

their State Plans, including EPSDT services for children and youth under the age of 21. 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r). The Medicaid Act requires states to provide covered services (or “make medical assistance available”), including mental health services provided pursuant to the EPSDT mandate, to Medicaid beneficiaries when medically necessary, with “reasonable promptness to all eligible individuals.” 42 U.S.C. § 1396a(a)(8). Even when a particular service or treatment for youth is not written into the State Plan, a state must nevertheless provide that service or treatment if it is listed in Section 1396d(a) and it is necessary to correct or ameliorate the child’s condition. 42 U.S.C. § 1396a(a)(43)(C); 42 C.F.R. § 441.57.

Additionally, under Title II and Section 504 and their implementing regulations, LDH is the “public entity” charged with administering the Medicaid program in Louisiana. It must administer the program in a manner that does not result in or risk the unnecessary segregation of Plaintiffs and the Class from their communities and into hospitals and psychiatric institutions. *See* 42 U.S.C. §§ 12131-12132; *Olmstead v. L.C.*, 527 U.S. 581 (1999).

access to mental health care for children with a mental illness or condition.² Mental Health America's 2020 report was equally concerning, finding that Louisiana ranked 41st in providing access to mental health care for youth and adults.³ In February 2018, the Louisiana Legislative Auditor released a performance audit evaluating the accessibility of Medicaid mental health services for adults and children in Louisiana and concluded that "Louisiana does not always provide Medicaid recipients with comprehensive and appropriate specialized behavioral health services."⁴

Ampuns-6(be)4lce ngEMC /Span <<MCID 27 >>B31 12 -0 0 0 8.04 119.52 -2.d [432p0.0(pr

Id. The counseling A.A. received during this time was poor, and at one point, counselors stopped showing up for A.A.'s appointments all together. *Id.*

In August 2019, A.A.'s mother took it upon herself to refer A.A. to Louisiana's Medicaid waiver program, the Coordinated System of Care. *Id.* In this program, A.A. and his mother have met with a wrap-around facilitator, and A.A. has received weekly counseling, but this program has not met the intensity of his needs. *Id.* A.A. has faced multiple crises at school, and the only options available to A.A.'s mother have been to keep her son in a hospital or care for him at home on her own without adequate assistance. *Id.* A.A. continues to struggle in school and to maintain positive relationships with his peers and family. *Id.* Unable to access IHCBS, A.A. is at serious risk of being excluded from school and being unnecessarily institutionalized and separated from his family and community again. *Id.*

B.B. is a 14-year old Louisiana Medicaid recipient residing in Caddo Parish. Decl., P.B. (Exh. 7); Supp. Decl., P.B. (Exh. 8). Despite having multiple mental illnesses and experiencing psychiatric crises, B.B. has never been recommended for IHCBS because such services are unavailable in her community. All she has received is inadequate outpatient counseling and medication management. *Id.* Because B.B. lacks intensive care coordination, B.B.'s mother has attempted to locate providers on her own to provide IHCBS; however, she has not been able to locate any in her area. *Id.* B.B.'s condition continues to decline, causing strife between her mother and her younger brothers. *Id.* Most recently, B.B. experienced a significant mental health setback after a recent incident involving her father and learning about potential modifications of his visitation rights. *Id.* Unable to access IHCBS, institutionalization for B.B. and separation from her family is a serious fear. *Id.*

C.C. is a 14-year old Louisiana Medicaid recipient residing in Terrebonne Parish. Decl., P.C. (Exh. 9); Supp. Decl., P.C. (Exh. 10). Despite having multiple mental illnesses, experiencing psychiatric crises, and being recommended by her providers for IHCBS, C.C. has never received these needed services. *Id.* She has been institutionalized three (3) times at psychiatric facilities, with her first as a Louisiana Medicaid recipient occurring in September 2013, and with her most recent institutionalization in late 2018 lasting for over 100 days. *Id.* Before and after each time she was institutionalized, C.C. only received inadequate mental health services, including: inadequate outpatient counseling, infrequent and sporadic mental health rehabilitation services such as community psychiatric support and treatment (CPST) and psychosocial rehabilitation (PSR), and occasional medication management. *Id.*

In summer 2019, C.C. began receiving some family therapy; however, when her therapist resigned, C.C.'s services terminated prematurely. Neither the providing agency nor the wrap-around facilitator found a replacement for her. Furthermore, C.C.'s managed care organization (MCO) did not intervene to address the termination of her services or the unused pre-authorized therapeutic hours. Several months later, and only after C.C.'s mother made a request, the family therapy was restarted, but the gap resulted in lost progress for their family. Since November 2019, C.C. has become more physically aggressive with her parents

D.D. is a 14-year old Louisiana Medicaid recipient residing in Rapides Parish. Decl., P.D. (Exh. 11); Supp. Decl., P.D. (Exh. 12). Despite having multiple mental illnesses and experiencing multiple psychiatric crises, D.D. has never received crisis services, i

E.E. is a 14-year old Louisiana Medicaid recipient

programming. *Id.* This program is a last resort for F.F. and her family because it segregates her from her nondisabled peers at school and places her in a hospital setting for most of the day. *Id.*

IV. ARGUMENT

Class certification is appropriate where the threshold requirements of Rule 23(a) and any of the requirements of subsections (b) (1), (2), or (3) are satisfied. Fed. R. Civ. P. 23; *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-614 (1997)). “By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.” *Teta v. Chow (In Re TWL Corp.)*, 712 F.3d 886, 894 (5th Cir. 2013) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010)).

While a district court has broad discretion when deciding a motion for class certification, the Court must engage in a rigorous analysis when deciding certification. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998); *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 545 (5th Cir. 2020). In its analysis, the court need not fully consider the merits of the plaintiffs’ claims at the certification stage but may permissibly look past the pleadings to the record and any other completed discovery when deciding whether a class should be certified. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Adickes v. Hellerstedt*, 753 F. Appx 236, 244 (5th Cir. 2018). The court should seek to “understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination[.]” *Chavez*, 957 F.3d at 545 (citing *Flecha v. Mediacredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020)).

Here, Plaintiffs’ proposed class meets the rigorous requirements of Rules 23(a) and (b)(2).

a. The proposed Class satisfies the requirements for a class action suit under Rule 23(a)

i. Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of individual members into one suit is impracticable. In evaluating the numerosity element, the “the primary consideration for courts is the practicality of joining the members of a proposed class.” *Pitts v. Greenstein*, No. 10–635–JJB–SR, 2011 WL 2193398, at *3 (M.D. La. June 6, 2011) (citing *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir.1981)).

This court considers several factors in assessing “practicality,” including “the sheer size of the class and whether the class will include future members.” *Pitts*, 2011 WL 2193398, at *3. “Although there is no strict threshold, classes containing more than 40 members are generally large enough to warrant certification.” *Lewis v. Cain*, 324 F.R.D. 159, 168 (M.D. La. Feb. 26, 2018) (J. Dick) (granting class certification in a prison conditions class action alleging, among other claims, a violation of Title II and Section 504).

Using data obtained from Defendants’ 2018 Medicaid Annual Report,⁶ Plaintiffs believe that the Class consists of approximately 47,500 Louisiana Medicaid-eligible children and youth under the age of 21. To arrive at this number, Plaintiffs estimated the number of Medicaid-

Class members because they need or will need access to intensive home and community-based services for the treatment of their mental health conditions. The range of services (including amount and duration) that these children need may change over time, but Defendants must always make the full array of IHCBS available to them. *See, e.g., S.R. v. Pa. Dep't of Human Servs.*, 325 F.R.D. 103, 109 (M.D. Pa. 2018). Thus, Plaintiffs easily meet the threshold numerical requisite for a federal class action.⁸

Thang

Additionally, “the Fifth Circuit has repeatedly noted that ‘the number of members in a proposed class is not determinative of whether joinder is impracticable.’” *Cain*, 324 F.R.D., at 167–68 (quoting *In re TWL Corp.*, 712 F.3d 886, 894 (5th Cir. 2013)). Consideration is also given to intertwining factors including (a) the ease of identification of class members (*see Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980)), (b) whether the “class members lack the financial

Accordingly, Plaintiffs sufficiently meet their burden to establish numerosity.

ii. Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class” in order to establish class certification. Plaintiffs’ claims “must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.” *Lightbourn v. Co. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (citations omitted). “[W]hat is significant with respect to a commonality determination is ‘not the raising of common questions—even in droves—but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.’” *Adickes v. Hellerstedt*, 753 F. App’x 236, 245 (5th Cir. 2018) (citing *Yates v. Collier*, 868 F.3d 354, 361 (5th Cir. 2017)).

A common question is one which, when answered as to one class member, is answered as to all. “Even where individual class members may not be identically situated, commonality exists where a question of law linking class members is substantially related to the resolution of the litigation.” *Lane v. Campus Fed. Credit Union*, No. 16-CV-37-JWD-EWD, 2017 WL 3719976, at *4 (M.D. La. May 16, 2017) (citing *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839-40 (5th Cir. 2012)). “[T]he only consideration at the class certification stage is whether the issues are appropriate for classwide litigation,” not whether the plaintiffs will win on the merits. *Dockery v. Fischer*, 253 F. Supp. 3d 832, 848 (S.D. Miss. 2015) (citations omitted). *See also In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014) (“ . . . the principal requirement of *Wal-Mart* is merely a single common contention that enables the class action ‘to generate common *answers* apt to drive

the resolution of the litigation’”; and therefore, “these ‘common answers’ may indeed relate to the injurious effects experienced by the class members, but they may also relate to the defendant’s injurious conduct.”) (citing *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012)).

Here, Defendants, through their policies, practices, and procedures, or lack or deficiencies thereof, are not fulfilling their federal mandate to provide Plaintiffs and the Class with the necessary IHCBS to treat their mental health conditions. The injuries of the proposed class members all derive

requirement. In *S.R. v. Pa. Dep't of Human Servs.*,

benefit Class members. Plaintiffs seek an injunction requiring Defendants to take affirmative actions to: (a) provide or arrange for necessary and timely IHCBS that corrects or ameliorates Plaintiffs' and Class members' significant mental health conditions; and (b) ensure that Plaintiffs and the Class receive mental health services in the most integrated setting appropriate to their needs so that Defendants do not discriminate against them because of their mental health conditions.

Using these same factors, courts have found typicality to exist among plaintiff representatives and class members. In *N.B. v. Hamos*, for example, the Court held Plaintiffs had established typicality where they “all suffer from mental illness and/or behavioral or emotional disorders . . . [and were] alleged to have been denied access to intensive community-based services based on the failure of the [Defendant] to make them available, in violation of EPSDT and the integration mandate.” .

the interests of the absentees””; and (b) the “zeal and competence of the representatives’ counsel””. *Feder v. Electronic Data Systems Corp.*, 429 F.3d 125, 130 (5th Cir. 2005) (quoting *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001)).

Plaintiffs and their next friends are adeq4c-14(E)-3(l)-6(v)-4(ee0.003 T515-3(om)2(pa2(-10(125, 1

Counsel for Plaintiffs, Southern Poverty Law Center (SPLC),

(iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

For the same reasons that counsel for Plaintiffs are adequate representatives of the Class (as discussed *supra* IV.(a)(iv.)), Plaintiffs' counsel are qualified to serve as counsel for the Class.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the Renewed Motion for Class Certification under Federal Rule of Civil Procedure 23. Further, Plaintiffs respectfully request this Court appoint Proposed Class Counsel as counsel to represent the certified class.

Respectfully submitted this 18th day of September 2020,

A.A., B.B., C.C., D.D., E.E., and F.F.
By and through their n w [and thried class.

/s/ Britney R. Wilson

Britney R. Wilson, NY Bar No. 5426713
National Center for Law and Economic Justice
275 Seventh Avenue, Suite 1506
New York, NY 10001-6860
Phone: (212) 633-6967
Facsimile: (212) 633-6371
wilson@nclej.org
Admitted Pro Hac Vice

/s/ Ronald Lospennato

Ronald Lospennato, LA Bar No. 32191
Evelyn Chuang, LA Bar No. 38993
Disability Rights Louisiana
8325 Oak Street
New Orleans, LA 70118
Phone: (504) 522-2337
Facsimile: (504) 522-5507
rlospennato@disabilityrightsla.org
echuang@disabilityrightsla.org

/s/ Darin W. Snyder

Darin W. Snyder, CA Bar No. 136003
Kristin M. MacDonnell, CA Bar No. 307124
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
Phone: (415) 984-8700
Facsimile: (415) 984-8701
dsnyder@omm.com
kmacdonnell@omm.com
Admitted Pro Hac Vice

Counsel for Plaintiffs and class members