IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS 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.

TERRY J. STIGDON, Director of the Indiana Department of Child Services, in her official capacity, HON. MARILYN A. MOORES, Marion Superior Court Judge, in her official capacity, HON. MARK A. JONES, Marion Superior Court Judge, in his official capacity, HON. THOMAS P. STEFANIAK, JR., Lake Superior Court Judge, in his official capacity, HON. MARSHA OWENS HOWSER, Scott Superior Court Judge, in her official capacity, and HON. JASON M. MOUNT, Scott Circuit Court Judge, in his official capacity,

Defendants.

Case No.: 1:19-cv-01521-JPH-MJD

JURY TRIAL DEMANDED

Honorable James Patrick Hanlon

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

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I. INTRODUCTION

Plaintiffs meet all requirements for class certification under Federal Rule of Civil Procedure 23. Defendants do not contest that Plaintiffs satisfy the numerosity and typicality requirements of Rule 23(a)(1) and (a)(3). Defendants do not contest that the representative parties will fairly and adequately protect the interests of the proposed class under Rule 23(a)(4), and Defendants do not contest, pursuant to Rule 23(b)(2), that Defendants have 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. Defendants contest only commonality under Rule 23(a)(2), challenging Plaintiffs' position that "there are questions of law or fact common to the class." Defendants are wrong. Plaintiffs' claims satisfy the commonality requirement because all members of the proposed class and subclass have suffered the same injury (no counsel) and have requested the same relief (appointed counsel). Common questions of fact and law affect proposed class and subclass members alike, including whether Defendants routinely fail to appoint counsel, or fail to ensure counsel are appointed, to represent children in CHINS and TPR proceedings 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. Defendants' efforts to manufacture differences within the proposed class are unavailing. Likewise, Defendants' attempt to recast the class certification issue as a case-dispositive merits issue is improper and should be rejected.

Thus, the Court should grant Plaintiffs' motion for class certification.

II. ARGUMENT

This case presents a straightforward application of Rule 23. Proposed class and subclass members have suffered the same injury: they have been thrust into CHINS and/or TPR proceedings with no attorney representation. This injury provides commonality across the class.

See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011) (commonality provision "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'") (*quoting Gen. Tel. Co. of SW v. Falcon*, 457 U.S. 147, 157 (1982)). Defendants argue that "[t]he one size fits all approach suggested by the Plaintiffs does not seek to remedy a consistent injury." (Dkt. 82, Defendants' Opposition to Plaintiffs' Motion for Class Certification ("Opp.") at 6.) But that is precisely what Plaintiffs seek, as the injury across the class members is the same. And the Court can remedy this injury by requiring Defendants to provide counsel or ensure counsel are provided. That is all that is required to satisfy the commonality prong.

Defendants seek to peel back the layers of each individual CHINS case in an effort to argue that Plaintiffs have failed to show that "a protected liberty interest is being infringed" in every case. (Opp. at 2.) But Plaintiffs are not required to prove the merits of their claims at the class certification stage. Although a Rule 23(a) analysis can "overlap with the merits of the plaintiff's underlying claim," *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013) (internal quotation marks and citation omitted), proof of a plaintiff's claim is not required at the class certification stage, "only that it is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 375 (7th Cir. 2015) (internal quotation marks and citation omitted) ("We need not spend too much time analyzing whether the district court . . . did or did not come to a conclusion about the merits of the question, because our case law is clear that such proof is not required"); *see also Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."); *Hostetler v. Johnson Controls, Inc.*, No. 3:15-CV-226 JD, 2018 WL 3868848, at *6 (N.D. Ind. Aug. 15, 2018) ("In considering . . . evidence [put forth by plaintiff], a court is not concerned with

whether it shows that the class is likely to succeed on the merits, but only whether it shows that the requirements for class certification have been met."). Plaintiffs allege, on the merits, that they have a constitutional right to attorney representation in CHINS and TPR proceedings. To support their right to relief, Plaintiffs allege that they have been denied attorney representation in these proceedings. The denial of representation is the common injury that the proposed class members have suffered, and Defendants do not contest that the proposed class members share this common injury.

Even if analysis of specific liberty interests were required for each CHINS/TPR case, Plaintiffs still satisfy commonality, because the nature of CHINS and TPR proceedings means that each proposed class member risks losing his or her physical liberty in those proceedings. Thus, whether the common injury is viewed as lack of counsel or the risk of deprivation of physical liberty that flows from lack of representation, the proposed class and subclass satisfy the Rule 23 commonality requirement.

A. The Class and Subclass Satisfy Rule 23(a)(2) Commonality

Plaintiffs challenge systemic deficiencies in the manner in which Defendants appoint—or fail to appoint—counsel to foster children in CHINS and TPR proceedings. All proposed class members claim entitlement to legally mandated rights under the due process and equal protection clauses. Thus, Plaintiffs' attack on Defendants' systemic deficiencies in CHINS and TPR proceedings is "plainly sufficient to satisfy the commonality requirement." *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 300 (N.D. Ga. 2003); *see also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) ("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.").

Here, the common issues include the extent of Defendants' failure to appoint counsel, or failure to ensure that counsel are appointed, any criteria used for doing so, and whether such

failure violates Plaintiffs' rights to due process and equal protection, as guaranteed by the Fourteenth Amendment to the United States Constitution. The Court can resolve the common issues on a classwide basis because these issues are central to every class member's case.[1] A decision about whether Defendants violated Plaintiffs' constitutional rights by failing to provide counsel will resolve every class member's injury. Moreover, there are no individual issues because all class members request the exact same relief: appointment of counsel.

Accordingly, the proposed class and subclass satisfy the commonality requirement.

B. All Class Members Have Fundamental Liberty Interests at Stake in CHINS and TPR Proceedings

1. All Class and Subclass Members Risk Suffering the Same Loss of Physical Liberty Interest in Violation of Due Process

Apart from the common injury of deprivation of counsel, all potential class members share the common injury that permeates every CHINS and TPR proceeding where counsel are not appointed to represent children: the unacceptable risk of deprivation of physical liberty. Defendants argue that not all class members have lost the same liberty interest because Plaintiffs "cite a wide range of possible liberty interests." (Opp. at 10.) Defendants misunderstand what Plaintiffs allege and what is required to satisfy the commonality requirement. First, Plaintiffs allege and offer factual support showing that all proposed class members risk suffering the same loss of physical liberty interest in TPR and CHINS proceedings. (*See, e.g.*, Dkt. 40 ("FAC") ¶¶ 13, 15, Exhibit 1.) Second, Defendants cite no authority for the proposition that in order to satisfy the commonality requirement under Rule 23, Plaintiffs "must show that, at a minimum,

[1] Defendants' reliance on *Harper v. Sheriff*, 581 F.3d 511 (7th Cir. 2009) is misplaced. (Opp. at 8.) In *Harper*, the court held that certification was improper because the plaintiff was "trying to focus the class certification discussion around an issue that is not central to the litigation," namely, the assignment of a jail identification number to a detainee before allowing him to be released on bond. *Id.* at 515. Here, by contrast, the central, common issue and the basis for certification are the same: the denial of counsel to every member of the proposed class. *Harper* is inapposite.

there is a common liberty interest shared by every member of the proposed class." (Opp. at 10.) Third, to the extent Plaintiffs describe the individual circumstances of each Plaintiff, such individual issues or considerations do not defeat commonality.

As explained in the FAC and in Plaintiffs' Opposition to Defendants' Motion to Dismiss, foster children's physical liberty is at stake in TPR and CHINS proceedings. (*See* FAC ¶ 13, 15, Exhibit 1; Opposition to Motion to Dismiss (Dkt. 67, "MTD Opp.") at 12.) All aspects of a child's future are at stake in a CHINS or TPR proceeding, including where the child will live and with whom the child will live, among countless other consequences. (*See generally* FAC at ¶ 1; MTD Opp. 12.) Indeed, "no other legal proceeding that pertains to children has such a major effect on their lives. While the outcome of an abuse and neglect case has drastic implications for both the parents and the children involved, **only children's physical liberty is threatened**." (FAC at ¶ 13 (quoting American Bar Association, Section of Litigation, Report to the House of Delegates (Aug. 2011) at 1 (emphasis added).) Courts have similarly recognized the loss of physical liberty that children in these proceedings face:

> The Court also rejects County Defendants' argument that deprivation and TPR proceedings present no threat to children's physical liberty. To the contrary, the evidence shows that foster children in state custody are subject to placement in a wide array of different types of foster care placements, including institutional facilities where their physical liberty is greatly restricted.

Kenny A. ex rel. Winn v. Purdue, 356 F. Supp. 2d 1353, 1360–61 (N.D. Ga. 2005) ("The Court concludes that only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings.").

Plaintiffs have met their burden to demonstrate that their claims are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 818 (7th Cir. 2012) (quotation

marks and citation omitted). Through the FAC and the studies cited therein, Plaintiffs have demonstrated that all members of the proposed class suffer an elevated risk of loss of physical liberty without counsel in CHINS and TPR proceedings. Evidence presented at trial will be common to the class because Defendants' systemic failure to fulfill their constitutional obligations to children in CHINS and TPR proceedings gives rise to the same legal and factual issues. *See Postawko v. Missouri Dept. of Corrections*, 2:16-cv-04219, 2017 WL 3185155, at *4 (W.D. Mo. 2017) ("To create a rule that required evidence, much less admissible evidence, to be submitted at the class certification stage, would turn a class certification motion into something akin to a motion for summary judgment, which would be inconsistent with an expeditious resolution of class certification."), *aff'd*, 910 F.3d 1030 (8th Cir. 2018).

Defendants' cases discussing substantive due process rights are inapt. As explained in Plaintiffs' Opposition to Defendants' Motion to Dismiss, *Lassiter v. Dep't of Soc. Servs. Of Durham Cty., N.C.*, 452 U.S. 18 (1981) is inapplicable because it addressed a parent's right to counsel in termination proceedings. While similar in many respects, a child's interests in termination proceedings are even *more* heightened than a parent's interests. Crucially, a parent's physical liberty is not at stake in a parental termination proceeding, whereas decisions made in a TPR or CHINS hearing can, and often do, affect the physical liberty of the child. (*See* FAC ¶ 13.) Thus, the "presumption" of *Lassiter* that a litigant who is not facing a loss of physical liberty is not entitled to counsel does not apply to this case. (MTD Opp. at 11.) And *Lassiter* did not hold that "it is only the severe loss of physical liberty by incarceration in prison or a state institution which warrants the appointment of counsel in every case," as Defendants suggest. (Opp. at 11.) *Lassiter* instead held that "counsel must be provided before any indigent may be sentenced to prison," and further held that, "it is the defendant's interest in personal freedom, and

not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." *Lassiter*, 452 U.S. at 25. Plaintiffs' interest in "personal freedom" is undeniably at stake in CHINS and TPR proceedings.

Defendants' reliance on *Jamie S.* is equally unavailing. There, the plaintiffs identified the common issue as "all potential class members have suffered as a result of MPS' failure to ensure their Child Find rights under IDEA and Wisconsin law." *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 497 (7th Cir. 2012). The court explained that "while that generic question is surely a part of [all class member's] claims, it must be answered separately for each child based on individualized questions of fact and law, and the answers are unique to each child's particular situation." *Id.* at 498. Here, by contrast, there are no separate questions to be answered for each proposed class member based on unique facts. Instead, the proposed class members have salient questions of law and fact in common, including the extent of Defendants' failure to appoint counsel, or failure to ensure that counsel are appointed, any criteria used for doing so, and whether such failure violates Plaintiffs' rights to due process and equal protection, as guaranteed by the Fourteenth Amendment to the United States Constitution.

Moreover, minor differences regarding the details of any class members' circumstances, even if present, do not defeat commonality, because "[i]ndividual questions need not be absent." *Messner*, 669 F.3d at 815 ("The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole."). Commonality "is satisfied as long as the class claims have their roots in the same legal or remedial theory," which is the case here. *Taylor v. Alltran Fin., LP*, No. 18-CV-00306, 2018 WL 4403335, at *3 (S.D. Ind. Sept. 17, 2018); *see also Wal-Mart Stores, Inc.*, 564 U.S. at 350 (Key to commonality "is not the raising of

common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (emphasis in original) (internal quotation marks and citation omitted).

2. All Class and Subclass Members Risk Suffering the Same Fundamental Equal Protection Violation

By failing to appoint counsel, or ensure that counsel are appointed, Defendants jeopardize Plaintiffs' fundamental rights, including their right to physical liberty, in violation of the Equal Protection Clause. Defendants argue that "there must be an individualized determination about whether strict scrutiny or rational basis review should apply" because Plaintiffs have not "prove[n] that all class members have a fundamental right being infringed in every CHINS and TPR case." (Opp. at 14–15 (citing *Jamie S.*, 668 F.3d at 497).) Defendants are wrong.

First, Plaintiffs have properly alleged that there is a fundamental right being placed "at risk" in every case and need not "prove" this now. (*See* FAC ¶¶ 13, 15, Exhibit 1.) The ultimate question regarding the potential class members' fundamental liberty interests is one of law reserved for this Court at a later stage and is not a matter for class certification.

Second, Defendants concede (as they must) that strict scrutiny may be applied if "there is an infringement on a fundamental right." (Opp. at 14 (citing *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457–458 (1990)).) Plaintiffs have properly alleged that there *is* a fundamental right at risk in every case, which therefore warrants strict scrutiny for the entire class. As pled in the FAC, the proposed class members' physical liberty is at stake in these proceedings, and therefore, Defendants' assertion that "Plaintiffs have . . . failed to specify what fundamental right is shared by all class members to warrant strict scrutiny of their Equal Protection claim" is plainly wrong. (Opp. at 13.) Consequently, Defendants' related claim that, because Plaintiffs "do not specify what fundamental right is being infringed . . . there must be an individualized

determination about whether strict scrutiny or rational basis review should apply in each case," is also meritless. (Opp. at 15.)

Thus, the proposed class members' risk of deprivation of the fundamental right to physical liberty, in violation of the Equal Protection Clause, further supports commonality for class certification.

C. Courts Routinely Certify Classes in Similar Circumstances

Plaintiffs identified a legion of cases demonstrating that courts routinely certify classes in similar circumstances to those presented here. (*See* Mot. at 10–12.) Defendants challenge only four of those cases, but each of Defendants' challenges fails.

Defendants challenge *Marisol A. v. Giuliani,* 126 F.3d 372 (2d Cir. 1997), *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010), and *Baby Neal v. Casey*, 43 F.3d 48 (3d Cir. 1994) all on the same grounds: that in each of those cases, "the members of the class wanted the court to address the same legal question of whether the state child services agency was violating its own statutes or policies." (Opp. at 16.)[2] Defendants argue that here, "Plaintiffs do not allege a violation of state law." (*Id.*) But this is a distinction without a difference, because Plaintiffs challenge the whole "scheme" that courts employ arbitrary discretion to appoint counsel in CHINS and TPR proceedings. (Opp. at 16 (quoting *Baby Neal*, 43 F.3d at 61 ("[A]s the children challenge the scheme for the provision of child welfare services, their claims share a common legal basis.").) Defendants emphasize that "[t]he key in determining the propriety of class certification is whether there is a common question that the court can answer so that relief

[2] Defendants also observe that *Lynch v. Dukakis*, 719 F.2d 504, 506 (1st Cir. 1983) only noted that the class had been certified and did not itself evaluate the issue. (Opp. at 15.) Plaintiffs do not disagree, and Plaintiffs cited the case as yet another example of a district court certifying a class of children subject to dependency proceedings. (Mot. at 11 (citing *Lynch* as "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'").)

can be provided to all the members of the class." (Opp. at 17.) Plaintiffs agree, and Plaintiffs' cited authority does not contend otherwise. As explained above, Plaintiffs have demonstrated that relief can be provided to every proposed member of the class through an answer to the common question of whether Defendants' failure to ensure counsel are appointed violates Plaintiffs' rights to due process and equal protection.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for class certification.

Dated: July 15, 2019

By: */s/ Stephen D. Keane*

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CERTIFICATE OF SERVICE

I certify that this PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL was filed electronically on July 15, 2019, and was simultaneously served on all counsel who have appeared in this matter through the Court's ECF system.

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