Nos. 17-17501 & 17-17502

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

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

# PLAINTIFFS/APPELLEES' OPPOSITION TO APPEAL OF CLASS CERTIFICATION ORDER

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## JURISDICTIONAL STATEMENT

Plaintiffs agree with Defendants' jurisdictional statement.

## ISSUE PRESENTED

Under Rule 23 precedent, when children in a state's foster care system face systemic health or placement practices that expose them to a substantial risk of serious harm, an injunction class of all affected children may be certified to protect them against future harm. Here, the record includes voluminous evidence of such systemic practices in Arizona's foster care system. Did the district court abuse its discretion in certifying a class and subclasses of children affected by the systemwide practices that Plaintiffs seek to enjoin?

Pursuant to Ninth Circuit Local Rule 28-2.7, each of the statutes, regulations, and rules cited in this Brief is set forth in the concurrently-filed Addendum.

## INTRODUCTION AND STATEMENT OF THE CASE

This is an appeal of a class certification order involving the thousands of abused and neglected children who have been or will be placed in the custody of Arizona's foster care system. In granting certification, the district court found that Defendants engage in multiple statewide practices that allegedly expose all of these children to substantial risks of harm. These practices—proof of which largely comes from Defendants' records—include Defendants' failure to provide children with necessary and timely mental and physical health services; placement of children in

inappropriate congregate care facilities; failure to timely investigate reports of abuse and neglect; and more.

Defendants concede that the certification order hews to this Court's 2014 decision in *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), which affirmed certification of a statewide class of Arizona prison inmates who likewise faced systemic health practices that allegedly exposed them to a substantial risk of serious harm. Indeed, it's *because* the district court followed *Parsons* that, according to Defendants, reversal is warranted. *Parsons*, say Defendants, conflicts with *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). But *Parsons* was decided three years after *Wal-Mart*, and it expressly reconciled its class-certification analysis with *Wal-Mart.*

This Court refused *en banc* review in *Parsons*, and it remains controlling precedent—for good reason. Both the district court in *Parsons* and the district court here did precisely what *Wal-Mart* commands: they identified centralized practices that form the "glue" holding the relevant classes together. Whether those practices expose the classes to a serious risk of substantial harm, in violation of their constitutional and statutory rights, can be answered, consistent with *Wal-Mart*, in "one stroke."

The grounds for certification here are even stronger than in *Parsons*. The class in *Parsons* included healthy adult inmates who did not *presently* need medical

care, whereas every child in the classes here *presently* needs preventative care, safe places to live, caseworkers who can timely respond to allegations of abuse and neglect, and the like.

In appealing, Defendants spend less than three pages of their brief on the facts, virtually ignoring the evidence of the systemic practices at issue. That evidence compels affirmance.

## STATEMENT OF FACTS

### I. THE ARIZONA FOSTER CARE SYSTEM

The Arizona Department of Child Safety ("DCS") is the "*de facto* parent" of approximately 18,000 children who have been removed from their homes because of abuse or neglect, and placed into the State's custody.[1] *See Tamas v. Dep't of Soc. & Health Servs*., 630 F.3d 833, 843 (9th Cir. 2010). Defendant McKay is DCS's Director.

Arizona's foster children are among society's most vulnerable people. They typically have been traumatized from the abuse or neglect in their original homes, and traumatized once again when removed from those homes. [ER1258-59 (White Expert Report)] Many suffer more trauma as they are moved from foster home to foster home, often over a period of many years. According to DCS, "[f]or almost

[1] ER623 (number of children in out-of-home care as of August 2016). Defendants' brief claims that a smaller number of children are currently in foster care.

three decades, researchers have noted a high prevalence of physical and mental health problems in foster children. . . . These children were not only victims of abuse (physical, sexual, emotional) and neglect (medical, physical), but they also represent a disproportionate number of children with developmental disabilities and/or behavioral health disorders." [ER1311]

DCS must ensure that children in its custody are placed in safe and appropriate living environments, A.R.S. § 8-451, and given the mental and physical health services that they need. A.R.S. § 8-512(A).[2] DCS must also protect the children in its custody from further abuse and neglect. Arizona law requires DCS to "[e]nsure that all . . . reports of imminent risk of harm [to foster care children] are investigated," A.R.S. § 8-453(A)(19), and details DCS's investigative responsibilities, A.R.S. § 8-456.

Nearly all foster children in Arizona are eligible for Medicaid. [ER706] For these children, the State's obligation to provide necessary health services is shared by DCS and the State's Medicaid agency, the Arizona Health Care Cost Containment System ("AHCCCS"). Defendant Betlach is its Director.

[2] *See* Arizona Department of Child Safety: Policy and Procedure Manual ("DCS Manual"), Ch. 3, Sec. 8.1, available at: http://bit.ly/DCSPolicy8-1 ("[t]he Department shall ensure" that foster care children "receive necessary medical, dental, and behavioral health services").

Under the Medicaid Act, states must implement an Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") program for foster children. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B). That program must include screening, vision, dental, and hearing services and "other necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illness and conditions discovered by the screening services." 42 U.S.C. § 1396d(r)(5). States must arrange for "corrective treatment" identified by the EPSDT program, and furnish Medicaid assistance "with reasonable promptness." 42 U.S.C. §§ 1396a(a)(8) and (a)(43)(C); 42 C.F.R. § 435.930(a) (the agency must furnish Medicaid "promptly to beneficiaries without any delay").

AHCCCS and DCS must collaborate with each other to "provide comprehensive medical and dental care" to foster children. A.R.S. § 8-512(A). They must determine "the most efficient and effective way to provide comprehensive medical, dental and behavioral health services, including behavioral health diagnostic, evaluation and treatment services for children who are provided" this care. A.R.S. § 8-512(B)(1). In collaborating, AHCCCS is responsible for maintaining a network of behavioral and mental health care providers to treat

Medicaid-eligible foster children,[3] while DCS is responsible for maintaining a network of physical and dental providers to treat those children.[4]

For all health care services, DCS must "ensure that children in out-of-home care receive necessary medical, dental, and behavioral health services."[5] As to physical health, DCS caseworkers must arrange for each child to have a "complete medical examination" within 30 days of initial placement [ER755]; verify "that the child is current on his/her immunizations" and arrange for "the child to receive delayed or missing immunizations" [*id.*]; "ensure that the child receives a medical examination annually" [ER756]; and "ensure that recommended follow-up care and referrals from the medical provider are provided" [ER755]. As to mental and behavioral health, DCS caseworkers must "ensure that all children and families served by DCS receive appropriate behavioral health and substance abuse services [ER1420]; "accompany the child and the parent to the intake and assessment appointments" [ER1422.]; and "monitor and ensure" that the "child is obtaining services in a timely manner" [*id.*].

[3] ER873; *see* DCS Manual, supra n.2, Ch. 3, Sec. 8.1.
[4] ER871-72; *see* DCS Manual, supra n.2, Ch. 3, Sec. 8.1.
[5] DCS Manual, supra n.2, Ch. 3, Sec. 8.1.

## II. PLAINTIFFS' CLAIMS

Plaintiffs allege that Defendants have not adequately provided for the needs of foster care children in several critical respects. The Second Amended Complaint asserts four causes of action:

1. Defendants'[6] practices deprive Plaintiffs of adequate and timely physical, dental, and mental health care, in violation of their due process rights. [ER2720-27]. This claim is asserted on behalf of a "general class" of children who are or will be in DCS's custody due to a report or suspicion of abuse or neglect. [ER2720; *see* ER22-23]

2. Defendants' practices deprive Plaintiffs of medical services required under the Medicaid statute, 42 U.S.C. § 1396, et seq. [ER2727-31] This claim is asserted on behalf of a "Medicaid subclass" of all members of the General Class who are eligible for Medicaid. [ER2727; *see* ER22-23]

3. DCS's practices deprive Plaintiffs of a safe and appropriate living environment that protects their physical, mental, and emotional safety, and well-being, in violation of their due process rights. [ER2735-41] This claim is asserted on behalf of a "non-kinship subclass" of all members in the General

[6] Director Betlach is a defendant only on the first and second causes of action described above. For convenience, this brief generally refers to him and Director McKay collectively as "Defendants."

Class who are not placed in the care of an adult relative or person who has a significant relationship with the child. [ER2735; *see* ER22-23]

4. DCS's practices deprive Plaintiffs of their due process right to timely investigations into allegations of abuse and neglect while in State custody. [ER2732-35] This claim is asserted on behalf of the General Class. [ER2732; *see* ER22-23]

## III. EVIDENCE SUPPORTING CLASS CERTIFICATION

### A. Overview

For their class certification motion, Plaintiffs submitted substantial evidence of the practices giving rise to these claims and the effect of those practices on the Named Plaintiffs and the class and subclasses. This evidence includes the reports and supporting documentation of three nationally-recognized foster care experts.

The expert reports reflect that Defendants fail to maintain an adequate array of therapeutic services necessary to meet the mental health needs of foster children and fail to coordinate the various agencies, caseworkers and foster parents to ensure that these children receive the mental health care they need. [*See* ER1251-307 (White Expert Report)] In addition, DCS burdens foster care workers with unreasonably high workloads, which make it impossible for them to perform their tasks. [ER1279-81] As a result, Defendants provide only a fraction of the mental

health care needed by foster children, and all foster children are at substantial risk of failing to receive necessary behavioral and mental health treatment. [ER1261-67]

The expert reports also demonstrate that, for years, DCS has had a significant shortage of licensed family foster homes. [*See* ER1504-54 (Happach Expert Report)] As a result, it has been DCS's practice to place substantial numbers of foster children in shelters, inappropriate group homes, and other harmful settings. It also has been DCS's practice to unnecessarily separate foster children from their siblings and to place them far from their home communities. [ER1511-18]

Overburdened DCS caseworkers also do not have sufficient time to ensure that children receive the physical and dental health care they need, placing all foster children at risk. [*See* ER761-816 (Blatt Expert Report)] Overburdened caseworkers also cannot conduct timely investigations of abuse or neglect in care, and DCS's practice is to conduct substantial numbers of investigations in an untimely manner, once again placing all foster children at risk. [*See* ER1519-25 (Happach Expert

Report)][7]

The effect of these practices on the Named Plaintiffs, and the evidence of these practices with respect to the classes, are discussed below.

**B. The Effect of Defendants' Practices on the Named Plaintiffs.**

The Named Plaintiffs, B.K. and B.T., have been in Arizona's foster-care system for more than half of their lives. [ER2702; ER2707-09; ER2659, 65-66 (Defendant McKay admitting allegations)] They have been and remain subjected to the practices described above. They are members of the General Class and both subclasses.

[7] The three expert reports submitted with the class certification motion and cited above were prepared in September 2016, based on then-available data and discovery taken through that time. Discovery continued during the pendency of the motion and thereafter. In December 2017, in opposing Defendants' motion to stay pending this appeal, Plaintiffs filed additional expert reports (the "Updated Reports") based on updated data and additional discovery. [Dkt. No. 392, Exhibits. 1-5.]

Defendants cite (at 55-56) an extra-record op-ed by Plaintiffs' counsel that references the Updated Reports. Defendants cite the op-ed to suggest that Plaintiffs' counsel have "concede[d]" that the entire foster care system has "become 'commendable'" through post-complaint developments. In fact, the reference to a "commendable" change was only to a reduction in the backlog of uninvestigated cases. As the op-ed goes on explain, "[t]he detailed reports [i.e., the Updated Reports] we recently provided to DCS and AHCCCS from five nationally-recognized experts document [the] extensive, continuing problems" giving rise to this litigation.

### 1. B.K.

B.K. was born into a drug-ridden environment, suffered from early childhood trauma, and walked with a limp. Victimized by physical abuse from her mother, she was diagnosed with PTSD, a mood disorder, psychosis and anxiety. [ER2702; ER2659 (Defendant McKay admitting allegations); Supplemental Excerpts of Record ("SER") 27 (B.K.'s limp)]

Defendants allowed B.K. to languish without the mental health care she needed. When B.K. entered custody for the third time in 2012, she was seven years old. [SER16 (re-entry); SER17 (birthday); *see* ER2702; ER2659 (Defendant McKay admitting allegations)] Instead of getting the care she needed, B.K. spent the next two years bouncing between 11 placements. [SER16] B.K.'s first placement during this time was a shelter. [SER16] A shelter is supposed to be a temporary placement lasting no longer than three weeks [ER1514], yet B.K. spent seven months there.

Although DCS next put B.K. in a therapeutic foster home, DCS determined that she needed a higher level of care at a residential treatment center, but it found that no such placements were "available." [SER21; *see* SER19-20] Instead, B.K. was moved between five inappropriately non-therapeutic placements until she was hospitalized in September 2014. [SER16; *see* ER2703-04] While in one of these non-therapeutic placements, B.K. reported having "visions" and that she was "seeing the Devil." [SER17] A little over a year after leaving the therapeutic foster home,

B.K. was hospitalized after telling others she had tried to strangle herself. [SER26; *see* SER16]

When B.K. was discharged from the hospital, DCS had her sleep in a DCS intake office along with eight other children. [SER23-26] B.K.'s therapist was "very upset that more care was not taken so that [B.K.] would not have had to move so many time[s]," and was "concerned that [B.K.] keeps falling through cracks." [SER28] B.K. was hospitalized again two months later. [SER16]

Compounding these problems, B.K. was forced to wait years before receiving necessary orthotics that could have helped with a debilitating limp that caused problems "with her balance and her behaviors." [SER27; ER2703; ER8-9]. During this time, B.K. was also often separated from her siblings. [ER2702; ER2659 (Defendant McKay admitting allegations)][8]

**2. B.T.**

B.T.'s experience was similar. Although diagnosed with PTSD, he was shuffled through multiple inappropriate institutional settings, separated from his siblings for months at a time, and denied needed health care services and therapeutic placements. [ER2707-711; ER2665-69 (Defendant McKay admitting allegations); ER9; *see* SER1-2, 7-15] DCS also repeatedly placed B.T. in shelters and group

[8] The Updated Report of Dr. Azzi-Lessing further details B.K. and B.T.'s harmful experiences in Defendants' custody. [Dkt. No. 392-2]

homes, and forced him to sleep in a DCS intake office along with 13 other children. [SER1-2, 7-15] Between his entry into the foster care system and March 2016**,** B.T. had been moved to at least 10 different foster care facilities—most of them unable to provide the level of care he required. [ER2709-711; ER2666-68 (Defendant McKay admitting allegations)] Most of these moves required B.T. to change schools. [ER2711; ER2668 (Defendant McKay admitting allegations)] B.T. reported, "I feel like I get tossed around like a bag of chips." [ER2709; *see also* Dkt. No. 392-2 at p. 24]

When B.T. was 10, he was sexually abused by a 17-year-old boy within a few days of arriving at a shelter. [SER1-5] He was hospitalized when he became suicidal, but DCS later returned him to the shelter where he had been placed despite his expressed fears. [SER6; *see also* Dkt. No. 392-2 at pp. 21-22] At least once, B.T. became so despondent that he grabbed the steering wheel of a van driven by a group-home staffer and said, "I want us all to die." [ER2710; ER2668 (Defendant McKay admitting allegations); ER11]

### C. Evidence of Defendants' Practices with Respect to the Class.

#### 1. Defendants' Practice of Failing to Provide Foster Children with Timely and Necessary Behavioral Health Services.

Arizona's foster children have a compelling need for mental and behavioral health services. As stated in Marci White's Expert Report, "Children who are abused, neglected or dependent have experienced trauma and have often already

accumulated numerous risk factors (*e.g.*, premature birth, prenatal substance exposure, prior abuse/neglect, disruption of primary caretaker/infant attachment, parental disorders and family stressors) that increase the likelihood of their developing behavioral health problems." [ER1258-59] Foster children "are more likely than other children to have behavioral health problems as a result of their maltreatment and/or neglect, the process of being removed and being taken away from their families, from their home community." [ER1259] DCS's own records reflect that "moderate to severe behavioral health disorders are reported in 70% to 85% of children in foster care." [*Id.*]

Yet, Ms. White's report shows that Defendants "are failing to meet the behavioral health needs of children in . . . custody, which creates a significant risk of harm and deterioration beyond what these children have already experienced." [ER1254] Ms. White explained that Defendants fail to maintain "an adequate array of appropriate services," [*id.*], resulting in a "shortage of and lack of access to therapeutic foster care" and other necessary behavioral health services. [ER1270; *see, e.g.*, ER1274-77] Ms. White also identified Defendants' continuing failure to "ensure inter-agency coordination of behavioral health services" [ER1277], and excessively "high caseloads and frequent turnover by staff" [ER1280], leading to a continuing failure by overburdened caseworkers to ensure that foster children actually get the mental health services they require. [ER1261-69]

For example, Ms. White identified a particularly acute shortage of "therapeutic foster care" (referred to in Arizona as Home Care Training to Home Care Client (HCTC)). [ER1270-71] Therapeutic foster home providers receive "specialized training," and serve children "whose behavioral health needs are of such a critical nature that in the absence of such services, the child may be placed in a more restrictive" and inappropriate setting. [*Id.*] In 2013, there were only 425 HCTC homes for about 15,000 foster children. [ER1271] As of February 2016, there were only 310 HCTC homes—with over 19,000 children in care. [*Id.*] Ms. White explained that this was "too few" therapeutic foster homes to serve the population and that this shortage "creates a significant gap in the array of services available for children in DCS custody." [ER1271-72] In consequence, "Arizona foster children are not receiving the behavioral health care they need." [ER1273]

Ms. White also identified a longstanding lack of behavioral health providers more generally, including a shortage of "specialty health care services," resulting in the failure to provide foster children with critically needed behavioral health services on a timely basis. [ER1274] For example, a former AHCCCS official acknowledged that "providers have waitlists and individuals are waiting 4-6 months to get services in place," and that DCS caseworkers in one region reported "at least a 2-3 month waiting list for kids to get into counseling." [ER1274; ER1276] As

Ms. White explained, "[w]aiting for months for counseling is unacceptable for children who require this essential, basic service." [ER1277][9]

Ms. White also found that Defendants have failed to implement necessary system-wide measures to coordinate behavioral health services, putting foster children at "risk of harm." [ER1281] Coordination is supposed to be implemented through the Child and Family Teams (CFTs), in which behavioral health providers and DCS caseworkers are supposed to work collaboratively to ensure the "appropriate alignment" of the behavioral health service plan with the DCS case plan. [ER1278] Despite the CFTs' critical coordination role, Ms. White found there is "no systematic monitoring of CFT practice" for children in foster care. [ER1279] She also determined that, without oversight, DCS caseworkers are not participating in the CFT process as a regular practice, and the "CFT process is not functioning for children in foster care." [*Id.*]

According to Ms. White, the lack of CFT oversight is "especially concerning in light of the current number of children in foster care in Arizona, and the workloads of DCS caseworkers." [*Id.*] DCS staff "are frequently not available to participate" in CFTs in person or by phone, and this "is undoubtedly due to the high caseloads

[9] Ms. White's Updated Report finds that Defendants still have not remedied the shortages of therapeutic foster homes, community based behavioral health services, therapeutic specialties and other necessary behavioral health services. [Dkt. No. 392-1 at pp. 23-32]

and frequent turn over by staff." [ER1280] DCS caseworkers are responsible for monitoring whether each child receives appropriate and timely behavioral health services. [ER1260] Ms. White found that caseworkers carrying excessive caseloads do not have time to perform these critical functions. [*See* ER1279-81]

Confirming Ms. White's opinion, DCS has acknowledged its failure to meet caseload standards, and the effect of that failure on children's well-being:

> Child Safety Specialist caseload continues to be a primary challenge facing the Department, which affects performance in relation to all safety, permanency, and well-being outcomes. Child Safety Specialists have been carrying caseloads well above the standards for many years.

[ER1062]

DCS's data also highlight the excessive caseloads borne by its caseworkers, leaving them unable to assure proper care for foster children. As of June 2016, the state-wide average caseload was 30 children per employee—150% of the state's caseload standard of 20. [ER1279-80; *see* ER1062] In June 2016, some DCS regions had caseloads double the State's own standard, with averages of 40 children per employee. [ER1279-80][10]

As a result of the practices identified by Ms. White—the continuing shortage of mental health services, the failure to implement system-wide coordination, and excessive caseloads—she determined that Arizona's foster children do not get the

[10] Arlene Happach's Updated Report finds that DCS still maintains its "practice of overburdening case managers." [Dkt. No. 392-5 at p.1]

mental and behavioral health care they need when they need it. [ER1261-67] For example, Ms. White highlighted data produced by Defendants showing that for the first two quarters of contract year 2014, "only 17.2% and 29.0% of foster children . . . received the services identified in their plans." [ER1268] Ms. White also reported that the "AHCCCS minimum performance standard for this metric is 85%," a figure that shows "how crucial it is" that children's service plans reflect their needs, and that children actually receive the services specified in those plans. [*Id.*]

Ms. White also described data showing that children fail to receive timely mental and behavioral health services within the first 30 days of entering care, a particularly crucial period for these children. [ER1261-67] "Children enter foster care with significant trauma that requires immediate assessment and response," and "[d]elays in services result in risk of harm for children with mental and behavioral health needs." [ER1267]

In particular, Ms. White explained that during the period immediately after entering care, Arizona foster children are supposed to receive an initial assessment within seven days of being identified as needing mental and behavioral health services, and are supposed to receive an initial service within 23 or 21 days of the assessment.[11] [ER1261] AHCCCS's own minimum performance standards reflect

[11] In March 2016, the Arizona state legislature reduced this period from 23 to 21 days. A.R.S. § 8-512.01(B); *see* ER1261 at n.27.

that 75% of children should get an initial assessment within the 7-day window, and 90% of the children should get initial services within the 21/23-day window. [ER1265; ER1267] But Ms. White cites data showing that more than half of children did not receive a timely assessment within 7 days and that 45% to 72% of children did not receive behavioral health services within 23 days of their initial assessment. [ER1262-63; ER1265]

The consequences of these many systemic failures are clear: "When children do not receive timely [mental health] assessments and treatment, and when their service plans do not reflect current assessments or guide their care, these children are at significant risk of harm"; they "do not heal from the trauma of abuse and neglect, risk deteriorating, losing ground in school, and disrupting from their placements, which can cause further harm." [ER1269; ER1281]

### 2. Defendants' Practice of Placing Foster Children in Inappropriate Settings.

Arlene Happach's Expert Report finds that, for many years, DCS has failed to maintain "a sufficient number of family homes and beds to place those children for whom kin placement is not an option. . . . creating a significant risk of harm to the well-being of children in care." [ER1508] Ms. Happach explained that this shortage of homes results in "unsafe placement practices," including the "[o]veruse of non-therapeutic congregate care, especially shelter care; [s]eparation of siblings when it is not in their best interest to do so; and [p]lacement of children far from their

families and communities of origin"—all of which place children "at significant risk of trauma and emotional harm." [ER1511]

Ms. Happach's review of DCS placement data demonstrates that "Arizona has not kept up with the increasing need for homes." [ER1511] For the period October 2012 to March 2016, "the number of youth in out-of-home care increased by 32% while the number of available foster home beds increased by only 20%." [ER1512] Ms. Happach also found that DCS statistics understate the problem because "every bed is not available to every youth." [*Id.*]

DCS has long been aware of these issues, repeatedly acknowledging that it has "an insufficient number of foster homes to meet demand." [ER1163] The severity of the shortage is illustrated by the following chart, comparing the number of available beds reported by DCS to the number of children requiring non-kinship out-of-home care from 2013 to 2016.[12]

[12] The data reflected in the table comes from DCS reports found at ER1797-1867 (March 31, 2013 data); ER1871-0941 (March 31, 2014 data); ER1945-2015 (March 31, 2015 data); and ER632-701 (March 31, 2016 data). Within those reports, the number of available beds is found at ER1845, ER1920, ER1994, and ER677, and is calculated by the "number of spaces," minus spaces reported as "unavailable for placements." The number of children in out-of-home care is found at ER1840, ER1915, ER1989, and ER675. The number of children in non-kinship placements is calculated by the number of children in out-of-home care, minus the number of children in "relative placements."

| Date | Number of Available Beds | Number in Out of Home Care | Number in Non-Kinship Placements |
|---|---|---|---|
| March 31, 2013 | 6,427 | 14,314 | 8,599 |
| March 31, 2014 | 6,636 | 15,751 | 9,009 |
| Oct. 2014 | Arizona Auditor General concludes that DCS has an inadequate supply of foster homes.[13] | | |
| March 31, 2015 | 6,525 | 17,592 | 9,611 |
| Dec. 10, 2015 | Defendant McKay publicly states that DCS lacks enough foster homes.[14] | | |
| March 31, 2016 | 7,452 | 18,906 | 10,400 |
| May 6, 2016 | DCS tells stakeholders that DCS has "insufficient foster home capacity."[15] | | |

Ms. Happach described the harm to children arising from this foster home shortage: "One of the most egregious indicators of Arizona's inadequate number of foster care placements is its use of non-therapeutic congregate care, including group homes, shelters and institutions." [ER1512] That use, she explained, is contrary to clear research establishing "the need for children to be in a family-like setting in order to minimize the trauma and emotional harm resulting from removal from the family of origin." [ER1508]

[13] ER2059-60.

[14] Dkt. No. 238-1, Pltf. Ex. 72, DCS Community Advisory Committee, YOUTUBE (December 10, 2015), available at https://www.youtube.com/watch?v=dv1qNoe-MHU at 21:03. (cited in Plaintiffs' brief to the district court at ER2574)

[15] ER1443.

Documents produced with Ms. Happach's report confirm the professional consensus that children are harmed by congregate care. For example, a National Conference of State Legislatures report cites research demonstrating that "[y]outh who live in institutional settings are at greater risk of developing physical, emotional and behavioral problems that can lead to school failure, teen pregnancy, homelessness, unemployment and incarceration and are less likely to find a permanent home than those who live in family foster care." [ER2088] DCS acknowledges these risks. In a report submitted to the federal government, DCS stated that the "research literature makes it very clear that congregate care placements can have significant negative impacts on children's overall development" and that "many short term congregate care settings do not have the therapeutic or educational supports necessary for children and can be detrimental to achieving well-being outcomes." [ER2317]

DCS also recognizes that a "family-like setting" "is imperative for a child's healthy brain and social development throughout life." [ER2148] And a U.S. Department of Health and Human Services ("HHS") report similarly states that "stays in congregate care should be based on the specialized behavioral and mental health needs or clinical disabilities of children. It should be used only for as long as is needed to stabilize the child or youth so they can return to a family-like setting." [ER1513]

It is well understood in the field that children should not be placed in congregate care as a default due to the State's failure to develop capacity to place them with families. [*See* ER1512-13] Yet, DCS documents indicate that the lack of available foster homes has led DCS to improperly rely on congregate care. As DCS put it, "[w]hen children are removed from their homes, they are often placed in congregate care settings and remain there for extended periods of time due to the lack of placements [*sic*] options and openings in less[] restrictive environments." [ER2018] DCS likewise admits that the majority of these children do not need to be in congregate care: "The information has consistently indicated that Arizona is over-utilizing congregate care for children where placement in such restrictive environments is not necessary due to behavioral, medical, or juvenile justice requirements." [ER2149-50; *see* ER1397, Janette Bell Dep. 57:16-20, Nov. 15, 2016 (testifying that 725 of 1,070 children in congregate care in Maricopa County in April 2016 could have been placed in a more family-like setting)]

Placement in congregate care (and particularly in shelters) is especially harmful to young children. [ER1514] DCS's chief quality improvement officer testified that "we don't like to see children in shelter at all, but it is especially concerning when we have very young children in shelter." [ER1573] Consistent with this concern, Arizona supposedly limits shelter-placements to three weeks. [ER1514] Yet, during each month of FY 2016, there were between 31 and 57

toddlers age 3 and under living in shelters. [ER2576] Moreover, from October 1, 2015 through March 31, 2016, 974 children remained in a shelter for more than 21 consecutive days. [ER677]

DCS's inadequate supply of home placements has also caused foster children to be separated from their siblings at alarming rates. For a child, the removal from one's parents into foster care is a traumatic experience. After removal, a child's siblings are often one of the child's only sources of continuity and support. Thus, "[t]he trauma of removal from the home of origin is compounded by separating siblings into different placements." [ER1515] Accordingly, federal standards cited by Ms. Happach provide that "all siblings should be placed together 85% of the time, and two siblings should be placed together 95% of the time." [*Id.*] But for children with siblings in non-kinship placements on January 31, 2016, all siblings were placed together only 43% of the time, and two were placed together 25% of the time. [ER1560] Almost a third of these children were not placed with any of their siblings. [*Id.*][16]

DCS's shortage of foster homes has also led DCS to place children far from their homes. "A child welfare system must have the capability to keep children close

[16] DCS acknowledged in 2016 that "placing siblings together is one reason why some children are placed into congregate care. . . . Arizona will need more placement resources that are outside of congregate care that can care for sibling groups." [ER2211]

to their home communities when they enter foster care." [ER1516] As explained above, the removal itself is already a traumatic experience. Placing children close to home thus "allows for greater emotional stability as youth are able to maintain relationships and familiarity with surroundings." [ER1516] Arizona law and DCS policy recognize the significance of these connections. *See* A.R.S. § 8-513(C) (a foster child has a "right to maintain contact with friends and relatives unless the court has determined that contact is not in the child's best interests"); [ER2367]

Yet, DCS's long-standing failure to maintain an adequate placement array has caused it to place children far from home. According to DCS data, for example, in September 2014, 1,700 foster children were placed an hour or more from home. [ER1517] Similarly, as of January 31, 2016, more than half of the children in non-kinship care were placed outside of the cities from which they were removed. [ER1560][17]

### 3. Defendants' Practice of Failing to Provide Foster Children with Necessary Physical and Dental Health Care Services.

The district court record also shows that DCS regularly fails to provide the well-child physical examinations, immunizations, dental examinations, and other preventative services required by the Medicaid statute.

[17] Ms. Happach's Updated Report finds that DCS still fails to provide a sufficient array of foster homes. [Dkt. No. 392-5 at pp. 1, 6, 12, 14]

As explained in Dr. Steven Blatt's Expert Report, foster children "are an especially vulnerable group with significant health deficits." [ER767] They "have 'a higher prevalence of physical, developmental, dental, and behavioral health conditions than any other group of children.'" [*Id.* (quoting American Academy of Pediatrics' guidelines)] The health risks they face are profound:

> First, they are at significant risk for having unmet health care needs including under-immunization; under-treatment of chronic diseases such as asthma and poor vision; untreated dental needs; and non-treatment of mental health conditions or developmental delays. Additionally, children in foster care are at high risk of having been exposed to intrauterine substance and alcohol abuse; malnutrition and failure to thrive; physical abuse; sexual abuse; and sub-standard emotional supports such as loving and nurturing parents.

[ER768]

To address these needs, "fundamental principles of pediatrics in foster care" require that foster agencies "provide children with comprehensive medical and dental assessments when they enter care, provide regular and routine preventative care, and ensure that children's medical and dental needs are met until they are discharged." [ER770] Failure to do so "puts them at a grave risk of harm." [ER768]

Yet, Dr. Blatt found that DCS has a "consistent practice" of failing to provide foster children with the physical and dental health care services they require. [ER770] He is not alone. His report cites December 2015 HHS data showing that "DCS ensured that children had received adequate services to meet their physical and mental health needs in only 43% of the applicable foster care cases." [ER772]

Similarly, June 2016 DCS data show that "the agency properly assessed and provided necessary services to children to meet their physical and dental health needs in only 51% of cases reviewed." [*Id.*] DCS reported similar data in 2015. [*Id.*]

Dr. Blatt's report details specific DCS data that show Arizona's foster children are at substantial risk of harm. For example:

- 40% of children were not evaluated within the 30-day time period required by DCS policy. [ER774] Failure to do so "delays the child welfare system in obtaining critical information to address the effects of abuse and neglect and create a meaningful service plan to ensure a child's health care needs are met." [*Id.*]

- In 2015, the year for which the most recent data were available at the time Dr. Blatt wrote his report, more than one in five of all children who had been in foster care for a year did not receive a comprehensive physical examination meeting EPSDT requirements within the most recent 12 months. [ER776] The statistics were even worse for pre-school aged children (ages 3 to 6) and adolescents (ages 12-18). [ER777] But as Dr. Blatt noted, "annual preventative medical visits [are] the lynchpin of pediatric care." [ER776]

- In 2015, DCS data showed that over a quarter to two-thirds of foster care children "who should have seen a dentist did not," even though "it is essential to children's health." [ER775]

- Based on state data for both infants and teenagers, Dr. Blatt found that "Arizona has a clear pattern of failing to ensure that about half of children in foster care receive . . . essential [immunization] services," even though "[l]ack of immunizations places them at risk for infectious diseases." [ER780]

Dr. Blatt concluded that these low levels of health care delivery were caused by DCS's failure to effectively manage and coordinate care. [ER782] For

example, he described the DCS "120 Day Report," which was purportedly used to identify children who have not received necessary preventative medical and dental services—and was supposed to remedy that failure. [ER783] Dr. Blatt found that "[t]his practice is clearly ineffective," as children remain on the 120 day reports for months—and even years. [ER784]

Although DCS policy states that the "child's case manager is ultimately responsible for ensuring that children are safe and well," Dr. Blatt found that "DCS and its caseworkers are not meeting their obligation to ensure that the children in the agency's care receive [comprehensive medical and dental] services." [ER784-85] As a result, children "run the significant risk of having their health deteriorate while in the state's care." [ER785][18]

#### 4. Defendants' Practice of Failing to Conduct Timely Investigations of Abuse and Neglect.

Ms. Happach's Expert Report found that "DCS has a consistent practice of failing to complete in a timely fashion the investigatory steps that are fundamental to keeping vulnerable children who are in Arizona's care and custody safe from maltreatment." [ER1525-26] As Ms. Happach explained, "[a] process failure puts

[18] Dr. Blatt's Updated Report cites DCS's most recent available data to show that "DCS still fails to ensure that children in foster care actually receive comprehensive preventative and treatment services, and still fails to effectively manage and coordinate the delivery of physical and dental health care services to children in foster care." [Dkt. No. 392-3 at p. 2]

a child in harm's way; a single failure can result in death of a child." [ER1468] "Once a child is removed from home and taken into out-of-home care, the child welfare system is obligated to protect that child from further maltreatment." [ER1519] Failure to conduct timely investigations puts all children in out-of-home care "at serious risk of harm." [ER1526] Yet, after examining DCS's practices, Ms. Happach concluded that DCS investigatory caseworkers were overburdened with excessive caseloads [ER1524], contributing to DCS's consistent investigatory failures.

**a. Lack of Timely Initial Response.**

DCS policies purport to require an investigation to be initiated—meaning merely a first attempt to see a child—between 2 hours and 7 days of a report of maltreatment, depending on the severity of the allegations. [ER1520] In Ms. Happach's opinion, even if DCS met that initial response deadline, it would be insufficient to ensure the child's safety because the policy does not require the investigator to actually *see* the child during that timeframe. [*Id.*] Yet, even by its own standards, DCS failed to timely initiate an attempt to see the child in 28% of the reports of maltreatment it received over the three-year period from January 1, 2013 to January 31, 2016. [ER1520; ER1557-58] DCS's failure to make a timely initial attempt to see the child "creates a safety risk" because without it, "[t]he

investigator cannot identify and respond to any imminent, current, or likely danger facing the child." [ER1521]

**b. Lack of Timely Safety Assessments.**

"In an investigation of child maltreatment, the investigator's first task is to determine the child's or children's immediate safety." [*Id.*] DCS policy purports to require an investigator to make and document a "safety assessment" about the child within 48 hours of seeing the child but, here again, this policy is deficient because there is no deadline as to when that face-to-face meeting must occur. [ER1564; ER1521-22] At the beginning of 2016, DCS began tracking whether an investigator saw the child and documented a safety decision within 48 hours of the *initial response deadline*, rather than within 48 hours of seeing the child. [ER1521] "The completion of the safety assessment in the 48 hour timeframe is . . . critical to ensure that a child is not left in an unsafe situation." [ER1522] As one DCS witness explained, meeting this deadline is "extremely important. It's one of the most important things we do." [ER1577-78 Guffey Dep. Tr., at 173:22-174:3)]

Yet, according to Ms. Happach, DCS's data show a "particularly egregious" delay in making these safety decisions. [ER1522] With few exceptions, DCS made less than 60% of its safety decisions on time each month from February (when DCS began collecting data) through July 2016, in the regions that account for approximately 89% of the children in foster care. [ER1522]

### c. Failure to Timely Enter Findings and Close Investigations.

Ms. Happach also found that DCS regularly fails to meet its deadline for closing an investigation, once again "putting children at risk." [ER1524] DCS policy gives it 60 days from the beginning of the investigation to complete it—which means (among other things) that findings have been entered and any safety threats have been addressed. [ER1585 (DCS Rule 30(b)(6) Dep. Tr., at 46:4-8)] This deadline is meant to "ensure[] that a child does not linger in a dangerous environment and ensure[] that the safety of any other children who are or could be placed in the placement is addressed." [ER1523]

Yet, over the three-year period from January 1, 2013 to January 31, 2016, and even for the most serious allegations, DCS met its 60-day deadline in only about half of its investigations. [ER1524] Further, it took DCS at least three times as long as policy allows to complete these late investigations. [*Id.* ][19]

## IV. THE CLASS CERTIFICATION ORDER

On Plaintiffs' motion, the district court certified the following class and subclasses under Rule 23(b)(2):

- a **General Class** of "children who are or will be in the legal custody of DCS due to a report or suspicion of abuse or neglect";

[19] Ms. Happach's Updated Report finds that "DCS continues to fail to meet its own deadlines on investigations in large numbers of cases, placing children at risk of harm." [Dkt. No. 392-5 at p. 18]

- a **Non-Kinship Subclass** of "[a]ll members in the General Class who are not placed in the care of an adult relative or person who has a significant relationship with the child"; and
- a **Medicaid Subclass** of "[a]ll members of the General Class who are entitled to early and periodic screening, diagnostic, and treatment services under the federal Medicaid statute." [ER22-23]

In certifying these classes, the district court followed *Parsons'* legal framework, and applied it not only to the allegations of the complaint, but also to the voluminous exhibits, expert reports, deposition excerpts, internal DCS documents, thousands of pages of documents produced in discovery, and Named Plaintiffs' sealed medical files. [ER4, 16-17] The following discussion of the certification order focuses on the issues raised by Defendants on appeal: standing, commonality, typicality, and the propriety of classwide injunctive and declaratory relief.[20]

### A. Standing

The district court explained that under this Court's precedent, "[s]tanding exists if at least one named plaintiff meets the requirements." [ER8] The court found that both B.K. and B.T. meet those requirements given the "seven pages in the [complaint] dedicated to outlining the injuries [they] personally suffered as well as

[20] Defendants argued below that purported improvements in the foster care system somehow moot the case. Rejecting that argument, the court found that the Defendants' statistics "do not establish Defendants were not, are not, and will not be in violation of Plaintiffs' federal rights." [ER6 n.2] The Updated Reports cited in note 7 above confirm that the challenged practices continue to expose the classes to harm. Defendants do not argue mootness on appeal.

the many exhibits submitted in support of Named Plaintiffs' motion which demonstrate the personal and individual harm they suffered." [*Id*.]

The court likewise rejected Defendants' argument that B.K. and B.T. lacked standing for their Medicaid claims. The court found that both Plaintiffs "presented evidence they personally suffered harm from not receiving the necessary health care diagnostic services and treatment necessary to correct physical and mental conditions in a prompt manner." [ER12]

**B. Commonality**

On commonality, the district court found that "the putative class and subclass members . . . set forth numerous common contentions whose truth or falsity can be determined in one stroke: whether the specified statewide policies and practices to which they are all subjected by the [DCS] expose them to a substantial risk of harm." [ER16]

In so finding, the court rejected Defendants' contention that '"the diversity of needs of children in care require[s] an individual determination.'" [ER15] Even if health issues among individual class members may differ, the court explained, "every child in the [DCS] custody is necessarily subject to the same medical, mental health, and dental care policies and practices" challenged in the complaint "in the same way that the inmates in *Parsons* were subjected to the policies and practices of the ADC." [ER16] "Thus, every single child in the foster care system faces a

substantial risk of serious harm if [DCS] policies and practices fail to adhere to constitutional requirements." [ER17] Similarly, on the Medicaid Act claim, the court found that "[e]ven if a child's specific medical diagnosis may differ, . . . whether the foster care system's practices establish a pattern of non-compliance arise from [Defendants'] statewide policies and practices . . . ." [ER18]

**C. Typicality**

The court found that B.K. and B.T.'s claims were typical for the same reasons as the plaintiffs' claims in *Parsons*—namely, because they "allege 'the same or [a] similar injury' as the rest of the putative class; they allege this injury is a result of a course of conduct that is not unique to any of them . . . ." [ER19] Because "every child in the foster care system under state custody is highly likely to require medical care and housing placement, each Named Plaintiff is similarly positioned to all other children with respect to exposure to the Defendants' policies and practices." [*Id.*]

**D. Remedies**

The court found Rule 23(b)(2) satisfied because the class seeks injunctive and declaratory relief '"from policies or practices that are generally applicable to the class as a whole.'" [ER20 (citing *Parsons*)] For that reason, the court rejected Defendants' argument that any injunctive relief would need to be tailored to unique circumstances of each class member. [ER21] Rather, "the harm Named Plaintiffs seek to remedy is the 'risk of exposure' created by subjecting children in foster care

to [Defendants'] policies and practices—not the harm an individual child suffers from a misdiagnosis." [*Id.*]

## SUMMARY OF ARGUMENT

Defendants contend that the district court abused its discretion in finding that the proposed class and subclasses meet Rule 23(a)'s requirements of commonality and typicality, and Rule 23(b)(2)'s requirements for injunctive and declaratory relief. On each of those factors, though, Defendants repeatedly concede that the district court faithfully followed this Court's analysis in *Parsons*.[21] That concession alone warrants affirmance of the district court's order.[22] Moreover, apart from *Parsons*, the district court correctly applied the voluminous evidentiary record to well-established Rule 23 precedent.

*Commonality:* As a matter of law, when a defendant engages in systemic practices that allegedly expose a class to a substantial risk of serious harm, those practices form the "glue" that binds the class members together for purposes of the commonality requirement. That is precisely the case here, where multiple systemic practices by Defendants risk serious harm to the physical and mental health of children in their care.

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[21] *See, e.g.*, Def. Br. at 5, 6 ("Relying on *Parsons*"), 10 ("hewing to *Parsons*"), 17 ("Applying *Parsons*"), 18 ("As *Parsons*"), 21 ("rest[ing] squarely" on "*Parsons*"), 40 ("shaped by *Parsons*"), 50 ("With *Parsons* . . . as a blueprint").

[22] *See In re Zappos.com, Inc.*, 888 F.3d 1020, 1025 (9th Cir. 2018) (binding effect of panel decisions).

*Typicality:* B.K. and B.T. have both been exposed to the same challenged practices, and to the same substantial risk of harm, as all other class members—which is all the typicality test demands.

*Relief:* Plaintiffs seek to enjoin and declare unlawful the challenged practices to which each class member is exposed. This sort of indivisible relief is Rule 23(b)(2)'s intended purpose.

At bottom, Defendants' argument on all these issues is that the class action remedy is *never* appropriate unless each class member has experienced actual harm. But neither as a matter of substantive nor class-action law must a class wait for a tragic event or medical crisis to befall every class member before seeking relief. That principle surely applies to class members as vulnerable as the children here.

## STANDARD OF REVIEW

This Court "review[s] a district court's decision to certify a class for abuse of discretion, and accord[s] the district court "noticeably more deference" when reviewing a grant of class certification than when reviewing a denial." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017) (citations omitted).[23]

A district court applying the correct legal standard abuses its discretion only if "it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits

[23] Defendants criticize (at 8) the additional deference paid to *grants* of class certification. But this Court consistently embraces this standard, as *Just Film* confirms. Whatever the standard, though, affirmance is warranted here.

a clear error of judgment in weighing the correct mix of factors." *Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623, 629 (9th Cir. 2018) (citation omitted). Additionally, under the clearly-erroneous standard, this Court upholds finding of fact unless they are "(1) illogical, (2) implausible, or (3) without 'support in inferences that may be drawn from the record.'" *Id.* (citation omitted). "This standard applies even when findings are based on documentary evidence or inferences." *Wardley Int'l Bank, Inc. v. Nasipit Bay Vessel*, 841 F.2d 259, 262 n.1 (9th Cir. 1988).

"'Neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies' Rule 23." *Sali*, 889 F.3d at 632 (citation omitted).

## ARGUMENT

### I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING COMMONALITY.

Rule 23(a)(2) requires "questions of law or fact common to the class." Under this Rule, plaintiffs' "claims must depend upon a common contention" such 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." *Wal-Mart*, 564 U.S. at 350. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (citation omitted).

"This analysis does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014). "[E]ven a single common question will do." *Wal-Mart*, 564 U.S. at 359 (quotation marks and alterations omitted).

"To assess whether the putative class members share a common question . . . , [the court] must identify the elements of the class members'[] case-in-chief." *Stockwell v. City and Cty. of San Francisco*, 749 F.3d 1107, 1114 (9th Cir. 2014). Here, Plaintiffs claim that Defendants have violated their duties to foster children under both the Due Process Clause and the Medicaid Act, and in so doing, have exposed those children to substantial risks of harm.

### A. The State Owes Foster Children Affirmative Duties Under the Due Process Clause and Medicaid Act.

"[O]nce the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012) (citation omitted). The State's failure to protect and provide for foster children thus violates due process. *Id.* The "standard for determining whether a foster child's due process rights have been violated is 'deliberate indifference,'" which "requires an objective risk of harm and a subjective awareness of that harm." *Id.* at 1000-01 (citation omitted).

Allegations that the State "failed to provide adequate medical care, monitor the administration of medication, or respond to reports of abuse" satisfy this standard. *Id.* at 1001. Those are the nature of Plaintiffs' due process allegations here.

The State also owes foster children affirmative duties under the Medicaid Act, 42 U.S.C. § 1396 *et seq*. Specifically, Arizona, "like all other states participating in Medicaid, is required to provide EPSDT care to eligible children under the age of 21," and must ensure that such care is "reasonably effective." *Katie A, ex rel. Ludin v. Los Angeles Cty.*, 481 F.3d 1150, 1154, 1159 (9th Cir. 2007). It also has an "obligation to see that [health care] services are provided when screening reveals that they are medically necessary for a child." *Id.* at 1158. "This obligation is created by § 1396a(a)(43)(C), which states that a state plan must provide for arranging, directly or through referral, necessary corrective treatment under the EPSDT obligation." *Id.*; *see also Stanton v. Bond*, 504 F.2d 1246, 1250 (7th Cir. 1974) ("The mandatory obligation upon each participating state to aggressively notify, seek out and screen persons under 21 in order to detect health problems and to pursue those problems with the needed treatment is made unambiguously clear . . . ."). Plaintiffs' Medicaid claim is based on Defendants' failure to meet these statutory obligations.

### B. A Substantial Risk of Harm Suffices to Establish Injury Under the Due Process Clause and the Medicaid Act.

The above due process and Medicaid Act requirements are not seriously disputed. What is in dispute is whether violation of those requirements (1) can be established by a substantial risk of future injury faced by the class as a whole, as the district court held [ER16-19], or (2) may only be established with proof that each individual child has suffered actual injury. Defendants argue for the second proposition, contending (at 14, 32) that "[o]nly individualized inquiries can reveal a violation of minimum constitutional standards" because each class member supposedly must have suffered "concrete and particularized harm." They argue likewise (at 16-17) on the Medicaid Act claim. In essence, Defendants argue that the class action vehicle is *never* appropriate to challenge systemic practices that create risk of harm.

Defendants' argument rests on a false premise: As *Parsons* explained, class action claims arising from practices that create a "substantial risk of serious harm" are "firmly established in our constitutional law." *Parsons*, 754 F.3d at 676-77. A "remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). A prison inmate, for example, may "successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery," and prison officials may not be "deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining

inmate shows no serious current symptoms." *Id.* Indeed, it "would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.* [24]

The principle that a risk of harm suffices to state a claim applies equally to the Medicaid Act. For example, a child should not have to wait to suffer a mental breakdown to complain that the state lacks enough qualified therapists to provide statutorily-required mental health services. Courts have thus not hesitated to certify classes seeking to enjoin threatened violations of the Medicaid Act. *See, e.g.*, *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 375, 378 (2d Cir. 1997) (affirming certification of class of foster children alleging Medicaid Act and other violations, including children who are or will be "at *risk* of neglect or abuse") (emphasis added). Courts have held similarly under other statutes. *See, e.g.*, *Central Delta Water Agency v. United States*, 306 F.3d 938, 949-50 (9th Cir. 2002) (addressing standing under an environmental statute: "a credible threat of harm is

[24] Cases to the same effect are legion. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) ("[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment"); *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) ("One does not have to await the consummation of threatened injury to obtain preventive relief."); *Zappos.com*, 888 F.3d 1020 at 1024 (plaintiffs sufficiently alleged standing based on the *risk* of identity theft); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) (prisoners "have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions").

sufficient to constitute actual injury for standing purposes, whether or not a statutory violation has occurred").

*Lewis v. Casey*, 518 U.S. 343 (1996), repeatedly relied on by Defendants (*e.g.* at 18-19), does not retreat from this risk-of-harm analysis. There, the Supreme Court reversed an injunction requiring reform to the law-library and legal-assistance system in Arizona prisons. *Id.* at 347-48. The Court might have sustained the injunction if "the right at issue—the right to which the actual or threatened harm must pertain—were the right to a law library or to legal assistance." *Id.* at 350. But the Court held that no such right existed; rather, the only pertinent right was the "right of access to the courts," an end to which law libraries and legal assistance are merely means. *Id.* at 350-51 (emphasis omitted). Because prisoners were only twice denied their right of access to the courts, the prisoner class lacked standing for a systemwide injunction. *Id.* at 356-60.

Here, by contrast, "the right to which the actual or threatened harm must pertain," *id.* at 350, is the right to be free from a substantial risk of harm. As discussed in the next section, each class member is exposed to that risk because of practices they all face.

### C. The District Court Rightly Found That All Class Members Are Exposed to Practices That Allegedly Create a Substantial Risk of Serious Harm.

*Parsons* held that all class members had in common "their alleged exposure, as a result of specified statewide . . . policies and practices that govern the overall conditions of health care services and confinement, to a substantial risk of serious future harm." 754 F.3d at 678. The district court did not abuse its discretion in finding commonality [ER16] for the same reason here.

#### 1. The District Court Identified the Practices That Create a Substantial Risk of Serious Harm for Foster Children.

The district court rightly identified [ER14-15, 17-18] the practices that create a substantial risk of harm for all of the State's foster care children. The Statement of Facts ("SOF") above summarizes the voluminous evidence of those practices, including:

- Defendants fail to maintain an adequate array of therapeutic services necessary to meet the children's mental health needs [SOF at 8-9, 11, 14, 17, 19, 27];
- DCS burdens its foster care workers with unreasonably high workloads, making it impossible for them to provide required services [SOF at 8, 14, 16-17, 29];
- Because of DCS's failure to remedy its significant shortage of licensed family foster homes, it places large numbers of children in shelters,

offices, inappropriate group homes, and other harmful settings [SOF at 9, 11-13, 19, 21, 23-24];

- DCS unnecessarily separates foster children from their siblings and places them unreasonably far from their home communities [SOF at 9, 12, 19-20, 24-25];
- Defendants frequently fail to provide basic physical and dental health services to many children [SOF at 9, 12, 26-28];
- DCS fails to timely complete the investigatory steps required to protect children from further abuse and neglect while in State custody [SOF at 9, 29-31].

Defendants do not seriously dispute the evidence establishing these practices—they barely even acknowledge its existence. Yet, as in *Parsons*, these practices are the "glue" holding the classes together because "either each of the policies and practices is unlawful as to every [class member] or it is not." 754 F.3d at 678.

The answer to that question is not, as Defendants contend (at 22-23), "unique to each child's particular situation." Rather, the question can be answered "in one stroke" as to all class members. *See Wal-Mart*, 564 U.S. at 350. As the district court explained [ER16]:

> The inquiry here does not require the Court to determine the effect of the policies and practices upon any individual class member . . . or to

> undertake an individualized determination. Even if health issues may differ, every child in the [DCS] custody is necessarily subject to the same medical, mental health, and dental care policies and practices of the [DCS] in the same way that the inmates in *Parsons* were subjected to the policies and practices of the ADC.

The district court's finding in this regard is unassailable. The question, for example, of whether Defendants maintain a uniform policy and practice of understaffing (and thus overloading) caseworkers does not depend on the circumstances of any individual foster child. The answer is the same for the entire population of foster children.

### 2. Courts Routinely Find Commonality from Systemic Practices Affecting All Class Members.

This Court in *Parsons*, like the district court here, had plenty of company in finding commonality based on these sorts of systemic practices:

- *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48 (3rd Cir. 1994): The Third Circuit held that the district court abused its discretion by *declining* to certify a class of foster children challenging various foster care practices including "an insufficient number of trained caseworkers; an insufficient number of medical, psychiatric, psychological, and educational service providers; [and] an insufficient number of trained foster parents." *Id.* at 53. The court observed that class treatment is appropriate so long as all class members are "*subject* to the same harm." *Id.* at 56.

- *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997): The Second Circuit affirmed the certification of a class of foster children alleging, among other things, "inadequate training and supervision of foster parents, the failure to properly investigate reports of suspected neglect and abuse, [and] unconscionable delay in removing children from abusive homes." *Id.* at 376. The district court did not abuse its discretion because plaintiffs' "injuries derive[d] from a unitary course of conduct by a single system." *Id.* at 377.
- *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010): The Tenth Circuit affirmed the certification of a class of foster children challenging (among other practices) the state's failure "to protect class members from abuse and neglect"; the state's practice of "assigning excessive caseloads to its child welfare caseworkers and supervisors"; and the state's practice of "placing class members in unsafe and overcrowded emergency shelters." *Id.* at 1193. The court observed that "[a]ll class members, by virtue of being in . . . foster care, are subject to the [state's] purportedly faulty monitoring policies . . . , regardless of their individual differences; therefore, all members of the class are allegedly exposed to the same unreasonable risk of harm as a result of Defendants' unlawful practices." *Id.* at 1196.

*Parsons* itself cites a half dozen post-*Wal-Mart* cases concluding that "the commonality requirement can be satisfied by proof of the existence of systemic policies and practices that allegedly expose inmates to a substantial risk of harm." 754 F.3d at 681-82. And several district courts, post-*Wal-Mart*, have certified classes of foster children challenging practices similar to those at issue here. *See, e.g.*, *M.D. v. Perry*, 294 F.R.D. 7, 44 (S.D. Tex. 2013); *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 34 (D. Mass. 2011).

The case for commonality is even stronger here than it was in *Parsons.* According to the dissent from the denial of the rehearing *en banc* in *Parsons*, commonality was lacking because the relevant classes included many prisoners who did not "presently require" medical or mental health care. 784 F.3d 571, 579. But here, 75-85% of foster care children have behavioral health disorders [SOF at 14], *every* foster child needs a caseworker, *every* foster child needs a safe and appropriate place to live, and *every* child requires comprehensive medical and dental assessments, preventative care, immunizations, and the like.

### D. Defendants' Commonality Arguments Mischaracterize Plaintiffs' Claims and Ignore the Record.

#### 1. Commonality Exists Even If Some Children Have Escaped Harm.

In Defendants' view (at 15), commonality is lacking because, even if many foster care children get deficient care, others have been well-treated. But when a

practice fails the needs of thousands of children, it creates an undue risk of harm to all children. That any given child has not yet been injured is to his good fortune, but does not mean he is safe from harm tomorrow.

Many courts have recognized this point. In *DG*, for example, Oklahoma's foster care agency argued that "because the evidence presented demonstrated . . . [that a foster child] ha[d] only a 1.2% chance of being injured, then 98.8% of the putative class [was] not under an imminent threat of serious harm and, therefore, no issue of fact or law common to its members exist[ed]." 594 F.3d at 1198. Concluding that this argument "entirely misse[d] the mark," the Tenth Circuit held:

> That "only" 1.2% of OKDHS foster children actually suffered abuse reveals nothing about how many of those children were not properly monitored and yet survived an unconstitutional risk of abuse or neglect unscathed. Logically, the fact that 1.2% of OKDHS foster children reported abuse or neglect does not mean the rest of the class was not exposed to an impermissible risk of serious harm. In theory, 100% of foster children could live under an imminent threat of serious harm, but only 1.2% ultimately suffer and report abuse or neglect.

*Id.* The Third Circuit reached the same conclusion when it found that "[a] child lucky enough to be receiving permanency planning . . . faces the immediate threat of losing that service in a system characterized by the widespread absence of such services." *Baby Neal*, 43 F.3d at 63. Similarly, *Parsons* reasoned that inadequate health care in a prison endangers every inmate, as "any one of them could easily fall ill, be injured, need to fill a prescription, require emergency or specialist care, crack a tooth, or require mental health treatment." 754 F.3d at 678-79.

### 2. Class Members Are Not in Conflict.

Defendants argue (at 23) that the general class and subclasses "advance claims which conflict with other class claims." (Emphasis omitted). To make this point, Defendants hypothesize (at 23-24, 32) that a child in the non-kinship class may prefer congregate care to stay with their siblings, and that in other situations it may be inappropriate to place children with their kin. But nowhere do Plaintiffs claim that it is *never* appropriate to use congregate care. Rather, Plaintiffs' claim is over Defendants' practice of defaulting to congregate care simply because of capacity challenges and not because it serves the interests of the children involved. [SOF at 21, 23]

### 3. Defendants' Rhetoric Cannot Avoid the Challenged Practices.

Defendants say (at 24) that Plaintiffs are merely contesting a "smorgasbord of day-to-day, case-by-case operational failures." But failures such as an inadequate number and array of placements, or employing an inadequate number of caseworkers to meet children's needs, cannot be dismissed as isolated "operational" incidents; they are paradigms of systemic deficiencies. Defendants' own authority (cited at 24) agrees. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 848 n.7 (5th Cir. 2012) ("[I]t is not clear how several of the State's alleged failures, such as its failure to (1) maintain sufficient licensing standards for its placements, (2) maintain an

adequate number and array of placements, or (3) employ a sufficient number of caseworkers, can be considered 'day-to-day, case-by-case operational failures.'").[25]

The same authority disposes of Defendants' argument (at 30-31) that a "failure" to provide a foster care service is "not a policy or practice." *Stukenberg* acknowledged that "class claims could conceivably be based on an allegation that the State engages in a pattern or practice of agency action or inaction—*including a failure to correct a structural deficiency within the agency, such as insufficient staffing*." 675 F.3d at 847 (emphasis added). This Circuit and others concur. *See, e.g.*, *Parsons*, 754 F.3d at 679 ("every single inmate has allegedly been placed at substantial risk of future harm due to the general unavailability of constitutionally adequate care"); *DG*, 594 F.3d at 1198 ("agency-wide failure to monitor class members adequately" constitutes an "unconstitutional risk of abuse or neglect"); *Marisol A.*, 126 F.3d at 378 ("Insofar as the deficiencies of the child welfare system stem from central and systemic failures, the district court did not abuse its discretion in certifying a 23(b)(2) class at this stage of the litigation.").

Equally without merit is Defendants' argument (28) that a practice must reflect a policy, or at least be "approved or tacitly approved," to be "fit for class certification." In Defendants' world, their consistent failure to provide needed

[25] Although *Stukenberg* vacated a class certification order, the district court certified a class again on remand. *M.D. v. Perry*, 294 F.R.D. at 18.

medical services would be immune from a class claim so long as that failure was not the result of some official policy or approved procedure. Again, even Defendants' cited authority declines to accept a result that would reward such behavior. *See Stukenberg*, 675 F.3d at 847 ("we do not necessarily agree . . . that the proposed class can only be certified . . . if its claims are premised on a 'specific policy"'). Similarly, in *Jimenez*, 765 F.3d at 1162-63, this Court upheld the district court's grant of class certification to employees who alleged that their employer had a "practice or unofficial policy" of encouraging them to work unpaid off-the-clock overtime. The Court affirmed even though the employer argued that its *formal policies* were lawful. *Id.* at 1166 n.5.

Nor did the district court here group all the challenged practices into one "super claim," as Defendants state (at 23). To the contrary, each challenged practice will be evaluated separately to determine whether it exposes class members to an undue risk.

**4. Defendants Cannot Avoid Their Own Statistics.**

Defendants' argue (at 31-33) that use here of "aggregate statistics" showing "aggregate deficiencies in care" cannot establish commonality for the same reason that *Wal-Mart* criticized use of statistics there. Defendants fail to identify all but a handful of the data that is the subject of their criticism.[26] Regardless, Plaintiffs' use

[26] Defendants try (at 33) to make their argument about aggregate statistics by

of data in this case has no parallel to *Wal-Mart*.

In *Wal-Mart*, the aggregate statistics could not establish a uniform practice of gender discrimination because the millions of employment decisions at issue were "committed to local managers' broad discretion" at 3,400 separate stores. 564 U.S. at 343, 356-67. Here, by contrast, decision-making is centralized in just two agencies. Moreover, those agencies measure their performance against minimum standards, using the very statewide data presented in support of class certification. [*See* SOF at 17-18, 30] Presumably, Defendants do so because they recognize the probative value of the data.

That the data come from Defendants, and are used by them to assess their own performance, also refutes their argument (at 34) that the data cannot show "deliberate indifference." In any event, whether this data ultimately does establish deliberate indifference is a common question that warrants class certification. The answer to that question, though, is for trial, and "is immaterial at th[e] class certification stage." *See Jimenez*, 765 F.3d at 1166 n.5.

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focusing on statewide data on caseworker caseloads. They suggest that those statistics are deceptive because "DCS case workers have lower caseloads in some regions and higher caseloads in others." But Defendants have long recognized that caseloads are a statewide "systemic" issue that requires a statewide solution. [*E.g.*, ER1163, 1105] And Defendants ignore that the vast majority of class members are in the region (Maricopa County) with the highest and most burdensome caseloads. [ER__ Dkt 238 Expert Report of Marci White at 27, Happach Report at 19]

### 5. Defendants' Standing Argument Misstates the Law and the Facts.

Defendants suggest (at 11-15) that commonality is missing because many of the class members supposedly have not suffered the concrete and particularized harm required for standing.

As a matter of law, however, this Court has repeatedly held, and confirmed just this year, that "only one [named] Plaintiff needs to have standing for a class action to proceed." *Zappos.com*, 888 F.3d at 1028 n.11. Indeed, elsewhere in their brief (at 42), Defendants concede that "class members need not show injury" for "Article III standing."

Likewise, as a matter of class action procedure, Rule 23 does not require proof that each class member suffered injury. Again, Defendants concede this point later in their brief (at 41-42):

> *Wal-Mart's* admonition does not require every member of the class to show injury at the class-certification stage. A class is certifiable under Rule 23(b)(2) even if the policy in question 'has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.' Rule 23(b)(2) advisory committee's note (1966).

Defendants' standing argument also ignores the facts. As the district court found [ER17], "every single child in the foster care system faces a substantial risk of serious harm" if Defendants' practices fail to adhere to constitutional and Medicaid Act requirements. Even if other class members were required to establish

standing, that risk of harm suffices. *See Zappos.com*, 888 F.3d at 1026 (standing may be based on a "substantial risk" of injury).

## II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING TYPICALITY.

The district court rightly found that B.K. and B.T.'s claims are typical of those of the class and two subclasses they represent. That finding naturally flows from its commonality decision because "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Wal-Mart*, 564 U.S. at 350 n.5 (citation omitted).

"Typicality focuses on the class representative's claim—but not the specific facts from which the claim arose—and ensures that the interest of the class representative 'aligns with the interests of the class.'" *Just Film*, 847 F.3d at 1116 (citation omitted). The typicality requirement "is permissive, such that 'representative claims are "typical" if they are reasonably coextensive with those of absent class members; they need not be substantially identical."' *Id.* (citations omitted). "Measures of typicality include 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Id.* (citations omitted).

"It does not matter that the named plaintiffs may have in the past suffered varying injuries or that they may currently have different health care needs; Rule 23(a)(3) requires only that their claims be 'typical' of the class, not that they be

identically positioned to each other or to every class member." *Parsons*, 754 F.3d at 686. "[I]ndividual fact differences are less relevant and will not destroy typicality" where "the relief sought is likely to redress the wrongs suffered by both the plaintiff and the class members." 1 Newberg on Class Actions § 3:34 (5th ed. 2018). For that reason, "the typicality requirement is easily satisfied in suits seeking declaratory or injunctive relief" such as this one. *Id*.

Here, B.K. and B.T.'s claims precisely overlap with those of the classes they represent. As was the case in *Parsons*, 754 F.3d at 685-86, and as the district court found here [ER19-20], each is exposed to the same challenged practices, and to the same substantial risk of serious harm, as all other class members. And, as more fully discussed in the next Section, the injunctive and declaratory relief they seek from those practices would redress the constitutional and statutory violations suffered by all class members. Thus, contrary to Defendants' argument (at 37), B.K. and B.T. have no "[i]nterests that differ" or "conflict" with any other class members.

Moreover, B.K. and B.T. have not only been exposed to injury, they have suffered actual injury from the Defendants' practices in issue. This is apparent not merely from the pleadings, as Defendants suggest (at 37), but from the evidence that they all but ignore. As the SOF describes above (at 11-13), these Named Plaintiffs did not receive mental and therapeutic services at times they were most needed, they had physical problems (such as B.K.'s debilitating limp) that went unaddressed, they

were separated from their families and placed in inappropriate congregate care for settings for prolonged periods, and more.

Defendants thus ignore the record in contending (at 57) that "Plaintiffs provided no evidence that Defendants violated the Medicaid Act with regard to the Named Plaintiffs." The mental and physical health services Plaintiffs needed, but did not get, are exactly what the Medicaid Act requires. [*See* SOF at 4-6 (describing Medicaid Act requirements)] That failure also refutes the premise for each of Defendants' arguments (at 60) on standing, commonality, and typicality for Plaintiffs' Medicaid Act claims.[27]

## III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN APPLYING RULE 23(b)(2).

Rule 23(b)(2) allows class treatment when "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." The certified classes here typify the Rule's intended use because they seek uniform injunctive and declaratory relief from practices that affect the classes as a whole.[28]

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[27] Defendants say (at 37) say they dispute some of the district court's summary of the experiences faced by the Named Plaintiffs. But again, Defendants largely leave unanswered the evidence of those experiences.

[28] Rule 23(b)(2)'s "primary role" is "the certification of civil rights class actions" such as this. *Parsons*, 754 F.3d at 686 (citing authorities). Defendants suggest (at 52) though that the Rule was drafted merely "with school-desegregation

### A. Plaintiffs Meet Rule 23(b)(2)'s Requirements.

"The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart*, 564 U.S. at 360 (citation omitted). Actions seeking to enjoin or declare unlawful "a generally applicable policy or practice" necessarily call for "indivisible remedies." Principles of the Law of Aggregate Litigation § 2.04 (2010).[29]

That is the case with the practices challenged here. Illustratively, an injunction limiting the number of foster children assigned to Defendants' caseworkers would "appl[y] to the proposed class as a whole without requiring differentiation between class members." *DG*, 594 F.3d at 1201. Likewise, requiring Defendants' caseworkers to investigate reports of abuse within a certain time can be implemented only as to all foster children or as to none of them. *Id.* (affirming certification of a Rule 23(b)(2) class seeking an injunction that caseworkers monitor foster children with a certain frequency). The same goes for an injunction that would

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cases in mind." Not so. Courts have applied the Rule in a "wide range of civil-rights contexts," 7AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1776, 1776.1 (3d ed. 2018), and in varied statutory settings, *id.* § 1775.

[29] "Indivisible remedies are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants." Principles of the Law of Aggregate Litigation § 2.04 (2010).

address Defendants' failure to provide timely access to health care. *See Parsons*, 754 F.3d at 680 ("Either ADC employs enough nurses and doctors to provide adequate care to all of its inmates or it does not do so; there is no need for an inmate-by-inmate inquiry . . . .").

Indeed, courts regularly approve Rule 23(b)(2) certification of classes of foster children challenging centralized practices like those here, and, in so doing, reject arguments that only child-specific, divisible remedies are appropriate. *See, e.g.*, *DG*, 594 F.3d at 1192-93; *Marisol A.*, 126 F.3d at 378; *Baby Neal*, 43 F.3d at 64. Defendants argue (at 53) that this precedent "cannot survive *Wal-Mart*." But *Wal-Mart* merely held that "claims for *monetary relief*" may generally not be certified under Rule 23(b)(2). *Wal-Mart*, 564 U.S. at 360 (emphasis added); *see also Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 34 (D. Mass. 2011) ("Any new rules of law that *Wal-Mart* may have created for Rule 23(b)(2) class actions were limited to its specific holding regarding the propriety of claims for monetary relief."). Plaintiffs here do not seek monetary relief.

"[E]ven after *Wal-Mart*, Rule 23(b)(2) suits remain appropriate mechanisms for obtaining injunctive relief in cases," like this one, "where a centralized policy is alleged to impact a large class of plaintiffs, even when the magnitude (and existence) of the impact may vary by class member." *Floyd v. City of New York*, 283 F.R.D. 153, 173 (S.D.N.Y. 2012).

### B. Defendants' Other Rule 23(b)(2) Arguments Lack Merit.

#### 1. The Alleged Differences Among Class Members Do Not Bar an Injunction.

Defendants argue (at 42) that "[a] court cannot issue a single, specific injunction because class members face different potential harms, require different remedies, and have competing interests." They contend (at 44), for example, that only "*[s]ome* foster children require vaccinations," and that few "experience maltreatment in care." But the unique circumstances experienced by individual class members have no bearing on the court's ability to issue an injunction that protects them all.

Rather than focus on the unique circumstances of class members, Rule 23(b)(2) "focuses on the *defendant* and questions whether the *defendant* has a policy that affects everyone in the proposed class in a similar fashion." 2 Newberg on Class Actions § 4:28 (5th ed. 2018) (emphasis added). Thus, merely because "some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). As Defendants elsewhere concede (at 41-42), "[a] class is certifiable under Rule 23(b)(2) even if the policy in question 'has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.'" (Quoting Rule 23(b)(2) advisory committee's note (1966)).

Defendants suggest (at 49) though, that given resource constraints, class members might *prioritize* certain remedies over others. They say, for example, that "[s]ome would prioritize behavioral assessments," "while others would prioritize vision screenings." *Id.* Defendants imply that by devoting resources to remedying one deficient practice, they would starve another program of funds.

But "[l]ack of resources is not a defense to a claim for prospective relief because [government] officials may be compelled to expand the pool of existing resources in order to remedy continuing [constitutional] violations." *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014). The conflict Defendants posit is thus a false one—they need not (and cannot) shift required resources from one constitutional or statutory need to another, but must instead "expand the pool of existing resources" to address *all* the identified violations.

In any event, "internal disagreement among class members as to the aims of the litigation is largely irrelevant to one class member's right to pursue a challenge to a policy alleged to be illegal." 2 Newberg on Class Actions § 4:28 (5th ed. 2018). As observed in a law review Defendants cite (at 50), "courts and commentators generally agree that '[a]ll the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2).'" Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 Colum. L. Rev. 599, 651 (2015) (quoting Ninth Circuit

precedent). "[I]f the [Defendants' practices are] found to violate [constitutional and statutory provisions], [they] will be invalidated notwithstanding the fact that there may be some who would prefer that [those practices] remain in operation." *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 781 (9th Cir. 1986).

For the same reason, Defendants' arguments (at 47-54) about potential due-process concerns are misplaced. As Defendants acknowledge (at 50), their arguments apply, if at all, only "in cases involving *divisible* injunctive relief." (Original emphasis omitted, emphasis added). But as noted, the injunctive relief Plaintiffs seek here is *indivisible*. Because Defendants' policies and practices "can be enjoined or declared unlawful only as to all of the class members or as to none of them," *Wal-Mart*, 564 U.S. at 360, certain "procedural protections attending [a] (b)(3) class," such as "the right to opt out," are "unnecessary." *Id.* at 362.

### 2. Plaintiffs Appropriately Outlined the Contours of An Injunction.

Relying almost entirely on cases from outside this Circuit, Defendants argue (at 45) that Plaintiffs have failed "to explain their desired relief *with specificity*."[30] Many of those cases rely on a Tenth Circuit decision suggesting that plaintiffs seeking Rule 23(b)(2) certification might be required to provide, at the class

[30] Defendants cite (at 45) one Ninth Circuit case for the proposition—inapplicable here—that "a bare injunction to follow the law" is insufficient. *See Civil Rights Educ. & Enf't Ctr. (CREEC) v. Hosp. Props. Tr.*, 867 F.3d 1093, 1103 (9th Cir. 2017).

certification stage, a relatively detailed description of the relief they seek. *See Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 543 F.3d 597 (10th Cir. 2008) ("*Shook II*"). But this Court has already rejected "*Shook II*'s wide-ranging dicta" as "ill-founded." *Parsons*, 754 F.3d at 689 n.35. Most significantly, as even *Shook II* recognized, 543 F.3d at 606 n.4, it is well settled that Plaintiffs need not craft the terms of a final injunction before certification is granted. Rather, courts expect that in a class action "challenging the constitutionality of a system-wide policy or practice, it would be difficult for a plaintiff to determine precisely the appropriate scope of injunctive relief at the class certification stage." *Ashker v. Governor of California*, No. C 09-5796 CW, 2014 WL 2465191, at *7 (N.D. Cal. June 2, 2014). Certification of a 23(b)(2) class is therefore appropriate so long as the deficiencies identified by Plaintiffs, if proven at trial, "might conceivably be remedied by an injunction." *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 522 (N.D. Cal. 2011).

Other foster care cases are instructive. Illustratively, in *Baby Neal*, 43 F.3d at 64, the district court found it "impossible to conceive of an Order . . . granting class-wide injunctive relief which could address the specific case-by-case deficiencies in [the child welfare agency's] performance." (Citation omitted). Reversing, the Third Circuit held that the district court could "fashion precise orders to address specific, system-wide deficiencies and then monitor compliance relative to those orders." *Id.*

It "could, for example, order the DHS to develop training protocols for its prospective foster parents." *Id.* Such an order would not require "individual, case-by-case determinations." *Id.*

Similarly, in *M.D. v. Perry*, 294 F.R.D. at 47, the district court found injunctive relief would be proper to address the problem of overburdened caseworkers because it could "conceive of a number of appropriate injunctions that would cure this injury, such as: setting maximum caseloads, hiring more caseworkers, or some overflow procedure that distributes cases so as to ensure that no caseworker is especially overburdened."

So too here, the deficient practices Plaintiffs have identified, if proven at trial, "might conceivably be remedied by an injunction." *Gray*, 279 F.R.D. at 522. For example, the district court could order Defendants to employ more caseworkers, or require them to investigate all reports of abuse within a certain time, or to expand the number of non-congregate care facilities, and so on. The specific terms of the injunction will be set by the district court after trial.[31]

[31] After trial, in foster care suits and in other contexts, courts routinely craft injunctions concerning the sort of matters here at issue. *See*, *e.g.*, *Gates v. Cook*, 376 F.3d 323, 342-43 (5th Cir. 2004) (affirming injunction concerning mental health care); *Tillery v. Owens*, 907 F.2d 418, 430-31 (3d Cir. 1990) (affirming injunction concerning housing and staffing); *Lynch v. Dukakis*, 719 F.2d 504, 506, 512-14 (1st Cir. 1983) (affirming injunction concerning caseloads and staffing), *abrogated on other grounds by Suter v. Artist M.*, 503 U.S. 347 (1992). Moreover, contrary to Defendants contention (at 47), Plaintiffs have not asked for a "neutral expert monitor" to craft this relief, but rather, only to monitor compliance. [ER02748]

Even if this Court "were to apply *Shook II* and all of its dicta," this Court should still affirm. *Parsons*, 754 F.3d at 689 n.35. As did the plaintiffs in *Parsons*, the children here have "described their injunction in more specific terms than did the plaintiffs in *Shook II*, and they have fleshed out that description by introducing . . . expert reports that explain which policies are deficient and what sorts of policy remedies could alleviate the alleged violations." *Id.*

Defendants' demand for exacting specificity also collides with their request (at 46) that the district court "minimize interference with legitimate state activities in tailoring remedies." Courts pay deference to state agencies by allowing them "an opportunity jointly to develop the remedial plan needed to implement the injunction." *Katie A. ex rel. Ludin v. Los Angeles Cty.*, 481 F.3d 1150, 1157 (9th Cir. 2007). By affording Defendants some measure of flexibility in determining how best to comply with federal law, the district court appropriately "grant[s] [the] state 'the widest latitude'" in the dispatch of its operations. *Id.* The flexibility afforded to the Defendants also answers their concern (at 54) that injunctive relief would "displace[] executive policymaking with judicial policymaking."

## CONCLUSION

The class certification order should be affirmed. Were there any doubt about the appropriateness of class certification, and there should not be, the district court should be permitted to evaluate the impact under Rule 23 of the expert and other

evidence added to the record since its order was entered (see n.7, above)—evidence that further confirms the existence of and continuing harm caused by the systemic practices in issue.

Respectfully submitted on this 29th day of June, 2018.

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## STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

Dated: June 29, 2018

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**Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

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## CERTIFICATE OF SERVICE

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Nos. 17-17501 & 17-17502

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

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

# PLAINTIFFS/APPELLEES' ADDENDUM TO OPPOSITION TO APPEAL OF CLASS CERTIFICATION ORDER

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A.R.S. § 8-451

# § 8-451. Department; purpose

Effective: May 29, 2014
Currentness

**A.** The department of child safety is established.

**B.** The primary purpose of the department is to protect children. To achieve this purpose, the department shall do and focus equally on the following:

1. Investigate reports of abuse and neglect.

2. Assess, promote and support the safety of a child in a safe and stable family or other appropriate placement in response to allegations of abuse or neglect.

3. Work cooperatively with law enforcement regarding reports that include criminal conduct allegations.

4. Without compromising child safety, coordinate services to achieve and maintain permanency on behalf of the child, strengthen the family and provide prevention, intervention and treatment services pursuant to this chapter.

**Credits**
Added by Laws 2014, 2nd S.S., Ch. 1, § 20, eff. May 29, 2014.

A. R. S. § 8-451, AZ ST § 8-451
Current through the First Special Session of the Fifty-Third Legislature (2018), and through legislation effective May 16, 2018 of the Second Regular Session of the Fifty-Third Legislature (2018)

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Addendum 1

Arizona Revised Statutes Annotated
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Article 1. General Provisions

A.R.S. § 8-453

# § 8-453. Powers and duties

Effective: May 29, 2014
Currentness

**A.** The director shall:

1. Carry out the purposes of the department prescribed in § 8-451.

2. Provide transparency by being open and accountable to the public for the actions of the department.

3. Develop a data system that enables persons and entities that are charged with a responsibility relating to child safety to access all relevant information relating to an abused, neglected or abandoned child as provided by law.

4. Subject to title 41, chapter 4, article 4 and, as applicable, articles 5 and 6,[1] employ deputy directors and other key personnel based on qualifications that are prescribed by the director.

5. Adopt rules to implement the purposes of the department and the duties and powers of the director.

6. Petition, as necessary to implement the case plan established under § 8-824 or 8-845, for the appointment of a guardian or a temporary guardian under title 14, chapter 5[2] for children who are in custody of the department pursuant to court order. Persons applying to be guardians or temporary guardians under this section shall be fingerprinted. A foster parent or certified adoptive parent already fingerprinted is not required to be fingerprinted again, if the foster parent or certified adoptive parent is the person applying to be the guardian or temporary guardian.

7. Cooperate with other agencies of this state, county and municipal agencies, faith-based organizations and community social services agencies, if available, to achieve the purposes of this chapter.

8. Exchange information, including case specific information, and cooperate with the department of economic security for the administration of the department of economic security's programs.

9. Administer child welfare activities, including:



Addendum 2

(a) Cross-jurisdictional placements pursuant to § 8-548.

(b) Providing the cost of care of:

(i) Children who are in temporary custody, are the subject of a dependency petition or are adjudicated by the court as dependent and who are in out-of-home placement, except state institutions.

(ii) Children who are voluntarily placed in out-of-home placement pursuant to § 8-806.

(iii) Children who are the subject of a dependency petition or are adjudicated dependent and who are in the custody of the department and ordered by the court pursuant to § 8-845 to reside in an independent living program pursuant to § 8-521.

(c) Providing services for children placed in adoption.

10. Formulate policies, plans and programs to effectuate the missions and purposes of the department.

11. Make contracts and incur obligations within the general scope of the department's activities and operations subject to the availability of funds.

12. Coordinate with, contract with or assist other departments, agencies and institutions of this state and local and federal governments in the furtherance of the department's purposes, objectives and programs.

13. Accept and disburse grants, matching funds and direct payments from public or private agencies for the conduct of programs that are consistent with the overall purposes and objectives of the department.

14. Collect monies owed to the department.

15. Act as an agent of the federal government in furtherance of any functions of the department.

16. Carry on research and compile statistics relating to the child welfare program throughout this state, including all phases of dependency.

17. Cooperate with the superior court in all matters related to this title and title 13.[3]

18. Provide the cost of care and transitional independent living services for a person under twenty-one years of age pursuant to § 8-521.01.

19. Ensure that all criminal conduct allegations and reports of imminent risk of harm are investigated.

20. Ensure the department's compliance with the Indian child welfare act of 1978 (P.L. 95-608; 92 Stat. 3069; 25 United States Code §§ 1901 through 1963).

21. Strengthen relationships with tribal child protection agencies or programs.

**B.** The director may:

1. Take administrative action to improve the efficiency of the department.

2. Contract with a private entity to provide any functions or services pursuant to this title.

3. Apply for, accept, receive and expend public and private gifts or grants of money or property on the terms and conditions as may be imposed by the donor and for any purpose provided for by this title.

4. Reimburse department volunteers, designated by the director, for expenses in transporting clients of the department on official business. Volunteers reimbursed for expenses are not eligible for workers' compensation under title 23, chapter 6.[4]

**C.** The department shall administer individual and family services, including sections on services to children and youth and other related functions in furtherance of social service programs under the social security act, as amended, title IV, parts B and E, grants to states for aid and services to needy families with children and for child-welfare services, title XX, grants to states for services and other related federal acts and titles.

**D.** If the department has responsibility for the care, custody or control of a child or is paying the cost of care for a child, the department may serve as representative payee to receive and administer social security and veterans administration benefits and other benefits payable to the child. Notwithstanding any law to the contrary, the department:

1. Shall deposit, pursuant to §§ 35-146 and 35-147, any monies it receives to be retained separate and apart from the state general fund on the books of the department of administration.

2. May use these monies to defray the cost of care and services expended by the department for the benefit, welfare and best interests of the child and invest any of the monies that the director determines are not necessary for immediate use.

3. Shall maintain separate records to account for the receipt, investment and disposition of monies received for each child.

4. On termination of the department's responsibility for the child, shall release any monies remaining to the child's credit pursuant to the requirements of the funding source or, in the absence of any requirements, shall release the remaining monies to:

(a) The child, if the child is at least eighteen years of age or is emancipated.

(b) The person who is responsible for the child if the child is a minor and not emancipated.

**E.** Subsection D of this section does not apply to benefits that are payable to or for the benefit of a child receiving services under title 36. [5]

**F.** Notwithstanding any other law, a state or local governmental agency or a private entity is not subject to civil liability for the disclosure of information that is made in good faith to the department pursuant to this section.

**G.** Notwithstanding § 41-192, the department may employ legal counsel to provide legal advice to the director. The attorney general shall represent the department in any administrative or judicial proceeding pursuant to title 41, chapter 1, article 5. [6]

**H.** The total amount of state monies that may be spent in any fiscal year by the department for foster care as provided in subsection A, paragraph 9, subdivision (b) of this section may not exceed the amount appropriated or authorized by § 35-173 for that purpose. This section does not impose a duty on an officer, agent or employee of this state to discharge a responsibility or to create any right in a person or group if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation for that specific purpose.

**Credits**
Added by Laws 2014, 2nd S.S., Ch. 1, § 20, eff. May 29, 2014.

Footnotes
1 Sections 41-741 et seq., 41-761 et seq., 41-781 et seq.
2 Section 14-5101 et seq.
3 Section 13-101 et seq.
4 Section 23-901 et seq.
5 Section 36-101 et seq.
6 Section 41-191 et seq.

A. R. S. § 8-453, AZ ST § 8-453
Current through the First Special Session of the Fifty-Third Legislature (2018), and through legislation effective May 16, 2018 of the Second Regular Session of the Fifty-Third Legislature (2018)

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A.R.S. § 8-456

# § 8-456. Investigative function; training; criminal offenses; definition

Effective: August 6, 2016 to June 30, 2018
Currentness

<Section effective until July 1, 2018. See, also, section 8-456 effective July 1, 2018.>

**A.** The department shall train all investigators in forensic interviewing and processes and the protocols established pursuant to § 8-817. The training must include:

1. Uniform safety and risk assessment tools to determine whether the conduct constitutes abuse or neglect and the severity of the abuse or neglect.

2. The duty to protect the legal and due process rights of children and families from the time of the initial contact through case closure.

3. Instruction on a child's rights as a crime victim and instruction on the legal rights of parents.

4. A checklist or other mechanism to assist the investigator in giving consideration to the relevant factors in each investigation.

**B.** The office of child welfare investigations shall investigate DCS reports that contain a criminal conduct allegation as provided in §§ 8-471 and 8-817.

**C.** After receiving a DCS report from the centralized intake hotline pursuant to § 8-455, an investigator shall do all of the following:

1. Make a prompt and thorough investigation. An investigation must evaluate and determine the nature, extent and cause of any condition created by the parents, guardian or custodian or an adult member of the victim's household that would tend to support or refute the allegation that the child is a victim of abuse or neglect and determine the name, age and condition of other children in the home. If an investigator has sufficient information to determine that the child is not a victim of abuse or neglect, the investigator may close the investigation.

  

2. If required by § 8-821 and subject to § 8-471, take a child into temporary custody. Law enforcement officers shall cooperate with the department to remove a child from the custody of the child's parents, guardian or custodian when necessary.

**D.** After an investigation, an investigator shall:

1. Determine whether any child is in need of child safety services consistent with the evaluation and determination made pursuant to subsection C of this section.

2. If appropriate pursuant to § 8-846, offer to the family of any child who is found to be a child in need of child safety services those services that are designed to correct unresolved problems that would indicate a reason to adjudicate the child dependent.

3. Submit a written report of the investigator's investigation to:

(a) The department's case management information system within a reasonable amount of time that does not exceed forty-five days after receipt of the DCS report except as provided in § 8-811. If the investigation involves allegations regarding a child who at the time of the alleged incident was in the custody of a child welfare agency licensed by the department under this title, a copy of the report and any additional investigative or other related reports must be provided to the board of directors of the agency or to the administrative head of the agency unless the incident is alleged to have been committed by the person. The department shall excise all information with regard to the identity of the source of the reports.

(b) The appropriate court forty-eight hours before a dependency hearing pursuant to a petition of dependency or within twenty-one days after a petition of dependency is filed, whichever is earlier. On receipt of the report the court shall make the report available to all parties and counsel.

4. Accept a child into voluntary placement pursuant to § 8-806.

5. Identify, promptly obtain and abide by court orders that restrict or deny custody, visitation or contact by a parent or other person in the home with the child and notify appropriate personnel in the department to preclude violations of a court order in the provision of any services.

**E.** In conducting an investigation pursuant to this section, if the investigator is made aware that an allegation of abuse or neglect may also have been made in another state, the investigator shall contact the appropriate agency in that state to attempt to determine the outcome of any investigation of that allegation.

**F.** If an investigation indicates a reason to believe that a criminal offense has been committed, the investigator shall immediately provide the information to the appropriate law enforcement agency and the office of child welfare investigations, unless the information was previously provided pursuant to § 8-455.

**G.** For the purposes of this section, "investigator" means an employee of the department who investigates allegations of abuse or neglect pursuant to a DCS report.

**Credits**

Added by Laws 2014, 2nd S.S., Ch. 1, § 20, eff. May 29, 2014. Amended by Laws 2016, Ch. 300, § 3.

A. R. S. § 8-456, AZ ST § 8-456

Current through the First Special Session of the Fifty-Third Legislature (2018), and through legislation effective May 16, 2018 of the Second Regular Session of the Fifty-Third Legislature (2018)

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Article 4. Child Welfare and Placement (Refs & Annos)

A.R.S. § 8-512

# § 8-512. Comprehensive medical and dental care; guidelines

Effective: July 3, 2015
Currentness

**A.** The department shall provide comprehensive medical and dental care, as prescribed by rules of the department, for each child who is:

1. In a voluntary placement pursuant to § 8-806.

2. In the custody of the department in an out-of-home placement.

3. In the custody of a probation department and placed in foster care. The department shall not provide this care if the cost exceeds funds currently appropriated and available for that purpose.

**B.** On or before October 1, 2015, the department of child safety, in collaboration with the department of health services and the Arizona health care cost containment system administration, shall:

1. Determine the most efficient and effective way to provide comprehensive medical, dental and behavioral health services, including behavioral health diagnostic, evaluation and treatment services for children who are provided care pursuant to subsection A of this section.

2. Determine the number of disruptions of placements in foster care by age of child due to behavioral health management issues and the extent each child is receiving behavioral health services.

3. Determine the number of adopted children who have entered foster care due to the adoptive parents' inability to receive behavioral health services to adequately meet the needs of the child and parents.

4. Submit a report of its recommendations for providing services pursuant to this subsection to the governor, the speaker of the house of representatives and the president of the senate and shall provide a copy of its report to the secretary of state. The collaborative determination shall consider an administratively integrated system.

  

**C.** The comprehensive medical and dental care consists of those benefits provided by the Arizona health care cost containment system benefit as prescribed in title 36, chapter 29, article 1 [1] and as set forth in the approved medicaid state plan.

**D.** Any provider that has a provider agreement registration may be employed through the comprehensive medical and dental program by the foster parent, relative, certified adoptive parent, agency or department having responsibility for the care of the child.

**E.** The department shall reimburse a provider according to the rates established by the Arizona health care cost containment system administration pursuant to title 36, chapter 29, article 1.

**F.** The department shall use the Arizona health care cost containment system administration rates as identified in subsection E of this section for any child eligible for services under this section.

**G.** The department shall require providers to submit claims for medical and dental services pursuant to § 36-2903.01.

**H.** The department shall require that the provider pursue other third party payors before submitting a claim to the department. Payment received by a provider from the department is considered payment by the department of the department's liability for the bill. A provider may collect any unpaid portion of its bill from other third party payors or in situations covered by title 33, chapter 7, article 3. [2]

**I.** The department shall not pay claims for services pursuant to this section that are submitted more than one hundred eighty days after the date of the service for which the payment is claimed.

**J.** The department may provide for payment through an insurance plan, hospital service plan, medical service plan, or any other health service plan authorized to do business in this state, fiscal intermediary or a combination of such plans or methods. The state shall not be liable for and the department shall not pay to any plan or intermediary any portion of the cost of comprehensive medical and dental care in excess of funds appropriated and available for such purpose at the time the plan or intermediary incurs the expense for such care.

**K.** The total amount of state monies that may be spent in any fiscal year by the department for comprehensive medical and dental care shall not exceed the amount appropriated or authorized by § 35-173 for that purpose. This section shall not be construed to impose a duty on an officer, agent or employee of this state to discharge a responsibility or to create any right in a person or group if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation for that specific purpose.

**Credits**

Added by Laws 1970, Ch. 205, § 4. Amended by Laws 1977, Ch. 165, § 3; Laws 1982, Ch. 246, § 2; Laws 1983, Ch. 170, § 2; Laws 1986, Ch. 75, § 3; Laws 1988, Ch. 73, § 1; Laws 1992, Ch. 302, § 2; Laws 1993, 2nd S.S., Ch. 6, § 2; Laws 1995, 1st S.S., Ch. 5, § 2; Laws 1995, Ch. 49, § 1; Laws 1995, Ch. 196, § 3; Laws 2001, Ch. 344, § 4, eff. Oct. 1, 2001; Laws

2003, Ch. 265, § 2; Laws 2012, Ch. 122, § 3; Laws 2013, Ch. 220, § 1; Laws 2014, 2nd S.S., Ch. 1, § 36, eff. May 29, 2014; Laws 2015, Ch. 257, § 10.

Footnotes

1 Section 36-2901 et seq.

2 Section 33-931 et seq.

A. R. S. § 8-512, AZ ST § 8-512

Current through the First Special Session of the Fifty-Third Legislature (2018), and through legislation effective May 16, 2018 of the Second Regular Session of the Fifty-Third Legislature (2018)

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Article 4. Child Welfare and Placement (Refs & Annos)

A.R.S. § 8-512.01

# § 8-512.01. Behavioral health services; urgent need; dependent and adopted children; definition

Effective: March 24, 2016
Currentness

**A.** If a dependent child who is in the legal custody of the department of child safety is placed in an out-of-home placement, the out-of-home placement shall receive immediately on placement of the child from the department an updated complete placement packet, contact information for the child's caseworker, the child's regional behavioral health authority designated point of contact, the telephone number to the Arizona health care cost containment system's customer service line, a list of Arizona health care cost containment system registered providers and information regarding the out-of-home placement's rights, if applicable, under this section.

**B.** If the out-of-home placement of a dependent child who is in the legal custody of the department of child safety or the adoptive parent of a child who is eligible under title XIX or XXI of the social security act identifies an urgent need for the child to receive behavioral health services, the out-of-home placement or adoptive parent may directly contact a regional behavioral health authority for a screening and evaluation of the child. The regional behavioral health authority shall dispatch an assessment team within seventy-two hours after being notified that the child has entered care in an out-of-home placement or within two hours after being notified that the child has an urgent need. The regional behavioral health authority shall provide an initial evaluation of the child within seven calendar days after a referral or request for services. If after the screening and evaluation it is determined that the child is in need of behavioral health services, the regional behavioral health authority shall provide an initial behavioral health appointment for the child within twenty-one calendar days after the initial evaluation.

**C.** On completion of the initial evaluation, the out-of-home placement or adoptive parent:

1. Shall call the regional behavioral health authority designated point of contact and the Arizona health care cost containment system's customer service line if services are not received within twenty-one days to document the failure to receive the service.

2. May access services directly from any Arizona health care cost containment system registered provider regardless of whether the provider is contracted with the regional behavioral health authority. If the provider is not contracted with the regional behavioral health authority, the provider must submit the provider's claim to the regional behavioral health authority and accept the lesser of one hundred thirty percent of the Arizona health care cost containment system's negotiated rate or the provider's standard rate.

**D.** If the out-of-home placement or adoptive parent recognizes that the child is in need of crisis services and the crisis services provider in that county is not being responsive to the situation, the out-of-home placement or adoptive parent

may contact the child's regional behavioral health authority designated point of contact to coordinate crisis services for the child.

**E.** If an out-of-home placement or adoptive parent requests the regional behavioral health authority to place a foster child or adoptive child in residential treatment because the child is displaying threatening behavior, the regional behavioral health authority shall respond to the out-of-home placement or adoptive parent within seventy-two hours after the request was made. If the foster child or adoptive child is hospitalized due to the threatening behavior before the regional behavioral health authority responds, the regional behavioral health authority shall reimburse the hospital for all medically necessary care, including any days of the hospital stay during which the child does not meet criteria for an inpatient stay but is not discharged because the regional behavioral health authority has not authorized a safe and appropriate placement for the child outside of the hospital.

**F.** If a foster child moves into a different county because of the location of the child's out-of-home placement, the child's out-of-home placement may choose to have the child continue any current treatment in the previous county. The out-of-home placement may seek any new or additional treatment for the child in the out-of-home placement's county of residence.

**G.** The Arizona health care cost containment system administration shall track and report annually the number of times the regional behavioral health authority coordinated crisis services because a crisis services provider was unresponsive, the number of times services were not provided within the twenty-one-day time frame, the amount of services accessed directly by an out-of-home placement or adoptive parents that were provided by noncontracted providers, the list of providers that were formerly contracted with the regional behavioral health authority but that terminated the contract and provided services pursuant to this section for one hundred thirty percent of the Arizona health care cost containment system's negotiated rate and the amount the administration spent on services pursuant to this section. On or before July 1, 2017, the administration shall complete a network adequacy study for behavioral health service providers that provide behavioral health services to children enrolled in the comprehensive medical and dental care program.

**H.** The Arizona health care cost containment system administration shall adopt corrective action plans, sanctions or other measures to address noncompliance by the regional behavioral health authority, including compliance with the timely payment requirements pursuant to § 36-2904.

**I.** For the purposes of this section, "out-of-home placement" means a foster home, kinship foster care, a shelter care provider, a receiving home or a group foster home.

**Credits**
Added by Laws 2016, Ch. 71, § 2, eff. March 24, 2016.

A. R. S. § 8-512.01, AZ ST § 8-512.01
Current through the First Special Session of the Fifty-Third Legislature (2018), and through legislation effective May 16, 2018 of the Second Regular Session of the Fifty-Third Legislature (2018)

End of Document

Arizona Revised Statutes Annotated
Title 8. Child Safety (Refs & Annos)
Chapter 4 . Department of Child Safety (Refs & Annos)
Article 4. Child Welfare and Placement (Refs & Annos)

A.R.S. § 8-513

# § 8-513. Participation in activities; contact with relatives; placement with siblings

Effective: July 29, 2010
Currentness

**A.** A child may participate in activities and functions generally accepted as usual and normal for children of the child's age group if permission is granted as follows:

1. If the activity by law requires a license, the agency or division that placed the child may give permission on request of the foster parent.

2. If the activity includes the child leaving the jurisdiction of the court for a period not to exceed thirty days, the agency or division that placed the child may give permission on request of the foster parent.

3. If the activity is one which is associated with a school or organization not prohibited by rule of the division, the foster parents of the child may give permission.

**B.** The state shall indemnify and hold harmless the agency or foster parents for liability that may be incurred or alleged as a result of giving permission pursuant to subsection A if it is reasonably and prudently given. The state shall provide the defense of any action alleging such liability.

**C.** A child placed in foster care has the right to maintain contact with friends and other relatives unless the court has determined that contact is not in the child's best interests as determined pursuant to a court hearing.

**D.** If a child has been removed from the child's home and placed in out-of-home placement, guardianship or adoptive placement, the department shall make reasonable efforts to place that child with the child's siblings or, if that is not possible, to maintain frequent visitation or other ongoing contact between the child and the child's siblings unless a court determines that either the placement or the visitation or contact would be contrary to the child's or a sibling's safety or well-being.

**Credits**
Added by Laws 1970, Ch. 205, § 4. Amended by Laws 1972, Ch. 114, § 13; Laws 1999, Ch. 198, § 2; Laws 2010, Ch. 214, § 1.

A. R. S. § 8-513, AZ ST § 8-513

  

Current through the First Special Session of the Fifty-Third Legislature (2018), and through legislation effective May 16, 2018 of the Second Regular Session of the Fifty-Third Legislature (2018)

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XIX. Grants to States for Medical Assistance Programs (Refs & Annos)

42 U.S.C.A. § 1396

# § 1396. Medicaid and CHIP Payment and Access Commission

Effective: April 1, 2014
Currentness

**(a) Establishment**

There is hereby established the Medicaid and CHIP Payment and Access Commission (in this section referred to as "MACPAC")

**(b) Duties**

**(1) Review of access policies for all States and annual reports**

MACPAC shall--

**(A)** review policies of the Medicaid program established under this subchapter (in this section referred to as "Medicaid") and the State Children's Health Insurance Program established under subchapter XXI of this chapter (in this section referred to as "CHIP") affecting access to covered items and services, including topics described in paragraph (2);

**(B)** make recommendations to Congress, the Secretary, and States concerning such access policies;

**(C)** by not later than March 15 of each year (beginning with 2010), submit a report to Congress containing the results of such reviews and MACPAC's recommendations concerning such policies; and

**(D)** by not later than June 15 of each year (beginning with 2010), submit a report to Congress containing an examination of issues affecting Medicaid and CHIP, including the implications of changes in health care delivery in the United States and in the market for health care services on such programs.

**(2) Specific topics to be reviewed**

Specifically, MACPAC shall review and assess the following:

**(A) Medicaid and CHIP payment policies**

  

Payment policies under Medicaid and CHIP, including--

**(i)** the factors affecting expenditures for the efficient provision of items and services in different sectors, including the process for updating payments to medical, dental, and health professionals, hospitals, residential and long-term care providers, providers of home and community based services, Federally-qualified health centers and rural health clinics, managed care entities, and providers of other covered items and services;

**(ii)** payment methodologies; and

**(iii)** the relationship of such factors and methodologies to access and quality of care for Medicaid and CHIP beneficiaries (including how such factors and methodologies enable such beneficiaries to obtain the services for which they are eligible, affect provider supply, and affect providers that serve a disproportionate share of low-income and other vulnerable populations).

**(B) Eligibility policies**

Medicaid and CHIP eligibility policies, including a determination of the degree to which Federal and State policies provide health care coverage to needy populations.

**(C) Enrollment and retention processes**

Medicaid and CHIP enrollment and retention processes, including a determination of the degree to which Federal and State policies encourage the enrollment of individuals who are eligible for such programs and screen out individuals who are ineligible, while minimizing the share of program expenses devoted to such processes.

**(D) Coverage policies**

Medicaid and CHIP benefit and coverage policies, including a determination of the degree to which Federal and State policies provide access to the services enrollees require to improve and maintain their health and functional status.

**(E) Quality of care**

Medicaid and CHIP policies as they relate to the quality of care provided under those programs, including a determination of the degree to which Federal and State policies achieve their stated goals and interact with similar goals established by other purchasers of health care services.

**(F) Interaction of Medicaid and CHIP payment policies with health care delivery generally**

The effect of Medicaid and CHIP payment policies on access to items and services for children and other Medicaid and CHIP populations other than under this subchapter or subchapter XXI of this chapter and the implications

  

of changes in health care delivery in the United States and in the general market for health care items and services on Medicaid and CHIP.

**(G) Interactions with Medicare and Medicaid**

Consistent with paragraph (11), the interaction of policies under Medicaid and the Medicare program under subchapter XVIII of this chapter, including with respect to how such interactions affect access to services, payments, and dual eligible individuals.

**(H) Other access policies**

The effect of other Medicaid and CHIP policies on access to covered items and services, including policies relating to transportation and language barriers and preventive, acute, and long-term services and supports.

**(3) Recommendations and reports of State-specific data**

MACPAC shall--

**(A)** review national and State-specific Medicaid and CHIP data; and

**(B)** submit reports and recommendations to Congress, the Secretary, and States based on such reviews.

**(4) Creation of early-warning system**

MACPAC shall create an early-warning system to identify provider shortage areas, as well as other factors that adversely affect, or have the potential to adversely affect, access to care by, or the health care status of, Medicaid and CHIP beneficiaries. MACPAC shall include in the annual report required under paragraph (1)(D) a description of all such areas or problems identified with respect to the period addressed in the report.

**(5) Comments on certain secretarial reports and regulations**

**(A) Certain secretarial reports**

If the Secretary submits to Congress (or a committee of Congress) a report that is required by law and that relates to access policies, including with respect to payment policies, under Medicaid or CHIP, the Secretary shall transmit a copy of the report to MACPAC. MACPAC shall review the report and, not later than 6 months after the date of submittal of the Secretary's report to Congress, shall submit to the appropriate committees of Congress and the Secretary written comments on such report. Such comments may include such recommendations as MACPAC deems appropriate.

**(B) Regulations**

MACPAC shall review Medicaid and CHIP regulations and may comment through submission of a report to the appropriate committees of Congress and the Secretary, on any such regulations that affect access, quality, or efficiency of health care.

**(6) Agenda and additional reviews**

**(A) In general**

MACPAC shall consult periodically with the chairmen and ranking minority members of the appropriate committees of Congress regarding MACPAC's agenda and progress towards achieving the agenda. MACPAC may conduct additional reviews, and submit additional reports to the appropriate committees of Congress, from time to time on such topics relating to the program under this subchapter or subchapter XXI of this chapter as may be requested by such chairmen and members and as MACPAC deems appropriate.

**(B) Review and reports regarding Medicaid DSH**

**(i) In general**

MACPAC shall review and submit an annual report to Congress on disproportionate share hospital payments under section 1396r-4 of this title. Each report shall include the information specified in clause (ii).

**(ii) Required report information**

Each report required under this subparagraph shall include the following:

**(I)** Data relating to changes in the number of uninsured individuals.

**(II)** Data relating to the amount and sources of hospitals' uncompensated care costs, including the amount of such costs that are the result of providing unreimbursed or under-reimbursed services, charity care, or bad debt.

**(III)** Data identifying hospitals with high levels of uncompensated care that also provide access to essential community services for low-income, uninsured, and vulnerable populations, such as graduate medical education, and the continuum of primary through quarternary care, including the provision of trauma care and public health services.

**(IV)** State-specific analyses regarding the relationship between the most recent State DSH allotment and the projected State DSH allotment for the succeeding year and the data reported under subclauses (I), (II), and (III) for the State.

**(iii) Data**

  

Notwithstanding any other provision of law, the Secretary regularly shall provide MACPAC with the most recent State reports and most recent independent certified audits submitted under section 1396r-4(j) of this title, cost reports submitted under subchapter XVIII of this chapter, and such other data as MACPAC may request for purposes of conducting the reviews and preparing and submitting the annual reports required under this subparagraph.

**(iv) Submission deadlines**

The first report required under this subparagraph shall be submitted to Congress not later than February 1, 2016. Subsequent reports shall be submitted as part of, or with, each annual report required under paragraph (1)(C) during the period of fiscal years 2017 through 2024.

**(7) Availability of reports**

MACPAC shall transmit to the Secretary a copy of each report submitted under this subsection and shall make such reports available to the public.

**(8) Appropriate committee of Congress**

For purposes of this section, the term "appropriate committees of Congress" means the Committee on Energy and Commerce of the House of Representatives and the Committee on Finance of the Senate.

**(9) Voting and reporting requirements**

With respect to each recommendation contained in a report submitted under paragraph (1), each member of MACPAC shall vote on the recommendation, and MACPAC shall include, by member, the results of that vote in the report containing the recommendation.

**(10) Examination of budget consequences**

Before making any recommendations, MACPAC shall examine the budget consequences of such recommendations, directly or through consultation with appropriate expert entities, and shall submit with any recommendations, a report on the Federal and State-specific budget consequences of the recommendations.

**(11) Consultation and coordination with MedPAC**

**(A) In general**

MACPAC shall consult with the Medicare Payment Advisory Commission (in this paragraph referred to as "MedPAC") established under section 1395b-6 of this title in carrying out its duties under this section, as appropriate and particularly with respect to the issues specified in paragraph (2) as they relate to those Medicaid beneficiaries who are dually eligible for Medicaid and the Medicare program under subchapter XVIII of this chapter, adult Medicaid beneficiaries (who are not dually eligible for Medicare), and beneficiaries under Medicare. Responsibility

  

for analysis of and recommendations to change Medicare policy regarding Medicare beneficiaries, including Medicare beneficiaries who are dually eligible for Medicare and Medicaid, shall rest with MedPAC.

**(B) Information sharing**

MACPAC and MedPAC shall have access to deliberations and records of the other such entity, respectively, upon the request of the other such entity.

**(12) Consultation with States**

MACPAC shall regularly consult with States in carrying out its duties under this section, including with respect to developing processes for carrying out such duties, and shall ensure that input from States is taken into account and represented in MACPAC's recommendations and reports.

**(13) Coordinate and consult with the Federal Coordinated Health Care Office**

MACPAC shall coordinate and consult with the Federal Coordinated Health Care Office established under section 2081 of the Patient Protection and Affordable Care Act [1] before making any recommendations regarding dual eligible individuals.

**(14) Programmatic oversight vested in the Secretary**

MACPAC's authority to make recommendations in accordance with this section shall not affect, or be considered to duplicate, the Secretary's authority to carry out Federal responsibilities with respect to Medicaid and CHIP.

**(c) Membership**

**(1) Number and appointment**

MACPAC shall be composed of 17 members appointed by the Comptroller General of the United States.

**(2) Qualifications**

**(A) In general**

The membership of MACPAC shall include individuals who have had direct experience as enrollees or parents or caregivers of enrollees in Medicaid or CHIP and individuals with national recognition for their expertise in Federal safety net health programs, health finance and economics, actuarial science, health plans and integrated delivery systems, reimbursement for health care, health information technology, and other providers of health services, public health, and other related fields, who provide a mix of different professions, broad geographic representation, and a balance between urban and rural representation.

**(B) Inclusion**

The membership of MACPAC shall include (but not be limited to) physicians, dentists, and other health professionals, employers, third-party payers, and individuals with expertise in the delivery of health services. Such membership shall also include representatives of children, pregnant women, the elderly, individuals with disabilities, caregivers, and dual eligible individuals, current or former representatives of State agencies responsible for administering Medicaid, and current or former representatives of State agencies responsible for administering CHIP.

**(C) Majority nonproviders**

Individuals who are directly involved in the provision, or management of the delivery, of items and services covered under Medicaid or CHIP shall not constitute a majority of the membership of MACPAC.

**(D) Ethical disclosure**

The Comptroller General of the United States shall establish a system for public disclosure by members of MACPAC of financial and other potential conflicts of interest relating to such members. Members of MACPAC shall be treated as employees of Congress for purposes of applying title I of the Ethics in Government Act of 1978 (Public Law 95-521).

**(3) Terms**

**(A) In general**

The terms of members of MACPAC shall be for 3 years except that the Comptroller General of the United States shall designate staggered terms for the members first appointed.

**(B) Vacancies**

Any member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed shall be appointed only for the remainder of that term. A member may serve after the expiration of that member's term until a successor has taken office. A vacancy in MACPAC shall be filled in the manner in which the original appointment was made.

**(4) Compensation**

While serving on the business of MACPAC (including travel time), a member of MACPAC shall be entitled to compensation at the per diem equivalent of the rate provided for level IV of the Executive Schedule under section 5315 of Title 5; and while so serving away from home and the member's regular place of business, a member may be allowed travel expenses, as authorized by the Chairman of MACPAC. Physicians serving as personnel of MACPAC may be provided a physician comparability allowance by MACPAC in the same manner as Government physicians may be provided such an allowance by an agency under section 5948 of Title 5, and for such purpose subsection (i) of such section shall apply to MACPAC in the same manner as it applies to the Tennessee Valley Authority. For purposes

of pay (other than pay of members of MACPAC) and employment benefits, rights, and privileges, all personnel of MACPAC shall be treated as if they were employees of the United States Senate.

**(5) Chairman; Vice Chairman**

The Comptroller General of the United States shall designate a member of MACPAC, at the time of appointment of the member [2] as Chairman and a member as Vice Chairman for that term of appointment, except that in the case of vacancy of the Chairmanship or Vice Chairmanship, the Comptroller General of the United States may designate another member for the remainder of that member's term.

**(6) Meetings**

MACPAC shall meet at the call of the Chairman.

**(d) Director and staff; experts and consultants**

Subject to such review as the Comptroller General of the United States deems necessary to assure the efficient administration of MACPAC, MACPAC may--

**(1)** employ and fix the compensation of an Executive Director (subject to the approval of the Comptroller General of the United States) and such other personnel as may be necessary to carry out its duties (without regard to the provisions of Title 5, governing appointments in the competitive service);

**(2)** seek such assistance and support as may be required in the performance of its duties from appropriate Federal and State departments and agencies;

**(3)** enter into contracts or make other arrangements, as may be necessary for the conduct of the work of MACPAC (without regard to section 6101 of Title 41);

**(4)** make advance, progress, and other payments which relate to the work of MACPAC;

**(5)** provide transportation and subsistence for persons serving without compensation; and

**(6)** prescribe such rules and regulations as it deems necessary with respect to the internal organization and operation of MACPAC.

**(e) Powers**

**(1) Obtaining official data**

MACPAC may secure directly from any department or agency of the United States and, as a condition for receiving payments under sections 1396b(a) and 1397ee(a) of this title, from any State agency responsible for administering Medicaid or CHIP, information necessary to enable it to carry out this section. Upon request of the Chairman, the head of that department or agency shall furnish that information to MACPAC on an agreed upon schedule.

**(2) Data collection**

In order to carry out its functions, MACPAC shall--

**(A)** utilize existing information, both published and unpublished, where possible, collected and assessed either by its own staff or under other arrangements made in accordance with this section;

**(B)** carry out, or award grants or contracts for, original research and experimentation, where existing information is inadequate; and

**(C)** adopt procedures allowing any interested party to submit information for MACPAC's use in making reports and recommendations.

**(3) Access of GAO to information**

The Comptroller General of the United States shall have unrestricted access to all deliberations, records, and nonproprietary data of MACPAC, immediately upon request.

**(4) Periodic audit**

MACPAC shall be subject to periodic audit by the Comptroller General of the United States.

**(f) Funding**

**(1) Request for appropriations**

MACPAC shall submit requests for appropriations (other than for fiscal year 2010) in the same manner as the Comptroller General of the United States submits requests for appropriations, but amounts appropriated for MACPAC shall be separate from amounts appropriated for the Comptroller General of the United States.

**(2) Authorization**

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

**(3) Funding for fiscal year 2010**

**(A) In general**

Out of any funds in the Treasury not otherwise appropriated, there is appropriated to MACPAC to carry out the provisions of this section for fiscal year 2010, $9,000,000.

**(B) Transfer of funds**

Notwithstanding section 1397dd(a)(13) of this title, from the amounts appropriated in such section for fiscal year 2010, $2,000,000 is hereby transferred and made available in such fiscal year to MACPAC to carry out the provisions of this section.

**(4) Availability**

Amounts made available under paragraphs (2) and (3) to MACPAC to carry out the provisions of this section shall remain available until expended.

**CREDIT(S)**

(Aug. 14, 1935, c. 531, Title XIX, § 1900, as added Pub.L. 111-3, Title V, § 506(a), Feb. 4, 2009, 123 Stat. 91; amended Pub.L. 111-148, Title II, § 2801(a), Mar. 23, 2010, 124 Stat. 328; Pub.L. 113-93, Title II, § 221(b), Apr. 1, 2014, 128 Stat. 1076.)

Footnotes

1 So in original. Section 2081 of the Patient Protection and Affordable Care Act, probably means section 2602 of the Patient Protection and Affordable Care Act, Pub.L. 111-148, Title II, Mar. 23, 2010, 124 Stat. 315, which is classified to 42 U.S.C.A. § 1315b, and established the Federal Coordinated Health Care Office, as there is no section 2081 in the Patient Protection and Affordable Care Act.

2 So in original. Probably should be followed by a comma.

42 U.S.C.A. § 1396, 42 USCA § 1396

Current through P.L. 115-185.

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 23 are displayed in two separate documents. Notes of Decisions for subdivisions I and II are contained in this document. For Notes of Decisions for subdivisions III to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 23.>

**(a) 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; and

**(4)** the representative parties will fairly and adequately protect the interests of the class.

**(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

**(1)** prosecuting separate actions by or against individual class members would create a risk of:

**(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

**(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

**(2)** 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; or

  

**(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

**(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;

**(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;

**(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

**(D)** the likely difficulties in managing a class action.

**(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**

**(1)** ***Certification Order.***

**(A)** *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

**(B)** *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

**(C)** *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

**(2)** ***Notice.***

**(A)** *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

<[Text of subdivision (c)(2)(B) opening paragraph effective until
December 1, 2018, absent contrary Congressional action.]>

**(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

  

<[Text of subdivision (c)(2)(B) opening paragraph effective
December 1, 2018, absent contrary Congressional action.]>

**(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)--the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

**(i)** the nature of the action;

**(ii)** the definition of the class certified;

**(iii)** the class claims, issues, or defenses;

**(iv)** that a class member may enter an appearance through an attorney if the member so desires;

**(v)** that the court will exclude from the class any member who requests exclusion;

**(vi)** the time and manner for requesting exclusion; and

**(vii)** the binding effect of a class judgment on members under Rule 23(c)(3).

**(3)** ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

**(A)** for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

**(B)** for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

**(4)** ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

**(5)** ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

**(d) Conducting the Action.**

  

**(1)** ***In General.*** In conducting an action under this rule, the court may issue orders that:

**(A)** determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

**(B)** require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

**(i)** any step in the action;

**(ii)** the proposed extent of the judgment; or

**(iii)** the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

**(C)** impose conditions on the representative parties or on intervenors;

**(D)** require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

**(E)** deal with similar procedural matters.

**(2)** ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

<[Text of subdivisions (e) and (f) effective until December 1, 2018, absent contrary Congressional action.]>

**(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

**(1)** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

**(2)** If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

**(3)** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

  

**(4)** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

**(5)** Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

**(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

<[Text of subdivisions (e) and (f) effective December 1, 2018, absent contrary Congressional action.]>

**(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

**(1)** ***Notice to the Class.***

**(A)** Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

**(B)** Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

**(i)** approve the proposal under Rule 23(e)(2); and

**(ii)** certify the class for purposes of judgment on the proposal.

**(2)** ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

**(A)** the class representatives and class counsel have adequately represented the class;

**(B)** the proposal was negotiated at arm's length;

**(C)** the relief provided for the class is adequate, taking into account:

  

**(i)** the costs, risks, and delay of trial and appeal;

**(ii)** the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

**(iii)** the terms of any proposed award of attorney's fees, including timing of payment; and

**(iv)** any agreement required to be identified under Rule 23(e)(3); and

**(D)** the proposal treats class members equitably relative to each other.

**(3)** ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

**(4)** ***New Opportunity to be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

**(5)** ***Class-Member Objections.***

**(A)** *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

**(B)** *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

**(i)** forgoing or withdrawing an objection, or

**(ii)** forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

**(C)** *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

**(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with

duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

**(g) Class Counsel.**

**(1)** ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

**(A)** must consider:

**(i)** the work counsel has done in identifying or investigating potential claims in the action;

**(ii)** counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

**(iii)** counsel's knowledge of the applicable law; and

**(iv)** the resources that counsel will commit to representing the class;

**(B)** may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

**(C)** may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

**(D)** may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

**(E)** may make further orders in connection with the appointment.

**(2)** ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

**(3)** ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

**(4)** ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

  

**(h) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

**(1)** A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

**(2)** A class member, or a party from whom payment is sought, may object to the motion.

**(3)** The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

**(4)** The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

**CREDIT(S)**

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 26, 2018, effective December 1, 2018, absent contrary Congressional action.)

Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A., FRCP Rule 23
Including Amendments Received Through 6-1-18

End of Document

Code of Federal Regulations
Title 42. Public Health
Chapter IV. Centers for Medicare & Medicaid Services, Department of Health and Human Services (Refs & Annos)
Subchapter C. Medical Assistance Programs
Part 435. Eligibility in the States, District of Columbia, the Northern Mariana Islands, and American Samoa (Refs & Annos)
Subpart J. Eligibility in the States and District of Columbia (Refs & Annos)
Furnishing Medicaid

42 C.F.R. § 435.930

§ 435.930 Furnishing Medicaid.

Effective: July 16, 2012
Currentness

The agency must—

(a) Furnish Medicaid promptly to beneficiaries without any delay caused by the agency's administrative procedures;

(b) Continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible; and

(c) Make arrangements to assist applicants and beneficiaries to get emergency medical care whenever needed, 24 hours a day and 7 days a week.

SOURCE: 43 FR 45204, Sept. 29, 1978; 44 FR 17937, March 23, 1979; 51 FR 41338, 41350, Nov. 14, 1986; 77 FR 17203, March 23, 2012; 77 FR 29028, May 16, 2012, unless otherwise noted.

AUTHORITY: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Current through June 22, 2018; 83 FR 29209.

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