UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-23037-CIV-JORDAN/MCALILEY

FLORIDA PEDIATRIC SOCIETY, et al.,

Plaintiffs,

v.

HOLLY BENSON, in her official capacity as Secretary of the Florida Agency for Health Care Administration, et al.,

Defendants.
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REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pending before this Court is Plaintiffs' Motion for Class Certification. [DE 281]. Plaintiffs ask the Court to certify, under Fed.R.Civ.P. 23(b)(2), a class of children in Florida who now are, or in the future will be, eligible to receive Medicaid; they also ask the Court to appoint Plaintiffs as class representatives and their counsel as class counsel. For the reasons that follow, this Court recommends that the Motion be granted.[1]

I. Background

The Florida Pediatric Society/Florida Chapter of the American Academy of Pediatrics (FPS), the Florida Academy of Pediatric Dentistry, Inc. (FAPD) (here, the Organizational Plaintiffs), and the named individual Plaintiffs (here, the Individual Plaintiffs) bring this civil

[1] The Motion was referred to the undersigned by the Honorable Adalberto Jordan. [DE 218, 271].

rights class action under 42 U.S.C. § 1983 against Holly Benson, in her official capacity as Secretary of the Florida Agency for Health Care Administration (AHCA), George Sheldon, in his official capacity as Secretary of the Florida Department of Children and Family Services (DCF), and Ana Viamonte Ros, M.D., M.P.H., in her official capacity as Surgeon General for the State of Florida and Secretary of the Florida Department of Health (DOH).[2] Plaintiffs accuse Defendants of systematically failing to administer Florida's Medicaid program in compliance with federal law. Specifically, they claim that Defendants have violated Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. (here, the Medicaid Act), by failing to provide children in Florida eligible for Medicaid with essential medical and dental services. [DE 220-2].[3]

The Individual Plaintiffs (each appearing with their next friend)[4] are children who are eligible to receive medical and dental care through Medicaid, and the Organizational Plaintiffs are non-profit professional organizations of pediatricians, pediatric specialists, and pediatric dentists, whose missions generally are to secure, improve and maintain the medical and dental care of Florida children. [DE 220-2, p. 10-11]. Plaintiffs seek declaratory and

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[2] The Defendants are hereafter referred to by their agency acronyms.

[3] Medicaid is a cooperative federal-state program through which the federal government furnishes financial assistance to the states so that the states may provide the necessary medical, rehabilitation and other services to low-income persons. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1268 (11th Cir. 2000).

[4] The Individual Plaintiffs, identified in this lawsuit by their initials, are: L.C., S.M., N.V., J.S., J.W., N.A., K.K., T.G. and N.G.

injunctive relief to end the alleged violations of federal law, and to compel Defendants to comply with certain provisions of the Medicaid Act. Specifically, in Count I of the Second Amended Complaint, Plaintiffs charge that Defendants failed to provide "medical assistance . . . with reasonable promptness to all eligible individuals" as required by 42 U.S.C. §§ 1396a(a)(8) and (a)(10). Count II charges that Defendants violated their duty under 42 U.S.C. § 1396a(a)(30)(A) to provide equal access to medical care by developing a Medicaid plan that assures that payments to medical providers are consistent with quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.[5] Count IV alleges that Defendants failed to effectively inform Plaintiffs and their caretakers of the existence of the child healthcare services as mandated by 42 U.S.C. § 1396a(a)(43).[6] [*See generally*, DE 220-2]. (In this opinion this Court will often refer to these claims by the shorthand phrases: "reasonable promptness" (Count I), "equal access" (Count II) and "outreach and information" (Count IV).)

Plaintiffs bring these claims on behalf of the following proposed class of children: "[a]ll children under the age of 21 who now, or in the future will, reside in Florida and who

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[5] Count III, which alleged a violation of 42 U.S.C. § 1396u-2(b)(5), has been dismissed. [DE 40].

[6] Judge Jordan has dismissed some of these claims as to Defendants DCF and DOH. Specifically, on March 19, 2009, he granted DCF's motion for partial summary judgment on Count II, and as to Count I to the extent that it alleges a violation of 42 U.S.C. § 1396a(a)(10). DOH's motion for partial summary judgment was granted as to Count IV. [DE 541].

are, or will be, eligible under Title XIX of the Social Security Act for Early and Periodic Screening, Diagnosis and Treatment Services." [DE 281, p. 2].

The Motion [DE 281], response [DE 299] and reply [DE 346] raise a multitude of issues, which counsel addressed at oral argument.[7] This Court reached its conclusions after careful review of the parties' memoranda, the record in this case, applicable law and counsel's oral argument.

II. Analysis

In their Motion, Plaintiffs argue that they have met the requirements of Federal Rule of Civil Procedure 23(a) and 23(b)(2) for class certification. Defendants dispute this, and also argue that a class cannot be certified because Plaintiffs do not have standing to bring the lawsuit. Defendants also re-present an argument, already considered and rejected by Judge Jordan, that Plaintiffs have no private right of action to bring the claims alleged in Counts I, II and IV.[8] This Court considers each issue in turn.

A. Standing

"[A]ny analysis of class certification must begin with the issue of standing." *Prado-Steiman v. Bush,* 221 F.3d 1266, 1279-80 (11th Cir. 2000). Before a court can certify a class

[7] The transcript of that oral argument has been filed with the Court and is cited, at times, in this Report and Recommendation. [DE 447].

[8] Defendants also argue that no class should be certified against DOH and DCF because Plaintiffs' Complaint does not claim that these Defendants have statutory responsibilities under the Medicaid Act, and because there is no evidence that either DCF or DOH has caused Plaintiffs' alleged harm. [DE 299, p. 45-47]. Judge Jordan addressed these arguments in his Order on Motions for Summary Judgment [DE 541], and therefore this Court does not address them here.

or even review class certification requirements, it "must determine that at least one named class representative has Article III standing to raise each class subclaim." *Id*. Thus, the Court here need not find that each named Plaintiff meets the requirements of standing for each cause of action. It is enough that the Court find, for each cause of action, that one named Plaintiff has standing, *Id*. at 1267, 1279-80;[9] if it makes that finding, the Court may then turn to the question of class certification.

For a plaintiff to have standing under Article III, there must be (1) an injury-in-fact, *i.e.*, an invasion of the plaintiff's legally protected interest that is concrete and particularized, and actual or imminent; (2) a causal connection between the plaintiff's injury and the defendant's conduct; and (3) the likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Florida Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008); Order on Motions for Summary Judgment, DE 541, p. 4. Plaintiffs have the burden of establishing each of these three elements. *31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003). "Each element of standing must be supported in the same manner as any other matter on which the plaintiff bears the burden of proof." *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1177 (11th Cir. 2009). The evidence necessary to satisfy this burden depends on the stage of litigation at which standing is challenged. *31 Foster Children*, 329 F.3d at 1263. When standing is raised at this point in the litigation - when class certification is being determined - the

[9] Judge Jordan has repeatedly recognized this principle. [DE 40, p. 3; DE 541, p. 4].

inquiry is "necessarily fact-specific and requires factual proffers, through affidavits and other evidentiary documents . . . ." *Prado-Steiman*, 221 F.3d at 1280.

Plaintiffs argue that each of the Individual and Organizational Plaintiffs have standing to assert each claim; Defendants counter that not one of them has standing. After carefully reviewing the evidence before the Court and the applicable law, this Court concludes that for each claim - Counts I, II and IV - there is at least one Individual Plaintiff who has standing. For this reason, and others explained below, the Court does not need to determine whether either of the Organizational Plaintiffs have standing.

1. Individual standing

In his Order on Motions for Summary Judgment (which addressed motions for partial summary judgment brought by Defendants DCF and DOH, but not Defendant AHCA), Judge Jordan settled a considerable portion of the parties' debate about standing. Specifically, he found that there is an Individual Plaintiff who has standing to bring each of the claims (that survived summary judgment) against Defendants DCF and DOH. [DE 541, p. 4-9]. In particular, Judge Jordan found that Plaintiff S.M. has standing to bring Counts I and IV against DCF, and that T.G. has standing to proceed on Counts I and II against DOH. *Id.* The only remaining question is whether there is a Plaintiff who has standing to bring Counts I (reasonable promptness), II (equal access) and IV (outreach and information) against Defendant AHCA.

a. Injury in fact

Plaintiffs state that the Individual Plaintiffs have suffered, or face an imminent prospect of suffering, an invasion of their legally protected interests (*i.e.* their right to reasonably prompt medical assistance, equal access to health care, and outreach and information about Medicaid services) which has, and will continue to result in, concrete and particularized injury. Plaintiffs cite to various examples of these injuries. [DE 281, p. 34-36]. Defendants, for their part, define injury far more narrowly and focus their argument on their claim that no Individual Plaintiff has shown that he was denied health care, and that being the case, that no Individual Plaintiff has established that he has suffered an injury-in-fact. [DE 299, p. 33-34]. Defendants also argue that Plaintiffs have not shown that they have had difficulty receiving information about Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services, or that payments for covered services have been insufficient to ensure that the Individual Plaintiffs received services. [*Id.* at p. 34].

Where a plaintiff seeks prospective (declaratory and injunctive) relief, as is the case here, he must establish imminent harm. The Supreme Court and this Circuit have held that, although a plaintiff seeking prospective relief must establish "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," the plaintiff "does not have to await the consummation of the threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (quotations omitted). *See also Browning*, 522 F.3d at 1161; *31 Foster Children*, 329 F.3d at 1265; DE 541, p. 5-6.

An imminent injury is one that is "likely to occur immediately." *Browning,* 522 F.3d at 1161 (citing *31 Foster Children*, 329 F. 3d at 1265). "Immediately" has a different meaning here: it "requires only that the anticipated injury occur with some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months." *Id.*; *see also* DE 541, p. 6. Once the requirement of immediacy is met, a court must then consider the substantial likelihood of future injury. *Browning*, 522 F.3d at 1161. "To be likely enough, the threatened future injury must pose a 'realistic danger' and cannot be merely hypothetical or conjectural. How likely is enough[,] is necessarily a qualitative judgment." *Id.*; *see also* DE 541, p. 6.

In *Browning*, the Eleventh Circuit Court of Appeals held that the plaintiffs, who alleged that a Florida statute would prevent voters from being able to vote in upcoming elections, had shown a high likelihood that at least one of their 20,000 members would have his voter application rejected due to human error. On that reasoning the court found that the plaintiffs had demonstrated both an imminent threat of injury, and a substantial likelihood that the injury would occur, and noted that the threatened future injury was not based on conjecture about how people would act in the future. *Id.* at 1163.

Judge Jordan, in his Order on Motions for Summary Judgment, applied this legal framework in resolving the question of standing as to DCF and DOH. As to DCF's motion the Court found that S.M., an Individual Plaintiff, had demonstrated an injury-in-fact as to Counts I and IV. [DE 541, p. 5-7]. Plaintiffs' allegations of injury-in-fact apply equally to

Defendants DCF and AHCA, and this Court relies upon Judge Jordan's finding that S.M. has demonstrated an injury-in-fact as to Count I and IV. For convenience those findings are briefly summarized in the following section.[10] This Court finds that a different Individual Plaintiff, J.S., has demonstrated an injury-in-fact as to Count II.

i. Counts I and IV

In his Order on Motions for Summary Judgment, Judge Jordan made the following factual findings regarding S.M., an Individual Plaintiff:

> S.M., a two-year old boy, has been switched[11] from his insurance plan on more than one occasion. S.M. was unable to obtain an EPSDT appointment at 18 months of age as prescribed by law. When S.M.'s mother took him to his appointment, she was informed, for the first time, that S.M. could not be seen because S.M.'s Medicaid insurance plan has been switched and his doctor was not a participant in the newly assigned plan. S.M.'s screening was delayed by two months, during which time his mother and doctors attempted to switch him back to his initial plan and then wait[ed] for a new appointment to become available.

[DE 541, p. 5].

Judge Jordan considered Plaintiffs' argument, that the two-month delay exposed S.M. to substantial health risks because the 18-month screening is a critical appointment, and the

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[10] Redressibility, the third element of standing, is also equally applicable to Defendants DCF and AHCA. On the other hand, the second element of standing - the causal connection between the plaintiff's injury and the defendant's conduct - must be considered separately for each Defendant. Accordingly, in Section II(A)(1)(b) this Court undertakes an independent analysis of the causation element, vis-a-vis Defendant AHCA.

[11] Switching refers to a child's reassignment from one Medicaid insurance plan to another without notice, often preventing the child from accessing care when his existing doctor is not affiliated with the new Medicaid plan to which the child is assigned. [DE 541, p. 5].

Defendants' position that this was a mere delay that did not cause S.M. any negative health consequences, and rejected the Defendants' position. Judge Jordan considered the harm caused by switching and found that "the injury in this case, the lack of access to care and information, will occur with some fixed period of time, and the plaintiffs have offered evidence that switching occurs frequently." [DE 541, p. 6]. Judge Jordan specifically found that Plaintiffs satisfied the immediacy requirement, and further found that "the substantial likelihood of future injury in this case is not in 'the realm of conjecture and speculation,' because the plaintiffs have made a sufficient showing that it is likely that a child eligible for Medicaid will have his or her plan switched and thus unable to access care." (citing to *31 Foster Children,* 329 F.3d at 1266-67). [*See* DE 541, p. 7]. Judge Jordan concluded that:

> [t]his case is about the alleged systemic problem of delay and denial of healthcare, so the injury is such delay and denial of healthcare, and need not be accompanied by an adverse health consequence. Here, S.M.'s 18-month EPSDT appointment was delayed, and that constitutes injury-in-fact as to Count I. Moreover, S.M.'s mother stated that she did not receive information about S.M.'s rights from the defendants, and such lack of information also constitutes an injury-in-fact with respect to Count IV.

Id. p. 7.

As already noted, these conclusions made with regard to Defendant DCF apply equally to Defendant AHCA.

ii. Count II

This Court finds that a different Individual Plaintiff, J.S., has shown that she has suffered an injury of the kind complained of in Count II: denial of equal access to health

care.

J.S.'s difficulties have concerned her access to specialty care. In 2007 J.S. broke her wrist and the emergency room doctor instructed J.S.'s mother that it was crucial that she receive treatment the following Monday. J.S. did not receive timely treatment, however, because the orthopedic physician she was referred to did not accept Medicaid. [DE 281, Ex. 26]. J.S.'s mother then called ten or fifteen doctors who were listed in the phonebook, and about six doctors whose names were provided to her by Defendants, none of whom accepted Medicaid. [*Id.*]. As a result J.S.'s treatment was delayed by three days, and her mother had to drive an hour-and-a-half to obtain the follow-up care. [*Id.*, Ex. 27]. Similarly, when J.S. received emergency treatment for a broken ankle, and her mother was told that it was important to follow-up the next Monday, J.S.'s mother was unable to locate a doctor who would accept Medicaid. [*Id.*, Ex. 26]. Plaintiffs also offer evidence that J.S. has been unable to access gynecological care [*Id.*, Ex. 26, 28], and that her mother must drive from Jupiter to Miami to obtain care from a Medicaid provider for J.S.'s immune deficiency condition. [*Id.*, Ex. 26].

Count II alleges that Plaintiffs, as Medicaid recipients, do not have equal access to health care that is otherwise available to the general population. This Court finds that Plaintiffs have put forward sufficient evidence that J.S. repeatedly has not been able to access specialty care, in the way that a child with private funding could. This harm is imminent, within the context of standing, because it is likely to reoccur within some fixed period of time

in the future. *See Browning,* 522 F.3d at 1161. In particular, given J.S.'s ongoing medical needs, including her immune deficiency disorder which requires travel to Miami every six months, Plaintiffs have established that J.S. will require specialty care in the future, and that there is a substantial likelihood that she will encounter similar problems accessing that care. In sum, J.S. has demonstrated that she has suffered an injury-in-fact, and has thus established the first element of standing for Count II.

b. Causation

Plaintiffs have easily demonstrated the second element of standing - causation - for S.M.'s and J.S.' claims against AHCA. The Florida legislature designated AHCA as the single state agency authorized to make payments for Medicaid services. §§ 409.901 and 409.902, Fla. Stat. (2007). This includes payment for EPSDT and physician services, § 409.905(2) and (9), Fla. Stat. (2007), and various optional Medicaid services that Florida has chosen to provide, such as children's dental services (*see* § 409.906(6), Fla. Stat. (2007)). The Florida legislature has also delegated authority to AHCA for setting Medicaid reimbursement rates (*see* § 409.908, Fla. Stat. (2007)), and for ensuring that each Medicaid recipient receives information about Medicaid plans (*see* § 409.9122, Fla. Stat. (2007). Given the broad statutory responsibility AHCA has over the Medicaid program, Plaintiffs have easily demonstrated a causal connection between S.M.'s and J.S.' injuries and AHCA's conduct.

c. Redressibility

Judge Jordan has found that the injuries alleged in Counts I and IV (against DCF) and Counts I and II (against DOH) are likely to be redressed by a favorable ruling for Plaintiffs. [DE 541, p. 9, 17]. The same conclusion is easily reached for Counts I, II and IV against Defendant AHCA.

For an injury to be redressible, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." *Lujan*, 504 U.S. at 561; *see also* DE 541, p. 9. Plaintiffs' injuries, alleged in Counts I, II and IV, will be prevented by the injunctive relief sought, which would require Defendants to: (1) furnish all enrolled and eligible Florida children the continuing and complete children's health care to which they are entitled; (2) implement administrative systems that minimize both the switching of children between insurance plans, and eligibility problems; (3) provide sufficient payments to health care providers so that there are enough enlisted providers available to administer care and services to enrolled and eligible children, at least to the same extent that such care and services are available to children in the geographic area; and (4) institute outreach programs that effectively inform children of their rights under the Medicaid Act. [DE 220-2, p. 38; DE 541, p. 9, 17].

In sum, this Court concludes that there is sufficient evidence that S.M. has standing to bring the claims alleged in Counts I and IV against Defendant AHCA, and J.S. has standing to bring Count II against AHCA.

2. Organizational standing

For reasons explained below (*see* discussion of typicality, at Section II(C)(3)) this Court concludes that the Organizational Plaintiffs are not qualified to serve as class representatives. Given that finding, and the finding that there are Individual Plaintiffs who have standing, this Court need not determine whether the Organizational Plaintiffs have standing

B. Private right of action

Defendants argue that the Court should deny class certification because none of the sections of Title XIX should be read to confer on the Plaintiffs a private right of action. [DE 299, p. 30-32]. This Court declines to address that argument here, for two reasons.

As for the Organizational Plaintiffs, as already noted, this Court concludes that they are not qualified to serve as class representatives. That being the case, whether the Organizational Plaintiffs have a private right of action is a question that need not be resolved in order to rule on the question of class certification. Moreover, the issue is presently before Judge Jordan, as it has been raised by Defendants in their Motion for Final Summary Judgment. [*See* DE 548-3].

As for the Individual Plaintiffs, Judge Jordan has twice considered and rejected Defendants' argument. [*See* Order on Motion to Dismiss, DE 40; Order Denying Motion to Reconsider Motion to Dismiss and to Certify Issues as Immediately Appealable, DE 58]. Judge Jordan's prior rulings are the law of this case, and this Court relies upon them to reject

Defendants' arguments that the Individual Plaintiffs do not have a private right of action to bring the claims in Counts I, II, and IV.[12]

The Court turns to the question of class certification.

C. Class certification under Rule 23

"For a district court to certify a class action, the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009) (citations omitted). Under Rule 23(a) Plaintiffs first must satisfy the requirements of: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of both class Plaintiffs and class counsel. *See Id.*; Fed.R.Civ.P. 23(a). Plaintiffs here move to certify their class pursuant to Rule 23(b)(2), which requires Plaintiffs to establish that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2).

"A district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class." *Vega,* 564 F.3d at 1266 (citations omitted). The trial court should not

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[12] Defendants cite to opinions by the Tenth and Fifth Circuit Courts of Appeals, issued since Judge Jordan ruled on this subject, which hold that the Medicaid Act obligates states to pay for, but not actually deliver, medical services. *See Oklahoma Chapter of the American Academy of Pediatrics v. Fogarty*, 472 F.3d 1208 (10th Cir. 2007); *Equal Access for El Paso v. Hawkins*, 562 F.3d 724 (5th Cir. 2009). Defendants contend that these decisions support their argument that the Plaintiffs have no private right of action as to Count I, because the Plaintiffs do not identify any Medicaid service Defendants failed to provide, nor do they identify any failure by Defendants to pay for such service. Again, this argument is pending before Judge Jordan, raised by Defendants in their Motion for Final Summary Judgment. [DE 548-3].

determine the merits of the plaintiffs' claim at the class certification stage. *Id.* "Therefore, it is proper to accept the substantive allegations contained in the complaint as true when assessing Rule 23 requirements." *Drayton v. Western Auto Supply Co.*,Case No. 01-10415, 2002 WL 32508918, at *6 (11th Cir. March 11, 2002). However, "it may be necessary to probe behind the pleadings before coming to rest on the certification issue." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982).[13] The Court has broad discretion in determining whether to certify a class. *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992). The burden of establishing the Rule 23 requirements is on the plaintiff who seeks to certify the suit as a class action. *Heaven v. Trust Company Bank*, 118 F.3d 735, 737 (11th Cir. 1997). Plaintiffs have met that burden here.

1. Numerosity

Rule 23(a) first requires that the proposed class be "so numerous that joinder is impracticable." Fed.R.Civ.P. 23(a)(1). "Practicability of joinder depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Kilgo v. Bowman Transportation, Inc.*, 789 F. 2d 859, 878 (11th Cir. 1986) (citations

[13] In support of their motion for class certification, Plaintiffs have filed considerable evidence, in the form of deposition testimony, affidavits, documents, and interrogatory responses. *See generally* DE 281, Ex. 1-44. While a decision on class certification may be made by simply relying upon the allegations in the complaint, the Court has made a careful review of Plaintiffs' proffered evidence, and Defendants' various challenges to that evidence. As a general proposition, the Court finds that Plaintiffs have supported each of the Rule 23 elements with proffered evidence. It simply is not practical, nor necessary, for the Court to cite to each example of such evidence. Instead, the Court cites some examples of that evidentiary support at various points in this Report and Recommendation.

omitted).

Plaintiffs assert that the numerosity requirement is easily satisfied here, as there are 1.6 million Medicaid-enrolled children dispersed throughout the state of Florida. [DE 281, p. 23]. Further, Plaintiffs contend that these class members are economically disadvantaged children for whom finding counsel and bringing individual claims would be extremely difficult, if not impossible, and that for these reasons joinder is particularly impracticable. [*Id.*].

Defendants, challenge numerosity by arguing that Plaintiffs' class definition is overbroad. [DE 299, p. 39]. According to Defendants, Plaintiffs have not shown that any class members have suffered actual injuries, such as having been denied preventative healthcare, or having had to endure unreasonably long waits for healthcare. Defendants contend that on this record, the Court can only speculate as to the number of class members with claims against Defendants. [*Id.*].

Throughout their opposition to class certification, Defendants make this same argument, that no proof has been put forward that any Individual Plaintiff - much less any class member - has been "harmed" by Defendants' administration of the Medicaid program. There are several problems with this argument. First, Defendants seek to define harm in the narrowest possible way - to mean only that a Plaintiff has experienced an outright denial of medical or dental services. This wished-for definition of harm ignores the very statutory provisions that Plaintiffs are suing to enforce, which guarantee something more: the

reasonably prompt provision of those services, equal access to those services, and outreach and information. It also ignores that Plaintiffs allege, and offer evidence in support, that some Plaintiffs have been unable to access medical or dental providers who accept Medicaid, and thus have had to pay non-Medicaid providers out-of-pocket. Plaintiffs also allege other forms of harm, for example that some have had to drive long distances to obtain care, or have had to endure unreasonably long delays to be seen by a provider. The second problem with this argument is that Defendants apparently presume that Plaintiffs, at the class certification stage, must present evidence of a kind and quality that will be needed to prevail at trial. In fact, as already noted, the burden on Plaintiffs is not that high. *Drayton,* 2002 WL 32508918, at *6 (it is proper at this stage to "accept the substantive allegations contained in the complaint as true").

It is worth noting that Plaintiffs have presented evidence that many class members have been denied the rights guaranteed by the Medicaid Act that are the subject of this lawsuit. For example, they cite statistics that in 2007 approximately 386,000 Medicaid-enrolled children did not receive preventative health care services (which supports Plaintiffs' allegations, in Counts I and II, that Defendants have not met their statutory obligations of reasonable promptness and equal access) and that approximately 400,000 Florida children are eligible for Medicaid, but not enrolled. This latter statistic suggests a lack of outreach and information, which is the subject of Count IV of Complaint. [DE 167, Ex. 15; DE 281,

Ex. 10[14], 11]. Moreover, there is no doubt that joinder here would be impracticable, given the wide geographic distribution of the class. *See Kilgo*, 789 F.2d at 878.

"Parties seeking class certification do not need to know the precise number of class members, but they must make reasonable estimates with support as to the size of the proposed class." *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 685, 693 (S.D. Fla. 2008) (citations omitted). The "sheer number of potential class members may warrant a conclusion that Rule 23(a)(1) is satisfied." *Id.* On the point of numerosity, this case is not unlike *Hernandez v. Meadows*, 209 F.R.D. 665, 669 (S.D. Fla. 2002), a class action brought by Medicaid recipients against AHCA for failure to comply with certain provisions of the Medicaid Act, where the court found that the numerosity requirement was satisfied, as AHCA's statistics showed that 35,000 Medicaid recipients had been denied coverage.

The Court thus concludes that Plaintiffs have met their burden to satisfy the numerosity requirement.

2. Commonality

The commonality requirement "demands only that there be questions of law or fact common to the class." *Vega*, 564 F.3d at 1268; Fed.R.Civ.P. 23(a)(2). It "'does not require

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[14] Exhibit 10 is the CMS-416 Report from 2006-2007 (416 Report). Defendants contend these statistics are unreliable, and that they underreport preventative screenings given children on Medicaid in 2007. [*See* Transcript of December 2, 2008 oral argument, DE 447, p. 66-9]. Even if Defendants are right, and significantly less than 386,000 children did not get these screenings in that year, this does not defeat Plaintiffs' showing of numerosity, as the standard for numerosity is well below the considerable class size here. As this Circuit has noted: "while there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate . . . ." *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

that all the questions of law and fact raised by the dispute be common', or that common questions of law and fact 'predominate' over individual issues." *Vega,* 564 F.3d at 1268 (citations omitted). In other words, to satisfy the commonality requirement, Plaintiffs must show that the class action involves issues that are susceptible to class-wide proof. *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001). Plaintiffs have met their burden to establish commonality.

The Complaint presents three overarching legal questions that are common to all members of the class, specifically: are Defendants meeting their obligations under the Medicaid Act to provide reasonably prompt services, equal access to those services, and outreach and information? Within these broad legal issues are other legal questions common to the class. For example, are the State's Medicaid reimbursement rates adequate to ensure that class members have access to providers? Are class members' guardians being adequately informed of their right to obtain EPSDT services, and how to obtain those services?

Commonality is often found to exist - in cases such as this - when plaintiffs allege that a defendant has acted, or is acting, uniformly regarding a class. *Haitian Refugee Center, Inc. v. Nelson*, 694 F. Supp. 864, 877 (S.D. Fla. 1988). This is particularly true for "[c]lass actions seeking injunctive or declaratory relief [which] by their very nature present common questions of law or fact." *Id.* Here, Plaintiffs seek prospective relief and there is no real debate that Defendants' policies, and their implementation of the Medicaid program, are

applied uniformly to the members of the class.

Defendants challenge commonality, by again arguing that there is no proof that Medicaid's fee schedule, outreach program, or any other act allegedly attributable to Defendants, has caused any Medicaid-eligible child to not receive treatment. From this Defendants contend that there can be no question of law or fact common to the class. [DE 299, p. 40]. For the reasons already given, Defendants' argument that Plaintiffs have not proved an actual denial of services, and that therefore this class cannot be certified, is unpersuasive.

Defendants also argue that the class members' complaints are too individualized. In particular, they point to Plaintiffs' claims that class members have experienced unreasonable wait times for services. Defendants argue that Plaintiffs have not shown that any common act or omission by Defendants have led to those delays. Rather, Defendants argue, those delays have been caused by circumstances unique to each Plaintiff. Thus, say Defendants, there is no common proof that the Court might use to adjudicate on a classwide basis whether wait times have been reasonable, or if they have been the result of an act or omission by Defendants. [*Id.*, p. 41].

Defendants try to raise the threshold for Plaintiffs' proof of commonality; however, it is not high. *Hernandez*, 209 F.R.D. at 669. The fact that there are factual differences between class members' particular experiences, does not preclude a finding of commonality where a common question of law does exist. *Hernandez*, 209 F.R.D. at 669. It is enough

for Plaintiffs to show a single question of law or fact that affects all class members alike, *Colomar v. Mercy Hosp., Inc.,* 242 F.R.D. 671, 676 (S.D. Fla. 2007) and, as already noted, Plaintiffs have done so here.

Defendants rely upon *J.B. v. Valdez*, 186 F. 3d 1280 (10th Cir. 1999) for the proposition that sweeping claims of systemic failures by defendants do not satisfy the commonality requirement. The proposed class in *Valdez* was all disabled children in that state's custody, in need of therapeutic services or support. The plaintiffs there alleged that the state violated a long list of statutes, with the end-result that the state had failed to provide disabled children in its custody with needed services. The court carefully reviewed each legal claim in the complaint, and compared it with the claim of each plaintiff, and found that there was no question of fact common to the class and more to the point here, that there was no common question of law, as "there was no one statutory or constitutional claim common to all named Plaintiffs and all putative class members." *Id*. at 1289. It was on that record that the court wrote: "We refuse to hold, as a matter of law, that *any* allegation of a systematic violation of various laws automatically" establishes commonality. *Id*.

Defendants are wrong to compare Plaintiffs' proof of commonality here, with that offered in *Valdez*. Unlike the plaintiffs in *Valdez* who offered a smorgasbord of alleged statutory violations, not one of which was common to all named plaintiffs, Plaintiffs here charge only that Defendants, uniformly as to all Plaintiffs and class members, have failed to satisfy three specific provisions of the Medicaid Act, and have made an initial showing of

evidence to support that charge. *See e.g.*, DE 281, Ex. 3, 4, 5, 7, 10, 11. This case is far more similar to *Hernandez*, 209 FR.D. at 669-70, where the common question presented was whether AHCA had violated the Medicaid Act's provisions for notice and a fair hearing when it denied prescription drug coverage. The court there rejected the notion that the individualized circumstances surrounding each class member's prescription drug denial defeated commonality, because there was a legal question common to all class members. As in *Hernandez*, the details of each Plaintiffs' efforts to access Medicaid services do not drown out the common legal question whether Defendants have met their obligations under the Medicaid Act to provide Medicaid eligible children with reasonably prompt care, equal access to care, outreach and information. As the Eleventh Circuit recently phrased it: "[t]hese common questions are sufficient to satisfy the low hurdle of Rule 23(a)(2)." *Williams v. Mohawk Industries, Inc.*, Case No. 08-13446, 2009 WL 1476702, at *6 (11th Cir. May 28, 2009).

On this reasoning this Court concludes that Plaintiffs have met their burden to establish commonality under Rule 23(a)(2).

3. Typicality

The element of typicality requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). "Proof of typicality requires more than general conclusory allegations." *Hernandez*, 209 FR.D. at 671. The analysis therefore focuses on "whether the class representative[s]' interest is aligned

enough with the proposed class members to stand in their shoes for purposes of the litigation and bind them in a judgment on the merits." *Colomar*, 242 F.R.D. at 677 (citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982) and *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984)). "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Vega*, 564 F.3d at 1275 (citations omitted). While commonality and typicality may be related, "traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Id.*

According to Plaintiffs, the typicality requirement is met here, where each Individual Plaintiff's inability to access care resulted from the same pattern or practice (i.e. Defendants' administration of the Medicaid system), and their claims are all based on the same legal theory (i.e. violations of the Medicaid Act). [DE 281, p. 26]. In other words, Plaintiffs argue that typicality is satisfied by the Individual Plaintiffs' and class members' shared contention that they have been or will be harmed by Defendants' unlawful operation of the Florida Medicaid system and their common endeavor to bring Defendants into compliance with the law. *Id.*

Defendants, in arguing that the Individual Plaintiffs are not typical of the putative class once again attempt to define the class more narrowly as "all Medicaid eligible children in Florida who have not received Medicaid-financed healthcare, including EPSDT services."

[DE 299, p. 42]. Again this argument is unavailing, as this lawsuit addresses alleged violations of law beyond flat-out denial of medical care. Defendants further argue that some Individual Plaintiffs have received so much specialty care, that they have deemed more routine EPSDT services unnecessary, making them atypical of most class members. [DE 299, p. 42]. Finally, at oral argument Defendants generally argued that each Plaintiff's experiences accessing Medicaid services is so idiosyncratic, that it can not be said that the Individual Plaintiffs' experiences are typical of each class member.

There is no doubt that each Medicaid recipient has had personal, and sometimes unique, experiences seeking and receiving medical and dental services. However, cases in this Circuit make clear that these factual differences do not defeat typicality. "The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiff and other class members, unless the factual position of the representative markedly differs from that of other members of the class." *Hernandez,* 209 F.R.D. at 671. To defeat typicality, a conflict between the Individual Plaintiffs' claims and those of the class members "must be clear and must be such that the interests of the class are placed in significant jeopardy." *Id*., at 672 (citations omitted). *See also Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985), *abrogated on other grounds by Green v. Mansour*, 474 U.S. 64 (1985) ("The similarity of the legal theories shared by the plaintiffs and class at large is so strong as to override whatever factual differences might exist and dictate a determination that the named plaintiffs' claims are typical of those of the members of the putative class.").

The Individual Plaintiffs' claims here are typical of the proposed class members in that they have all allegedly been denied their rights to reasonably prompt care, equal access to care, preventative and corrective care, and outreach. The Individual Plaintiffs, who live in diverse geographic areas within the state,[15] offer a broad spectrum of experiences that collectively illustrate the alleged failures of Florida's Medicaid system. For example, the Individual Plaintiffs claim that they have been unable to access a variety of areas of care, including pediatric care, orthopedic care, dentistry, immune system care, psychiatry, spinal care, psychology, radiology, pharmaceuticals, ENT care, and gynecology. [DE 281, p. 28 and Ex. 17-18, 20-22, 26-27, 29-30, 32-34, 36-38]. Also, the Individual Plaintiffs are eligible for Medicaid services through a variety of criteria, including means-tests, custody status, a hybrid of medical conditions and means-tests, and complex medical conditions. [*Id.*]. The ages of the Individual Plaintiffs also range from infancy to teenagers. [*Id.*]. In the opinion of this Court, the prosecution of this case will benefit from the range of personal experiences presented by the Individual Plaintiffs, as they illustrate the breadth of the alleged harm to the proposed class and the need for universal relief.

While there necessarily will be factual variations between the Individual Plaintiffs' claims and the claims of each proposed class member, each has suffered the same alleged injury (*i.e.* lack of medically prompt care, equal access to care, and outreach) as that alleged

[15] The Individual Plaintiffs reside in South Florida (K.S., T.G., N.G.), the Panhandle (J.W.), the Capital Region (S.M., N.A.), the Gulf Coast (A.D.), Central Florida (L.C.) and Daytona Beach (N.V.). [*See* DE 281, p. 28].

for the class, and each Individual Plaintiff has the same interest in assuring that Defendants comply with their obligations under the Medicaid Act. *See Edmonds v. Levine*, 233 F.R.D. 638, 641-42 (S.D. Fla. 2006) ("Plaintiffs assert that the injuries suffered by the representatives and potential class members all arise from AHCA's practice of denying coverage for certain uses, and this practice, according to Plaintiffs, violates the federal Medicaid statute. In accordance with Eleventh Circuit standards, the typicality requirement is met.")

A brief comparison to two recent Eleventh Circuit opinions is useful here. This case is unlike *Vega*, 564 F.3d 1256, an action brought by a T-Mobile sales representative against T-Mobile for unpaid commissions, where the court concluded that typicality was lacking where the complaint contained no allegation of a common contract among all class members. *Id*. at 1276. With no common contract, the trial court would have to look to each plaintiff's individual contract, what he was told regarding compensation when he was hired, etc. Thus, the named plaintiff's claims could not be typical of those of class members. In contrast, the Individual Plaintiffs' claims here, like those of each class member, turn on three provisions of the Medicaid Act.

By comparison, the court in *Williams,* 2009 WL 1476702, found that the named plaintiffs' claim was "typical of the claims of other members of the class because the claims are based on the same legal theory." *Id.,* at *6. The Court observed "[a]lthough this legal theory may ultimately not be sustained by the evidence, it is typical of the class of which [the

named plaintiffs] are representative." *Id.*. As in *Williams*, here the Individual Plaintiffs' claims are typical of the class because they are based on the same legal theory. Whether Plaintiffs can prove that theory at trial remains to be seen, but the Individual Plaintiffs stand in the same shoes as the class members when asserting those common claims.

As for the Organizational Plaintiffs, the Court concludes that they can not satisfy the typicality requirement. The stated mission of FPS is to improve the health and welfare of infants, children and young adults of Florida [DE 281, Ex. 39]; the mission of FAPD is to practice the art and science of Pediatric Dentistry and to promote optimal health care for infants, children, and persons with special needs [DE 281, Ex. 42]. From these missions it does appear that the Organizational Plaintiffs share the *interest* of the proposed class members, that Defendants meet their obligations under the Medicaid Act. However, it can not be said that they share the same *injury* as the class members. ("A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Vega*, 563 F.3d at 1275.) The Organizational Plaintiffs describe their injuries in the following terms: devoting considerable time, effort and resources to remedying the Defendants' alleged violations of Medicaid Act; being forced to forgo revenue, by providing services below cost, when treating children on Medicaid; spending uncompensated time helping children and their parents overcome bureaucratic obstacles to care; being forced to treat children for free without assurance of future reimbursement, and having lost potential patients because of Defendants' inadequate

outreach. [DE 281, p. 38, 40]. These injuries of the providers of health care simply are not the same as those of health care consumers. *See Georgia State Conference of Branches of NAACP v. State of Ga.*, 99 F.R.D. 16, 35 (S.D. Ga. 1983). Because the Organizational Plaintiffs do not satisfy the typicality requirement, they cannot serve as class representatives.[16] *Id.*

4. Adequacy

The requirement of adequacy ensures that there are no substantial conflicts of interest between the named representatives and members of the proposed class. *Colomar*, 242 F.R.D. at 678-9. This requirement encompasses the adequacy of class counsel and the named Plaintiffs' ability to adequately prosecute the action; therefore, the Court should consider (1) "whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation," and (2) "whether plaintiffs have interests antagonistic to those of the rest of the class." *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985).

The Eleventh Circuit Court of Appeals has held that "a party's claim to representative status is defeated only if the conflict between the representative and the class is a fundamental one, going to the specific issues in controversy." *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000). "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181,

[16] Given this conclusion, the Court does not reach the question of the adequacy of the Organizational Plaintiffs to serve as class representatives.

1189 (11th Cir. 2003). In that instance the named representatives cannot vigorously prosecute the interests of the class "because their interests are actually or potentially antagonistic to, or in conflict with, the interests and objectives of other class members." *Id.*

This Court finds no fundamental conflict between the Individual Plaintiffs and class members. To the extent Defendants are not complying with the Medicaid Act, they are doing so in a manner uniform to all Individual Plaintiffs and class members, all of whom would benefit from the injunctive and declaratory relief sought in this litigation. The Court agrees with Plaintiffs that the inclusion of several medically complicated Individual Plaintiffs as class representatives[17] strengthens Plaintiffs' ability to represent class members and prosecute their interests. These Individual Plaintiffs will likely require extensive health care in the future and therefore have a strong interest in pursuing claims that would improve Florida's Medicaid system. These particular Individual Plaintiffs also have had experiences with varied components of the Medicaid system, and therefore have broad knowledge of the delivery of Medicaid services, which enhances their adequacy as class representatives.

Defendants again make the claim that not one Individual Plaintiff has been denied care, and they contend here that the Individual Plaintiffs can not adequately represent the interests of any class members who have been denied care. Defendants also point out that the proposed class includes children who are eligible for Medicaid, but who are not enrolled

[17] For example, N.V. suffers from Shwachman Diamond syndrome; J.S. has immune deficiency; N.A. has respiratory ailments; N.G. has HIV/AIDS; and L.C. suffers from post-traumatic stress disorder. [DE 281, p. 31].

in the program, and they note that no Individual Plaintiff fits this bill. [DE 299, p. 43; Transcript of December 2, 2008 oral argument, DE 447, p. 50]. Defendants also make specific challenges to the adequacy of the proposed class representatives by arguing that J.W. and A.D. can not represent the class because the wait time they experienced in receiving care is not alleged to be the result of Defendants' actions or inactions, and that L.C., J.S., T.G., N.G. and N.A., as children with special health care needs, are not adequate representatives because they qualify for health care and related services of a type or amount that is not generally required by other children. [*Id.*, p. 43-44].

Defendants' arguments fail because they have not shown that the Individual Plaintiffs "have interests antagonistic to those of the rest of the class," *Griffin*, 755 F2d at 1533, which is the core consideration when addressing adequacy. All children receiving Medicaid will have individualized health care needs, yet they all benefit from Defendants' compliance with the mandates of the Medicaid Act, and thus they all have an interest in the relief sought by this lawsuit. Defendants, in essence, demand that all named Plaintiffs look identical to all class members, in terms of their needs for medical and dental services, and the difficulties they have experienced in accessing these services. This, of course, is an impossibility and Rule 23 does not demand as much. As for the class members who are eligible for Medicaid, but not enrolled in the program, they too have a stake in Defendants' compliance with the Medicaid Act, and this Court sees no reason why the Individual Plaintiffs can not represent

their interests.[18] As a practical matter, it would seem impossible to find a Medicaid-eligible child who is not enrolled in the program to serve as a class representative, because if such a child were identified class counsel would surely represent their interests and help that child enroll in Medicaid. On this reasoning, this Court concludes that the Individual Plaintiffs' interests can not be said to conflict with the interests of other members of the proposed class. *See Hernandez*, 209 F.R.D. at 673.

Lastly, Defendants do not dispute, and this Court specifically finds that class counsel, Boies Schiller & Flexner, LLP and Louis Bullock of Bullock & Blakemore, are qualified, experienced, and fully capable of representing the class in this litigation.

Accordingly, this Court concludes that the Individual Plaintiffs have shown adequacy of representation, and with this have satisfied the four requirements for class certification of Rule 23(a).

5. Rule 23(b)(2)

To certify a class, Plaintiffs must satisfy the four requirements of Rule 23(a), as well as one of the subsections of Rule 23(b). Plaintiffs ask to certify the class under Rule 23(b)(2), which applies where "the party opposing the class has acted or refused to act on the grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). "Rule 23(b)(2) was intended 'primarily to facilitate civil rights class actions, where the class

[18] For the same reasons offered here, this Court concludes that the absence of a named Plaintiff who is eligible-but-not-enrolled, does not defeat typicality.

representatives typically sought broad injunctive or declaratory relief against discriminatory practices." *Hernandez*, 209 F.R.D. at 673 (quoting *Penson v. Terminal Transport Co., Inc.*, 634 F.2d 989, 993 (5th Cir. 1981)).

Defendants argue that Plaintiffs have not met their burden under Rule 23(b)(2) to show that Defendants acted or refused to act on grounds generally applicable to the class. [DE 299, p. 44]. Defendants again state that no Plaintiff has come forward with evidence of a denial or a wait time to receive a medical service that resulted in harm to that Plaintiff, or that was the result of an act or omission by Defendants that also caused a similar harm to the entire class. [*Id.*]. Simply put, according to Defendants, there is no evidence that Defendants ever failed to provide services to Plaintiffs, therefore Rule 23(b)(2) is not satisfied. [*Id.*]. Again, Defendants essentially argue that Plaintiffs can not marshal the evidence needed to secure final declaratory and injunctive relief; in so doing, they misapprehend the question that is before this Court in resolving this element of class certification.

At its core, this case is about Defendants' policies in administering Medicaid to Florida's children. Plaintiffs allege that Defendants have implemented deficient policies that prevent children from receiving the medical and dental care to which they are entitled under the Medicaid Act. These policies are equally applicable to each member of the proposed class. *See Hernandez*, 209 F.R.D. at 673. "Injunctive or declaratory relief settling the legality of the policy with respect to the class as a whole is appropriate." *Id.* Class

certification is therefore appropriate here, under Rule 23(b)(2).

III. Conclusion

For the foregoing reasons, this Court respectfully RECOMMENDS that Plaintiffs' Motion for Class Certification [DE 281] be **GRANTED** and that the Court certify the following class: All children under the age of 21 who now, or in the future will, reside in Florida and who are, or will be, eligible under Title XIX of the Social Security Act for Early and Periodic Screening, Diagnosis and Treatment Services. This Court further recommends that Boies Schiller & Flexner, LLP and Louis Bullock of Bullock & Blakemore be appointed as class counsel.

IV. Objections Period

The parties may file written objections to this Report and Recommendation with the Honorable Adalberto Jordan **no later than July 16, 2009.** The undersigned has conferred with Judge Jordan, who has advised that he will not grant any extension of this deadline. Failure to timely file objections shall bar the parties from attacking on appeal any factual findings contained herein. *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745, 749-50 (11th Cir. 1988).

RESPECTFULLY SUBMITTED in chambers at Miami, Florida this 25th day of June, 2009.

CHRIS MCALILEY
UNITED STATES MAGISTRATE JUDGE

Copies to:
The Honorable Adalberto Jordan
All counsel of record