Florida, No. 13-CV-61576, ECF No. 1. On December 6, 2013, this Court consolidated Plaintiffs' action with the United States' case because both actions involved common questions of law and fact. See ECF No. 214.

On December 19, 2013, Plaintiffs filed a Renewed Motion for Class Certification, including thirty exhibits. ECF No. 220. On March 3, 2014, in response to Plaintiffs' Renewed Motion for Class Certification, Defendants also renewed their motion to dismiss Plaintiffs' Complaint. ECF No. 237. Defendants contended, in part, that formerly pending rule changes had finalized, which mooted any of Plaintiffs' claims that were premised on the prior rules. ECF No. 237. Plaintiffs argued, *inter alia*, that their claims were still justiciable because Defendants had failed to change the definition of

[9] The United States' claim against the State is based solely on an alleged violation of Title II of the ADA.

"medically necessary" or "medical necessity," as addressed in this Court's prior ruling.

On September 9, 2014, this Court denied the pending Renewed Motion for Class Certification, again without prejudice, so that this Court could address the jurisdictional issues raised in Defendants' renewed motion to dismiss. ECF No. 263.

On December 29, 2014, this Court adopted the undersigned's Report and Recommendation on Defendants' motion to dismiss, see ECF No. 310, wherein the undersigned concluded, in part, as follows:

> This Court expressly stated that Plaintiffs' claims were not moot because Defendants had not changed the challenged definition that permeates Plaintiffs' claims. Thus, even if it is presumed that Defendants would not return the now finalized rules to their prior language and applications, Defendants' purported termination of the offending conduct is still ambiguous because the challenged definition remains unchanged.

ECF No. 287 at 26.

On April 3, 2015, Plaintiffs filed their Second Renewed Motion for Class Certification, ECF No. 329, and a hearing was held on July 14, 2015, ECF No. 386. At the hearing, Plaintiffs' counsel made arguments, but relied on their attached exhibits in support of their request for class certification and did not attempt to present more evidence.

II. ANALYSIS

In the prior Report and Recommendation on Defendants' motion to dismiss, the undersigned previously set forth the legal landscape applicable to this case, including discussion of the Supreme Court case of Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), which addressed Title II claims in the context of two mentally retarded women who were unnecessarily institutionalized by the State of Georgia. See ECF No. 287 at 7–10. The undersigned hereby incorporates the prior Report and Recommendation by

reference and will focus this Report and Recommendation on the class-action analysis.

A. Class-Action Standard

This Court "has broad discretion in determining whether to certify a class." Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1569 (11th Cir. 1992) (citing Coon v. Ga. Pac. Co., 829 F.2d 1563, 1566 (11th Cir. 1987)). "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" Wal–Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)). Federal Rule of Civil Procedure 23 guides the court in deciding whether class certification is appropriate. Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1187 (11th Cir. 2003). "Before a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is 'adequately defined and clearly ascertainable.'" Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012) (quoting DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970)[10]). "After a court determines that a class is ascertainable, it then considers whether the Rule 23 factors are met." Bush v. Calloway Consolidated Grp. River City, Inc., No. 3:10-cv-841-J-37MCR, 2012 WL 1016871, at *3 (M.D. Fla. Mar. 26, 2012).

Federal Rule of Civil Procedure 23(a) permits the certification of a class when a class representative is part of the class and possesses the same interest and suffered the same injury as the proposed class members. Wal–Mart, 131 S. Ct. at 2250. "The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the

[10] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

named plaintiff's claims." Id. (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)) (internal quotation marks omitted). Rule 23(a) sets forth the following prerequisites:

> One or more members of a class may sue or be sued as representative parties on behalf of all members 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;
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Once a party establishes the four prerequisites, a class action may be pursued when, *inter alia*, "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." Fed. R. Civ. P. 23(b)(2); see also Heaven v. Trust Co. Bank, 118 F.3d 735, 737 (11th Cir. 1997) ("An action may be maintained as a class action only if all four prerequisites of Rule 23(a) are satisfied and, in addition, the requirements of one of the three subsections of Rule 23(b) are also met."). "'The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted.'" Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC, 763 F.3d 1280, 1291 (11th Cir. 2014) (quoting Wal–Mart, 131 S. Ct. at 2257).

The Rule is not a pleading standard; rather, a party seeking class certification must "affirmatively demonstrate his compliance with the Rule." Wal–Mart, 131 S. Ct. at 2552; see also Lakeland Reg'l Med. Ctr., 763 F.3d at 1291 (stating that it was plaintiff's

burden to affirmatively demonstrate appropriateness of class certification). Because class certification requires proofs, "it may be necessary for the court to probe behind the pleadings" and conduct "a rigorous analysis" on whether the Rule 23(a) prerequisites have been satisfied. Falcon, 457 U.S. at 160–61. Furthermore, the "'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim," Wal–Mart, 131 S. Ct. at 2551, because "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action[,]'" Falcon, 457 U.S. at 160 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)). However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits 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 & Trust Funds, 133 S. Ct. 1184, 1194–95 (2013); see also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

B. Definition and Ascertainability

A party satisfies the threshold requirement of adequate definition and ascertainability if the proposed class "can be ascertained by reference to objective criteria" and the members thereof can be identified through "a manageable process that does not require much, if any, individual inquiry." Bussey v. Macon Cnty. Greyhound Park, Inc., 562 F. App'x 782, 787 (11th Cir. 2014) (internal quotation marks omitted); see also Moore v. Walter Coke, Inc., 294 F.R.D. 620, 624 (N.D. Ala. 2013)

("Ascertainability depends on the class definition, and a successful definition is one that is precise, objective, and presently ascertainable by reference to objective criteria." (internal quotation marks and alterations omitted)). However, the same level of precision is not required when a party seeks to certify a class under 23(b)(2). See Newberg on Class Actions § 3:7 (5th ed. 2015) (collecting cases); see also Kenneth R. ex rel. Tri-Cnty CAP, Inc./GS v. Hassan, 293 F.R.D. 254, 263–64 (D.N.H. 2013) ("The level of precision, or 'definiteness' required, varies depending on the type of class sought to be certified under part (b) of Rule 23.").

The First Circuit Court of Appeals has held that "notice to the members of a (b)(2) class in not required and the actual membership of the class need not . . . be precisely delimited." Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972). Likewise, the Tenth Circuit Court of Appeals has more recently stated that "while the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2)." Shook v. El Paso Cnty., 386 F.3d 963, 972 (10th Cir. 2004) (citing Yaffe, 454 F.2d at 1366). The focus of a Rule 23(b)(2) class is on "the conduct complained of [as] the benchmark for determining whether a subdivision (b)(2) class exists, making it uniquely suited to civil rights actions in which the members of the class are often 'incapable of specific enumeration.'" Id. (citing Committee's Notes to Revised Rule 23; 3B Moore's Federal Practice ¶ 23.01 [10-2] (2d ed. 1969)).

However, the former Fifth Circuit Court of Appeal in DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970), required a clearly defined and ascertainable definition for a Rule 23(b)(2) class and denied certification of the proposed class because it was too

amorphous.[11]

As presented in the Second Renewed Motion for Class Certification (and the prior two motions for class certification), Plaintiffs seek certification of one class, as follows: "All current and future Medicaid recipients in Florida under the age of 21, who are (1) institutionalized in nursing facilities, or (2) medically complex or fragile and at risk of institutionalization in nursing facilities."[12]

Though precise definitions are less likely to be required when proceeding under Rule 23(b)(2), Plaintiffs' definition is still too broad in scope and carries an amorphous "at risk" indicator which is elusive and lacks objective criteria defining the class.

First, the proposed class includes all children in the State Medicaid system who are institutionalized or at risk of institutionalization, without accounting for whether the institutionalization is necessary or justified. The Court in Olmstead did not condemn institutionalization, it condemned **unnecessary** institutionalization. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 597 (1999). As such, Plaintiffs' definition is over inclusive because it includes children who are unharmed by the policies alleged to be causing institutionalization and, thus, lack standing. See, e.g., Kenneth R. ex rel. Tri-Cnty. CAP, Inc./GS v. Hassan, 293 F.R.D. 254, 264 (D.N.H. 2013). However, this potential problem is easily curable by adding the term "unnecessarily" and "unnecessary" to modify "institutionalized" and "institutionalization," respectively. See In re Monumental Life Ins.

[11] The class sought was for "'residents of this State active in the "peace movement" who have been harassed and intimidated as well as those who fear harassment and intimidation in exercising their First Amendment right of free expression in the form of passing out leaflets in furtherance of their cause.'" DeBremaecker, 433 F.2d at 734.

[12] Plaintiffs maintain that they are proposing one class, while Defendants phrase the matter as two subclasses. Interestingly, the Complaint sets forth the claims as two sub-classes, "institutionalized" and "at-risk-of institutionalization," but Plaintiffs seem to have abandoned this approach. ECF No. 62 at 38.

Co., 365 F.3d 408 (5th Cir. 2004) ("District courts are permitted to limit or modify class definitions to provide the necessary precision.").

Second, but most importantly, as set forth in the undersigned's adopted Report and Recommendation on Defendants' motion to dismiss, the determination of when a risk is sufficient to confer standing is fact intensive and case specific. See ECF No. 287 at 18–19 ("It appears that the question is not whether all disabled children in any Medicaid system can bring generalized claims against abstract policies that may or may not result in unnecessary institutionalization . . . . Instead, the Article III question is whether the particular disabled children have alleged effects of the infringing polices that are real and concrete enough for a court to find a true threat of institutionalization."); see also ECF No. 310 (order adopting R&R). Children in the State Medicaid program who have not had their community services materially reduced by the allegedly deficient polices cannot be said to be at risk of imminent injury—unnecessary institutionalization—and thus lack standing.

In sum, the proposed class, though analyzed under a less stringent standard than a Rule 23(b)(3) class, is simply too broad and over inclusive so as to be adequately defined. See Kenneth R. ex rel., 293 F.R.D. at 264–65 (requiring objective and relevant limiting criteria to define "at risk"). Furthermore, alteration to this portion of Plaintiffs' proposed class is too fundamental to their claims for this Court to independently take control and alter the definition. There has been no proffer of any objective criteria that could help define the at-risk members or any potential sub-class or a separate proffer of evidence to support a finding of numerosity, commonality, typicality, and adequacy of such a sub-class. Accordingly, the undersigned concludes

that Plaintiffs' proposed class lacks the required definiteness and ascertainability required to obtain class certification.

Even if the proposed class were adequately defined and ascertainable, the undersigned also concludes that certification is unnecessary under the current circumstances.

C. Necessity of Class Certification

In addition to Rule 23's requirements, "a district court should ask itself whether the need for the class exists to offset the concomitant expense and complexities associated with class action suits." McArthur v. Firestone, 690 F. Supp. 1018, 1018 (S.D. Fla. 1988); see also Ruiz v. Robinson, No. 1:11-cv-23776-KMM, 2012 WL 3278644, at *2 (S.D. Fla. Aug. 9, 2012); Hall v. Burger King Corp., No. 89-0260-CIV-KEHOE, 1992 WL 372354, at *12 (S.D. Fla. October 26, 1992) ("Whether plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant but all other persons subject to the practice of the rule under attack." (internal quotation marks omitted)). Though some Circuits expressly disagree with the requirement of necessity,[13] this Circuit's binding precedent has applied the requirement. See United Farmworkers Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974); Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1964) ("The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated."), cert. denied, 376 U.S. 910 (1964); accord M.R. v. Bd. of Sch. Comm'rs of Mobile Cnty., 286 F.R.D. 510, 519–20 (S.D. Ala. 2012) (citing former Fifth Circuit cases

[13] See Dionne v. Bouley, 757 F.2d 1344, 1356 (1st Cir. 1985); Brown v. Scott, 602 F.2d 791, 795 (7th Cir. 1979); see generally Newberg on Class Actions § 4:35 (5th ed. 2015) (collecting cases on necessity requirement).

as binding precedent and stating: "More importantly, binding precedent lends strong support to the notion that it is appropriate for district courts to consider the benefits and burdens in making a Rule 23(b)(2) certification decision, and to deny class certification where those benefits are insubstantial.").

Defendants argue that class certification is unnecessary because injunctive relief against the state officials as to Plaintiffs would inure to the benefit of the proposed class without necessitating the concomitant expense and complexities associated with class-action suits. ECF No. 345 at 27 (citing McArthur, 690 F. Supp. at 1018). Put differently, if any Plaintiffs are granted injunctive relief in the form of having the Defendants change their policies, those same policies would benefit all Medicaid recipients. See, e.g., Access Now Inc. v. Walt Disney World Co., 211 F.R.D. 452, 455 (M.D. Fla. 2001) ("Finally, the Court finds that class certification in this action is unnecessary. The Plaintiffs are only seeking injunctive relief which, if granted, would necessarily benefit all other potential class members.").

Plaintiffs argue that necessity is not a controlling factor when all of Rule 23's requirements are satisfied. ECF No. 358 at 7 (citing ECF No. 138 at 3–6) (Plaintiffs' Reply to Renewed Motion for Class Certification). All of the cases cited by Plaintiffs are non-binding precedent from other Circuits and do not guide this Court's decision. Accordingly, absent any exception to the general requirement of necessity, the undersigned concludes that class certification is not appropriate in the instant case.

However, Plaintiffs also argue that the risk of mootness should influence this Court's decision to certify a class. Indeed, if the circumstances showed that Plaintiffs' case could become moot prior to judgment, class certification may be proper to ensure

that the injunctive relief sought for the class is obtained notwithstanding the loss of Plaintiffs. See Lebron v. Wilkins, 277 F.R.D. 664, 666 (M.D. Fla. 2011) (citing Johnson v. City of Opelousas, 658 F.2d 1065, 1070 (5th Cir. 1981)). Here, though there have been some unfortunate deaths of three Plaintiffs, there remain seven Plaintiffs, and the undersigned concludes that the likelihood of all Plaintiffs' claims becoming moot is too remote at this stage in the proceeding to mandate the application of an exception to the necessity requirement of class certification.

Notwithstanding the above conclusions and recommendation, in the event that this Court disagrees with the foregoing analysis and concludes that the class is adequately defined and that class certification is necessary, the undersigned will proceed to analyze the Rule 23(a) criteria as applied to the modified class.

D. Standing and Mootness

Defendants once again assert that Plaintiffs' claims are moot and that Plaintiffs lack standing to represent the unnecessarily institutionalized class members because no Plaintiffs are currently institutionalized. In fact, A.G. is the sole surviving Plaintiff that was institutionalized at the time of the Complaint, and he is no longer institutionalized.

Article III of the United States Constitution limits federal courts' jurisdiction to actual "cases" and "controversies"—otherwise known as "justiciability." See United States v. Rivera, 613 F.3d 1046, 1049 (11th Cir. 2010). "A claim is justiciable if it is definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character." Id. at 1049–50 (quoting Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240–41 (1937)) (internal quotation marks

omitted). Justiciability defines the judicial role by requiring the judiciary to defer to other branches of government when appropriate. Id. at 1050 (citing Erwin Chemerinsky, Federal Jurisdiction § 2.1, at 45 (5th ed. 2007)).

Two important elements of justiciability are standing and mootness. See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000); see also Am. Civil Liberties Union v. The Fla. Bar, 999 F.2d 1486, 1489–90 (11th Cir. 1993). Standing is the requisite personal interest that must exist at the commencement of the litigation. Laidlaw, 528 U.S. at 189. Mootness, on the other hand, addresses whether the personal interest that existed at the beginning of the case is still present at a later stage of the proceeding. Id. However, the "description of mootness as standing set in a time frame is not comprehensive." Id. at 190. Indeed, distinct from standing, there are exceptions to mootness that permit a court to retain jurisdiction over an otherwise moot case—e.g., allegedly unlawful activity that is "capable of repetition, yet evading review." Id.

1. Institutionalized Plaintiffs' Standing

"'[P]rior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.'" Murray v. Auslander, 244 F.3d 807, 810 (11th Cir. 2001) (quoting Prado–Steiman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000)); see also Klay v. Humana, Inc., 382 F.3d 1241, 1250 (11th Cir. 2004).

Here, Defendants claim that none of the Plaintiffs remain institutionalized, which is counter to the requirement that "the lead plaintiff must fit the class definition." Hayes

v. Wal–Mart Stores, Inc., 725 F.3d 349, 360 (3d Cir. 2013). Plaintiffs submit that the capable-of-repetition, yet-evading-review exception to the mootness doctrine should apply to the "ephemeral children with severe disabilities" because the class and its representatives are "inherently transitory." ECF No. 358 at 8–9 (citing Olmstead v. L.C., 527 U.S. 581, 594 n.6 (1999); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191–92 (2000); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030 (5th Cir. 1981)); see also Sierra Club v. Martin, 110 F.3d 1551, 1554 (11th Cir. 1997) ("To satisfy the 'capable of repetition, yet evading review' exception to mootness, the Supreme Court has required that (1) there be a reasonable expectation or demonstrated probability that the same controversy will recur involving the same complaining party, and (2) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration."). The inherently-transitory exception applies only "where it is 'certain that other persons similarly situated' will continue to be subject to the challenged conduct and the claims raised are 'so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1530–31 (2013) (quoting Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991)). Importantly, this exception has been extended to situations where a defendant can "pick off" proposed class representatives by making their claims moot prior to certification. E.g., Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1090–92 (9th Cir. 2011) (applying inherently-transitory exception in class-certification case when the named plaintiff's claim would be mooted by an unaccepted offer of judgment for the full amount of the named plaintiff's individual claim).

First, this Court has already determined that the capable-of-repetition, yet-evading-review exception applies to the formerly institutionalized Plaintiff T.H. ECF No. 287 at 24. Thus, at least one Plaintiff has standing.

Second, the undersigned further concludes that application of the inherently-transitory exception is appropriate for this Olmstead action because Defendants could "pick off" unnecessarily institutionalized Plaintiffs by releasing them from the nursing homes and mooting their claims prior to class certification. Therefore, to the extent that Plaintiffs seek to certify a class including unnecessarily institutionalized children, they have standing to do so.

2. Mootness

Defendants also argue that they have cured the policies and procedures that Plaintiffs allege are the cause or evidence of the systemic problems—thus mooting this case. Indeed, since the filing of this case, Defendants' policies have undergone many changes and Plaintiffs have acknowledge most of these changes while still maintaining that their claims are not moot. Specifically as to the remaining policy addressed in this Court's orders on Defendants' motions to dismiss, Defendants now assert that they have incorporated new language in the Home Health Services Coverage and Limitations Handbook regarding PDN services that overrides the statutory language referencing the convenience-of-the-caretaker standard—or the definitions of "medical necessity" and "medically necessary."

This Court previously addressed Defendants' mootness argument and found that Defendants had not unambiguously terminated the convenience-of-the-caretaker standard because the statutory definition of "medical necessity" was unchanged. See

ECF Nos. 287, 310. The undersigned incorporates by reference the legal framework and conclusion contained therein, and again concludes that ambiguity exists notwithstanding Defendants' new assertions and alterations to the Handbook. Accordingly, it is recommended that this Court determine that Plaintiffs' claims are not moot. To the extent that Defendants continuously make changes to their policies in an attempt to moot Plaintiffs' claims, those issues previously addressed at the motion-to-dismiss stage can be readdressed at the summary-judgment stage.

E. Numerosity

Rule 23(a)(1) requires a class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Although mere allegations of numerosity are insufficient to meet this prerequisite, a plaintiff need not show the precise number of members in the class." Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 930 (11th Cir. 1983). "Nevertheless, a plaintiff still bears the burden of making *some* showing, affording the district court the means to make a supported factual finding, that the class actually certified meets the numerosity requirement." Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1267 (11th Cir. 2009). "[W]hile there is no fixed numerosity rule, generally less than twenty-one [plaintiffs] is inadequate, more than forty adequate, with numbers between varying according to other factors." Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) (internal quotation marks omitted). Furthermore, a court must consider "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir. 1981). Such factors are considered for purposes of determining the impracticability of joinder.

See Armstead v. Pingree, 629 F. Supp. 273, 279 (M.D. Fla. 1986).

As presented by Plaintiffs, the class includes 179 "medically complex" children who are in the State's Medicaid system and institutionalized in skilled-nursing facilities (this number is derived from eQHealth's records as of November 4, 2013), ECF No. 329 Attach. 1;[14] 2,902 medically complex children in the State's Medicaid system who are residing in the community throughout the State, ECF No. 329 Attach. 2 (Plaintiffs' Motion asserts that 2,989 children are in the system, but their citation to Attachment 2 indicates that there were 2,902 children for the period July 1, 2012, through June 30, 2013); and 727 children in Florida's Medical Foster Care ("MFC") Program for the 2011–2012 year, ECF No. 329 Attach. 4 (Plaintiffs get this number from an MFC "Fact Sheet" and cannot confirm whether these children are included in the 179 and 2902 children previously referenced). Though these numbers are not current and are approximations, this Court may make commonsense assumptions to find support for numerosity. See Martinez v. Mecca Farms, Inc., 213 F.R.D. 601, 605 (S.D. Fla. 2002) (citing Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925 (11th Cir. 1983)).

Defendants do not raise any challenge to Plaintiffs' proof of numerosity as it would apply to the proposed class. Without question, the near 3,000 children included in the proposed class is well above any numerosity threshold and, as the children are located in diverse geographical locations throughout the State with changing locations and placements, joinder is impractical. See, e.g., M.D. v. Perry, 294 F.R.D. 7, 38 (S.D. Tex. 2013). Accordingly, the undersigned concludes that Plaintiffs satisfy the requirements of Rule 23(a)(1).

[14] Defendants present evidence that there are at least 148 children in their system who are institutionalized in nursing facilities. ECF No. 345 Attach. 1 (Affidavit of Shevaun Harris).

F. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law." Wal–Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (citation and internal quotation marks omitted). "Their claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. "'Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'" Id. (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131–32 (2009)).

Plaintiffs claim that four individual policies "among others," "[i]n the aggregate," "coalesce to form a cohesive practice of unnecessarily institutionalizing medically complex and medically fragile children." ECF No. 329 at 11. Plaintiffs explain that the policy preference "is the glue that unites all members of the putative class because they have all either been institutionalized or put at risk of institutionalization as a result of this policy." Id. Specifically, Plaintiffs propose the following question as a common question applicable to all class members: "Do any or all of Defendants' policies and systemic practices, outlined in Named Plaintiffs' Second Amended Complaint, violate Named Plaintiffs' or the putative class members' civil rights under the ADA, Rehabilitation Act, or the Medicaid Act via 42 U.S.C. § 1983?" ECF No. 329 at 8. In particular, the

definitions of "medically necessary" and "medical necessity"—which incorporate the convenience-of-the-caretaker standard—have remained at the center of Plaintiffs' claims and allegedly permeate Defendants' review process resulting in the unnecessary institutionalization of medically fragile or complex children.

Defendants argue that Plaintiffs' amorphous, systemic questions are really a composite of more specific questions that are not applicable to all members of the class. In fact, Defendants focus their entire Rule 23(a) argument on their position that the proposed class lacks commonality. See ECF No. 345 at 11–19.

It is no surprise that Plaintiffs wish to paint with a broad brush on one canvas and Defendants wish to frame this case as smaller, distinct pictures. The reality is that Plaintiffs' claims are more akin to the art of pointillism.[15] That is, the smaller pictures (or policies) that Defendants argue are not common to all members, could indeed be common to all members when they are juxtaposed and viewed together from a distance. Furthermore, one of the policies extends to the entire class—the convenience-of-the-caretaker standard.

Recently, in Wal–Mart, the Supreme Court appeared to tighten Rule 23's commonality requirement in its decertification of an employment-discrimination class. 131 S. Ct. 2541; see also D.L. v. District of Columbia, 713 F.3d 120, 126 (D.C. Cir. 2013) (stating that Wal–Mart "changed the landscape" of commonality review). In holding that the district court improperly certified the class, the Court relied on its prior holding in General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982). In

[15] "Pointillism" is "a technique of painting using tiny dots of various pure colors, which when viewed from a distance are blended by the viewer's eye." Oxford English Dictionary (3d ed. 2006). The "technique was developed particularly by French neo-impressionist painters . . . as a means of producing luminous effects." Id.

Falcon, the Court determined, in the context of an employment discrimination claim, as follows:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Id. at 157–58. The Falcon Court then "suggested two ways in which that conceptual gap might be bridged." Wal–Mart, 131 S. Ct. at 2253. First, if an employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." Falcon, 457 U.S. at 159 n.15. Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." Id.

Applying the Falcon principles, the Court in Wal–Mart determined that the first way of bridging the gap did not apply to the case at issue because there were no testing procedures or company-wide evaluation methods that could be challenged. Thus, the Court attempted to bridge the gap by requiring significant proof that Wal–Mart operated under a general policy of discrimination. The Court determined that the plaintiffs failed to establish significant proof of a systemic policy of discrimination, and the Court reversed.

Here, unlike in Wal–Mart, Plaintiffs' Complaint challenges actual written policies, which when implemented in part or together, allegedly result in a systemic practice of unnecessary institutionalization. See, e.g., Lane v. Kitzhaber, 283 F.R.D. 587, 597 (D. Or. 2012) ("[A]s was the situation before Wal–Mart, despite the individual dissimilarities among class members, 'commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.'" (quoting Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001)). Plaintiffs further allege that by these policies being in existence and applied at least every six months, all medically complex and fragile children in the State's Medicaid plan are suffering a harm and are at risk of institutionalization.[16]

Consistent with Wal–Mart, if Plaintiffs were claiming that Defendants operated under a general policy of unnecessary institutionalization, but did not challenge objective rules or methods of evaluation that resulted in institutionalization, Plaintiffs would be required to marshal significant proof of an unwritten policy or practice that was evidenced by empirical data. However, here, Plaintiffs have challenged at least four express policies, one of which remains at least ambiguously in effect—the convenience-of-the-caretaker standard—that could apply to the proposed class. A legal determination on the validity of those policies could be the glue that binds the class. See, e.g., Pashby v. Cansler, 279 F.R.D. 347, 353 (E.D.N.C. 2011) (holding that a determination of whether a specific policy is valid or invalid would resolve claims of potential class members, irrespective of particular factual circumstances), remanded on

[16] As previously stated, the undersigned's first conclusion is as follows: whether a class member is "at risk" is unascertainable based on a lack of objective criteria to show when a reduction in services is material enough to cause an imminent risk of unnecessary institutionalization. However, the instant analysis on commonality ignores any issues with the class as defined.

other grounds, 708 F.3d 307 (4th Cir. 2013). Put differently, there will be a common question, and answer, as to whether the application of the convenience-of-the-caretaker standard to the class runs afoul of federal law. Indeed, without conceding that the policies violate Olmstead, but repeatedly arguing mootness, Defendants have been attempting to rid their written policies of the alleged issues that Plaintiffs assert cause unnecessary institutionalization.[17] It is not necessary that all questions be common to the class—one common question will do. D.L. v. District of Columbia, 713 F.3d 120, 128 (2013) (citing Wal–Mart, 131 S. Ct. at 2556).

In sum, Plaintiffs' claim of systemic failure is actually an amalgam of individualized policies, one of which is still generally applicable to the entire class, for which a determination of its legality would be a common dispositive question leading to a yes/no answer applicable to the entire class. Thus, the undersigned concludes that Plaintiffs satisfy the requirements of Rule 23(a)(2).

G. Typicality

Rule 23(a)(3) requires "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). "Class members' claims need not be identical to satisfy the typicality requirement; rather, there need only exist 'a sufficient nexus . . . between the legal claims of the named class representatives and those of individual class members to warrant class certification.'" Ault v. Walt Disney World Co., 692 F.3d 1212, 1216 (11th Cir. 2012) (quoting Prado–Steiman v. Bush, 221 F.3d 1266, 1278–79 (11th Cir. 2000)) (alteration in original). "Although typicality and commonality may be related," the two concepts have been

[17] Though Defendants have altered other policies (one after acknowledging a failure to provide appropriate PASSR screenings), the existence of these policies at one time could still support Plaintiffs' claim that Defendants have a systemic problem.

distinguished "by noting that, '[t]raditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class.'" Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1275 (11th Cir. 2009) (quoting Piazza v. Ebsco Indus., 273 F.3d 1341, 1346 (11th Cir. 2001)) (alteration in original). But see M.D. v. Perry, 294 F.R.D. 7, 29 (S.D. Tex. 2013) ("Often, once commonality is shown typicality will follow as a matter of course."). "Factual distinctions between the claims of the named plaintiffs and those of other class members will not necessarily defeat a finding of typicality. Thus, a strong similarity of legal issues will suffice despite substantial factual differences." In re Amerifirst Sec. Litigation, 139 F.R.D. 423, 428 (citing Appleyard v. Wallace, 754 F.2d 955, 959–63 (11th Cir. 1985), disapproved of on other grounds, Green v. Mansour, 474 U.S. 64, 67 (1985)).

Defendants do not present any argument against a finding of typicality, except to the extent that their commonality argument blends into typicality. Plaintiffs are medically complex Medicaid recipients under the age of twenty one who have allegedly been unnecessarily institutionalized in a nursing facility and/or are currently at risk of being unnecessarily institutionalized based on the application of Defendants' policies. Plaintiffs' claims are typical of the proposed class in that their claims arise from Defendants' application of policies applicable to the entire class. Therefore, the undersigned concludes that Plaintiffs satisfy the requirements of Rule 23(a)(3).

H. 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). The court's determination

on adequacy of representation requires two distinct inquiries: "(1) whether any substantial conflicts of interest exist between the representative and the class; and (2) whether the representatives will adequately prosecute the action." Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003). "Significantly, the existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy." Id. (citing 7A Charles Alan Wright *et al.*, Federal Practice & Procedure § 1768, at 326–27 (2d ed. 1986)). If some class members claim to have been harmed by the same conduct that helped other class members, such a situation would be a fundamental conflict. Id. Furthermore, "[c]ounsel will be deemed adequate if they are shown to be qualified, adequately financed, and possess sufficient experience in the subject matter of the class action." City of St. Petersburg v. Total Containment, Inc., 265 F.R.D. 630, 651 (S.D. Fla. 2010).

Defendants have not argued that Plaintiffs or Plaintiffs' counsel are inadequate to represent the class, nor could they reasonably do so. As such, the undersigned concludes that Plaintiffs satisfy the requirements of Rule 23(a)(4). Thus, in the event that this Court deems class certification appropriate, this Court should appoint Matthew W. Dietz, The North Florida Center for Equal Justice, Inc., and the Florida State University College of Law Public Interest Law Center as Class Counsel. See Fed. R. Civ. P. 23(g).

I. Rule 23(b)

In addition to satisfying Rule 21(a), Plaintiffs must also satisfy one of the three types of class actions set forth in Rule 23(b). Here, Plaintiffs seek certification pursuant

to 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." Fed. R. Civ. P. 23(b)(2); see also Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001) (requiring predominant relief sought in Rule 23(b)(2) class to be injunctive or declaratory relief).

There is no dispute among the parties that Plaintiffs are solely seeking injunctive and declaratory relief; thus, Plaintiffs fulfill Rule 23(b)(2)'s requirement.

J. Miscellaneous Arguments

1. Whether the Adequacy of Defendants' MFC Program Is Proper for Class-Wide Determination.

Defendants argue that Plaintiffs failed to raise their Medical Foster Care ("MFC") claim in the Complaint, ECF No. 62, and thus, cannot seek class determination on the issue. In addition, Defendants argue that no Plaintiffs have standing to challenge the MFC program because only one child is in foster care and eligible to be placed in a medical foster home, and that child, T.H., resides in a group home and does not claim to seek placement in a medical foster home. Plaintiffs' Reply asserts that the MFC program is subsumed in the general policies challenged in the Amended Complaint. ECF No. 358 at 3.

Defendants cite Brown v. American Airlines, Inc., 285 F.R.D. 546, 560 (C.D. Cal. 2011), for the proposition that "[c]lass certification is not a time for asserting new legal theories that were not pleaded in the complaint." ECF No. 345 at 20. The court in Brown made this statement because the named plaintiffs were attempting to change their prayer for relief from damages to injunctive relief in order to cure class-certification

deficiencies. Thus, in addition to its nonbinding status, Brown does not support Defendants' argument and is distinguishable from the instant case.

Furthermore, Defendants' argument is more appropriately addressed by a dispositive motion, rather than couched in their response to Plaintiffs' motion for class certification. The only issue before this Court is whether class certification is an appropriate mechanism to resolve Plaintiffs' claims. Therefore, the undersigned recommends that Defendants' MFC argument does not alter the class-certification analysis and recommendation.

2. Whether Compensatory Services Are Appropriate for Class-Wide Resolution.

Last, Defendants argue that an award of compensatory services would be intensely personal and individualized and, thus, is not appropriate for class-wide determination. ECF No. 345 at 29 (citing Wal–Mart, 131 S. Ct. at 2557). This issue is moot based on the undersigned's prior Report and Recommendation concluding that "compensatory services" are not awardable.

III. RECOMMENDATION

Based on the foregoing, the undersigned RECOMMENDS that Plaintiffs' Second Renewed Motion for Class Certification, ECF No. 329, be DENIED because the proposed class is not clearly defined and ascertainable and because class certification is unnecessary.

The parties will have fourteen (14) days after being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable William J. Zloch, United States District Judge. See 28 U.S.C.A. § 636(b)(1) (providing procedure for review of magistrate judge report and recommendation).

Failure to timely file objections shall bar the parties from a de novo determination by Judge Zloch of any issue covered in the Report and shall bar the parties from challenging, on appeal, the factual findings accepted or adopted by this Court, except upon grounds of plain error or manifest injustice. See Thomas v. Arn, 474 U.S. 140, 145–53 (1985) (holding that party waives appellate review of magistrate judge's factual findings that were not objected to within period prescribed by 28 U.S.C. § 636(b)(1)); see also Dupree v. Warden, 715 F.3d 1295, 1300 (11th Cir. 2013) (holding that under current Eleventh Circuit rule: "[T]he failure to object limits the scope of our appellate review to plain error review of the magistrate judge's *factual findings*[; however,] failure to object to the magistrate judge's *legal conclusions* does not preclude the party from challenging those conclusions on appeal.").

DONE and SUBMITTED at Fort Lauderdale, Florida, this 7th day of August, 2015.

PATRICK M. HUNT
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Honorable William J. Zloch

All Counsel of Record