

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION**

NICOLE K. and ROMAN S., by next friend  
Linda R.; ABIGAIL R., LILY R., and  
RACHEL H., by next friend Nancy B.; and  
ANNA C., BRIAN P., AMELIA P.,  
ALEXA C., and ZACHARY H., by next  
friend Jessie R.; for themselves and those  
similarly situated,

Plaintiffs,

v.

MARION COUNTY, LAKE COUNTY;  
and SCOTT COUNTY, INDIANA

Defendants.

Case No.: 3:19-cv-00025-RLY-MPB

JURY TRIAL DEMANDED

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION AND APPOINTMENT OF  
CLASS COUNSEL**

**I. INTRODUCTION**

Plaintiffs seek declaratory and injunctive relief on behalf of a class of children who are in Child in Need of Services ("CHINS") or Termination of Parental Rights ("TPR") proceedings in Marion County, Lake County, and Scott County (collectively, "Defendants" or "Defendant Counties"), and who do not have a licensed attorney of record to represent them in those proceedings. Plaintiffs' constitutional rights are being violated, and will continue to be violated, by Defendants' failure to provide Plaintiffs with legal representation in CHINS and TPR proceedings where Plaintiffs' liberty interests are at stake.

Plaintiffs seek an order certifying this case as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, with the class defined as **"all children who are in Child in Need of Services (CHINS) proceedings, pursuant to Indiana Code Title 31, Article 34, or Termination of Parental Rights (TPR) proceedings, pursuant to Indiana**

**Code Title 31, Article 35, in any of the Defendant Counties and who do not have a licensed attorney of record to represent them in those proceedings** (“Plaintiffs” or the “Class”). As set forth below, this action satisfies all requirements for class certification. Plaintiffs respectfully request that the Court issue an order certifying this case as a class action and appointing undersigned counsel to represent Plaintiffs as class counsel.

## **II. BACKGROUND**

### **A. Appointment of Counsel in CHINS and TPR Proceedings**

In Indiana, CHINS proceedings are governed by Indiana Code Title 31, Article 34 and are initiated in a county juvenile court when the Department of Child Services (“DCS”) files a petition that the subject child has suffered substantiated abuse or neglect. If circumstances warrant, DCS may also file a petition to terminate parental rights, thus initiating TPR proceedings governed by Indiana Code Title 31, Article 35.

In juvenile court proceedings in Indiana, appointment of an attorney is mandatory for “[a] parent, in a proceeding to terminate the parent-child relationship [TPR proceeding],” Ind. Code Ann. § 31-32-4-1; *see also* Ind. Code Ann. § 31-32-2-5 (“A parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship.”). Appointment of counsel for indigent parents in CHINS proceedings is also mandatory, *see* Ind. Code Ann. § 31-34-4-6; *G.P. v. Indiana Dept. of Child Servs.*, 4 N.E.3d 1158 (Ind. 2014), and plaintiffs allege that parents are appointed counsel in CHINS proceedings in most cases. (Compl. ¶ 6.)

Appointment of counsel for non-delinquent children in both CHINS and TPR proceedings, on the other hand, is entirely discretionary. Ind. Code Ann. § 31-32-4-2(b) (“The court may appoint counsel to represent any child in any other proceeding.”). Although juvenile courts have discretion to appoint counsel to children in CHINS and TPR proceedings, Plaintiffs allege that such appointment is almost never made. (Compl. ¶ 6.)

**B. Defendants' Failure to Appoint Counsel in CHINS and TPR Proceedings Violates the Named Plaintiffs' Constitutional Rights**

Defendants have violated each named plaintiffs' constitutional rights by failing to appoint legal counsel to Plaintiffs in their respective CHINS and TPR proceedings.

**1. Nicole K. and Roman S.**

Named plaintiffs Nicole K. and Roman S. are half-siblings who have lived with a foster parent, Linda R., in Marion County for the last three years. (Compl. ¶ 24.) Nicole was removed from her home by DCS as an infant because her biological mother was an alcoholic and there were severe issues of domestic violence in the home. (*Id.* ¶ 25.) Nicole was designated a CHINS in 2013 but was not assigned an attorney to represent her in CHINS proceedings. (*Id.*) During the pendency of her CHINS proceedings, Nicole was transferred to a total of 20 foster homes before her current foster parent took her in at the age of three. (*Id.*)

Roman was placed in foster care by DCS immediately following birth due to his mother's alcoholism and domestic violence. (Compl. ¶ 26.) Roman was also designated a CHINS in 2013 but, like Nicole, was not assigned an attorney to represent him in CHINS proceedings. (*Id.*) During the pendency of his CHINS proceedings, Roman was also transferred to 20 foster homes before his current foster parent took him in. (*Id.*)

The instability of home life has led to severe behavioral issues for both Nicole and Roman, and they have been kicked out of daycare for these issues. (Compl. ¶¶ 25, 26.) They have both been diagnosed with ADHD. (*Id.*) Nicole is failing emotionally and behaviorally, while Roman was far behind his peers in language and other areas by the time he was placed with his current foster parent at the age of two. (*Id.*) Although Marion County failed to appoint legal counsel for Nicole or Roman, it has appointed counsel to represent their biological mother in the CHINS proceedings. (*Id.* ¶ 27.)

**2. Abigail R., Lily R., and Rachel H.**

Named plaintiffs Abigail R., Lily R., and Rachel H. are biological sisters who have lived with a foster parent, Nancy B., in Lake County since approximately May 2015. (Compl. ¶ 30.) At the time Abigail, Lily, and Rachel were placed in foster care by DCS, they were homeless and living in a car with their biological parents. (*Id.* ¶ 31.) Both biological parents were heavy drug users and did not adequately take care of their children. (*Id.* ¶ 31.) Abigail and Lily showed signs of abuse when they were removed from their biological parents. (*Id.*) When Rachel was born, she had Vicodin in her system. (*Id.*) She was removed from her biological parents when she was only two months old. (*Id.*)

The girls' biological parents disappeared in 2016 and have been absent from their lives ever since. (Compl. ¶ 33.) TPR proceedings were subsequently initiated in Lake County with respect to all three children. (*Id.*) In late 2016, DCS began the process of putting the girls up for adoption. (*Id.* ¶ 34.) DCS arranged five separate families to meet with the girls for potential adoption, but would not allow them to meet with one of Abigail's and Lily's teachers even though she was highly motivated to adopt them. (*Id.*) At one point their case manager reported that the girls' grandmother had been located and wanted to adopt the girls. (*Id.*) This news was promising at first; however, the grandmother eventually stopped answering calls and continually made excuses that stalled the adoption. (*Id.*) The girls' foster parents have decided that they want to adopt the girls. Although this development is welcome news to the girls, Abigail's case manager has told her that Abigail does not have a say in where she ends up. (*Id.* ¶ 35.) Abigail, Lily, and Rachel have endured trauma and unfairness throughout these proceedings. (*See id.* ¶¶ 33, 35.) Lake County has failed to appoint legal counsel to Abigail, Lily, or Rachel in their CHINS or TPR proceedings. (*Id.* ¶ 36.)

**3. Anna C., Brian P., Amelia P., Alexa C., and Zachary H.**

Named plaintiffs Anna C., Brian P., Amelia P., Alexa C., and Zachary H. are foster children living in Scott County who share the same biological mother. (Compl. ¶ 39.) Brian and Amelia also have the same biological father. (*Id.*) All five children have been designated CHINS by Scott County. (*Id.*)

In March 2016, a CHINS case was opened in Scott County for Anna, Brian, Amelia, and Alexa, but the children were not yet removed from their biological mother. (Compl. ¶ 40.) In June 2016, their biological mother was jailed and then sent to a homeless shelter, where Anna, Brian, Amelia, and Alexa also lived until October 2016, when their mother was again arrested and sent to jail. (*Id.*) The children went to live with their second cousin at that time. (*Id.*)

Prior to moving in with their second cousin, Anna and Brian suffered repeated physical abuse by their biological mother and their mother's boyfriends. (Compl. ¶ 40.) As a result of their abusive home and the emotional abuse they suffered, Amelia and Alexa suffer from attachment disorder. (*Id.*) Zachary was born in November 2016 into state custody in light of his mother's inability to care for him and her history of abuse toward her children. (*Id.* ¶ 41.) Zachary was born with marijuana and methamphetamines in his system. (*Id.*) He was released from the hospital to the home of a family member close to the children's second cousin. (*Id.*) In June 2017, Anna, Brian, Amelia, and Alexa moved into the home of the same family member who was already taking care of Zachary. (*Id.* ¶ 42.) The family member hopes to adopt all five children. (*Id.*)

The CHINS proceedings for Anna, Brian, Amelia, Alexa, and Zachary have been difficult and painful. (Compl. ¶ 44.) Scott County appointed counsel to represent their biological mother in the CHINS proceedings, but failed to appoint legal counsel to any of the children. (*Id.* ¶¶ 44, 45.) Further, Scott County is required by law to appoint counsel to represent the children's

biological mother in forthcoming TPR proceedings, but not the children whose lives and liberty interests are dramatically affected by the outcome of those proceedings. (*Id.* ¶ 45.)

**C. Defendants' Failure to Appoint Counsel in CHINS and TPR Proceedings Violates the Class Members' Constitutional Rights**

The named plaintiffs' experiences are representative of Defendants' systemic constitutional violations with respect to all children in the proposed class in CHINS or TPR proceedings. Indiana is one of the most active states in the country when it comes to removing children from their homes due to abuse or neglect. (Compl. ¶ 9.) In fact, the number of children in Indiana placed in out-of-home state care is roughly 13 children per 1,000, which is more than double the national rate. (*See id.*) As of 2018, a total of 16,834 children were in foster care in Indiana. (*Id.*) In Indiana, appointment of counsel for parents in TPR proceedings is mandatory. Ind. Code Ann. § 31-32-2-5. Appointment of counsel for indigent parents in CHINS proceedings is also mandatory, *see* Ind. Code Ann. § 31-34-4-6; *G.P. v. Indiana Dept. of Child Servs.*, 4 N.E.3d 1158 (Ind. 2014), and plaintiffs allege that parents are appointed counsel in CHINS proceedings in most cases. (Compl. ¶ 6.) Although juvenile courts also have discretion to appoint counsel to children in CHINS and TPR proceedings, *see* Ind. Code Ann. § 31-32-4-2(b), Plaintiffs allege that such appointment is almost never made. (Compl. ¶ 6.)

Appointment of counsel to represent children who are subject to CHINS and TPR proceedings in Defendant Counties is made at the sole discretion of employees in Marion County, Lake County, and Scott County. (Compl. ¶¶ 49-51.) This complete discretion results in inconsistent, unpredictable outcomes that leave children with no voice and no one to advocate for their legal rights. (*See id.* ¶ 19.) Plaintiffs allege that an attorney is appointed to children in CHINS and TPR proceedings in fewer than 10% of cases in Defendant Counties. (*See id.* ¶¶ 67, 72, 80, 85, 93, 98.) Furthermore, Plaintiffs claim that attorneys are appointed to children in

CHINS and TPR proceedings at a lower rate than appointment of counsel to parents in CHINS and TPR proceedings. (*See id.* ¶¶ 71, 76, 84, 89, 97, 102.)

Defendants have violated the constitutional rights of children in CHINS and TPR proceedings by failing to provide counsel to those children while nonetheless adjudicating the fate of the children's lives and their future familial relations. (Compl. ¶ 4.) By withholding appointment of legal counsel for children in CHINS and TPR proceedings, Defendants have caused and will continue to cause the deprivation of Plaintiffs' fundamental liberty interests without due process of law. Furthermore, by appointing counsel for some, but not all, children in CHINS and TPR proceedings, and by appointing counsel for parents in CHINS and TPR proceedings without also appointing counsel for children in those proceedings, Defendants have denied Plaintiffs equal protection of the laws in violation of the Fourteenth Amendment. Defendants' acts and omissions affect not only the named plaintiffs, but the entire Class of children in CHINS or TPR proceedings whose constitutional right to legal representation is being violated.

### **III. LEGAL STANDARD**

"The purpose of class action litigation is to avoid repeated litigation of the same issue and to facilitate prosecution of claims that any one individual might not otherwise bring on her own." *Chicago Teachers Union, Local No. 1 v. Board of Educ. of the City of Chicago*, 797 F.3d 426, 433 (7th Cir. 2015). Rule 23(a) of the Federal Rules of Civil Procedure permits "[o]ne or more members of a class [to] sue or be sued as representative parties on behalf of all members" if four requirements are satisfied:

- (i) the class is so numerous that joinder of all members is impracticable;
- (ii) there are questions of law or fact common to the class;

(iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

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

Fed. R. Civ. P. 23(a). Maintenance of a class action also requires satisfaction of at least one prong of Rule 23(b). *See* Fed. R. Civ. P. 23(b). Certification is proper under Rule 23(b)(2) 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).

Pursuant to Rule 23(g), “a court that certifies a class must appoint class counsel,” and in doing so, must consider four factors:

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

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

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

(iv) the resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). Class counsel must “fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(4).

#### **IV. ARGUMENT**

Class certification is proper in this case. Plaintiffs bring this lawsuit to remedy violations of their constitutional rights, and Plaintiffs seek certification under Rules 23(a) and 23(b)(2) of a class consisting of “all children who are in Child in Need of Services (CHINS) proceedings, pursuant to Indiana Code Title 31, Article 34, or Termination of Parental Rights (TPR)

proceedings, pursuant to Indiana Code Title 31, Article 35, in any of the Defendant Counties and who do not have a licensed attorney of record to represent them in those proceedings.” Courts have routinely certified classes in cases with similar allegations of systemic violations of federal law, including cases involving children’s rights. *See, e.g., DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1192-94 (10th Cir. 2010) (affirming class certification where plaintiffs alleged that “agency-wide foster care policies and practices expose[d] all class members to an impermissible risk of harm,” including violations of their Fourteenth Amendment rights to substantive and procedural due process); *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997) (affirming class certification in lawsuit seeking declaratory and injunctive relief to redress systemic violations of children’s rights by New York City’s child welfare system); *Baby Neal v. Casey*, 43 F.3d 48, 52 (3rd Cir. 1994) (reversing denial of certification of a class of children who alleged that systemic deficiencies prevented Philadelphia’s Department of Human Services from providing a variety of child welfare services legally mandated by the United States Constitution and by federal and state law); *Lynch v. Dukakis*, 719 F. 2d 504, 506 n.1 (1st Cir. 1983) (noting previous certification of a class defined as “All children subject to protective intervention by agencies of the Commonwealth of Massachusetts under the foster family home care system . . . and all members of the natural and foster families of such children”); *Wilburn v. Nelson*, No. 3:17 cv 331-PPS-MGG, 2018 WL 5961724 (N.D. Ind. Nov. 13, 2018) (granting class certification where plaintiffs challenged “the rote policy of using solitary confinement” for detainees under the age of 18 as unconstitutional); *Stafford v. Carter*, No. 1:17-cv-00289-JMS-MJD, 2018 WL 1140388 (S.D. Ind. March 2, 2018) (granting class certification where plaintiffs alleged that policies maintained and implemented by the defendants resulted in the improper denial of treatment to incarcerated individuals in violation of the United States Constitution and

federal laws); *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 291 (D. Mass. 2011) (certifying class consisting of children in the foster care custody of the Massachusetts Department of Children and Families as a result of abuse or neglect, where plaintiffs alleged they suffered various forms of harm while in defendant's custody as a result of systemic failures); *Dwayne B. v. Granholm*, No. 06-13548, Dkt.. 27 at 1-2 (E.D. Mich. Feb. 15, 2007) (certifying class of children alleging systematic violations of some or all of the federal constitutional and statutory rights of Michigan's foster children) (attached hereto as Exhibit A); *Kenny A. v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003) (certifying class of children where plaintiffs alleged that State Defendants failed to put into place a system that delivered appropriate services, care, and treatment in accordance with statutory and constitutional mandates, and County Defendants denied plaintiffs adequate and effective legal representation in juvenile court proceedings); *Jeanine B. v. Thompson*, 877 F. Supp. 1268 (E.D. Wis. 1995) (certifying class of children in foster care custody in Milwaukee County where plaintiffs alleged systematic failures by the Milwaukee County Department of Human Services resulting in deprivation of constitutional rights); *Wilder v. Bernstein*, 499 F. Supp. 980, 994 (S.D.N.Y. 1980) (certifying class defined as "all those New York City children who are black, and who are Protestant, of other non-Catholic or non-Jewish faiths, or are of no religion, and are in need of child-care services outside their home" in case alleging systemic racial and religious discrimination in foster care placements).

As explained below, the proposed class meets the requirements of Rule 23(a) and Rule 23(b)(2) and should be certified. In addition, Plaintiffs' counsel will fairly and adequately represent the interests of the class and should be appointed class counsel under Rule 23(g).

**A. The Class Meets the Requirements of Rule 23(a)<sup>1</sup>**

**1. The Class Is So Numerous That Joinder of All Members Is Impracticable**

The proposed class of more than 5,000 children is sufficiently large to satisfy the numerosity requirement and makes joinder impracticable. The proposed class exceeds the size of many classes certified in the Seventh Circuit, thus easily meeting the numerosity requirement. *See, e.g., Swanson v. American Consumer Industries, Inc.*, 415 F.2d 1326, 1333 (7th Cir. 1969) (finding that a class of 151 individuals was a sufficient number to permit a class action to proceed); *Hizer v. Pulaski County, Indiana*, Case No. 3:16-CV-885-JD-MGG, 2017 WL 3977004, at \*4 (N.D. Ind. Sept. 11, 2017) (certifying class of approximately 1,000 individuals); *Phipps v. Sheriff of Cook County*, 249 F.R.D. 298, 300 (N.D. Ill. 2008) (class of fewer than 100 individuals was sufficient to satisfy numerosity requirement); *Evans v. Evans*, 818 F. Supp. 1215, 1219 (N.D. Ind. 1993) (proposed class of 100 to 200 members satisfied numerosity requirement). “While there is no magic number, this Circuit has found that a class with more than forty members will generally satisfy the numerosity requirement.” *Wilburn*, 2018 WL 5961724, at \*2.

Additionally, the proposed class consists of children who are unrepresented by counsel, have limited financial means, have limited understanding of the U.S. judicial system, and who are in many instances separated from their nuclear families. These circumstances all support a finding that joinder is impracticable, as class members are likely unable to institute individual

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<sup>1</sup> In addition to the explicit requirements under Rule 23, some courts in the Seventh Circuit have recognized an implicit “ascertainability” requirement “that a class must be defined clearly and that membership be defined by objective criteria.” *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015). “The ascertainability requirement does not mean that all members of a class must be identifiable at the time of certification.” *Hizer v. Pulaski County, Indiana*, Case No. 3:16-CV-885-JD-MGG, 2017 WL 3977004, at \*4 (N.D. Ind. Sept. 11, 2017). Rather, if the “general outlines” of the class are determinable, a class will be deemed to exist. *Id* (quotation omitted). Here, the class is defined by objective criteria: (1) the class members are children in CHINS or TPR

suits. *See, e.g., Hizer*, 2017 WL 3977004, at \*4 (“When determining if joinder of all class members is impracticable, courts often consider many factors, including: the class size; judicial economy arising from the avoidance of a multiplicity of actions; the ease of identification of members of the proposed class; the geographic dispersion of class members; the size of each plaintiff’s claim; the financial resources of the class members; the ability of claimants to institute individual suits; any requests for prospective injunctive relief which would involve future class members; and any other factors relevant to the practicability of joining all the class members.”); *Evans*, 818 F. Supp. at 1219 (“Additionally, in determining numerosity, the Court considers judicial economy and the ability of class members to institute individual suits.”).

The proposed class is sufficiently numerous and joinder of all members is impracticable. Therefore, the first prong of Rule 23(a) is satisfied.

## **2. There are Questions of Law or Fact Common to the Class**

The commonality requirement of Rule 23(a)(2) is satisfied “as long as a single issue is common to all class members.” *Evans*, 818 F. Supp. at 1219. “Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.” *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014). Further, “[c]ommon nuclei of fact are typically manifest where . . . the defendants have engaged in standardized conduct towards members of the proposed class.” *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998).

Here, nearly all questions of law and fact to be resolved are common to the proposed class. Defendants’ systematic failure to fulfill their constitutional obligations to children in CHINS and TPR proceedings gives rise to the same legal and factual issues, which are therefore

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proceedings in the Defendant Counties; and (2) the class members do not have a licensed attorney of record to represent them in those proceedings. Therefore, the class is clearly defined and ascertainable.

“common” within the meaning of Rule 23(a)(2). *See, e.g., Wilburn*, 2018 WL 5961724, at \*4 (commonality satisfied where a “central question [would] guide the determination of the constitutionality of the Defendants’ actions”). Plaintiffs allege that all of the named plaintiffs and class members are entitled to effective legal representation in their CHINS and TPR proceedings, and that they are harmed by the failure of Defendants to provide adequate and effective legal representation in those proceedings. (Compl. ¶ 54.) Questions of fact and law common to all members of the proposed class include the extent of Defendants’ failure to appoint counsel, any criteria used for doing so, and whether such failure violates Plaintiffs’ rights to procedural due process and equal protection, as guaranteed by the Fourteenth Amendment to the United States Constitution. (*Id.* ¶ 55.) Therefore, the commonality requirement of Rule 23(a) is satisfied.

### **3. The Claims of the Named Plaintiffs are Typical of the Claims of the Class**

The named plaintiffs’ claims also satisfy the typicality requirement. “The question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality.” *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). A plaintiff’s claim is typical “if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” *De La Fuente v. Stokely–Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (citations omitted) (upholding certification of class where “[a]ll members of the class were subject to the same allegedly unlawful practices”), *overruled on other grounds, Green v. Mansour*, 474 U.S. 64 (1985).

Plaintiffs have been deprived of legal counsel in their CHINS and TPR proceedings, and Plaintiffs allege that Defendants routinely fail to appoint counsel to represent children in the proposed class. The claims of both named plaintiffs and class members therefore arise from the

same course of conduct and are based on the same legal theory, as the same constitutional rights have been and will continue to be systematically violated by Defendants' acts and omissions. *See De La Fuente*, 713 F.2d at 232. Thus, the requirement of Rule 23(a)(3) that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" is satisfied. *See Rosario*, 963 F.2d at 1018 ("[E]ach class member's claims arise from the same event or practice of the [Defendant], so the claims meet the typicality requirement.").

**4. Named Plaintiffs Will Adequately Represent the Members of the Class**

Two factors are relevant in determining whether the named plaintiffs adequately represent the interests of the class: "1) whether conflicts of interest exist between the representatives and the rest of the class members; and 2) whether Plaintiffs' counsel will adequately protect the interests of the class." *Evans*, 818 F. Supp. at 1220 (finding that the adequacy requirement was satisfied where named plaintiffs and class members were both "seeking to enforce their rights under federal law" and the named plaintiffs would benefit from the relief sought in the case; therefore, their interests were "wholly compatible with those of the class and they [could] be expected to vigorously pursue the litigation"). Here, both factors are satisfied.

First, the named plaintiffs seek declaratory and injunctive relief declaring Indiana Code § 31-32-4-2(b) unconstitutional, enjoining Defendants from denying Plaintiffs the benefit of appointed counsel in CHINS and TPR proceedings, and requiring that Defendants provide appointed counsel to Plaintiffs, and to all those similarly situated, in all CHINS and TPR proceedings. Plaintiffs' request for systematic reforms will therefore not conflict with the interests of the class members. *See Phipps*, 249 F.R.D. at 301 (finding that plaintiff was an adequate class representative where defendant did not identify "any interests held by plaintiffs

which [were] antagonistic to or in conflict with those of class members”). In fact, relief for the named plaintiffs will accord relief to the class – all children who are in CHINS or TPR proceedings in Defendant Counties who are deprived of their right to a licensed attorney.

Second, Plaintiffs’ counsel will adequately protect the interests of the class. Plaintiffs are represented by the Children’s Advocacy Institute, as well as the law firms Morrison & Foerster LLP and DeLaney & DeLaney LLC. Children’s Advocacy Institute is a nonprofit legal organization whose attorneys have substantial experience and expertise in child welfare litigation nationally. (Declaration of Robert C. Fellmeth (“Fellmeth Decl.”) ¶ 8.) Morrison & Foerster LLP is a global private law firm with extensive experience in complex civil litigation including class action litigation, (Declaration of Stephen D. Keane (“Keane Decl.”) ¶ 6), and DeLaney & DeLaney is a private law firm with extensive litigation experience, including class action litigation. (Declaration of Kathleen A. DeLaney (“DeLaney Decl.”) ¶ 11.) Counsel for Plaintiffs have investigated all claims in this action and have committed sufficient resources to represent the proposed class, thereby satisfying the adequacy requirement for class certification. (*See* Keane Decl. ¶ 9; Fellmeth Decl. ¶ 10; DeLaney Decl. ¶ 12.)

Plaintiffs’ interests are consistent with those of the class, and Plaintiffs have retained experienced and competent counsel who will adequately protect the interests of the class; therefore, Plaintiffs have satisfied the requirements of Rule 23(a)(4).

**B. The Class Meets the Requirements of Rule 23(b)(2)**

The requirements of Rule 23(b)(2) are also satisfied. Rule 23(b)(2) is “the appropriate rule to enlist when the plaintiffs’ primary goal is not monetary relief, but rather to require the defendant to do or not do something that would benefit the whole class.” *Chicago Teachers Union*, 797 F.3d at 441.

Here, Defendants' failure to appoint counsel to represent children in CHINS and TPR proceedings affects all members of the class. Plaintiffs request declaratory and injunctive relief to enjoin Defendants from denying Plaintiffs the benefit of appointed counsel in CHINS and TPR proceedings, and to require Defendants to provide appointed counsel to Plaintiffs and those similarly situated now and in the future. (Compl. at pp. 26-29.) Certification under Rule 23(b)(2) is therefore proper. *See Chicago Teachers Union*, 797 F.3d 426 at 441; *Baby Neal*, 43 F.3d at 64 ("The fact that the plaintiffs in this case seek only injunctive and declaratory relief, not individual damages, further enhances the appropriateness of the class treatment."); *Wilburn*, 2018 WL 5961724, at \*6 (Rule 23(b)(2) was satisfied where "the main objective [was] to shut down the [defendant's] alleged unconstitutional policies and procedures affecting" the class members).

Furthermore, the nature of the proposed class makes it particularly difficult for individual plaintiffs to pursue their own claims or to obtain relief from Defendants' conduct. *See Baby Neal*, 43 F.3d at 64 ("The writers of Rule 23 intended that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights."). The proposed class consists of children who are unrepresented by counsel, have limited financial means, have limited understanding of the U.S. judicial system, and who are in many instances separated from their nuclear families. Individual class members are therefore highly unlikely to be able to vindicate their own claims. This fact, together with the declaratory and injunctive nature of the relief sought and the fact that Defendants' acts and omissions are generally applicable to all Plaintiffs, makes class certification proper under Rule 23(b)(2).

**C. The Court Should Certify the Proposed Class**

As explained above, the proposed class satisfies the four requirements of Rule 23(a) and the requirements of Rule 23(b)(2). Therefore, Plaintiffs respectfully request that the Court certify this case as a class action pursuant to Rule 23(c), with the class defined as: “all children who are in Child in Need of Services (CHINS) proceedings, pursuant to Indiana Code Title 31, Article 34, or Termination of Parental Rights (TPR) proceedings, pursuant to Indiana Code Title 31, Article 35, in any of the Defendant Counties and who do not have a licensed attorney of record to represent them in those proceedings.”

**D. Plaintiffs’ Counsel Will Fairly and Adequately Represent the Interests of the Class and Should Be Appointed Class Counsel Under Rule 23(g)**

Plaintiffs’ counsel are highly qualified to “fairly and adequately represent the interests of the class” and should be appointed class counsel. Fed. R. Civ. P. 23(g)(1)(B). Plaintiffs’ counsel easily meet the requirements of Rule 23(g). First, counsel have identified and investigated all claims in this action. (Compl. ¶ 59; Declaration of Stephen D. Keane (“Keane Decl.”) ¶ 9; Declaration of Robert C. Fellmeth (“Fellmeth Decl.”) ¶ 10; Declaration of Kathleen A. DeLaney (“DeLaney Decl.”) ¶ 12.) Second, counsel have extensive experience handling complex civil litigation including class action litigation. (*See* Keane Decl. ¶ 6; Fellmeth Decl. ¶ 8; DeLaney Decl. ¶ 11.) Third, counsel have a comprehensive knowledge of the applicable law, based both on current legal research and on the experience of attorneys at Children’s Advocacy Institute, who have substantial experience and expertise in child welfare litigation nationally. (*See id.*) Fourth, counsel have committed and will commit sufficient resources to represent the proposed class. (*See* Keane Decl. ¶ 9; Fellmeth Decl. ¶ 10; DeLaney Decl. ¶ 12.) Plaintiffs’ counsel satisfy the standard for appointment of class counsel under Rule 23(g); therefore, Plaintiffs respectfully request that the Court appoint Plaintiffs’ counsel as class counsel in this action.

**V. CONCLUSION**

For the foregoing reasons, Plaintiffs' motion should be granted.

Dated: February 6, 2019

By: /s/ Kathleen A. DeLaney

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