



A Memorandum in Support of this Motion is attached hereto.

Respectfully submitted,

s/Kristin E. Hildebrant

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<sup>2</sup> Robert A. Cole and W. David Koeninger are members in good standing of the bar of the United States District Court for the Northern District of Ohio, and will seek permanent admission to the bar of this Court.

**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

**I. INTRODUCTION**

Rule 24(a)(2) of the Fed. R. Civ. P. permits an applicant to intervene as of right in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Rule 24(b)(2) allows permissive intervention in an action when an applicant's claim or defense and the main action have a question of law or fact in common.

Applicants Z.H., J.H., and D.G. are proposed Plaintiff Class members who seek to intervene to enhance the ability of Plaintiffs to present a representative case to the Court on behalf of the Plaintiff Class and to strengthen the adequacy of class representation. Applicants, Z.H., J.H., and D.G., all of whom have been denied services through managed care plans, seek to intervene to ensure that Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services and treatments required by Plaintiffs are not denied or delayed based upon the lack of an effective, reasonably accessible method for requesting medically necessary services under EPSDT. Applicants Z.H., J.H., and D.G. also seek to intervene to ask the Court to declare that Defendant has failed to provide or arrange for medically necessary treatment under EPSDT, failed to maintain an effective method for requesting EPSDT services, failed to arrange for medically necessary EPSDT services in a reasonable time, and failed to adequately inform Plaintiffs and providers of the right to and availability of EPSDT services.

## II. BACKGROUND

A Pretrial and Scheduling Order was entered by this Court on May 12<sup>th</sup>, 2009, which states, among other things, the following:

A continued preliminary pretrial conference was held on May 12, 2009. All parties were represented.

Plaintiffs intend to seek to join additional plaintiffs, which will impact the issues addressed in the motion to certify and to appoint lead counsel, Doc. No. 7. Under these circumstances, and with the agreement of plaintiffs, the current motion, Doc. No. 7, is WITHDRAWN without prejudice to the filing of a new motion no later than July 15, 2009. Defendant may have thirty (30) days thereafter to respond.

Motions addressing the parties or pleadings may be filed, if at all, by July 15, 2009.

## III. STATEMENT OF LAW AND ARGUMENT

As set forth below, the Proposed Intervenors demonstrate that this Motion to Intervene should be granted in this action.

### A. INTERVENTION AS OF RIGHT SHOULD BE PERMITTED.

Federal Civil Rule 24(a) governs intervention of right: “[o]n timely motion, the court must permit anyone to intervene who...claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” If a party satisfies the requirements set forth in Rule 24(a), the party has an *unconditional* right to intervene in the action. *See* Fed. R. Civ. P. 24(a).

The 6th Circuit Court of Appeals has interpreted Rule 24 broadly and liberally to permit intervention. *See Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (“Rule 24 is broadly construed in favor of potential intervenors”); *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007). This "modern approach" has also been adopted by Ohio courts, including the Ohio Supreme Court. *See State ex rel. LTV Steel Co. v. Gwin*, 594 N.E.2d

616, 618-19 (Ohio 1992); *Dep't of Admin. Serv., Office of Collective Bargaining v. State Employment Relations Bd.*, 562 N.E.2d 125, 128 (Ohio 1990); *Peterman v. Vill. of Pataskala*, 702 N.E.2d 965, 966 (Ohio Ct. App. 1997); *State ex rel. Northwood v. Wood Cty. Court of Common Pleas*, 672 N.E.2d 695, 696-67 (Ohio Ct. App. 1996), *rev'd on other grounds*, 711 N.E.2d 1003 (Ohio 1999); *Blackburn v. Hamoudi*, 505 N.E.2d 1010, 1013 (Ohio Ct. App. 1986).

Pursuant to Rule 24(a)(2), a party seeking to intervene must satisfy the following elements:

- (1) the intervenor must claim an interest relating to the property or transaction that is the subject of the action;
- (2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect its interest;
- (3) the intervenor must demonstrate that its interest is not adequately represented by the existing parties to the action; and
- (4) the motion to intervene must be timely.

*Granholtz*, 501 F.3d at 779 (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999), *rev'd on other grounds*, *Gratz v. Bollinger*, 539 U.S. 244 (2003)). In this case, the Proposed Intervenor Plaintiffs meets all four criteria.

**1. The Proposed Intervenor Plaintiffs Have a Substantial Legal Interest in the Subject Matter of the Case.**

The United States Supreme Court has noted that an intervenor's interest must be significantly protectable. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). The proposed intervenors have a direct and substantial interest in the litigation since they are

Medicaid eligible children who have been denied access to EPSDT services.

The 6th Circuit Court of Appeals has consistently held that the “interest” sufficient to support intervention will be “construed liberally.” *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (citing *Hatton v. County Bd. Of Educ. Of Maury County, Tenn.*, 422 F.2d 457, 461 (6th Cir. 1970)); *See also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (stating that “[t]his circuit has opted for a rather expansive notion of the interest sufficient to invoke intervention of right”). Indeed, the court has stated that an interest claimed by a proposed intervenor may be sufficient even when “of a general and indefinite character”. *Hatton*, 422 F.2d at 461; *See also Purnell*, 925 F.2d at 947-48; *but see Granholm*, 501 F.3d at 782-84 (holding that a “general ideological interest” does not suffice). Establishing a substantial legal interest in the subject matter of the case will be fact-specific. *Granholm*, 501 F.3d at 780 (citing *Miller*, 103 F.3d at 1245).

As the Proposed Intervenors’ Complaint alleges, both Z.H. and D.G. are eligible and currently enrolled in Ohio’s Medicaid system. Further, they are children, who requested services – orthodontia and growth hormone injections, respectively – based on determinations by treating medical providers that the services were medically necessary. They were forced to have their requests for services submitted to the managed care plans for review, which employed a combination of a prior authorization process and a medical necessity determination. Both of these procedures failed to comply with EPSDT requirements. The procedures employed by both managed care companies were later determined to be in error. Both Z.H.’s and D.G.’s requests for services ultimately were approved after appeals to the ODJFS Bureau of State Hearings. Z.H. was found to be entitled to 18 months of orthodontia treatment. D.G. was found to be entitled to 12 months of growth hormone injection treatment. Both also allege that they continue

to be assigned to the same managed care companies that denied their requests for services and that they believe that their respective treatments will not be completed in the time allotted to them by their approval for services. Further, as alleged, both managed care providers continue to have the same prior authorization and medical necessity procedures in place which fail to incorporate EPSDT requirements.

As the Proposed Intervenor's Complaint alleges, J.H. is eligible and currently enrolled in Ohio's Medicaid system. Further, J.H. is a child with disabilities, who suffers from hydrocephalus and requires frequent and ongoing medical care as a result of her medical condition. While enrolled in Ohio's Medicaid system and while assigned to managed care, J.H. was denied therapy ordered and found to be medically necessary by her physician. The managed care company, to which the state assigned J.H., placed a limit on the number of therapy visits that they would allow in a six month period. Once J.H. reached that arbitrary number, she was not authorized, nor would her managed care company pay for additional therapy appointments until she waited a prescribed interval of time. J.H.'s physicians informed her family that this interruption in her medically necessary therapy adversely impacted J.H.'s medical condition. J.H. has been provided with a waiver to opt out of managed care and currently is enrolled in fee-for-service Medicaid. However, her previous managed care company still employs the same rules and authorization procedures for the type of therapy J.H. needs, and if J.H. is forced to return to managed care, her therapy will be interrupted, as before, to the detriment of her medical condition.

**2. The Proposed Intervenor's Ability to Protect Their Interest May Be Impaired in the Absence of Intervention.**

The applicants to intervene have interests which will be impaired if intervention is not granted. If intervention is denied, applicants would be left with the remedy of pursuing

individual actions to seek EPSDT services. This is a remedy without relief. Because Defendant has failed to maintain a system that allows Medicaid eligible children to access medically necessary EPSDT services, such action would be futile. As noted by the Sixth Circuit in *Grubbs v. Norris*, 870 F.2d 343, 347 (1989), “[c]oncerns of judicial economy and swift resolution of disputes counsel us to urge that this related matter be addressed in this primary lawsuit.” In addition, “the possibility of adverse stare decisis effects provides intervenors with sufficient interest to join an action.” *Jansen v. Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990).

Proposed Intervenors have no obligation to show that their ability to protect their interest *will be* impaired, or even that impairment of their ability to protect their interest is likely; rather, the language of Fed. R. Civ. P. 24 calls for a showing only that the absence of intervention “*may*...impair or impede the movant’s ability to protect its interest.” Fed. R. Civ. P 24(a)(2) (emphasis added); *Purnell*, 925 F.2d at 948. The 6th Circuit Court of Appeals has previously stated: “[t]his burden is minimal”. *Miller*, 103 F.3d at 1247.

Proposed Intervenors have alleged facts in their Complaint that support a finding that their ability to protect their interest will be impaired in the absence of intervention. Both Z.H. and D.G. already have been forced to appeal their prior authorization requests to the ODJFS Bureau of State Hearings in order to get the services that were deemed medically necessary by their treating medical providers. Because the services were approved only for limited periods of time –18 months for Z.H. and 12 months for D.G. – and because they believe that their need for treatment will be substantially longer than the periods authorized, it is very likely that they will again face this lengthy, time consuming, and mismanaged administrative impediment forced upon them and their families by their managed care companies.

Proposed Intervenor J.H. has alleged facts that support a finding that while enrolled in managed care she was denied medically necessary therapy and that this detrimentally affected her medical condition.

**3. The Parties Already Before the Court Cannot Adequately Represent the Proposed Intervenors' Interest.**

Under this requirement, the intervenor need only prove that existing representation may be inadequate. *Linton v. Tennessee*, 973 F.2d 1311, 1319 (6th Cir. 1992).

The applicants to intervene are not presently members of a certified class, and have no rights in the pending litigation until such time as the class is certified. Intervenors' requests for EPSDT services have been denied or ignored by their managed care plans and by Defendant. Consequently, there is no reason to believe that their interests are protected at this time.

When the proposed intervenor and a party to the suit have "the same ultimate objective", a presumption that the intervenor's interest will be protected arises. *Purnell*, 925 F.2d at 950 (quoting *Bradley*, 828 F.2d at 1192). However, the burden on the proposed intervenor to show inadequate representation has, like the "impairment" factor analyzed *supra*, been characterized as "minimal because it is sufficient that the movant prove that representation *may* be inadequate." *Miller*, 103 F.3d at 1247 (quoting *Linton v. Commissioner of Health & Env't*, 973 F.2d 1311, 1319 (6<sup>th</sup> Cir. 1992)) (emphasis added).

The 6th Circuit Court of Appeals in *Triax Co.* used the following factors in assessing whether the parties already before the court adequately represented the proposed intervenors' interest: 1) if there is collusion between the representative and an opposing party, 2) if the representative fails in the fulfillment of his duty, and 3) if the representative has an interest adverse to the proposed intervenor. *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227-28 (6<sup>th</sup> Cir. 1984). In other cases, the 6th Circuit Court of Appeals has set the bar lower: "it may be enough

to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Miller*, 103 F. 3d at 1247 (citing *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1498-99 (9<sup>th</sup> Cir. 1995)). The Proposed Intervenor Plaintiffs have all been denied by their Medicaid managed care plans services to which they are entitled under EPSDT. Since this case was filed in 2005, the vast majority of Medicaid eligible children in Ohio have been placed in managed care plans by the Defendant. Therefore, the Proposed Intervenor Plaintiffs will enhance class representation.

**4. The Motion to Intervene is Timely.**

In determining whether a proposed intervention is timely, a court will consider the following:

- (1) the point to which the suit has progressed;
- (2) the purpose for which intervention is sought;
- (3) the length of time before the application to intervene during which the proposed intervenor knew or reasonably should have known of his interest in the case;
- (4) prejudice to the original parties due to the proposed intervenor's failure to promptly apply for intervention;
- (5) the existence of unusual circumstances militating for or against intervention.

*Grubbs v. Norris*, 870 F.2d 343,345 (6<sup>th</sup> Cir. 1989); *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 582 (6<sup>th</sup> Cir. 1982), *cert. denied*, 459 U.S. 969 (1982); *Triax Co.*, 724 F.2d at 1228; *State ex rel. First New Shiloh Baptist Church v. Meagher*, 696 N.E.2d 1058, 1060 (Ohio 1998).

Whether a Fed. R. Civ. P. 24 motion to intervene is timely "should be evaluated in the context of all relevant circumstances", *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472-73 (6<sup>th</sup>

Cir. 2000) (quoting *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)), and “depends on the facts and circumstances of the particular case”, *Norton v. Sanders*, 574 N.E.2d 552, 554 (Ohio Ct. App. 1989); *NAACP v. New York*, 413 U.S. 345, 365-66 (1973) (“Timeliness is to be determined from all the circumstances”); *Bradley*, 828 F.2d at 1191.

Each of the factors enumerated by the 6th Circuit Court of Appeals and the Ohio Supreme Court weigh in favor of allowing intervention in this case. Intervention is timely as this case has not yet been certified as a class and active pre trial discovery is really just beginning after the parties engaged in almost 14 months of court ordered mediation. Consequently, there is no prejudice to the original parties. Additionally, the Court anticipated the possibility of intervening parties and addressed the issue in its pretrial and scheduling order of May 12, 2009. Proposed Intervenor have complied with the requirements set forth in the court’s order.

**B. IF THE MOTION TO INTERVENE AS OF RIGHT IS DENIED,  
THE COURT SHOULD GRANT PERMISSIVE INTERVENTION.**

In addition to allowing intervention as a matter of right, Federal Rule of Civil Procedure 24 also allows permissive intervention. *See* Fed. R. Civ. P. 24(b). In pertinent part, Rule 24(b)(2) provides that “[u]pon timely application, the court may permit anyone to intervene who...has a claim or defense that shares with the main action a common question of law or fact.” In addition, Rule 24(b)(3) requires the Court to consider “whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.”

The language for permissive intervention contains three requirements: the application must be timely, the intervenor’s claim (or defense) must contain a question of law or fact which is in common with the original action, and the intervention must not unduly delay or prejudice the adjudication of rights of the original parties. *Bradley*, 828 F.2d at 1193.

The discussion of the standards for intervention as of right *supra* (Section III(A)(4)) have addressed the timeliness of the application to intervene and the lack of any delay or prejudice to the existing parties. Clearly the applicants' claims and the main action have a question of law in common regarding the Defendant's failure to maintain an effective, reasonably accessible method for requesting medically necessary services under EPSDT . If the Court denies intervention as of right, the Court should allow permissive intervention.

### III. CONCLUSION

Based on the foregoing, the Proposed Intervenors have satisfied all of the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure and, as a result, may intervene in this action as a matter of right. In addition (or in the alternative), the Proposed Intervenors also meet the criteria for permissive intervention under Rule 24(b)(2) of the Federal Rules of Civil Procedure. As such, the Proposed Intervenors respectfully request that this Court grant this Motion to Intervene.

Respectfully submitted,

s/Kristin E. Hildebrant

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2009, a copy of the foregoing Proposed Intervening Plaintiffs' Z.H. , J.H. And D.G. Motion To Intervene was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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