IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

A.A.; **B.B.**; **C.C.**, a minor, by **JENNY CARROLL**, his Next Friend; **E.E.**, a minor, by **CHRISTINE FREEMAN**, her Next Friend; **F.F.**, a minor, by **CHRISTINE FREEMAN**, her Next Friend; and **G.G.**, a minor, by **CHRISTINE FREEMAN**, her Next Friend;

Plaintiffs,

v.

NANCY T. BUCKNER, Commissioner of the Alabama Department of Human Resources, in her official capacity,

Defendant.

Civil Action No.: 2:21-cv-367-ECM

CLASS ACTION

ORAL ARGUMENT REQUESTED

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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1	Excerpt of DHR Policy: Placement of Children (ADHR00012855)
2	Expert Report of John Mayo (C.C.)
3	Expert Report of John Mayo (F.F.)
4	Expert Report of John Mayo (G.G.)
5	Declaration of C.C.
6	Declaration of F.F.
7	Declaration of G.G.
8	Expert Report of Todd MacKenzie
9	Excerpt of Therapeutic Foster Care Manual (ADHR02378200)
10	Expert Report of Mathis Wagner
11	Excerpt from 2023.06.01 Deposition Transcript-DHR 30(b)(6) (Designee: Cathy Tylicki)
12	Excerpt from 2022.10.26 Deposition Transcript-DHR 30(b)(6) (Designee: Shea Cobb-England)
13	Expert Report of Dr. Thomas Simpatico
14	Defendants' Responses and Objections to Plaintiffs' Fourth Interrogatories
15	Expert Report of Narell Joyner
16	Expert Report of Mary Armstrong
17	Excerpt from 2023 Annual Progress and Services Report (ADHR02325669)
18	Excerpt from 2022 Annual Progress and Services Report (ADHR02346857)
19	Excerpt from 2021 Annual Progress and Services Report (ADHR02377880)
20	DHR Policy: Individualized Service Plan (ADHR00012618)
21	Excerpt from 2022.10.25 Deposition Transcript-DHR 30(b)(6) (Designee: Jan Casteel)
22	Declaration of Samantha Bartosz
23	Declaration of Andrea Mixson
24	Declaration of Michael Tafelski

PRELIMINARY STATEMENT

The state of Alabama administers its foster care system in a manner that arbitrarily and unnecessarily directs children with disabilities into congregate and highly restrictive, psychiatric residential treatment facilities ("PRTFs"), also known as "intensive" placements, for purposes of obtaining mental health treatment, even when their identified needs can be adequately met in the community.

As the state agency administering the child welfare system in Alabama, federal law requires the Alabama Department of Human Resources ("DHR") to place children with disabilities in the least restrictive, most integrated environment appropriate to serve their needs. *See* 28 C.F.R. § 35.130(d). In violation of federal law and applicable standards of care, rather than competently assessing each child's needs and matching those needs to the least restrictive, community-based placement, DHR instead too often relies on restrictive, congregate settings to furnish mental and behavioral health care, institutionalizing children with mental health disabilities, many of whom do not oppose and earnestly desire to live in their home communities.

Unnecessary institutionalization of children with disabilities violates Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794. *See* 28 C.F.R. § 35.130(d); 28 C.F.R. § 41.51(d); *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). DHR's administration of its foster care system perpetuates the historic isolation and segregation of children with disabilities that the ADA was designed to eradicate. *See* 42 U.S.C. § 12101(a)(2). Plaintiffs, on behalf of themselves and the putative class, seek injunctive and declaratory relief requiring DHR to remedy these statutory violations. Because all children with disabilities in DHR custody are subject to DHR's unlawful methods of administration, Plaintiffs move to certify the following class:

> Children who are adjudicated dependent under Ala. Code § 12-15-314(a)(3), and who have, or have a record of, a mental health impairment that substantially limits one or more major life activities.

In addition, Plaintiffs request that the Court appoint the Named Plaintiffs as class representatives, and appoint Plaintiffs' counsel to represent the certified class. Fed. R. Civ. P. 23(a)(4), (g).

FACTS

As Alabama's child welfare agency, DHR is responsible for arranging and securing appropriate foster care placements for children in its custody for whom out-of-home placement is necessary. DHR is required to maintain, either directly or through contract providers, a continuum of placement options that range from community-based, nonrestrictive placements, like traditional foster homes and relative (kinship) homes, to highly restrictive PRTFs. Ex. 1, ADHR00012855 at -876-914.

PRTFs—the most restrictive settings within DHR's continuum of placements—are non-hospital facilities that are meant to provide inpatient mental health services to children with DSM-V mental health diagnoses. *Id.* at ADHR00012889-90; Centers for Medicare & Medicaid Services, *What is a PRTF?,* https://www.cms.gov/medicare/provider-enrollment-and-certification/certificationandcomplianc/downloads/whatisaprtf.pdf (last modified Oct. 6, 2023). Unlike children residing in foster homes or kinship placements, children placed by DHR into PRTFs are segregated from the community and isolated from their families, friends, and non-disabled peers. These segregated children are denied essential childhood and adolescent experiences, like attending school in the community, participating in extracurricular activities, and living in family-like settings. Pursuant to state and federal law, PRTF placements can only be used for as long as inpatient treatment is necessary to treat a child's psychiatric condition. *See, e.g.*, Ala. Admin. Code 560-X-41-.01(2)-(3); Ala. Admin. Code 560-X-41-.04.

However, DHR administers its child welfare system in a manner that results in the unnecessary institutionalization of children with mental and behavioral health needs in PRTFs. DHR's policies and practices, and lack thereof, lead to unnecessary institutionalization in at least two respects.

First, DHR initially places children into PRTFs contrary to their needs. These improper placements occur because DHR (a) fails to maintain an adequate array and number of community-based placements to meet the demand presented by its out-of-home care population, and (b) fails to comprehensively assess the mental and behavioral health needs of the children in its care to facilitate purposeful planning for their care, including the selection of appropriate placement settings to deliver such care. Second, DHR permits children to languish in PRTFs longer than necessary due to its failure to timely execute discharge plans for children placed in intensive settings. Some children experience both: an inappropriate initial placement and an untimely discharge. Many children remain in PRTF settings for longer periods due to DHR's failure to procure a sufficient number of community-based placements ready and willing to receive them, even when these children are ready for discharge to less restrictive settings.

The Named Plaintiff Children: Plaintiffs C.C., F.F., and G.G.[1] (collectively, "Plaintiffs") are children with mental health impairments in the custody of DHR, who are, or have been, unnecessarily institutionalized in highly restrictive and segregated PRTF placements. *See generally* Ex. 2, Decl. of John Mayo (C.C.) ("Mayo Decl. (C.C.)"); Ex. 3, Decl. of John Mayo (F.F.) ("Mayo Decl. (F.F.)"); Ex. 4, Decl. of John Mayo (G.G.) ("Mayo Decl. (G.G.)").

C.C. is a seventeen-year-old child whose diagnoses include posttraumatic stress disorder ("PTSD"), oppositional defiant disorder ("ODD"), and attention deficit hyperactivity disorder

[1] Plaintiffs A.A., B.B., and E.E.'s motion for voluntary dismissal is currently pending.

("ADHD"). Ex. 2, Mayo Decl. (C.C.) ¶¶ 17, 36. Since he entered DHR custody in October of 2016, C.C. has spent over four years in PRTF placements, and he is currently placed in a PRTF in Florida. *See generally id.*

F.F. is a sixteen-year-old child whose diagnoses include reactive attachment disorder, ODD, and ADHD. Ex. 3, Mayo Decl. (F.F.) ¶¶ 17, 59. When she joined this case in May 2023, she had been residing in a PRTF placement for almost two years. *Id.* ¶¶ 42-44. She currently resides in a moderate residential placement, and is at risk of returning to a PRTF placement in the future.

G.G. is a fifteen-year-old child whose diagnoses include ADHD and PTSD. Ex. 4, Mayo Decl. (G.G.) ¶¶ 17, 53. G.G. has lived almost exclusively in PRTF placements since entering DHR custody in 2019, and she currently resides in a PRTF. *Id.* ¶ 55.

All three Plaintiffs want to live in the community. Ex. 5, Decl. of C.C. ¶ 4; Ex. 6, Decl. of F.F. ¶ 5; Ex. 7, Decl. of G.G. ¶ 4. And community-based placements are and were appropriate to meet their needs. Ex. 2, Mayo Decl. (C.C.) ¶¶ 76-78; Ex. 3, Mayo Decl. (F.F.) ¶¶ 62-65; Ex. 4, Mayo Decl. (G.G.) ¶¶ 55-57.

The evidentiary record amply shows that unnecessary institutionalization is rampant within DHR's system. Aggregate data generated from a representative sample of thirty (30) case files of children who experienced at least one PRTF placement between September 2019 to August 2022 (the "period under review") found that there is a 95% confidence level that 85.5% to 99.6% of all children placed in a PRTF during the period under review could have spent less time in a PRTF, and could have lived in their own home or in another home-like setting, if appropriate community-based placements/services were available. Ex. 8, Expert Report of Todd MacKenzie ("MacKenzie Report") at 3, 6.

DHR's Systemic Failures. Unnecessary institutionalization occurs, in part, because of three system-wide failures: (1) DHR's failure to conduct comprehensive assessments of child needs and strengths to determine whether PRTF placement is necessary; (2) DHR's failure to utilize and procure well-supported, community-based placements; and (3) DHR's failure to ensure that robust individualized service and placement planning occurs for youth in foster care with mental health disabilities. Because all children with disabilities in DHR's custody are subject to these same policies and practices, they are each subjected to the risk of unnecessary institutionalization, even if they are not currently placed in a PRTF. Each systemic failure is discussed in turn.

1. DHR's Failure to Conduct Comprehensive Child Assessments to Determine Whether PRTF Placement Is Necessary.

DHR maintains a continuum of placement types for the children and youth in foster care with varying needs. The intensity of services provided to children in these placements varies, and these placement types also range in their level of restrictiveness. Ex. 1 at ADHR00012876-914. DHR acknowledges that children should be placed in the least restrictive, most family-like setting possible. Ex. 1 at ADHR00012876. DHR also recognizes the importance of comprehensively assessing a child to determine the least restrictive placement setting appropriate to deliver therapeutic services designed to meet the child's behavioral health needs. Ex. 1 at ADHR00012877.

DHR's placement array contains two types of placements—therapeutic foster care ("TFC") and moderate residential facilities—that are designed to provide services less intensive than PRTFs but more intensive than a traditional foster home. Before placement in either of these types of placements, DHR policy requires the completion of a comprehensive assessment, known as a

Multi-Dimensional Assessment Tool ("MAT").[2] Ex. 9, ADHR02378200 at -210; Ex. 1 at ADHR00012889-90. The MAT examines the child's individual psychosocial conditions and identifies strengths and needs. The scoring or result on the MAT generates a recommendation for a particular level of care based on the child's behavioral and mental health condition and needs, such that the recommended placement level is calibrated to meet the child's needs in the least restrictive, appropriate environment. Ex. 10, Expert Report of Mathis Wagner ("Wagner Report") at 8, 21-22; Ex. 11, DHR Dep. Tr. (Tylicki, June 1, 2023) at 13-19.

DHR's requirement that a MAT be conducted when a child is referred to a TFC or moderate residential placement demonstrates DHR's full appreciation that child-serving systems must complete comprehensive assessments when determining the placements of children entrusted to their care. However, unlike for moderate residential and therapeutic foster care placements, DHR does not require a comprehensive, standardized assessment of a child before placement in a PRTF. DHR policy instead requires that the DHR caseworker and the case planning team assess and recommend the intensive placement and have a doctor fill out a form referred to as a Certificate of Need. Ex. 1 at ADHR00012890. DHR officials have testified that the MAT is not required as part of the case planning team's determination that a child is appropriate for an intensive placement. *See* Ex. 11, DHR Dep. Tr. (Tylicki, June 1, 2023) at 28; Ex. 12, Transcript of 30(b)(6) Deposition of DHR (Cobb-England) ("DHR Dep. Tr. (Cobb-England)") at 51.

The DHR case worker, case planning team, and Certificate of Need are not a replacement for comprehensive assessments. The Certificate of Need does not require the signing physician to

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[2] TFC placements are less restrictive than moderate residential placements because they are family-like settings in the community, while moderate placements are institutions more like (and sometimes in the same building as) PRTFs. Ex. 11, Transcript of 30(b)(6) Deposition of DHR (Tylicki, June 1, 2023) ("DHR Dep. Tr. (Tylicki, June 1, 2023)") at 45. Although not part of Plaintiffs' legal claim in this case, if a child is assessed to be appropriate for a either a TFC or a moderate residential facility, placing the child in a moderate facility would also be a violation of that child's rights under the ADA, because a moderate residential facility is a more restrictive, segregated setting than a TFC home.

review any documentation, comprehensively justify the finding that a child is appropriate for an intensive placement in writing, or even attend the case planning team meetings. DHR has admitted that it does not require a standardized, comprehensive assessment, like a MAT, be conducted or reviewed by a physician in completing a Certificate of Need for a child's intensive placement admission.[3]

Strikingly, in Plaintiffs' Fourth Interrogatories, DHR was asked to identify (a) the documents that must be supplied to or received from the physician signing a Certificate of Need or (b) what evaluation(s) of the child, if any, are required of the physician by DHR in the course of completing the Certificate of Need. *See* Ex. 14, Def. Resp. and Obj. to Pls.' Fourth Interrog. (Dec. 8, 2023) ¶¶ 11-13. DHR answered, "None." *Id*.

Data from Plaintiffs' expert's record review of 30 case files indicates that there is a 95% confidence level that between 48.9% and 81.4% of all children who were placed in an intensive placement during the period under review did not receive any form of comprehensive, standardized assessment before being placed in a PRTF. Ex. 8, MacKenzie Report at 7. This is not surprising since DHR policy does not require an assessment to be performed before placement in an intensive facility.

It is understood by competent mental health professionals and providers that "[t]he most restrictive therapeutic housing options can have a significant impact on a child's physical and emotional well-being. These settings can be isolating and dehumanizing, and they can make it difficult for children to develop relationships and trust." Ex. 13, Expert Report of Dr. Thomas Simpatico ("Simpatico Report") at 14. Thus, "[a] consistent clinically informed process can help to ensure that the most restrictive therapeutic housing option is only used when absolutely

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[3] A Certificate of Need is a federal requirement for remaining eligible for reimbursement on a child's treatment costs in a licensed PRTF. *See* 42 U.S.C. 1396a(a)(44).

necessary. . . This process should involve . . . [a] thorough standardized assessment of the child's needs and risks." *Id.* at 15. The lack of comprehensive assessment prior to placing youth in intensive settings contributes to the unnecessary segregation of children in settings that are more restrictive than the child needs. *See* Ex. 13, Simpatico Report at 20. "An individualized assessment of these children might have revealed that an intensive setting wasn't appropriate to meet their needs and that a less restrictive placement would have been appropriate." Ex. 15, Expert Report of Narell Joyner ("Joyner Report") at 23.[4] Instead, DHR placed and places children in intensive settings without sufficiently evaluating their needs.

2. DHR's Failure to Procure and Utilize Well-Supported Community-Based Placements.

To prevent the unnecessary institutionalization of children with mental health impairments, state foster care agencies like DHR must make available an array of community-based placements that can accommodate the service population's aggregate needs. Ex. 16, Expert Report of Mary Armstrong ("Armstrong Report") at 1, 4-7. As part of its placement array for foster children, DHR provides a type of community-based placement for children with mental impairments called therapeutic foster care ("TFC"). TFC combines a family environment with active and structured treatment. *Id.* at 5. TFC is a non-restrictive, family-like placement type, because it allows children to live in integrated community settings. *See* Ex. 9 at ADHR02378205. TFC "exists to serve children and youth" who, "in the absence of such programs, [] would be at risk of placement into restrictive residential settings, e.g. . . . residential treatment programs." *Id.* at ADHR02378244.

DHR contracts with various private entities to provide TFC placements for children in foster care. Ex. 12, DHR Dep. Tr. (Cobb-England) at 22-24. However, in Alabama, most of the contracted therapeutic foster care beds, referred to as slots, go unused, and children who need a

[4] Plaintiffs are attaching as Exhibit 15 only the non-confidential portions of the Expert Report of Narell Joyner.

TFC placement often do not receive one.

On paper, DHR arguably procures a sufficient number of TFC slots to serve the population of foster children across the state. In practice, based on data that DHR collects from its TFC providers every month, most of those slots—over 60%—go unused.[5] Ex. 10, Wagner Report at 28. Indeed, the data shows that DHR's providers reject the large majority of the children DHR refers to them—in fact, upwards of 90% of referrals to TFC are rejected.[6] Ex. 10, Wagner Report at 28. This staggeringly high rejection rate is in clear violation of the standard contract between DHR and its TFC providers, which sets 10% as the maximum allowable rejection rate. *Id.* at 27.

The issue of TFC capacity and utilization is not a new one: in 2022, DHR admitted in its federal reporting that it does not have "sufficient TFC homes willing to accept and maintain older teens/young adults and children with more significant behavioral/mental health issues[,]" even though TFC placement is designed to serve such youth. Ex. 17, ADHR02325669 at -808. Nearly identical language appeared in DHR's federal reporting submitted in the previous two years. *See* Ex. 18, ADHR02346857 at -995; Ex. 19, ADHR02377880 at -8007.

TFC slots may go unused even as the large majority of referrals are rejected, for a number of reasons. First, DHR is not ensuring that its contracted TFC providers have recruited a sufficient number of foster parents who are willing to accept certain demographics of children. Ex. 16, Armstrong Report at 17. Second, DHR fails to provide services and support to the TFC provider, the child, and the foster family to make the placement successful. *Id.* at 18. While a documented referral represents a clear determination by DHR that a child should be placed in TFC, the

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[5] DHR maintains a level of therapeutic foster care called "Enhanced Therapeutic Foster Care," ("TFC-E") which provides more intensive services than TFC. Ex. 1 at ADHR00012881. While TFC-E, did have a higher utilization rate during the period of time analyzed than TFC, there was still demonstrated unused contracted capacity at the TFC-E level. Ex. 10, Wagner Report at 28.

[6] In a sample month examined in more detail by Dr. Wagner, each child was referred to just over 5 different TFC providers on average, but still over 80% of referred children were not accepted into any TFC placement during the sample month or the following month. Ex. 10, Wagner Report.at 40-41.

experiences of children in Plaintiffs' expert's case file review suggest that additional children could have benefitted from TFC, but were never referred at all—perhaps in part because their case planning treatment teams are aware that referrals are highly likely to be denied. *Id.* at 15.

Despite its demonstrated awareness, DHR has not fixed this problem; instead, it has continued to renew its contracts with the very same providers under virtually the same terms, most recently in 2022.[7] As a result, DHR's network of community placements designed to serve the population of youth in the putative class exists only in theory. In practice, this network goes largely unused. Without this community-based placement type, youth who are eligible for TFC placements can and do end up in settings that are more restrictive than they need, in violation of their rights under the ADA and Section 504. Ex. 16, Armstrong Report at 18-19.

3. DHR's Failure to Ensure Robust Individualized Service and Placement Planning

Case planning for all children in DHR custody occurs through the Individualized Service Plan ("ISP") process facilitated by a case planning team called the "ISP team." Ex. 20, ADHR00012618 at -621. The ISP case plan, which depends on and integrates any assessments completed on a child, is a critical component of child welfare practice because "coherent, coordinated, and consistent planning and execution is necessary to deliver mental health treatment that is most likely to be effective." Ex. 13, Simpatico Report at 24. DHR entrusts the ISP teams with expansive responsibilities and significant authority to carry out their duties. These responsibilities include: setting goals for the child and family's permanency plan, selecting and referring children to the most appropriate placement, determining what services are necessary for a child (including scope, intensity, and frequency of services), monitoring service delivery and the

[7] As just one example, DHR renewed its contract with Seraaj Family Homes, Inc. for the period of 2022-2025, despite the fact that this provider, in the months immediately preceding renewal, accepted only 7% of referrals on average and never exceeded a utilization rate of 32%. Ex. 10, Wagner Report at D-10.

effectiveness of services for both children and caregivers, requesting and obtaining assessments, challenging the results of assessments, monitoring a child's progress, determining when a child is ready to leave a placement, and conducting discharge planning and planning for a subsequent placement. *See* Ex. 21, Transcript of 30(b)(6) Deposition of DHR (Casteel, Oct. 25, 2022) ("DHR Dep. Tr. (Casteel)") at 16, 24, 28, 30-31, 38-39, 41, 46, 72, 94, 137-38, 147, 150, 153, 155, 158, 183, 185, 198, 203, 212; Ex. 12, DHR Dep. Tr. (Cobb-England) at 69, 82.

Given this scope of responsibility, the effective operation of the ISP process is critical to ensure that children in DHR custody receive the most integrated placements appropriate to their needs. DHR's ISP policies reflect this understanding. DHR policies require ISPs to be conducted at regular intervals, be consistently reviewed and adjusted as needed, and to focus on a child and family's strengths/needs, with clear steps to promote a timely return home, placement with relatives, or another permanency goal. Ex. 20 at ADHR00012631-33.

However, DHR fails to ensure adherence with its own ISP policies, resulting in inadequate individualized case planning for the putative class, which contributes to unnecessary institutional placements. Despite some progress made in this area since 2022, DHR's most recent federal reporting identified persistent issues in case plan development, noting that ISP meetings are held outside policy timeframes and team members are not always invited. Alabama Dep't of Hum. Resources, *2024 Annual Progress & Services Report* (June 30, 2023), https://dhr.alabama.gov/wp-content/uploads/2023/12/2024-Annual-Progress-and-Services-Report.pdf.

Plaintiffs' case file review experts identified systemic violations of DHR's ISP policies among a statistically significant sample of children in DHR custody, finding that in all 30 cases, the ISP process failed to comply with DHR's internal policies. With a 95% confidence level, 93.8% to 100% of children who have experienced a PRTF placement during the period under review had

ISP plans that did not comply with DHR's ISP policies. Ex. 8, MacKenzie Report at 7. The ISP process in the cases reviewed reflects hurried, reactive decision-making, often overlooking a child's preferences, failing to justify intensive placements, or neglecting to provide clear discharge plans from such settings. Ex. 15, Joyner Report at 3, 16, 19-21. ISP planning documents were short, non-descriptive, repetitious, and in general, lacked the necessary depth to ensure that children receive the essential services and placements to meet their needs. *Id.* at 19-21. ISP failures resulted in PRTF placement being the "go-to", immediate plan for the case. *Id.* at 19.

Additionally, 28 of the 30 files reviewed contained evidence of DHR's failure to coordinate with and create links to community-based services for children placed in the community, a major responsibility of the ISP team. There is a 95% confidence level that 80% to 98% of youth who experienced a PRTF placement during the period under review also experienced DHR's failure to create sufficient links to services in the community that would allow them to be supported in community-based settings. *Id.* at 7. Without coordinated service delivery, a child's mental and behavioral health can deteriorate to a point where an unnecessary and avoidable institutional placement occurs. Ex. 15, Joyner Report at 19-21.

Outside of the case file review, Dr. Simpatico also reviewed a sample of 50 children's ISPs. He found that 50 of the 50 cases reviewed did not meet minimally accepted standards of case planning because the ISPs did not define the child's needs, goals of the case plan, or parameters to gauge progress towards attaining the goals. The plans also did not track any progress made toward goals and update services as needed. Ex. 13, Simpatico Report at 24-25. These case planning deficiencies lead to "a reactive pattern of changing placement settings for the child . . . including placement in restrictive residential treatment facilities that are not best suited to meet the mental health needs presented." *Id.* at 24.

Another inevitable consequence of poor ISP planning is a failure to timely discharge youth from intensive settings when they are ready to leave. *Id.* at 21. The ISP team should begin planning for a child's discharge from an intensive placement the day the child enters the placement. *Id.*; Ex. 21, DHR Dep. Tr. (Casteel) at 182. However, the case file review found there is a 95% confidence level that 85.5% to 99.6% of youth in DHR custody who had a PRTF placement during the period under review received no discharge planning. Ex. 8, MacKenzie Report at 7. Moreover, there is a 95% confidence level that 35.9% to 70.2% of youth in DHR custody who had a PRTF placement during the period under review also experienced a documented untimely discharge. *Id.* Failure to timely discharge youth occurs in part, due to a breakdown at the ISP level. This is especially true in DHR's system, which gives critical planning and decision-making responsibility to the ISP team.

These case review findings are bolstered by further data analysis conducted in this case. Among all children placed in PRTFs who received a MAT recommendation for a less restrictive setting, 72% were subsequently discharged to less restrictive settings. Ex. 10, Wagner Report at 23. Of the 72%, only 27% were discharged to that less restrictive setting within 45 days (which was the maximum limit set by DHR policy prior to 2022), and 60% were discharged within 90 days (the new maximum limit, which went into effect after the end of the period for which data was available). *Id.* at 24-25. The average length of time before a child was discharged to a less restrictive placement after receiving a MAT recommendation indicating they should do so was 104 days. *Id.* at 25.

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Each of these aforementioned systemic failures contributes to children with disabilities in foster care being unnecessarily segregated in institutions and experiencing delays when they are

ready for discharge. Because all children in foster care with mental health impairments are subjected to the same policies and practices of DHR, each failure creates an imminent risk of unnecessary placement in a PRTF. As will be shown below, the existence of these failures and their effect on the rights of youth in DHR's custody create common questions of law and fact that are capable of classwide resolution.

ARGUMENT

I. The Named Plaintiffs Have Standing to Assert Their ADA and RA Claims

Any class certification analysis must begin with the issue of the named plaintiffs' standing. *Griffin v. Duggar*, 823 F.2d 1476, 1482 (11th Cir. 1987). To establish standing, plaintiffs must show (1) that they have been injured, (2) that their injuries are fairly traceable to the defendant's conduct, and (3) that a judgment in their favor would likely redress their injuries. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-61 (1992).

Each of the Named Plaintiffs have standing to bring this case.[8] This Court has already found that Plaintiff C.C. has standing. In ruling on Defendant's motion to dismiss, this Court decided C.C. satisfied the first two elements of the standing analysis based on his allegations that, as a child with disabilities, he could be served in community-based placements and has been injured because of DHR's systemic failure to make community-based placements and services available. Mem. Op. and Order, ECF No. 43 at 8-9 (rejecting Defendant's argument that Plaintiffs cannot show an injury-in-fact traceable to Defendant Buckner). As to the third element of redressability, this Court found that injunctive relief requiring DHR to expand community-based placements and services would satisfy the redressability requirement as to C.C. and further held that "to the extent that there is redressability, [ ] there is standing." *Id*. at 9. Consistent with that

[8] As stated above, Named Plaintiffs A.A., B.B., and E.E.'s motion for voluntary dismissal is pending before this Court.

decision, Plaintiffs have since amended their original Complaint to request "injunctive relief requiring Defendant to develop and sustain sufficient capacity of community-based placements . . . and to implement and sustain an effective system for transitioning youth in foster care with mental impairments to integrated settings in the community." Pls.' Second Am. Compl., ECF No. 92 at 40. By showing redressability, Plaintiffs have satisfied standing.

Since this Court's prior standing analysis, F.F. and G.G. joined the case and brought the same claims as Named Plaintiff C.C. Named Plaintiffs F.F. and G.G., like C.C., allege that they could be served in community-based placements but, because of DHR's systemic failures, they have been unnecessarily segregated and confined to highly restrictive PRTF placements. Because F.F. and G.G. allege the same injuries based on the same challenged conduct as C.C., and seek identical relief, they also have standing to proceed.

II. The Requirements for Class Certification Are Satisfied

A. The Standard for Class Certification

To obtain class certification, Plaintiffs must show the following requirements of Federal Rule of Civil Procedure 23(a):

> (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.

Fed. R. Civ. P. 23(a); *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1187-88 (11th Cir. 2003) (same). Plaintiffs must also satisfy one of the Rule 23(b) requirements. Here, Plaintiffs seek certification under Rule 23(b)(2), which allows for class treatment if "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). And in fact, "some courts have gone so far as to say that [Rule 23(b)(2)'s] requirements are 'almost automatically satisfied in actions primarily seeking injunctive relief,'" which is what Plaintiffs seek here. *Braggs v. Dunn*, 317 F.R.D. 634, 667 (M.D. Ala. 2016) (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 59 (3d Cir. 1994)).

Certification is warranted when the court finds that the Rule 23 prerequisites have been met based on a "rigorous analysis." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). To certify a class, the court only needs to find "that the requirements for class certification are met—not that the class will prevail on its claims." *Braggs*, 317 F.R.D. at 642 (certifying a class of persons with serious mental health disabilities who are or will be subject to mental healthcare policies and practices in facilities run by the Alabama Department of Corrections) (emphasis in original); *see also Henderson v. Thomas*, 289 F.R.D. 506, 508 (M.D. Ala. 2012) (certifying a class of persons diagnosed with HIV who are or will be in the custody of the Alabama Department of Corrections). Although the court's class certification analysis "may 'entail some overlap with the merits of the plaintiff's underlying claim,'" inquiries into the merits at this early certification stage "may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013) (quoting *Wal-Mart*, 564 U.S. at 351); *see also Wal-Mart*, 564 U.S. at 351 n.6 (finding that Rule 23 grants courts no license to engage in free-ranging merits analyses). As stated below, Plaintiffs have met each requirement of Rule 23(a) and Rule 23(b)(2) in the present action.

B. Courts Have Repeatedly Certified Classes in Similar Cases Involving the Use of PRTFs to Treat Children with Disabilities

Federal courts have regularly certified classes in cases involving foster children with mental health disabilities, who, like Plaintiffs here, assert that defendants violated the ADA and

Section 504 by unlawfully segregating them in institutional settings. For instance, in *S.R., ex rel. Rosenbauer v. Pa. Dep't of Hum. Servs.*, a case involving claims like those asserted here, the court certified a class of "[a]ll Pennsylvania children and youth under the age of 21 who, now or in the future, are adjudicated dependent and have diagnosed mental health disabilities." 325 F.R.D. 103, 106, 112 (M.D. Pa. 2018) (plaintiffs alleged violations of the ADA where foster children with mental health disabilities languished in institutional settings).

More recently, in *Jonathan R. v. Justice*, foster children in West Virginia brought suit alleging a range of systemic failures in the foster care system, including unjustified segregation in institutional settings and "a failure to maintain critical infrastructure that would allow children with mental health service needs to remain in their communities." 344 F.R.D. 294, 300 (S.D. W.Va. 2023) (internal citations omitted). The *Jonathan R.* court certified a general class of all West Virginia foster children in the custody of the West Virginia Department of Health and Human Resources as well as a subclass of "all members of the General Class who have physical, intellectual, cognitive, or mental health disabilities, as defined by federal law." *Id.* at 318; *see also Wyatt B. v. Brown*, No. 6:19-cv-00556-AA, 2022 WL 3445767, at *33 (D. Or. Aug. 17, 2022) (certifying a subclass of Oregon foster children in the legal and physical custody of the Oregon Department of Human Services "who have or will have physical, intellectual, cognitive or mental health disabilities").

Moreover, courts routinely certify classes in similar cases seeking to enforce the integration mandate of the ADA and Section 504 on behalf of individuals with mental health disabilities. *See, e.g.*, *C.K. ex rel. P.K. v. McDonald*, No. 2:22-cv-01791 (NJC) (JMW), 2024 WL 730494, at *2 (E.D.N.Y. Feb. 22, 2024) (certifying a subclass of Medicaid-eligible children with mental or behavioral health disabilities who have been recommended for community-based services and are

institutionalized or at serious risk of becoming institutionalized due to their mental or behavioral health condition); *N.B. v. Hamos*, 26 F. Supp. 3d 756, 762, 776 (N.D. Ill. 2014) (certifying class of children with mental health or behavioral disorders where plaintiffs alleged they were unnecessarily institutionalized due to defendants' failure to provide home- or community-based services in the most integrated setting); *Kenneth R. ex rel. Tri-Cnty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 260, 271-72 (D.N.H. 2013) (certifying class of persons with serious mental illness where plaintiffs alleged they were unnecessarily institutionalized due to defendants' failure to develop an adequate array of community-based services); *State of Conn. Off. of Prot. and Advoc. for Pers. with Disabilities v. Conn.*, 706 F. Supp. 2d 266, 285-89 (D. Conn. 2010) (certifying class of persons with mental illness where plaintiffs alleged they were unnecessarily institutionalized due to defendants' failure to establish an effective working plan to provide services in the most integrated setting). Likewise, class certification is warranted here.

C. Plaintiffs Meet the Standard for Class Certification

i. Numerosity

The numerosity requirement under Federal Rule of Civil Procedure 23(a)(1) is met where "the class is so numerous that joinder of all members [individually] is impracticable." Fed. R. Civ. P. 23(a)(1). The burden imposed by Rule 23(a)(1) is a low one. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009). Plaintiffs need not show the exact size of the proposed class to establish numerosity, so long as they can show that the number is exceedingly large. *In re Fla. Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674, 679 (S.D. Fla. 2012). Classes with more than forty members are generally deemed large enough to warrant certification. *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986); *see also Braggs*, 317 F.R.D. at 653. Other factors that make joinder impracticable are also relevant to a numerosity analysis, including geographic diversity, the nature of the action, the inconvenience of trying individual lawsuits, the ability of

class members to initiate those lawsuits, and judicial economy. *Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 324 (S.D. Fla. 1996). The "fluid nature of a plaintiff class . . . counsels in favor of certification of all present and future class members." *See Braggs*, 317 F.R.D. at 653 (quoting *Henderson*, 289 F.R.D. at 510).

Because DHR does not track the number of children in its custody that have disabilities, including mental health impairments, the precise size of Plaintiffs' proposed class is unknown. However, the proposed class plainly satisfies the numerosity requirement. Between September 2019 and March 2022, 948 unique children entered PRTFs, which only serve children with a record of a DSM-V diagnoses. *See* Ex. 10, Wagner Report at 10. Because a mental health impairment is a condition for admission into a PRTF, at least 948 children in DHR custody had mental health impairments or record thereof. This far exceeds the 40-person threshold recognized by *Cox* and *Braggs.* In addition to the hundreds of children that have already been institutionalized in PRTFs, Plaintiffs' proposed class also includes the many more children with disabilities who have not yet been institutionalized, but who remain subject to DHR's policies and practices that funnel children into PRTFs.

The proposed class satisfies the other factors of numerosity that make joinder impracticable. The proposed class is fluid due to the inherently transitory nature of children in state custody. Children in foster care can move in and out of DHR custody, in and out of different levels of placements within DHR's continuum, and ultimately age out of DHR custody when they are no longer minors. The proposed class is scattered across the state and as children in state custody, cannot initiate lawsuits on their own. These collective factors make joinder of all impacted children impracticable, and judicial economy would be served by certifying the Plaintiffs' proposed class. Plaintiffs have satisfied numerosity.

ii. Commonality

Next, to satisfy the requirement of commonality, Plaintiffs must demonstrate that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality exists when plaintiffs put forth a "common contention" that "is capable of classwide resolution" such that "determination of its truth or falsity will resolve an issue . . . in one stroke." *Wal-Mart*, 564 U.S. at 350. Said differently, commonality is met when a common question can "generate common *answers* apt to drive the resolution of the litigation." *Id.* "Even a single common question" satisfies the commonality requirement of Rule 23(a)(2). *Id.* at 359; *see also Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016) ("Commonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members.") (quoting *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009)).

Putative classes seeking injunctive or declaratory relief from a government agency often satisfy commonality by raising questions about the legality of government policies or practices. *See Wyatt B.*, 2022 WL 3445767, at *24 ("[W]hen class members seek to enjoin state defendants from violating their rights through statewide policies and practices. . . commonality exists because the statewide policies and procedures are the 'glue' that holds the class together.") (internal citations and quotation marks omitted). For example, in *In re D.C.*, plaintiffs, who were receiving Medicaid-funded, long-term care in nursing homes, argued that the District of Columbia violated the ADA by failing to provide services to people with disabilities in the most integrated setting. 792 F.3d 96, 98, 100 (D.C. Cir. 2015). The plaintiffs identified systemic failures that contributed to their institutionalization, such as insufficient discharge planning and failure to inform residents about care alternatives in the community. On appeal, the court opined that these factors "represent the sort of systemic failure that might constitute a policy or practice affecting all members of the class" and accordingly, upheld the class. *Id.* at 100.

Factual differences among the class members do not defeat commonality where the plaintiffs have been subjected to the same illegal policies. *Coleman ex rel. Bunn v. D.C.*, 306 F.R.D. 68, 82 (D.D.C. 2015) ("A class may satisfy the commonality requirement even if factual distinctions exist among the claims of putative class members."). The operative question is whether a common contention drives the lawsuit. *Wal-Mart Stores*, 564 U.S. at 350; *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (state policies and practices posed common questions despite disparate impacts on class members); *Meza ex rel. Hernandez v. Marstiller*, No. 3:22-cv-783 (MMH)(LLL), 2023 WL 2648180, at *9 (M.D. Fla. Mar. 27, 2023) (holding that a policy—excluding incontinence supplies from Medicaid coverage—is "a common question capable of class-wide resolution" even though the "ramifications" from the lack of coverage may differ amongst class members).

In this district, *Braggs v. Dunn* is an instructive example of how a state agency's policies and practices affecting the entire class can create common questions of law or fact, even though each class member may be affected differently by the policies or practices. 317 F.R.D. at 639. In *Braggs*, a putative plaintiff class of incarcerated individuals sued the Alabama Department of Corrections for failing to provide adequate mental health treatment and medicating plaintiffs involuntarily and without due process. *Id.* Upon plaintiffs' motion for class certification, the court found that the plaintiffs had "offered more than adequate evidence" of "very concrete" policies and practices they sought to challenge including "using unsupervised and unqualified nurses to conduct intake screenings, or placing prisoners with serious mental illness in prolonged segregation." *Id.* at 657. Differences in whether or how these policies impacted the plaintiffs did not defeat the showing of commonality. *Id.* at 656-58.

Here too, Plaintiffs challenge Defendant's concrete practices, policies, and procedures that result in violations of the ADA and Section 504—in this case, unnecessary placement in and untimely discharge from intensive residential facilities, or the risk of such unnecessary placements and untimely discharges. Like in *Braggs*, the challenged policies and practices are applicable to all children in DHR's custody who have a mental health impairment and are therefore at risk for placement in intensive residential facilities. The alleged injuries to the proposed class members all result from the same systemic policies, practices, and procedures. And these injuries give rise to identical claims under the ADA and Section 504, the resolution of which depends on the answers to common questions of law and fact. The common questions of law and fact among the Plaintiffs and the class include:

- Does DHR discriminate against Plaintiffs in violation of the ADA and Section 504 by unnecessarily segregating Plaintiffs in institutional placements rather than providing placements and services in the most integrated setting appropriate to their needs?
- Does DHR fail to require a comprehensive assessment of children before placing them in intensive residential settings, resulting in unnecessarily restrictive placements?
- Does DHR fail to procure and utilize a sufficient array of appropriately-supported community-based placements for children in foster care with disabilities, resulting in their inappropriate placement in and/or untimely discharges from intensive settings?

- Does DHR administer a system that fails to conduct appropriate case planning for children in foster care with disabilities, resulting in inappropriate placements in intensive settings and/or untimely discharges from intensive settings?

These common questions of law and fact are capable of classwide resolution because they relate directly to Defendant's concrete practices, policies, and procedures, which apply to all members of the class. Because Plaintiffs allege that these concrete policies, practices, and procedures that drive unnecessary institutional placements or the risk of such placements for all children with mental impairments in DHR custody, answers to these common questions will drive the resolution of their ADA and Section 504 claims, as outlined below.

a. DHR's Failure to Require a Comprehensive Assessment of Children Before Placement in an Intensive Residential Setting

DHR's failure to require a comprehensive assessment before a child's placement in an intensive residential setting is a concrete practice that drives class-wide violations of the ADA and Section 504. No child should be placed in an intensive residential setting unless that child has first been comprehensively assessed and determined to present mental health needs that necessitate removal from a less restrictive placement. Yet, DHR requires no such assessment before placing children in its custody into intensive residential settings. *See supra* at 5-8. These children are deprived of the opportunity to receive behavioral health treatment in a community-based or family-based placement, even when their needs may not require an intensive residential level of care.

As determined by Plaintiffs' expert, Dr. Simpatico, "[t]he policies and practices of ADHR relating to its assessment practices for placing children in intensive placements are not consistent with generally accepted standards of care requiring consistent assessment mechanisms to assure that children are placed in the least restrictive care settings commensurate with their clinical needs" such that "children are not assured access to the least restrictive setting appropriate to provide for

their mental health treatment." Ex. 13, Simpatico Report at 18-19. This failure leads to unnecessary institutional placement or risk thereof. *See id.* at 20.

DHR's assessment policies and practices demonstrate DHR's systemic failure to ensure that children in its custody are placed in the least restrictive, appropriate setting for their mental and behavioral health needs, in violation of their rights under the ADA and Section 504, which is common to all children in the putative class. Therefore, whether DHR fails to require a comprehensive assessment to ensure that children are only placed in intensive settings when necessary presents a common question or issue of fact, the resolution of which will determine DHR's liability in relation to the entire class in a single stroke.

b. DHR's Failure to Procure and Utilize a Sufficient Array of Appropriately-Supported Community-Based Placements

DHR's failure to procure and maintain an adequate array of community-based placements for children with disabilities in its custody is a second concrete practice that drives class-wide violations of the ADA and Section 504. To prevent the unnecessary institutionalization of children with mental health impairments, state foster care agencies like DHR must make available an array of community-based placements that can accommodate these children. Ex. 16, Armstrong Report at 1, 4-7. As stated above, however, as a matter of practice, DHR does not ensure that there are enough TFC placements available for children with mental or behavioral health disabilities. *See supra* p. 8-10.

A lack of appropriately matched TFC placements can drive institutionalization in several ways: 1) children are placed immediately in intensive residential placements after a rejected referral to a TFC placement or a failure to appropriately refer a child; 2) children who are already in intensive residential placements remain there past their discharge date because no TFC placements are available for the child to move to a less restrictive placement; and 3) children who

are recommended for TFC placements are instead placed in a less-supported placement such as a basic foster home, which lacks the mental health services that TFC provides, because no TFC placements are available. In these cases, without supported placements, a child's condition can deteriorate to the point that intensive residential placement is deemed necessary. Ex. 16, Armstrong Report at 18-19. In each of these situations, placements are not based on individual determinations of the child's needs, but rather result from a systemic unavailability of TFC placements. This practice also creates a risk of unnecessary institutionalization for children who are not already in PRTFs, because they similarly lack access to a TFC placement in the community if they need one.

The court in *Jonathan R.* recently certified an ADA class of foster children presenting a common question regarding "systemic deficiencies in the availability of community-based services for children with disabilities . . . [and] whether the deficiency places foster children with disabilities at risk of unnecessary institutionalization." 344 F.R.D. at 313. Similarly here, there is substantial evidence that Defendant's failure to provide an adequate array of community-based placements for children with mental health impairments exposes these children to unnecessary institutionalization.

DHR's practice of failing to maintain sufficient TFC placements and support existing TFC placements demonstrates a systemic failure by DHR to ensure that children in its custody are placed in the least restrictive, appropriate setting for their mental and behavioral health needs, in violation of their rights under the ADA and Section 504, which is common to all children in the putative class. Therefore, whether DHR fails to procure and support an appropriate array of community-based placements to ensure that children are only placed in intensive settings when

necessary presents a common question or issue of fact, the resolution of which will determine DHR's liability in relation to the entire class in a single stroke.

c. DHR's Administration of a System that Fails to Conduct Appropriate Case Planning

Deficient case planning for children in foster care with mental and behavioral health impairments is a third systemic practice that drives class-wide violations of the ADA and Section 504. In *Jonathan R.*, the court also found that a common question existed "regarding whether the deficiencies in case planning subject[ed] the proposed [class] to an unreasonable risk of harm." *Id.* at 308. There, plaintiffs argued that insufficient case planning practices in West Virginia's foster care system harmed children in foster care. *Id.* at 307. The court, relying on federal findings of deficient case planning in West Virginia and plaintiffs' expert reports opining on the insufficiency of case plans, held that "[t]he connection between deficient case planning and instability in foster care is intuitive, as chaos is commonly the fruit of a failure to plan." *Id.* at 308. The same rings true in the instant case.

In Alabama, contrary to its intended purpose, the ISP process is not used to ensure that children are placed in the setting most appropriate to their needs. Similarly, the ISP process is not conducted with careful decision-making and accurate documentation of practice. *See supra* p. 10-14. Instead, the ISP has devolved into a hastily-completed checklist. *See* Ex. 15, Joyner Report 19-20. This lack of proper case planning drives unnecessary institutional placements for children in DHR custody with mental health impairments, placing all children with mental health impairments at risk of being forced to receive treatment at a PRTF, even when their needs can be met in the community. Ex. 13, Simpatico Report at 2, 24; Ex. 15, Joyner Report at 20-21. Moreover, children who are currently placed in intensive settings are at risk of staying longer than necessary, because without adequate case planning, those children will not have a specific, individualized, and

measurable plan for their discharge to a less restrictive setting when appropriate. Ex. 15, Joyner Report at 21.

DHR's ISP policies and practices demonstrate a systemic failure by DHR to ensure that children in its custody are placed in the least restrictive, appropriate setting for their mental and behavioral health needs, in violation of their rights under the ADA and Section 504, which is common to all children in the putative class. Therefore, whether DHR fails to ensure that robust case planning occurs for children in foster care to ensure that children are only placed in intensive settings when necessary presents a common question or issue of fact, the resolution of which will determine DHR's liability in relation to the entire class in a single stroke.

iii. Typicality

Typicality exists when a named plaintiff's claims arise from the same pattern or practice and the same legal theory as those of the class. *Williams*, 568 F.3d at 1357. It is "somewhat of a low hurdle." *Dunn v. Dunn*, 318 F.R.D. 652 (M.D. Ala. 2016), *modified sub nom. Braggs v. Dunn*, No. 2:14CV601-MHT, 2020 WL 2395987 (M.D. Ala. May 12, 2020) (internal citations omitted). A named plaintiff need not have identical claims or facts to those of the class members, and typicality is generally satisfied where the named plaintiffs and class members have experienced the same unlawful conduct irrespective of unique fact patterns. *See Williams*, 568 F.3d at 1357; *see also In re Disposable Contact Lens Antitrust*, 329 F.R.D. 336, 408 (M.D. Fla. 2018).

Plaintiffs' claims are typical of the proposed class claims because they challenge the same unlawful conduct under the same legal theory. Like the proposed class members, Plaintiffs are children in DHR custody with mental health disabilities. As children with disabilities in state custody, Plaintiffs are entitled to the most integrated, least restrictive placements appropriate to their needs. *See* 28 C.F.R. § 35.130(d) (requiring public entities, like DHR, to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified

individuals with disabilities”). Defendant fails to ensure that Plaintiffs have access to such placements by failing to substantively assess their needs, failing to conduct appropriate service planning, and failing to maintain a sufficient array of well-supported, community-based placements for children with mental health disabilities. As a result, Plaintiffs, like all class members, are unnecessarily segregated and confined to highly restrictive PRTF placements or are at imminent risk of the same. Ex. 2, Mayo Decl. (C.C.) ¶¶ 76-78; Ex. 3, Mayo Decl. (F.F.) ¶¶ 62-65; Ex. 4, Mayo Decl. (G.G.) ¶¶ 55-57. This unnecessary segregation and institutionalization constitute disability discrimination. *See Olmstead*, 527 U.S. at 592. Defendant’s deficient administration of the foster care system thus violates the ADA and Section 504, and the rights of each Plaintiff and class member under those statutes in the same way.

Courts have found typicality in cases like this one, where plaintiffs and the class had different disabilities or have not all suffered injury in precisely the same way. This Court found typicality in a case where named plaintiffs and the proposed class members had diverse disabilities, but challenged “systemic practices with which they all interact and from which they allegedly suffer” as unlawful under the ADA and Section 504. *Dunn*, 318 F.R.D. at 666. This Court and others have found that typicality was met even where named plaintiffs had not yet experienced the alleged class-wide injury and had varying levels of risk of exposure to the alleged harm, because they were subject to the same policies or practices that created the risk of injury for the class. *See, e.g.*, *Braggs*, 317 F.R.D. at 664 (holding that, to establish typicality, named plaintiffs need only show that they had been *exposed* to the same policies and practices creating a substantial risk of serious harm shared by the class, not that they had already suffered the same harm) (emphasis added); *Newkirk v. Pierre*, No. 19-cv-4283 (NGG)(SMG), 2020 WL 5035930, at *10 (E.D.N.Y. Aug. 26, 2020) (finding typicality where named plaintiffs and putative class members “have

experienced or are at imminent risk of experiencing discrimination . . . on the basis of their disabilities" due to the "same unlawful conduct" of "defendant's systemic failure to comply with the statutory mandates of the ADA and Section 504"); *Steward v. Janek*, 315 F.R.D. 472, 489-90 (W.D. Tex. 2016) (finding typicality where plaintiffs and the class were experiencing or at risk of institutionalization); *see also Yates v. Collier*, 868 F.3d 354, 363 (5th Cir. 2017) (certifying a class of all prisoners in an overheated prison despite variations in health and risk, where plaintiffs alleged that the risk resulted from systemic deficiencies).

Here too, Plaintiffs satisfy typicality under Rule 23(a). Even though the putative class members have varying disabilities and varying levels of need, each child in foster care with a mental health disability is subject to the same policies and practices of DHR, and all face the risk of unnecessary segregation in intensive residential facilities. Thus, even though members of the class may suffer varying degrees of harm, typicality is met.

iv. Adequacy of Representation

Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This analysis includes two inquiries: (1) whether any fundamental conflicts of interest exist between the named plaintiffs and the class, and (2) whether the named plaintiffs will adequately prosecute the action. *Valley Drug Co.*, 350 F.3d at 1189. "'Adequate representation is usually presumed in the absence of contrary evidence,' and generally exists for injunctive-relief classes, because there is no monetary pie to be sliced up." *Braggs*, 317 F.R.D. at 666 (quoting *Access Now, Inc. v. Ambulatory Surgery Ctr. Grp., Ltd.*, 197 F.R.D. 522, 528 (S.D. Fla. 2000)).

The Named Plaintiffs and their Next Friends are adequate representatives of the putative class. No conflict of interest exists between the Named Plaintiffs and class members. Indeed, the Named Plaintiffs' interests in protecting their access to integrated, community-based placements,

better assessment practices, and better ISP practices, directly align with the interests of the putative class. Moreover, the relief Plaintiffs seek—declaratory and injunctive relief requiring DHR to expand access to community-based placements and support them with adequate services, along with improving the deficient assessment and ISP practices that currently lead to inappropriate placements in intensive facilities—would equally benefit all members of the class. *See Ass'n for Disabled Am., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 464 (S.D. Fla. 2002) (noting that the requested relief would provide "substantially equal benefits and relief to all members of the class [of individuals with disabilities] through increased accessibility . . ."). Plaintiffs do not seek monetary damages, further ensuring that no conflict of interest exists between the Named Plaintiffs and the putative class. *See Access Now*, 197 F.R.D. at 528 (holding that, typically, no conflict of interest exists where plaintiffs do not seek damages).

The Named Plaintiffs will also vigorously prosecute this action through class counsel. Each Named Plaintiff has expressed their willingness and ability to actively participate in the litigation and to protect the interests of the class. Ex. 5, Decl. of C.C. ¶ 5; Ex. 6, Decl. of F.F. ¶ 6; Ex. 7, Decl. of G.G. ¶ 5. Plaintiffs' counsel are sufficiently qualified and experienced to prosecute the interests of the class. *See Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985) (explaining that the qualifications and experience of plaintiffs' counsel are relevant to the ability of the class representatives to prosecute the action). Plaintiffs are represented by Children's Rights, the Alabama Disabilities Advocacy Program ("ADAP"), and the Southern Poverty Law Center ("SPLC"). Each organization has extensive experience litigating complex, federal class action lawsuits under Rule 23(b)(2). Ex. 22, Decl. of Samantha Bartosz ("Bartosz Decl.") at ¶¶ 3-4, 7; Ex. 23, Decl. of Andrea Mixson ("Mixson Decl.") at ¶¶ 3, 6; Ex. 24, Decl. of Michael Tafelski ("Tafelski Decl.") at ¶¶ 3, 6. Children's Rights has a long history of representing Rule 23(b)(2)

classes of children in foster care, including cases under the ADA and Section 504. Ex. 22, Bartosz Decl. at ¶ 3. ADAP serves as the federally-funded protection and advocacy agency for individuals with disabilities in Alabama and has represented classes of children with disabilities and overseen monitoring of class settlements. Ex. 23, Mixson Decl. at ¶ 3. And SPLC has served as class counsel in dozens of cases under federal anti-discrimination laws like the ADA and Section 504. Ex. 24, Tafelski Decl. at ¶ 3. The undersigned counsel will continue to prosecute this action vigorously and competently, representing the class through final resolution. The competency of counsel for plaintiffs is "reflected plainly in their extensive involvement in a large number of successful class actions vindicating the . . . federal statutory rights of classes . . . of individuals with disabilities in Alabama, throughout the South, and across the county." *Dunn*, 318 F.R.D. at 667. Plaintiffs therefore satisfy the adequacy of representation requirement of Rule 23(a).

v. The Rule 23(b)(2) Standard

Finally, Plaintiffs satisfy the requirements of Rule 23(b)(2) because Defendant "has acted or refused to act on grounds that apply generally to the class," and as such, "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This is a case for injunctive relief, and "some courts have gone so far as to say that [Rule 23(b)(2)'s] requirements are 'almost automatically satisfied in actions primarily seeking injunctive relief.'" *Braggs*, 317 F.R.D. at 667 (internal citations omitted). "Rule 23(b)(2) has been liberally applied in the area of civil rights, including suits challenging . . . practices at various detention facilities." *Id.* (quoting *Bumgarner v. NCDOC*, 276 F.R.D. 452, 457 (E.D.N.C. 2011)). Moreover, this Court has found that Rule 23(b)(2) was met when plaintiffs have shown "*systemic* failure[s]" in the government's practices which affected all members of the class and when plaintiffs sought system-level change, which is what Plaintiffs seek to do here. *Hunter v. Beshear*, No. 2:16-cv-798-MHT, 2018 WL 564856, at *7 (M.D. Ala. Jan. 25, 2018) (emphasis in original).

Defendant, through its policies and practices, has acted and refused to act on grounds generally applicable to each putative class member. The injunctive relief that Plaintiffs seek aims to remedy the systemic failures of DHR's policies and practices that have led to the unnecessary placement and overstaying of children in intensive placements and exposed many more to the risk of such unnecessary placements and untimely discharges. This relief includes:

- requiring individualized and comprehensive assessments to occur before placing children in intensive placements;
- requiring that children are timely assessed for discharge and discharged on a timely basis once they have been placed in intensive placements;
- increasing the capacity and utilization of therapeutic foster care homes for children in foster care;
- ensuring data keeping and adequate data analysis occurs in building and maintaining appropriate placement capacity for children in foster care;
- ensuring ISP planning is conducted in a manner that identifies and addresses the needs of children in foster care and places them in the least restrictive setting appropriate to those needs; and
- requiring DHR to conduct quality assurance sufficient to ensure children are not inappropriately placed in restrictive settings.

There is no question that the relief Plaintiffs seek will provide relief to all members of the putative class.

CONCLUSION

For the reasons stated above, the Court should certify the class, appoint Named Plaintiffs as representatives of the class, and approve the undersigned counsel to be attorneys for the class.

Dated: March 8, 2024

Respectfully Submitted,

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I certify that I have on this day filed the foregoing document with the clerk of the court and electronically served the following persons:

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