IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

DWAYNE B., by his next friend, John Stempfle; CARMELA B., by her next friend, William Ladd; LISA J., by her next friend, Teresa Kibby; and JULIA, SIMON, and COURTNEY G., by their next friend, William Ladd; for themselves and others similarly situated, Plaintiffs, v. JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan; MARIANNE UDOW, in her official capacity as Director of the Michigan Department of Human Services ("DHS"); LAURA CHAMPAGNE, in her official capacity as Chief Deputy Director of DHS Operations; and JAMES HENNESSEY, in his official capacity as Deputy Director of DHS Children's Services, Defendants.	)	No. 2:06-cv-13548 Hon. Nancy G. Edmunds **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL**

Attorneys for Plaintiffs:

Marcia Robinson Lowry (Bar No. 1187053)
Susan Lambiase* (Bar No. 2099489)
Sara Michael Bartosz (Bar No. 6194058)
Elissa Hendler* (Bar No. 4269569)
Children's Rights
330 Seventh Avenue, Fourth Floor
New York, New York 10001
Phone: (212) 683-2210

Richard Landau (P42223)
Heidi Naasko (P58783)
Dykema Gossett PLLC
400 Renaissance Center
Detroit, Michigan 48243
Phone: (313) 568-6800

Attorney for Defendants:

William R. Morris (P31957)
Michigan Department of Attorney General
Education & Social Services Division
P.O. Box 30758
Lansing, MI 48909
Phone: (517) 373-7700

* Application and fee submitted; to be sworn in Jan. 31, 2007

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In their brief in opposition to class certification, Defendants ignore the overwhelming weight of legal authority presented by Plaintiffs and fail to introduce even *one* federal court decision in support of their claims. Instead, Defendants make a series of unpersuasive and diversionary arguments that flout widely accepted class certification standards. Accordingly, the Court should grant class certification, appoint Plaintiffs' counsel as class counsel, and allow Plaintiffs to proceed with merits discovery.

I. PLAINTIFFS HAVE SATISFIED EACH OF THE REQUIREMENTS FOR CLASS CERTIFICATION UNDER RULES 23(a) AND 23(b)(2)

Courts in the Sixth Circuit have repeatedly certified classes under Federal Rules of Civil Procedure 23(a) and 23(b)(2) in cases alleging systemic violations of federal constitutional and statutory law. (*See* Pls.' Br. in Supp. of Mot. for Class Cert. and Appt. of Class Counsel 6-7.) Defendants' contentions that Plaintiffs have failed to satisfy the numerosity, commonality, typicality and adequacy requirements for class certification under Rule 23(a), as well as the requirements of Rule 23(b)(2), are without merit.

A. Plaintiffs Overwhelmingly Satisfy the Numerosity Requirement

The "sheer number of potential litigants" in this case – almost 19,000 children – is "the *only* factor needed to satisfy Rule 23(a)(1)." *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004) (emphasis added). A class of this number overwhelmingly exceeds the "several hundred" that courts in the Sixth Circuit consider to be presumptively "beyond the point that joinder would be feasible." *Bacon*, 370 F.3d at 570. Defendants' claims that numerosity is not satisfied because (i) "the vast majority of this putative class cannot claim they have been subjected to harm," and (ii) "to the extent that any individual class member could state any of Plaintiffs' claims, he or she should have pursued that claim through the juvenile court

proceeding" (Defs.' Br. in Opp'n to Mot. for Class Cert. and Appt. of Class Counsel 7)[1] are *entirely* irrelevant to the question of numerosity.[2]

B. <u>There Are Questions of Law and Fact Common to the Class</u>

The putative class easily satisfies the low threshold for Rule 23(a)(2) commonality, which "simply requires *a* common question of law or fact." *Reese v. CNH Am.*, 227 F.R.D. 483, 487 (E.D. Mich. 2005) (quoting *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997)) (emphasis in original).[3] Factual and legal commonality is inherent in cases such as this one, which present a custodial class challenge to a common course of conduct by a unitary agency. *Baby Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994).[4,5]

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[1] Plaintiffs note that the page numbers at the bottom of each page of Defendants' Brief in Opposition to Motion for Class Certification and Appointment of Class Counsel are not strictly consecutive (e.g. page "3" appears three times). For ease of reference, Plaintiffs have cited to the PACER page numbers at the top of each page of the Brief.

[2] Defendants' point (i) is an issue of standing, and is properly addressed in Section II of Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss. Defendants' point (ii) relates to the propriety of the Court's exercise of its jurisdiction in this case, and is addressed in Sections III, IV of Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss.

[3] Commonality does not require that every question of law or fact be common to every member of the class and is instead generally demonstrated where – as here – "there is at least one issue whose resolution will affect all or a significant number of the putative class members." *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998) (relying on *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (finding commonality even though potential class covered by four different pension plans)). Indeed, substantial authority supports a finding of commonality when only a single issue of fact *or* law is common to all members of the class. *See, e.g.*, *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994); *Newberg on Class Actions* § 3:10 (4th ed.)(2005).

[4] *See also Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006); *Penland v. Warren County Jail*, 797 F.2d 332, 335 (6th Cir. 1986).

[5] Defendants attempt to distinguish this action from *Baby Neal* by dwelling upon a trivial point of difference – that the city of Philadelphia's child welfare agency was subject to a "license" by a state agency. (Defs.' Br. in Opp'n to Mot. for Class Cert. and Appt. of Class Counsel 8-9.) The existence or non-existence of such a license was not relevant to the *Baby Neal* court's commonality holding, and it is similarly irrelevant here. *Baby Neal* is apposite and instructive.

Defendants have not offered a *single* federal court opinion in support of their claim that commonality does not exist in this case. Instead, ignoring the vast body of case law that supports a commonality finding, Defendants offer a series of irrelevant and unpersuasive arguments.[6] First, Defendants note that "the putative class is spread across 83 Michigan counties" (Defs.' Opp'n 8), a fact that is unrelated to the question of commonality, since foster children throughout Michigan are subject to the common course of conduct of the Michigan Department of Human Services ("DHS") – a unitary executive agency.

Second, Defendants argue that commonality does not exist because Defendants have not "published a policy that prevent[s] some or all Plaintiffs from receiving needed services, or from securing appropriate placement." (Defs.' Opp'n 10.) This argument is entirely misguided. Plaintiffs have alleged that Defendants' "actions and inactions" and "failure to provide" safe and appropriate foster care placements violate various constitutional and federal statutory rights possessed by Plaintiffs. (*See* Compl. ¶ 1.) Defendants need not have *written policies* that expressly deny needed services to children in custody for commonality to exist. Plaintiffs'

[6] The only opinion upon which Defendants rely is a magistrate judge's non-binding and non-precedential report and recommendation ("R&R") in a district court case in a different circuit. (Defs.' Opp'n 10-11.) This R&R is currently being reviewed *de novo* by the district court. It disregards accepted legal standards and contravenes the vast body of federal court cases challenging systemic violations of children's rights under the U.S. Constitution and federal law in which class certification has been granted. (*See* Pls.' Br. in Supp. 7-8, fn4.) Though not referenced by Defendants, Plaintiffs note that the R&R's reliance on *Elizabeth M. v. Montanez*, 458 F.3d 779 (8th Cir. 2006) in recommending against class certification is wholly misplaced. In *Elizabeth M.*, the Eighth Circuit determined that "[t]he complaint and class action motion papers did not identify one or more policies or practices common to all three [mental health] facilities that caused [the] alleged violations." *Id.* at 787. In stark contrast, Plaintiffs have specifically identified numerous systemic failings within a unitary, statewide foster care system that have caused and continue to cause concrete harms to children in state custody.

allegations of actions and inactions that result in constitutional and statutory violations are sufficient to meet the element of commonality.

Finally, Defendants claim that the putative class does not satisfy commonality because of a supposed "disparity" between Plaintiffs' "individual interests" and what Defendants call "systemic interests." (Defs.' Opp'n 9.) This argument – presumably intended to highlight a conflict between the particular needs of each individual Plaintiff and the broader reform needs of a failing child welfare system – is confused. Plaintiffs allege that Defendants' *systemic failings* cause, and imminently threaten to cause, direct harm to individual Plaintiffs. (*See* Compl. ¶¶ 3,4) It is precisely *because* these individual harms are directly traceable to DHS systemic problems that commonality exists in this case and class certification is appropriate.[7] All members of the putative class have an interest in requiring the Defendants to adopt a common course of legal conduct with respect to the specific systemic issues raised in the litigation.

C. <u>The Claims of the Named Plaintiffs Are Typical of the Claims of the Class</u>

The typicality requirement – like the commonality requirement – is not onerous and "may be satisfied even if there are factual distinctions between the named plaintiffs and those of other class members," as long as the named Plaintiffs' claims arise from the same course of conduct as the class claims. *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 404 (M.D. Tenn. 1996); *see also Stewart v. Blackwell*, 444 F.3d 843, 880 (6th Cir. 2006). Where, as here, the named Plaintiffs

[7] For example, Plaintiffs' claims center on Defendants' systemic failure to, among other things, assure sufficient numbers and types of safe and appropriate foster care placements to prevent class members from suffering unnecessary and damaging placement disruptions (*see* Compl. ¶¶ 129-33, 143-47); recruit and train a workforce capable of overseeing the safety of class members (*id.* ¶¶ 99-117); ensure access for class members to critically needed medical and mental health services (*id.* ¶¶ 168-81); and engage in appropriate and timely permanency planning for class members (*id.* ¶¶ 148-50).

advance the same legal and remedial theories as the putative class,[8] this requirement is plainly satisfied. *See Stewart*, 444 F.3d at 880.[9]

Defendants' arguments against typicality are unconvincing. Defendants baldly assert that "the vast majority of the putative class receives appropriate services, treatment, and placement." (Defs.' Opp'n 11.) Defendants, however, cannot defeat typicality at this pre-discovery stage of litigation merely by arguing that Plaintiffs' detailed allegations of systemwide failures to protect all class members are *untrue*.[10] Further, Defendants' claim ignores the imminent risk posed to named Plaintiffs and class members alike by the various systemwide failures alleged in the Complaint. *Baby Neal*, 43 F.3d at 63 (finding that while "[a]t any one time, the plaintiffs do not suffer from precisely the same deficiency . . . they are all alleged victims of the systemic failures," and at a minimum, remain at risk of future harm).

D. <u>The Named Plaintiffs Adequately Represent the Interests of the Class</u>

The named Plaintiffs "have common interests with the unnamed members of the class," as required by Rule 23(a)(4). *Craft,* 174 F.R.D. at 405 (quoting *Senter v. GM Corp.*, 532 F.2d 511, 525 (6th Cir. 1976)). All class members share the same federal statutory and constitutional rights and a common interest in a child welfare system that meets it legal obligations to them to

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[8] *See* Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss at Section II.

[9] *See also Reese v. CNH Am.*, 227 F.R.D. 483, 487-88 (E.D. Mich. 2005) (finding typicality satisfied because, despite factual differences, claims of named representatives based on the same legal theory as class members); *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997) ("[t]hat the evidence varies from plaintiff to plaintiff" is not enough to defeat typicality).

[10] In determining whether class certification is warranted, a district court must not evaluate the plaintiffs' likelihood of success on the merits, but instead must look only to whether the requirements of Rule 23 are met given the facts alleged. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); s*ee also Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1201 (6th Cir. 1974).

keep them safe from harm. Appropriate remedial relief will ensure that Defendants meet their legal obligations to class members in all counties, irrespective of relative costs. Defendants' argument that "the State's budget is not a 'zero-sum' operation," and that relief granted by the Court might endanger "Medicaid-covered dental care for adults" (Defs.' Opp'n 12), is absolutely irrelevant to the question of adequacy of representation.

E. Plaintiffs Have Satisfied the Requirements of Rule 23(b)(2)

This case plainly satisfies the requirements of Rule 23(b)(2). *See, e.g., Stewart*, 444 F.3d at 880 (plaintiffs seeking injunctive relief aimed at the legality of a party's actions satisfy requirements of 23(b)(2) by definition).[11] Plaintiffs seek relief from Defendants' failure to provide and maintain the legally mandated services, processes and array of placements critical to the safety and well-being of the children in Michigan's foster care system. These failures generally affect all class members, and the declaratory and injunctive relief sought is intended to have class-wide scope and effect.

II. PLAINTIFFS' COUNSEL FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF THE PLAINTIFF CLASS

Plaintiffs' counsel are more than able to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(a)(4); 23(g)(1)(B). Defendants have not disputed that Plaintiffs have satisfied each of the four requirements for appointment of counsel delineated in Rule 23(g)

[11] *See also McGee v. E. Ohio Gas Co.*, 200 F.R.D. 382, 391 (S.D. Ohio 2001) (granting 23(b)(2) certification to a class alleging illegal credit consolidation practices and seeking injunctive relief, finding it "hard to imagine a proposed class more appropriate for (b)(2) certification"); *Baby Neal*, 43 F.3d at 58, 64 (the "writers of Rule 23 intended that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights violations"); *Penland*, 797 F.2d at 334-35 (finding reversible error in Eastern District of Tennessee's denial of 23(b)(2) class certification to prisoners seeking declaratory and injunctive relief in a civil rights suit).

(*see* Defs.' Opp'n 13-14), and in fact, have conceded that Children's Rights' executive director Marcia Robinson Lowry has previous experience working on "similar lawsuits across the country." (Defs.' Opp'n 14.)

III. CONCLUSION

This case satisfies all of the prerequisites to class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(2). Plaintiffs respectfully request that the Court exercise its substantial discretion and enter an order certifying this action as a class action for all purposes, with the Class defined as "all children in the foster custody of DHS in in-home or out-of-home placements." Further, Plaintiffs' counsel request an order appointing them as class counsel pursuant to Rule 23(g).

Dated: January 12, 2007

Respectfully submitted,

MARCIA ROBINSON LOWRY (Bar No. 1187053)
(mlowry@childrensrights.org)
SUSAN LAMBIASE (Bar No. 2099489)*
(slambiase@childrensrights.org)
SARA M. BARTOSZ (Bar No. 6194058)
(sbartosz@childrensrights.org)
ELISSA HENDLER (Bar No. 4269569)*
(ehendler@childrensrights.org)
CHILDREN'S RIGHTS
330 Seventh Avenue, Fourth Floor
New York, New York 10001
Phone: (212) 683-2210
Facsimile: (212) 683-4015

By:
/s/ Richard Landau
RICHARD LANDAU (P42223)
(rlandau@dykema.com)
HEIDI NAASKO (P58783)
(hnaasko@dykema.com)
DYKEMA GOSSETT PLLC
400 Renaissance Center
Detroit, Michigan 48243
Phone: (313) 568-6800
Facsimile: (313) 568-6893

* Application and fee submitted; to be sworn in on January 31, 2007

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2007, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: William R. Morris, morriswr@michigan.gov.

s/Richard J. Landau
Richard J. Landau
rlandau@dykema.com