IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ANISHA H. ITUAH By her Guardian, Angela McKay, on behalf of herself and those similarly situated, Plaintiff, V. AUSTIN STATE HOSPITAL, ALAN R. ISAACSON, CATHERINE NOTTEBART, and JOHN DOES #1-5, EMPLOYEES OF AUSTIN STATE HOSPITAL, Defendants.	§ § § § § § § § § § §	A-18-CV-11-RP

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE:

Before the court is Plaintiff's Motion for Class Certification (Dkt. #84 ("Mtn."), #103)[1] and all related briefing.[2] Having considered the motion, pleadings, applicable law, and the parties' oral arguments, the undersigned recommends that the motion be **DENIED**.

I. BACKGROUND[3]

The allegations made in this case are especially egregious and horrific—that nearly every week one of society's most vulnerable members is sexually assaulted while in the care of Austin State Hospital—but outrageous allegations alone cannot support class certification. As described below, after reviewing the evidence presented, the undersigned recommends that class certification be denied.

[1] Dkt. #84 was filed under seal. Dkt. #103 is a redacted and publicly available version of Dkt. #84.

[2] The motion has been referred to the undersigned for a Report and Recommendation by United States District Judge, Robert Pitman, pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

[3] The following is a recitation of pleaded facts and is not to be construed as factual findings by the undersigned.

Austin State Hospital ("ASH") is a state facility operated by the Texas Health and Human Services Commission. Dkt. #57 (Second Amended Class Action Complaint or "SACAC") at 1, ¶ 2; TEX. HEALTH & SAFETY CODE § 532.001(b)(2) (defining ASH as part of the Department of State Health Services). ASH's treatment focuses on stabilizing acute psychiatric illnesses and returning the patient to the community where outpatient support services may be provided. Dkt. #89 (Resp.") at 11.[4] On average, ASH houses approximately 250 patients daily. SACAC at ¶ 14. Since 2007, more than 700 sexual assault allegations have been made at ASH. *Id*. at ¶ 16. Since 2007, fewer than 20 of the 700 allegations have been "confirmed." *Id.* at ¶ 18. Between 2014-2016, there were more than 200 allegations of sexual assault at ASH, none of which were "confirmed." *Id*. at ¶¶ 19-20.

Anisha Ituah,[5] an adult woman with the approximate mental ability of a 12-year-old, was an involuntary patient at ASH pursuant to a court order in early January 2016. *Id.* at ¶¶ 2, 42, 64-65. While there, she was raped by a male patient. *Id*. at ¶ 47. Ituah immediately called her sister and reported the rape. *Id.* at ¶ 49. Her sister called 911, reported the rape to ASH, and requested a rape kit be conducted. *Id*. at ¶¶ 49-51. However, no rape kit was conducted, the staff instructed Ituah to "go take a shower," and her bed sheets were not preserved as possible evidence. *Id.* at pg. 3, ¶¶ 53-54. No one at ASH contacted the Austin Police Department about the assault. *Id*. at ¶ 55. The Office of Inspector General ("OIG") investigated the assault in March 2016, but no one from the OIG spoke to Ituah about the assault. *Id*. at ¶¶ 56-58. The investigation did not discover evidence to support the allegation of assault, and the investigation was closed. *Id.* at ¶ 57.

[4] Page references are to the CM/ECF header pagination.

[5] This suit is brought on Ituah's behalf by her mother and guardian, Angela McKay. For clarity, the court simply refers to Ituah when referring to Ituah herself or the allegations made on her behalf.

Ituah alleges when patients report their assaults, they are not taken seriously, and ASH regularly fails to preserve any evidence. *Id*. at ¶¶ 32-33. Ituah asserts the "investigations of sexual assault at ASH discriminate against Class Members on the basis of their mental disability, dismissing and discrediting their allegations because of their mental illness." *Id*. at ¶ 36. Ituah alleges a "pattern of covering up, ignoring, or dismissing allegations of sexual assault has contributed to ASH's failure to implement reasonable measures to prevent sexual assault against patients at ASH" and a "variety of reasonable, affordable measures could be taken that would reduce the incidence of sexual assault at ASH and improve the investigation of sexual assault at ASH." *Id*. at ¶¶ 37, 39. In short, Ituah alleges ASH fails to implement safety measures that would prevent sexual assaults and fails to adequately investigate assaults when they do occur.

Ituah asserts personal and class claims that ASH has violated Section 504 of the Rehabilitation Act and the Americans with Disabilities Act because ASH

> intentionally discriminated against Ms. Ituah and the Class on the basis of their disability by failing to make reasonable accommodations to protect them from sexual assault, by refusing to adequately investigate their reports of sexual assault, by failing to adequately train or supervise their agents and authorities in the proper prevention and investigation of sexual assaults at ASH, and by systemically discrediting reports of rapes at the ASH.

Id. at ¶¶ 84, 94, 80-99. On similar grounds, Ituah also brings personal and class claims under § 1983 for violating class members' rights to equal protection, *id*. at ¶¶ 100-119, for violations of the Texas Constitution Article I, section 30, *id*. at ¶¶ 123-26, and for negligence and premises liability under Texas common law, *id*. at ¶ 127-28.[6] Ituah seeks injunctive relief and punitive damages. *Id*. at ¶¶ 129-32, 134.

[6] The court previously dismissed Ituah's state law and § 1985(3) claims against ASH's current and former Superintendents. Dkt. #100 at 7. The state law claims remain pending against ASH and the § 1983 claim remains pending against ASH's current and former Superintendents. The court will refer to all Defendants collectively as "ASH."

Ituah now seeks to certify two subclasses of Plaintiffs under Federal Rule of 23(a) and 23(b)(2):

> 1. All women who were sexually assaulted in Austin State Hospital (the "Female Victim Subclass").
>
> 2. All patients who reported a sexual assault at Austin State Hospital but whose allegation was not adequately investigated by ASH because of ASH's negligent and discriminatory policies (the "Inadequate Investigation Subclass").

Dkt. #84 at 3.

II. STANDARD FOR CLASS CERTIFICATION

Class certification is controlled by Federal Rule of Civil Procedure 23. Rule 23(a) imposes four prerequisites on plaintiffs seeking certification of a class: (1) numerosity, i.e., a class so large that joinder of all members is impracticable; (2) commonality, i.e., that there are questions of law or fact common to the class; (3) typicality, i.e., that the named plaintiffs' claims or defenses are typical of those of the class; and (4) adequacy of representation, i.e., that the representatives will fairly and adequately protect the interests of the class. *Ackal v. Centennial Beauregard Cellular L.L.C.*, 700 F.3d 212, 216 (5th Cir. 2012)(quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)).

In addition to satisfying Rule 23(a)'s requirements, a class plaintiff must also satisfy one Rule 23(b) requirement. Rule 23(b)(2) allows a class to be certified 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).

To determine whether class certification is appropriate, courts "'must conduct [an] intense factual investigation,'" *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 345 (5th Cir. 2012) (quoting *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 420 (5th Cir. 2004)), and

the "unique facts of each case will generally be the determining factor governing certification." *Robinson*, 387 F.3d. at 421. The party seeking class certification bears the burden of demonstrating that the requirements of Rule 23 have been met. *Funeral Consumers All., Inc.*, 695 F.3d at 345 (quoting *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737-38 (5th Cir. 2003)).

Class certification requires more than merely pleading class claims.

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. . . . . "[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and [] certification is proper only if "the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–52 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)) (emphasis added).

III. CLASS CERTIFICATION EVIDENCE

To support her motion for class certification, Ituah presents the following evidence: excerpts from her deposition describing her assault and immediate response of ASH's staff (Mtn. Exh. A); the Adult Protective Services ("APS") Intake Report following Ituah's assault complaint (Mtn. Exh. B); the APS Abuse and Neglect Investigation Report of her assault (Mtn. Exh. C); deposition excerpts from ASH's corporate representative, Rachel Samsel (Mtn. Exh. D); deposition excerpts from Ituah's mother and legal guardian (Mtn. Exh. E); a table of DFPS investigations from 2010-2015 (Exh. F); definition pages from Plaintiff's discovery requests (Mtn. Exh. G); and a list of Plaintiff's counsels' class action and mass litigation experience (Mtn. Exh. G).

ASH's representative Samsel testified that she did not know "definitively" or "affirmatively" of any ASH patients who had been referred or sent to another facility for a sexual assault examination. Mtn. Exh. D at 43:8-16; 108:4-9 ("I can't confirm that there were none. I just don't have any knowledge of whether or not they had been."). She also testified that there is no ASH policy that requires ASH to maintain "segments of video unless Provider Investigations or law enforcement or OID were to request it." *Id.* at 80:7-15. She similarly testified that she did not know specifically of any instance in which clothing or sheets were bagged as evidence of a potential sexual assault. *Id.* at 164:18-165:6.

The table of DFPS investigations from January 1, 2010 through December 31, 2015 shows that during that time period, ASH received 388 "Inconclusive, Unconfirmed, Unfounded, [or] Other" reports of sexual abuse. Mtn. Exh. F. ASH received 5 reports that were "Confirmed, Confirmed (Reportable)." *Id.*

In addition to other evidence, ASH submitted a Memorandum of Understanding (Resp. App'x 001-009) and Policy and Flow Chart (Resp. App'x 010-016) describing the roles of ASH, the Department of Family and Protective Services ("DFPS"), and the Office of Inspector General ("OIG") of Health and Human Services Commission ("HHSC") when allegations of abuse, neglect, or exploitation ("ANE") are made.[7] The Memorandum of Understanding requires State Hospitals to report allegations of ANE to DFPS Statewide Intake within one hour of receiving the allegation. Resp. App'x 003. HHSC Provider Investigations reviews the reports from DFPS Statewide Intake and is to notify local law enforcement and the OIG within one hour of receiving the report. *Id.* at 004. HHSC Provider Investigations is also required to initiate and conduct an

[7] Although ASH submitted the Memorandum of Understanding as evidence, it states that it "pertain[s] only to each Party's duties concerning investigations of ANE alleged to have been *committed by employees of . . . [a] State Hospital*, and how those duties interrelate." Resp. at App'x 003 (emphasis added).

investigation into the allegation of ANE and to provide a report to the State Hospital and the OIG. *Id.* at 004-005.

ASH policy similarly requires "[s]taff witnessing a crime or receiving [an] allegation [to] immediately notify DFPS—which bears responsibility for investigating [the] allegation and reporting to law enforcement." *Id.* at 011. If a sexual assault is alleged, ASH security is also to notify law enforcement. *Id.* ASH security will only conduct an independent investigation if directed to by the superintendent. *Id.* ASH's policy requires that "[p]hysical evidence should be handled as little as possible. If law enforcement is called to the scene, the evidence is left in place and protect until a law enforcement officer arrives." *Id.* at 012. If law enforcement declines to take possession of any physical evidence, "[ASH] Security, in conjunction with nursing staff will ensure that the evidence is protected by securely bagging and labeling the evidence." *Id.* ASH's policies provide further guidance on how physical evidence is to be stored and for the protection of sexual assault evidence. *Id.* at 013-014.

After the hearing, ASH submitted Defendants' Advisory Concerning November 14, 2019 Oral Argument. Dkt. #109. The Advisory includes a list of at least seven[8] investigations where evidence was collected and the Bates Range, which includes over 950 pages, of the production. *Id.* at 2. The evidence collected included clothing sent to the Austin Police Department, video evidence, photographs, a pregnancy test, and a SANE exam. *Id.* In each of these investigations, the assault allegation was determined to be unconfirmed or unfounded. *Id.*

Ituah submitted no factual evidence concerning any other sexual assault or sexual assault investigation at ASH. Her class allegations are entirely based on inferences from the table of DFPS investigations, Samson's deposition, and her own experience. The record in this case is a stark

[8] The eighth investigation entry is a duplicate of the seventh. Dkt. #109 at 2.

contrast that of *M.D. v. Perry*, in which the district court was asked to certify a class of children in the custody of the Permanent Managing Conservatorship ("PMC") of the Texas Department of Family and Protective Services ("DFPS"). 294 F.R.D. 7 (S.D. Tex. 2013) (on remand for further consideration in light of *Dukes*). Fourteen named plaintiffs brought claims asserting "Texas policies and practices result in structural deficiencies that put all children who are or will be in the State's PMC at an unacceptable risk of harm." *Id.* at 19. Their proposed class and subclasses included all children in the Texas PMC and specifically children in the Texas PMC in various foster care placements. *Id.* at 30-31.

The *M.D.* court recounted each of the fourteen plaintiffs' history of various placements within the Texas PMC, beginning with their entry into foster care. *Id.* at 20-24. The court also described the three broad categories of evidence before it: 1) testimony and studies prepared by experts on child welfare management, administration, and evaluation of child welfare systems; 2) testimony and depositions excerpts from persons who are involved in Texas foster care, such as employees of DFPS, private contractors who provide monitoring and review services to the State, and next friends of the named plaintiffs; and 3) numerous DFPS documents, including excerpts of the named plaintiffs' case files, internal reports, appropriations requests to the Texas legislature, and communications amongst DFPS personnel. *Id.* at 36-38.

While the *M.D.* case—encompassing the entire Texas PMC system and over 12,000 children, *id.* at 38—is far more reaching than the present case, the record before this court on class certification is almost non-existent. Ituah has no co-plaintiffs and presents no direct evidence that any other person was sexually assaulted at ASH because of the lack of precautions she now seeks, that any other assault allegation was inadequately investigated, that ASH failed to preserve any other relevant evidence, or that such failures occurred because of systemic discrimination. Ituah's

dearth of evidence renders a "rigorous analysis" nearly impossible. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012) ("It is well-established that '[a] district court must conduct a rigorous analysis of the [R]ule 23 prerequisites before certifying a class.'"). Moreover, considering ASH's Advisory, Dkt. #109, which makes clear it has provided over 950 pages related to at least seven assault investigations—and that its list is not exhaustive—Ituah's failure to provide an adequate factual basis for her class claims is even more deleterious to her class certification arguments.

IV. ANALYSIS

A. Rule 23(a) Factors

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable. To satisfy this requirement, "a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members." *Pederson v. La. State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000)(internal quotations omitted). Leading commentators caution that there is no definite standard as to what size class satisfies Rule 23's numerosity requirement. *See* 7A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 1762 (3d ed. 2017 update). By way of example, however, the Fifth Circuit has stated that a putative class of 100-150 members is "within the range that generally satisfies the numerosity requirement." *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 624 (5th Cir. 1999).

Beyond the number of putative class members, courts may also consider other factors in determining whether joinder of all members is impracticable. *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. Unit A 1981). "The geographic dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each

plaintiff's claim" may also be relevant factors in this analysis. *Id*. (citing *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980)).

Extrapolating from the table of DFPS investigations from January 1, 2010 through December 31, 2015, Ituah estimates approximately 227 members of the proposed class. Mtn. at 6; *see* Mtn. Exh. F. Ituah argues this exceeds the 40-member threshold that renders joinder presumptively impracticable. Mtn. at 7 (citing *Mullen*, 186 F.3d at 624). ASH argues that Ituah's estimate is based on the flawed assumption that the number of allegations represents the number of individuals who filed allegations and the number of actual assaults. Resp. at 19. ASH also argues that Ituah's "head count" approach is legally inadequate and she must show joinder is impracticable. *Id.* at 20-21.

Given the nature of the potential plaintiff class—acute psychiatric patients, at least some of whom have been declared legally incompetent—Ituah has shown that joinder is impracticable *if* her class size estimate is accurate. ASH provides no argument that it would be practical to locate the putative class members, appoint guardians for these individuals, and join them to this suit through their guardians in a timely manner.

However, Ituah has failed to present evidence that supports her estimate of class size.[9] Ituah presents evidence—namely her own testimony—that her assault allegation was not adequately investigated and that ASH failed to preserve evidence so that her allegation could be adequately investigated. However, the only evidence Ituah presents that other sexual assaults were not adequately investigated is Samsel's testimony that she was unaware of instances where ASH

[9] Although she estimates 227 class members, Ituah does not specify how many members are in each subclass. At the hearing and to explain the lack of evidence relating to other sexual assault allegations and investigations, her counsel stated that at some point during discovery, the parties decided to stay discovery until a class was certified. However, ASH contends it did produce documents relating to other sexual assault investigations, which is supported by its Advisory filed after the hearing. Dkt. #109.

patients were referred for a sexual assault examination or where clothing or bedding was bagged as evidence. *See* Mtn. Exh. D at 43:8-16; 80:7-15; 108:4-9; 164:18-165:6. Importantly, Ituah presented no evidence of any other allegation where such measures would have been reasonable.[10] Similarly, although Ituah contends her assault occurred because ASH lacked adequate preventative safety measures, she provided no evidence that any other assault occurred because adequate safety measures were lacking. In fact, apart from the table of DFPS investigations from 2010-2015, Mtn. Exh. F, Ituah presented no evidence related to any other allegation of sexual assault at ASH. Besides her own, Ituah submitted no other Intake Report or Investigative Report concerning any other allegation at ASH. Ituah's circumstantial evidence of her own experience and Samsel's deposition fall short of "prov[ing] that there are in fact sufficiently numerous parties" that would make joinder impractical. *See Dukes*, 564 U.S. at 350–52 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties . . . ."); *Conrad v. Gen. Motors Acceptance Corp.*, 283 F.R.D. 326 (N.D. Tex. 2012) (refusing to certify a class where the submitted evidence only identified two putative class members).

2. Commonality

To satisfy Rule 23(a)(2)'s commonality requirement, a plaintiff must demonstrate that the class claims "'depend upon a common contention' and the common contention 'must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Ahmad v. Old Republic Nat'l Title Ins. Co.*, 690 F.3d 698, 702 (5th Cir. 2012) (quoting *Dukes*, 564

[10] At the hearing, counsel for ASH asserted that ASH reports all sexual assault allegations it receives without judging their credibility and without respect to whether the alleged assault occurred at ASH. Counsel also argued that not all allegations or assaults involve physical evidence that could be collected.

U.S. at 350). "[A]ny competently crafted class complaint literally raises common 'questions,'" nonetheless, there must be a single question of law or fact common to the members of the class that is not overwhelmed by dissimilarities precluding common answers. *Dukes*, 564 U.S. at 349, 359. The threshold for commonality is not high: the Fifth Circuit has recognized that "even a single common question will do." *In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014) (citations omitted).

It is not enough that class members suffer the same type of injury or have been subject to a violation of the same law; rather, a plaintiff must identify a unified common policy, practice, or course of conduct that is the source of their alleged injury. *Dukes*, 564 U.S. at 349-50. However, the policy or practice that a plaintiff identifies need not be formal or officially adopted. *M.D.*, 294 F.R.D. at 26. The plaintiff also bears the burden of connecting the policy or practice to the alleged harm, especially in cases where this connection is not readily apparent. *Id.* at 26-27 (collecting cases). Class certification does not require plaintiffs to establish that the harm actually occurred, i.e., they do not need to prove that the policies they identified did, in fact, cause the harm they are alleging; the only consideration at the class certification stage is whether the issues are appropriate for class-wide litigation. *Id.* at 27. Potential defenses against a plaintiff's claims should also be considered because those may undermine the dispositive nature of the proposed common questions. *M.D.*, 675 F.3d at 843-44; *M.D.*, 294 F.R.D. at 28.

Ituah argues that her proposed subclasses satisfy the commonality requirement "because they are based on the common contentions that ASH has failed to take reasonable measures to prevent sexual assaults, has failed to adequately investigate sexual assaults, and these failures by ASH violate Section 504 . . . , the Americans with Disability Act, and 42 U.S.C. § 1983." Mtn. at 7. ASH counters that Ituah has offered no evidence to support a pattern-or-practice claim and that

peer-to-peer harassment claims for intentional discrimination under the ADA and Section 504 require individualized assessments of five considerations. Resp. at 27-28 (citing *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 995 (5th Cir. 2014)).

In *Dukes*, the Court held the proposed class lacked commonality because the class plaintiffs could not show resolution of their employment discrimination claims would resolve the employment discrimination claims of the class members, who were employed across thousands of stores and subject to individualized employment decisions. *Dukes*, 564 U.S. at 352. Similarly, Ituah has not shown that resolution of her claims that insufficient safety measures were taken to prevent her assault and an inadequate investigation was conducted afterwards would resolve all other class members' similar allegations. Ituah does not need to prove at this stage that her proposed safety or investigatory measures would have prevented any other assault or prove any other assault, but she has presented no evidence that links ASH's alleged inadequacies or discrimination to any other putative class member's harm. *See M.D.*, 294 F.R.D. at 26-27.

Although Ituah asserts her claims and allegations of ASH's deficient policies with such broad strokes that appear to give rise to class-wide common issues,[11] her own allegations demonstrate the individualized issues that will arise if a class is certified. As noted at the hearing, Ituah's own allegations present sharp factual disputes about what happened the night she made her outcry. Ituah's statements are contradictory about whether the assailant penetrated her during the

[11] The court recognizes that Ituah's second subclass is a fail-safe class and limited to patients whose assault allegations "[were] not adequately investigated by ASH because of ASH's negligent and discriminatory policies." "A fail-safe class is a class whose membership can only be ascertained by a determination of the merits of the case because the class is defined in terms of the ultimate question of liability." *In re Rodriguez*, 695 F.3d 360, 369–70 (5th Cir. 2012). "[T]he class definition precludes the possibility of an adverse judgment against class members; the class members either win or are not in the class." *Id.* at 370 (internal quotation omitted). While the Fifth Circuit has rejected a rule against fail-safe classes, see id., merely pleading a fail-safe class cannot satisfy Rule 23. *See Dukes*, 564 U.S. at 350–52 ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. . . . ."). In this case, all Ituah has in support of class certification is a fail-safe class definition.

assault. *Compare* Resp. App'x 029 ("When I asked if they had sex she said she didn't remember."), *and* Resp. App'x 027 (signed statement) ("I don't know if he penetrated me."), *and* Mtn. Exh. B ("CL does not remember if there was sexual intercourse."), *and* Mtn. Exh. C (same), *with* Resp. App'x 051-052 (stating she believed there was penetration), *and* Resp. App'x 040-041 (same), *and* Mtn. Exh. A (Ituah Depo.) at 23:8-9 ("Q. Did he ever put his penis inside of you? A. Yes."). Her own statements are also contradictory about whether there was blood on her sheets or underwear after the assault. *Compare* Mtn. Exh. A (Ituah Depo.) at 52:18-20 ("Q. Was there blood in your bed after Alan Miller got back in his wheelchair and wheeled out of the room? A. Yes."), *with* Resp. App'x 052 ("The victim stated seeing the blood when she was washing, but nowhere else like her clothing or bed or sheets."), *and* Resp. App'x 040 (same).

These factual disputes related to Ituah's own assault demonstrate that resolution of individualized issues will not resolve class-wide issues. *See Dukes*, 564 U.S. at 350 ("Their claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."). Because Ituah has put forth no evidence of the circumstances of any other assault, she has failed to show that the security features she seeks would have prevented any other assault or that the investigatory policies she seeks would be relevant to any other assault. As the record stands now, there is a fact dispute as to whether the investigatory policies she seeks would even apply to her own assault. *See M.D.*, 675 F.3d at 843-44 (defenses may undermine common questions); *M.D.*, 294 F.R.D. at 28 (same).

3. Typicality

In order to meet the typicality requirement, "the claims or defenses of the parties [must be] typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3); *see Mullen*, 186 F.3d at 625. Typicality focuses on "the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent." *Lightbourn v. Cnty. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997). "Typicality does not require identity of claims but does require that 'the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.'" *Villagran v. Central Ford, Inc.*, 524 F. Supp. 2d 866, 883 (S.D. Tex. 2007) (quoting *James v. City of Dall.*, 254 F.3d 551, 571 (5th Cir. 2001), *abrogated on other grounds by M.D.*, 675 F.3d at 839–41).

ASH argues Ituah cannot show typicality because she lacks standing to bring a claim for injunctive relief, complex statute of limitations issues negate any typicality, and her personal pursuit of monetary damages only for herself negate typicality. The district judge has already rejected ASH's standing arguments. Dkt. #100 at 5-7 (order issued after ASH filed its responsive brief). ASH argues that determining which class members' claims are not time barred will require significant resources, especially considering class members' issues of competency and capacity. However, this argument would preclude a class ever being certified with this class population.

ASH also argues Ituah's pursuit of monetary damages for her herself defeats typicality. Ituah cites *Berry v. Schulman*, 807 F.3d 600, 607 (4th Cir. 2015), for the proposition that class members will retain their individual rights to pursue monetary claims for their actual damages. However, in *Berry* the right to pursue monetary claims was a term of settlement. At the hearing, Ituah argued that it is a fundamental legal premise that a Rule 23(b)(2) injunction can issue without

prejudice to monetary claim, but she was not able to cite any case for this point besides *Berry*. Ituah also argued res judicata would not apply to any later-brought monetary claims because those claims were not litigated in this suit. *Contra Dukes*, 564 U.S. at 364 (inclusion of backpay claims without inclusion of compensatory damages claims "created the possibility . . . that individual class members' compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from"); *but see In re Rodriquez*, 695 F.3d 360, 367 n.9, 369 (5th Cir. 2012) (affirming certification of injunctive relief and denial of certification on damages issues); FED. R. CIV. P. 23(c)(4)("When appropriate, an action may be brought or maintained as a class action with respect to particular issues.").

Nonetheless, although Ituah has asserted the same legal theory based on the same alleged course of conduct, she has pleaded no facts and presented no evidence that supports a course of conduct by ASH that was applicable to the class. Because Ituah has not demonstrated any facts with respect to any other class member's claim, she cannot show her claims are typical of those of other class members.

4. Adequacy

In the Fifth Circuit, the adequacy requirement "mandates an inquiry into (1) the zeal and competence of the representatives' counsel and . . . (2) the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001)(citing *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 474 (5th Cir. 1982) (alterations omitted)); *see also Berger v. Compaq Computer Corp.*, 279 F.3d 313, 313 (5th Cir. 2002)(per curiam)(denying petition for panel rehearing and clarifying that its *Berger* opinion, *supra*, 257 F.3d 475, had not

"changed the law of this circuit regarding the standard for conducting a rule 23(a)(4) adequacy inquiry").

a) Class Counsel

Ituah's counsel submitted a list of class and collective actions in which it has represented other plaintiffs. Mtn. Exh. G. In addition to those cases, counsel has also represented plaintiffs in many Title VII mass litigation cases. *Id*. Despite the evidentiary deficiencies of the current motion, the undersigned is satisfied with counsels' competence.

b) Class Representative

Neither Ituah nor her guardian attended the class certification hearing. Ituah seeks injunctive relief on behalf of the class, but she also seeks monetary damages for her own injuries. The undersigned has no assurance that if Ituah were able to settle her monetary damages early in this case, she would still vigorously pursue injunctive relief on behalf of the class. Given the likely incompetent nature of many class members and the differing relief Ituah seeks for herself, the undersigned has significant concerns about Ituah's, and her guardian's, ability and willingness to take an active role in and control the litigation and to protect the class members' interests.

B. Rule 23(b)(2) Considerations

There is no opportunity for (b)(2) class members to opt out of the class, and Rule 23 does not obligate the court to give class members notice of the action. *Dukes*, 564 U.S. at 362. Rule 23(b)(2) allows class treatment when "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). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class

members or as to none of them.'" *Dukes*, 564 U.S. at 360 (citing Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). "In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* "It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." *Id.* "Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* at 360-61.

The Fifth Circuit has interpreted Rule 23(b)(2) "to create two relevant requirements when a proposed class seeks classwide injunctive relief: (1) the class members must have been harmed in essentially the same way and (2) the injunctive relief sought must be specific." *M.D.*, 675 F.3d at 845 (internal citation omitted). Additionally, the injunctive relief sought must be specific, and "a plaintiff must 'make an effort' to describe the injunctive relief they request 'so that final injunctive relief may be crafted to describe in reasonable detail the acts required.'" *M.D.*, 294 F.R.D. at 30 (quoting *M.D.*, 675 F.3d at 848). "The precise terms of the injunction need not be decided at class certification, only that the class members' claim is such that a sufficiently specific injunction can be conceived; a plaintiff must present evidence and arguments 'sufficient to allow the district court to see how it might satisfy Rule 65(d)'s constraints and thus conform with Rule 23(b)(2)'s requirement.'" *Id.* (quoting *Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 543 F.3d 597, 605 n.4 (10th Cir. 2008)).

Ituah argues the Rule 23(b)(2) standard is met because ASH's policies were the same as to each class member such that the injunctive relief she seeks would be appropriate as to the class as a whole. ASH argues Ituah cannot show ASH acted on grounds that apply generally to the class or that injunctive relief is appropriate as to the class as a whole. ASH contends that Ituah has failed

to "define the relief sought, suggesting only that things like door locks and tracking devices could be used, without providing any evidence to support the idea that the proposed changes would apply classwide. Further, simpl[e] logic suggests that such ideas would not work classwide." Resp. at 34. Ituah contends ASH's "argument focuses on the ultimate merits or wisdom of the injunctive relief sought (see Response at 28) rather than the issue at the certification phase: whether the policies Plaintiff seeks to enjoin are common as to the whole class." Dkt. #91 ("Reply") at 6.

In her Second Amended Class Action Complaint, Ituah seeks the following injunctive relief:

> a. Adopt appropriate policies and make such renovations to the physical plant of ASH as necessary to prevent and/or minimize the risk of continued sexual assaults against ASH patients;
> b. Properly train and supervise ASH employees on responding to allegations of sexual assault and handling sexual assault cases or evidence, including the timely and proper administration of sexual assault kits;
> c. Require and enforce trauma-informed approaches to counseling and investigation in sexual assault cases;
> d. Require ASH to immediately report allegations of sexual assault to an appropriate law enforcement or investigative entity;
> e. Provide adequate staffing for investigation and processing of sexual assault cases;
> f. Treat female victims of sexual assault with the same respect and attention to their cases as male victims, both of sexual assaults and other crimes that occur at ASH; and
> g. Accurately and publicly report data reflecting the number of sexual assaults reported, investigated, and processed to conclusion at ASH on a bi-annual basis.

Dkt. #57 (SACAC) at ¶ 130. While some of these proposals are objective and specific, such as d. and g., the others are not. In her Motion for Class Certification, Ituah does not further specify the injunctive relief she seeks, but she does note that:

> ASH [has not] adopted policies to prevent sexual assault against patients, such as:
> • Equipping patients or patient rooms with call buttons or panic buttons;
> • Using radio-frequency identification (RFID) or similar technology to track patient whereabouts and monitor patient intrusions into other patients' bedrooms; or
> • Allowing patients to lock their bedrooms from the inside (with staff having access to even locked rooms by a swipe card).

Mtn. at 2. As to post-assault investigations, Ituah notes:

> ASH's corporate representative is unaware of ASH ever:
> • Preserving videotape from ASH's security cameras for more than 30 days;
> • Discouraging a victim from showering until a forensic examination can occur;
> • Arranging for a patient to undergo a sexual assault examination; or
> • Preserving bedding or clothing with potential physical evidence of sexual assault.

Id.

Ituah is not required to prove the "precise terms of the injunction" she seeks, but she is required to show "a sufficiently specific injunction can be conceived." *M.D.*, 294 F.R.D. at 30. As just noted above, most of the relief listed in her Second Amended Class Action Complaint is not sufficiently specific. To the extent her Motion more specifically describes the relief she seeks, she has made no effort to show such relief would be appropriate for class-wide application, especially given the institutionalized setting and the diminished capacity of the class. Contrary to Ituah's position, ASH's arguments criticizing panic buttons and door locks do not go to the merits of Ituah's claims but to whether Ituah's proposed relief is appropriate for class-wide application.

This case is unlike *M.D.*, where on remand the district court determined a class could be certified under Rule 23(b)(2). 294 F.R.D. at 46-47. In that case, plaintiffs alleged all children in Texas PMC were subject to an unreasonable risk of harm due to ineffective monitoring and planning because caseworkers were overburdened. *Id.* at 47. The district court was able to conceive of a number of specific and appropriate injunctions that could cure this injury, including setting maximum caseloads, hiring more caseworkers, or an overflow procedure that distributes cases to ensure no caseworker is especially overburdened. *Id.*

For the same reasons that Ituah failed to show commonality and typicality of the class, she has failed to show that final injunctive relief or declaratory relief is appropriate respecting the class as a whole. Although she seeks injunctive and declaratory relief that in theory could be applicable

to the entire class because it would bind ASH, she has not shown that the class members would each be each entitled to the same relief if they individually sought relief. *See Dukes*, 564 U.S. at 360 ("[Rule 23(b)(2)] does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant."). She has failed to show that the same safety measures or investigatory measures would apply to all class members because she has failed to include any factual basis of any other class member's claim. Again, Ituah's failure to provide any evidentiary support for her Rule 23(b)(2) class precludes the undersigned from conducting the rigorous analysis required by Rule 23. *See M.D.*, 675 F.3d at 837 ("It is well-established that '[a] district court must conduct a rigorous analysis of the [R]ule 23 prerequisites before certifying a class.'"). ASH's arguments are well taken, and Ituah has not shown certification under Rule 23(b)(2) is appropriate.

V. CONCLUSION

While Ituah's allegations of ASH's failures to prevent and investigate sexual assaults are compelling, she has failed to provide evidence that her claims merit class treatment. In her Motion, Ituah has put the proverbial cart before the horse. She has assumed—without evidence—that other ASH patients had experiences similar to hers and has therefore sought to certify a class with similar claims. As her attorneys stated at the hearing, they intended to seek discovery on other class members' claims only after certification. Because of this strategy, she has presented no direct evidence that anyone else has experienced a preventable sexual assault at ASH that was inadequately investigated. The undersigned will not recommend a class certification that is based solely on Ituah's speculation that other class members may exist, especially considering the factual issues that exist as to Ituah's own claims.

If a class could be certified on this thin of an evidentiary record that other class members even exist, then nearly every lawsuit could be brought as a class action and the rigorous Rule 23 analysis would be meaningless. Ituah has failed to carry her burden to demonstrate class certification is appropriate in this case.

VI. RECOMMENDATION

For the reasons stated above, the court **RECOMMENDS** Plaintiff's Motion for Class Certification (Dkt. #84, #103) be **DENIED**.

VII. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED January 3, 2020.

MARK LANE
UNITED STATES MAGISTRATE JUDGE