

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 05-23037-CIV-JORDAN

FLORIDA PEDIATRIC SOCIETY/THE)
FLORIDA CHAPTER OF THE)
AMERICAN ACADEMY OF)
PEDIATRICS; FLORIDA ACADEMY OF)
PEDIATRIC DENTISTRY, INC., et al.,)
Plaintiffs)
vs.)
HOLLY BENSON, in her official capacity)
as Secretary of the Florida Agency for Health)
Care Administration, et al.,)
Defendants)
_____)

ORDER GRANTING IN PART THE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Following oral argument and a de novo review of the record, including the defendants' objections [D.E. 622, 625] and the plaintiffs' response [D.E. 623], I adopt the thorough and well-reasoned report and recommendation ("R&R") issued by Magistrate Judge McAliley. Accordingly, the plaintiffs' motion for class certification [D.E. 281] is GRANTED IN PART.

I. LEGAL STANDARD

To certify a class action, "the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)." *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009) (citations omitted). The "district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class," and though it "should not determine the merits of the plaintiffs' claim at the class certification stage, [it] can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Id.*

at 1266 (citations omitted). Additionally, the court may “accept the substantive allegations in the complaint as true.” See *Drayton v. W. Auto Supply Co.*, 2002 WL 32508918, at *6 (11th Cir. 2002).¹

II. FACTS & PROCEDURAL HISTORY

The background of this case is described in Judge McAliley’s R&R and I will not repeat it here. Judge McAliley’s finding that class certification is appropriate is consistent with numerous federal cases considering a state’s alleged non-compliance with the Medicaid Act. See, e.g., *Memisovski ex. rel. Memisovski v. Maram*, 2004 WL 1878332, at *1 (N.D. Ill. 2004); *Hawkins ex. rel. Hawkins v. Comm’r of N.H. Dep’t of Health and Human Servs.*, 2004 WL 166722, at *4 (D.N.H. 2004); *McCree v. Odum*, No. 4:00-173 (H)(4) (E.D.N.C. 2002); *Carr v. Wilson-Coker*, 203 F.R.D. 66, 72-75 (D.Conn. 2001); *Salazar v. District of Columbia*, 954 F. Supp. 278, 287-88 (D.C. 1996); *Sanders v. Lewis*, 1995 WL 228308, at *1 (S.D. W. Va. 1995); *Thompson v. Raiford*, 1993 WL 497232, at *1 (N.D. Tex. 1993).² Despite this precedent, the defendants hurl a litany of objections at the R&R. Though the objections are impressive in number, they lack merit. I address the defendants’ arguments in the following order: (a) whether the class representatives have standing; (b) whether Rule 23(a) is satisfied; and (c) whether Rule 23(b) is satisfied.

¹The defendants argue that the R&R applies an incorrect legal standard to determine whether the proposed class satisfies Rule 23’s requirements and that I should conclusively resolve factual disputes where there is conflicting evidence. As is evident from the legal standard applicable to class actions, conclusive resolution of factual disputes is not required. I may accept the plaintiffs’ allegations as true and may “consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.” See *Vega*, 564 F.3d at 1265-66.

Because it does not affect the Rule 23 analysis, addressed below, the defendants’ contentions that the plaintiffs have not proffered evidence of care received by Florida children with private insurance and that the plaintiffs rely on inaccurate statistical evidence will be resolved at summary judgment or trial. The defendants’ argument that there is no evidence that AHCA has failed to pay for requested medical services, and that therefore there is no claim under 42 U.S.C. §§ 1396a(a)(8) and (a)(10), is rejected, as explained in the order denying the defendants’ motion for summary judgment.

² These decisions are inconsistent with *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), in which the Tenth Circuit denied class certification to the plaintiffs -- children suing New Mexico for failure to provide services required by Medicaid -- because the proposed class lacked commonality. Given the substantial legal support for finding class certification, the record in this case, and my own analysis of the commonality is sued discussed below, I do not find *Valdez* persuasive.

III. DISCUSSION

A. STANDING OF CLASS REPRESENTATIVES

Before certifying a class, a court must ensure that “at least one named class representative has Article III standing to raise each class subclaim.” *See Prado Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (citations omitted). For a plaintiff to have Article III standing, there must be (1) an injury in fact, i.e., an invasion of the plaintiff’s legally protected interest that is concrete and particularized, actual, or imminent; (2) a causal connection between the plaintiff’s injury and the defendant’s conduct; and (3) the likelihood that a favorable decision will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Fla. Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008). At the class certification stage, the plaintiff need not conclusively prove that he has suffered a redressable injury in fact that is causally related to the defendant’s conduct to show standing. Rather, the plaintiff need only “allege facts demonstrating that he is a proper party with standing to invoke judicial resolution of a dispute.” *See Hernandez v. Medows*, 209 F.R.D. 665, 668 (S.D. Fla. 2002) (emphasis added) (citations omitted). To determine whether a plaintiff has adequately alleged standing, a court undertakes a fact-specific inquiry and examines “factual proffers” such as “affidavits and other evidentiary documents.” *See Prado-Steiman*, 221 F.3d at 1280.³

Because I previously determined that individual plaintiffs had standing to bring Counts 1 and 4 against DCF and Counts 1 and 2 against DOH, *see* summary judgment order, [D.E. 541, p. 4-9],

³ The defendants contend that Magistrate Judge McAliley failed to adequately resolve claimed factual contradictions in the affidavits supporting standing. The defendants, however, misunderstand the plaintiffs’ burden in showing standing. At the class certification stage, the plaintiffs need only make an allegation, supported by “factual proffers” such as affidavits, that a plaintiff has standing. *See Prado-Steiman*, 221 F.3d at 1280. I need not determine that the plaintiffs’ factual allegations are conclusively correct at the class certification stage because lack of standing is a jurisdictional defect that is “open to review at all stages of the litigation.” *See Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1427 (11th Cir. 1998) (citation omitted). I find that the evidence that Magistrate Judge McAliley relied on sufficient to support each element of standing at this stage. *See generally Borchese v. Town of Ponce Inlet*, 405 F.3d 964, 975-76 (11th Cir. 2005) (each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation).

and this decision remains the law of the case,⁴ the only issues remaining are whether there is an individual plaintiff who has standing to bring Counts 1 (reasonable promptness), 2 (equal access), and 4 (outreach and information) against AHCA.

Magistrate Judge McAliley found that S.M. had standing to pursue Counts 1 and 4 against AHCA because he faces imminent injuries: he was denied a timely medical screening in the past, his mother did not receive required information about S.M.'s rights from defendants, and these injuries are likely to recur in the future.⁵ Similarly, she found that J.S. had standing to pursue Count 2 against AHCA because she also faces an imminent injury: it is likely that she would be denied access to necessary, specialized medical care based on repeated, past denials. Both S.M. and J.S. can show causation and redressability because the imminent denial of prompt, necessary care and lack of information is allegedly caused by AHCA's failure to fulfill its statutory responsibilities, including ensuring adequate funding and providing information. The injuries would be redressed by an injunction compelling compliance with the law. Indeed, several courts have held that there is a "direct connection between Medicaid recipients' access to medical care and services and low reimbursement rates" sufficient to prove causation and redressability. *See Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 701 n.5 (5th Cir. 2007) (citing *Okla. Chapter of the Am. Acad. of Pediatrics v. Fogarty*, 366 F. Supp. 2d 1050, 1106-07 (N.D. Okla. 2005)); *Memisovski ex rel. Memisovski v. Maram*, 2004 WL 1878332, at *42 (N.D. Ill. 2004); *Clayworth v. Bonta*, 295 F. Supp. 2d 1110, 1116 (E.D. Cal. 2003), *rev'd on other grounds*, 140 Fed. Appx. 677 (9th Cir. 2005); *Clark v. Kizer*, 758 F. Supp. 572, 577 (E.D. Cal. 1990), *aff'd in relevant part*, *Clark v. Coye*, 967 F.2d 585 (9th Cir. 1992); *Thomas v. Johnston*, 557 F. Supp. 879, 903-04 (W.D. Tex. 1983)). As a result, I

⁴ "A court has the power to revisit prior decisions of its own . . . although as a rule courts should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous or would work a manifest injustice." *Christianson v. Colt Indus. Op. Corp.*, 486 U.S. 800, 817 (1988). The defendants have not identified any extraordinary circumstances or an intervening change in controlling law to compel me to reevaluate my March, 2009 decision that individuals plaintiffs have standing to bring Counts 1, 2, and 4 against DCF and DOH. Should the evidence at trial demonstrate otherwise, I will of course revisit my prior rulings.

⁵The defendants also argue that 42 U.S.C. § 1396a(a)(43) requires states to provide Medicaid recipients outreach regarding only EPSDT services and immunizations. The plaintiffs' allegation that S.M.'s mother did not receive information about S.M.'s rights under Medicaid reasonably encompasses this narrower claim because the EPSDT program is a component of Medicaid. It is therefore unnecessary to determine the scope of the statutory provision in the standing analysis.

conclude that S.M. has standing to pursue Counts 1 and 4 against AHCA, and that J.S. has standing to pursue Count 2 against AHCA.

The defendants also argue, contrary to clear precedent of the Eleventh Circuit, that the plaintiffs have not demonstrated cognizable injuries in fact; according to the defendants, they have not shown by a preponderance of the evidence that they will suffer immediate harm because they have successfully received care in some instances. An injury in fact is imminent and “likely to occur immediately” if there is a “realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement,” and that the “anticipated injury [will] occur with some fixed period of time in the future.” *See Browning*, 522 F.3d at 1161. Thus, the plaintiffs’ allegations of future harm based on inconsistent care in the past are sufficiently imminent to show standing because there is a “realistic danger of sustaining a direct injury” in the near future. *See id.*

Furthermore, the fact that some of the plaintiffs have in some instances received necessary care does not make their claims of imminent injury moot:

It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways. In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant’s voluntary conduct is *stringent*: A case *might* become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior *could not reasonably be expected to recur*.

see Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 118384 (11th Cir. 2007) (citing *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs, Inc.*, 528 U.S. 167, 189 (2000)). Because the defendants voluntarily ceased the allegedly wrongful behavior that caused the plaintiffs’ past harm, and this harm could be reasonably expected to recur in the future, the plaintiffs’ claims are not moot. *See id.*

B. RULE 23(a)’S REQUIREMENTS

Under Rule 23(a), the plaintiffs must demonstrate (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of both the class plaintiffs and class counsel. *See Vega*, 564 F.3d at 1265.⁶ I find that the proposed class satisfies these elements.

⁶The defendants’ contentions that the R&R fails to assess conflicting evidence in its Rule 23 analysis (e.g., whether S.M. or T.G. suffered harm that satisfies the immediacy requirement) miss the mark because immediacy is evaluated under the standing principles and is distinct from the Rule 23 prerequisites. Because these class representatives have standing under the relevant legal standard,

1. NUMEROSITY

The numerosity requirement is met when the proposed class is “so numerous that joinder is impracticable.” Fed. R. Civ. P. 23(a)(1). “Parties seeking certification do not need to know the ‘precise number of class members,’ but they ‘must make reasonable estimates with support as to the size of the proposed class.’” *See Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 685, 693 (S.D. Fla. 2008) (citations omitted). The necessity of making a reasonable estimate does not preclude certification of a class where all class members are not known. In fact, that a proposed class includes unknown individuals supports finding numerosity because “joinder of unknown individuals is certainly impracticable.” *See Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1977) (finding numerosity existed for a proposed class that included unknown, future black employees). In this case, the plaintiffs contend that there are more than 1.5 million class members. They cite the CMS-416 Report from 2006-2007, which specifies that the total eligible individuals for the child health care check-up participation report are 1,593,814. *See* Plaintiffs’ Motion for Class Certification. [D.E. 281, Ex. 10]. I conclude that this report provides a reasonable estimate of the members of the proposed class and that the inclusion of unknown individuals, including children who “now, or in the future will” reside in Florida and who “are or will be eligible” for Medicaid services, supports rather than undermines a finding of numerosity.

2. COMMONALITY

Commonality is satisfied when there is one question of law or fact that is common to the class as a whole. *See Vega*, 564 F.3d at 1268. “Class actions seeking injunctive or declaratory relief . . . by their very nature present common questions of law or fact.” *Haitian Refugee Ctr., Inc. v. Nelson*, 694 F.Supp. 864, 877 (S.D. Fla. 1988). Additionally, all questions of law need not be common to all plaintiffs. *See id.* The plaintiffs, as Magistrate Judge McAlilely identified, have raised several common legal questions including whether the defendants are meeting their obligations under the Medicaid Act to provide reasonably prompt services, equal access to those services, and outreach and information, and whether Florida’s Medicaid reimbursement rates are adequate to ensure that class members have access to providers. The plaintiffs, moreover, are seeking declaratory and injunctive relief, and not damages. Because the plaintiffs share common legal questions and are seeking an injunction requiring Florida’s compliance with the Medicaid Act, the commonality requirement is satisfied.

as discussed above, a separate Rule 23 analysis of immediacy is not warranted.

3. TYPICALITY

The defendants argue that the plaintiffs' class representatives cannot represent individuals who are eligible but not enrolled for Medicaid, because none of the class representatives are eligible but not enrolled for Medicaid. The typicality requirement, however, can "be satisfied even if some factual differences exist between the claims of the named representatives and the claims of the class at large." *See Prado Steiman*, 221 F.3d at 1279 n.14 (citations omitted). A "strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *See id.* As the plaintiffs explain, children enrolled in Medicaid and children unenrolled but eligible for Medicaid share the legal theory that Florida is failing to comply with federal law in the administration of the Medicaid program. In particular, both groups pose that Florida has failed to satisfy its outreach obligation under § 1396a(a)(43).⁷ Therefore, typicality exists.

Additionally, I agree with Magistrate Judge McAliley's analysis that the organizational plaintiffs cannot satisfy the typicality requirement because they do not share the same injury as the class members. The organizational plaintiffs' injury of depletion of resources due to energy spent advocating for children improperly denied care under the Medicaid Act is distinct from the children's injury of improper denial of care. *See Vega*, 563 F.3d at 1275 ("A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3).").

4. ADEQUACY

The defendants do not clearly challenge the R&R's adequacy analysis. I adopt Magistrate Judge McAliley's finding that the plaintiffs' counsel are well qualified and the named plaintiffs do

⁷The defendants contend that 42 U.S.C. § 1396a(a)(43) does not require them to conduct outreach to children who are not enrolled but are eligible for Medicaid. The plain language of the regulations implementing this section state that "[t]he agency must [p]rovide for a combination of written and oral methods designed to inform effectively all EPSDT eligible individuals (or their families) about the EPSDT program." *See* 42 C.F.R. § 441.56(a)(1); *Friends of Everglades v. S. Fla. Water Mgt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009) (stating that an agency's promulgation of regulations interpreting ambiguous statutory language is entitled to deference as long as the interpretation is reasonable). The one case the defendants cite to support their claim that "federal courts . . . have found that this section provides only to Medicaid recipients" and not all eligible individuals, [D.E. 622], conclusively supports the plaintiffs. It holds that "Medicaid's implementing regulations [in specific, § 441.56(a)] . . . obligate participating States to "effectively" inform all eligible individuals." *See Westside Mothers v. Olszewski*, 454 F.3d 532, 543-44 (6th Cir. 2006). The plain language of the regulations, combined with the case law supporting this interpretation, compel the conclusion that § 1396a(a)(43) and 42 C.F.R. § 441.56(a)(1) mandate that the state conduct outreach to all eligible individuals.

not have interests antagonistic to those of the rest of the class. *See Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985) (finding that to determine adequacy, the court should consider whether the plaintiffs' counsel are able to conduct the litigation competently and whether the plaintiffs have clearly antagonistic interests to each other). The fact that some of the plaintiffs, including K.K and L.C., may have obtained private insurance in addition to the Medicaid coverage does not make their interests antagonistic to the those of the rest of the class.

C. RULE 23(b)(2)'S REQUIREMENTS

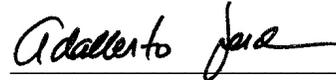
In addition to meeting the requirements of Rule 23(a), the plaintiffs must also satisfy one of the requirements of Rule 23(b). In this case, the plaintiffs ask that the class be certified under Rule 23(b)(2), which applies where "the party opposing the class has acted or refused to act on the grounds that apply generally to the class, so that the final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." As the plaintiffs assert, this provision was "designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." *See Baby Neal ex. rel. Kanter v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994) (citation omitted). For example, in *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 316 (S.D. Fla. 2001), the plaintiffs sought an injunction to force the defendants to comply with Florida laws regulating the sale of insurance. The district court found that "[r]equesting a declaration that defendants presently are violating the law and an injunction forcing defendants to comply with the law is precisely the type of class appropriate for class certification under Rule 23(b)(2)." *See id.* In this case, the plaintiffs are seeking injunctive relief to compel the AHCA and DoH to comply with the Medicaid Act. This is a prototypical case for 23(b)(2) class certification.

IV. CONCLUSION

For the above stated reasons, the plaintiffs' motion for class certification is GRANTED IN PART. The following class is certified: all children under the age of 21 who now, or in the future will, reside in Florida and who are, or will be, eligible under Title XIX of the Social Security Act for Early

Periodic Screening, Diagnosis and Treatment Services. Boies, Schiller & Flexner, LLP and Louis Bullock of Bullock & Blakemore are appointed as class counsel.

DONE and ORDERED in chambers in Miami, Florida, this 30th day of September, 2009.



Adalberto Jordan
United States District Judge

Copy to: All counsel of record