BY THE COURT:

DATE SIGNED: January 13, 2026

Electronically signed by Thomas J. Walsh
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH II

ANTRELL THOMAS, et al.,

Plaintiffs,

v.

ANTHONY S. EVERS, in his official capacity as the Governor of Wisconsin, et al.,

Case No. 22CV1027

Defendants.

DECISION AND ORDER

Before the Court is Plaintiffs' renewed motion for class certification. In this motion, Plaintiffs seek to certify the following class of individual plaintiffs per subsection 803.08(2)(b):

> All individuals who, after January 1, 2019, have been charged by the State of Wisconsin with a crime that carries a potential term of imprisonment, appeared before a judge for an initial appearance, requested and were found eligible for public defense counsel, yet did not receive public defense counsel within 30 days after their initial appearances solely because the [State Public Defender] failed to appoint an attorney on their behalf.

(Doc. 189:10–11, 21.)

The Court allowed Plaintiffs to conduct additional discovery following denial of their initial class certification motion. (*See* Docs. 118 & 146.) Plaintiffs support this second motion with four experts' declarations and reports: Professor Eve B. Primus (Doc. 165); Dr. Kirti Gupta (Doc. 166); Dr. Aaron S. Benjamin (Doc. 167); and Brian L. Landers (Doc. 168).

Defendant moved to strike the declarations and reports of Professor Primus, Dr. Gupta, and Mr. Landers, and that motion is also before the Court. (Doc. 206.) Defendant's motion to strike will be **DENIED** at this time because the Court believes deciding it would be premature during what the Court considers to be the class certification phase and not the merits phase. *See McDaniel v. Dep't of Corr.*, 2025 WI 24, ¶9, 416 Wis. 2d 516, 21 N.W.3d 749. The Court simply considered the information in the reports at face value, similar to an allegation in a complaint on a motion to dismiss. Depending on the direction this case ultimately goes, Defendant may renew this motion by a letter indicating as much served on Plaintiffs and the Court.

Defendant argues Plaintiffs' renewed motion for class certification should be denied because the actual plaintiffs' claims are moot because their criminal cases have concluded, they cannot satisfy the requirements of subsections (1)(a)–(d) or (2)(b), and their claims will fail on the merits. The Court resolves this motion on the grounds that Plaintiffs cannot meet the commonality and subsection (2)(b) requirements. For those reasons, Plaintiffs' renewed motion for class certification will be **DENIED**.

LAW AND ANALYSIS

One or more representatives of a class may sue or be sued on behalf of all of the class members only if the court finds these four requirements: (a) The class is so numerous that joinder of all members is impracticable; (b) There are questions of law or fact common to the class; (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and (d) The representative parties will fairly and adequately protect the interests of the class. WIS. STAT. § 803.08(1)(a)–(d) (2023–24).[1] If subsection (1) is satisfied, the court must also find

[1] All references to the Wisconsin Statutes are to the 2023–24 version. Wisconsin courts look to federal case law for guidance on class actions. *See Harwood v. Wheaton Franciscan Servs.*, Inc., 2019 WI App 53, ¶5, 388 Wis. 2d 546, 933 N.W.2d 654. But for consistency herein, the Court will refer to the Wisconsin Statute section numbers when relying on federal cases analyzing the Federal Rule 23 counterpart.

that one of three additional showings has been made. § 803.08(2). Here, Plaintiffs propose to show that Defendant "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." § 803.08(2)(b).

"A party seeking class certification bears the burden to prove the requirements in Wis. Stat. § 803.08(1) and (2) by a preponderance of the evidence." *McDaniel*, 416 Wis. 2d 516, ¶17. "Ultimately, the circuit court has 'broad discretion to determine whether certification of a class-action lawsuit is appropriate.'" *Hammetter v. Verisma Sys., Inc.*, 2021 WI App 53, ¶9, 399 Wis. 2d 211, 963 N.W.2d 874 (quoting *Harwood*, 388 Wis. 2d 546, ¶¶5, 41).

I. Additional Background

Plaintiffs argue that "judicial intervention is necessary because discovery has revealed that the SPD's policies and practices suffer from systematic and gross deficiencies that *facilitate the long delays* experienced by the proposed class members, and, at a minimum, expose them to a substantial risk of harm."[2] (Doc. 189:7 (emphasis in original).)

The SPD's operations manual provides:

> The local representative of the State Public Defender has the responsibility for assigning Trial Division counsel pursuant to section 977.08, Stats. The appointing office must ensure that counsel is provided to eligible applicants *as soon as possible* after they have been determined to qualify for SPD representation, with a goal of appointing within 72 hours of determination of eligibility.
>
> If it would be a conflict of interest to assign a case to a specific staff attorney, the case must be assigned to another staff attorney or to a private bar attorney. If a private attorney is currently representing the client or has recently represented the client in another SPD case, appointment of the case to that private attorney is generally appropriate.
>
> Cases shall be assigned to staff attorneys consistent with the staff caseload targets. In deciding whether a case will be assigned to a staff attorney or a private attorney, the supervising attorney should consider attorney experience levels, areas of

[2] The Court uses SPD and Defendant interchangeably herein.

> expertise, availability of support staff resources, and prior or pending client representation. *The most important consideration is the timely appointment of counsel*.
>
> When a private attorney is appointed, the [SPD case management system] record should include the reason for appointing to the private bar: Conflict, Prior Pending, or Other (Overflow).
>
> If one or more fixed-fee contracts are in effect for a county served by the local office, the office should, in assigning cases to the private bar, attempt to assign sufficient cases to fulfill the contract(s). Cases that staff can handle should not be assigned to private attorneys for the sole purpose of fulfilling the contract(s). However, in selecting which cases go to the private bar and which appointment method is followed, the local office should consider the goal of assigning the number of cases specified in each fixed-fee contract.

(Doc. 164:8–9 (emphasis added).)

Plaintiffs argue Defendant's internal policy of appointing counsel "as soon as possible" is to blame for the delay in defendants receiving an attorney. (Doc. 189:7.) Without additional centralized internal controls, the as-soon-as-possible standard gives Defendant "*an infinite amount* of time to identify and secure a specific lawyer to handle a case." (*Id.* (emphasis in original).) As such, an appointment which takes one year would still satisfy the ASAP standard. (*Id.*)

Plaintiffs specifically fault the SPD for delegating the duty to find counsel to the local SPD offices. (*Id.*, at 14.) It appears that in at least one SPD office, cases are not assigned but are "[made] available" to staff attorneys. (Doc. 171:5–6.) Staff attorneys can "say whether or not they want the case" based on the type of case and the circuit court branch it is assigned to. (*Id.*, at 6.) This process is called "shopping." (*Id.*) If the case cannot be given to a staff attorney, then the "shopping" process begins with the private bar. (*Id.*)

Plaintiffs further fault the SPD for not providing any guidance to the local offices on how to best appoint cases to private attorneys, including how to prioritize certain case appointments over other case appointments. (Doc. 171:5–8; Doc. 175:32.) One alleged issue is "quality control"

over the private attorneys taking cases. (Doc. 175:27–28.) Another alleged issue is the SPD's "haphazard free-for-all" method of attempting to locate private attorneys for case appointments—these attempts to locate private counsel include emails, calls, and in-person contacts with the private attorneys. (Doc. 189:14; Doc. 175:32.) There was no centralized process, and success in appointing cases could vary by office. (*Id.*)

The staff attorneys "collectively handle approximately 60% of the state's adult trial-level indigent defense caseload." (Doc. 165:6.) It is not clear how many staff attorneys the SPD currently employs. (*See e.g.*, Doc. 172:10.) But it is likely the SPD is understaffed for several reasons, the most obvious being money. (Doc. 165:9–10.)

"Approximately 40% of the adult trial-level indigent defense caseload in the state is currently handled by private defense counsel." (*Id.*, at 6.) The SPD is the primary agency that "finds, certifies, and appoints assigned-counsel and/or flat-fee contract attorneys to handle those cases, but local judges may also appoint private counsel to represent indigent individuals at county expense." (*Id.*) However, "[s]ome lawyers are reticent to accept judicial appointments to indigent defense cases, because some counties impose caps on the number of hours that attorneys are permitted to bill for a case." (*Id.*, at 10.)

Private attorneys are not required to take on a certain number of case appointments, and they can reject appointments at their discretion. (*Id.*, at 9.) For example, private attorneys may reject a case appointment due to the nature of the charges involved, the prosecutor, or the circuit court judge that the case is in front of. (*Id.*) Private attorneys also reject SPD case appointments for financial and logistical reasons. (*Id.*) Wisconsin does not have a plan for recruiting new private attorneys to accept SPD appointments. (*Id.*, at 11.) Presently, there are between 800 and 900 private bar attorneys who are certified to take appointments. (Doc. 172:10.)

The reality of the legal profession is that the market only supplies so many attorneys. Therefore, both the SPD and the private bar are impacted by an ongoing attorney shortage. (Doc. 175:33–34.) "[Former] Wisconsin Supreme Court Chief Justice Annette Ziegler described the state as facing a lawyer shortage crisis in her state of the judiciary address in 2024." (Doc. 165:10.) This attorney shortage particularly impacts Wisconsin's rural counties. (*See* Kawski Decl. Exs. A & B.) Indeed, much of the trouble in appointing cases appears to occur in rural areas, particularly in western and northern Wisconsin. (*See e.g.*, Kawski Decl. Exs. A & B; Doc. 169:22.)

These considerations helped the Court reach the conclusions that Plaintiffs cannot demonstrate the commonality and subsection (2)(b) requirements.

II. Commonality

Commonality requires the plaintiff to show "[t]here are questions of law or fact common to the class." § 803.08(1)(b). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' [but] [t]his does not mean merely that they have all suffered a violation of the same provision of law." *Dukes*, 564 U.S. 338, 349–50 (internal citation omitted). The plaintiff's claims must depend on a "common contention . . . 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." *Id.*, at 350. It follows then that "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

a. Discussion

The Court adopts the Defendant's reasoning articulated on the commonality inquiry. (*See* Doc. 207:6–26.) But certain cases in particular highlight the Court's conclusion. First, in *Scott v.*

Dart, the court considered a class action that attacked "[Cook] County's refusal for more than a decade to keep an oral surgeon on staff at the Jail." 99 F.4th 1076, 1079 (7th Cir. 2024). An oral surgeon would perform difficult extractions and diagnose other complicated dental problems. *Id.* at 1079–80. Without an on-site oral surgeon, inmates were referred to the county hospital's oral surgery clinic after a dentist examined them and determined such care was necessary. *Id.*, at 1080. The plaintiff alleged the lack of an on-site oral surgeon caused him and other inmates to "experience unnecessary pain and significant delays in receiving treatment." *Id.*

The plaintiff himself waited seven months after his first health services request to have his wisdom teeth removed. *Id.* The record further showed: inmates had to wait ninety days or more for an oral surgery appointment; upper-echelon officials on the jail's dental staff knew the lack of an on-site oral surgeon caused inmates to experience delays, worsening conditions, and unnecessary pain; the jail's dental chief had begged the county to hire an oral surgeon to address the issues; and an email from the jail's oral health director stated the jail was "in DESPERATE need for a part-time oral surgeon." *Id.*, at 1090 (emphasis in original).

The court summarized the issue:

> In this case, the claims of the proposed class members all arise from the same course of conduct by the same defendant: the County's decade-long refusal to have an oral surgeon on staff at the Jail. With no oral surgeon readily available, the class members all suffered the same alleged injury: unreasonable delays in receiving treatment for their acknowledged serious dental conditions.

Id., at 1088.

That summary is similar to Plaintiffs' commonality argument at first blush—the common question being whether the SPD's failure to appoint an eligible defendant counsel within thirty days of eligibility is per se unreasonable. (Doc. 189:25–27.) Plaintiffs cite to experts' reports which suggest that the first thirty days of a criminal case are especially critical due to the ways evidence—

eye-witness memory in particular—degrades over time. (*See* Docs. 167 & 168.) Plaintiffs then cite to the deposition testimonies of the SPD's present or former leadership which suggests that the SPD's allegedly subpar internal processes and record keeping practices exacerbated delays or outright prevented case appointments. (Doc. 189:30–31.)

On one hand then, there were inmates unnecessarily suffering due to the delay in seeing an oral surgeon, and on the other, defendants' cases being prejudiced because they did not have an attorney within thirty days. But the difference is that the jail had a specific policy in place—i.e., "[Cook] County's decision not to keep an oral surgeon at the Jail." *Scott*, 99 F.4th at 1091. In other words, the county's conduct was willful, and the jail inmates were consciously denied access to an on-site oral surgeon despite evidence suggesting one was "desperately" needed.

In this case, the conduct alleged is a "failure." Plaintiffs may deride the SPD's choice of words, but the SPD manual states that the "appointing office must ensure that counsel is provided to eligible applicants *as soon as possible* after they have been determined to qualify for SPD representation, *with a goal of appointing within 72 hours* of determination of eligibility." (Doc. 164:8.) There is no testimony in the depositions of the SPD's present or former leadership or any suggestion in other materials that the SPD is consciously denying eligible defendants an attorney for any length of time. The deposition testimony tells quite the opposite story.

Therefore, the answer to the question of whether the county's *decision* not to keep an oral surgeon on the jail's staff was objectively unreasonable would resolve all of the plaintiffs' claims. While here, the answer to the question of whether the SPD's *failure* to appoint counsel within thirty days of eligibility is per se unreasonable would not apply uniformly to all 8000-plus class members. The deposition transcripts in particular make this clear.

In *Jamie S. v. Milwaukee Public Schools*, the Individuals with Disabilities Education Act required local school districts to identify children with disabilities, determine whether those children needed special-education services, and then "develop individualized education programs ("IEPs") tailored to each student's specific needs." 668 F.3d 481, 485 (7th Cir. 2012). The alleged class consisted of "students eligible to receive special education from MPS 'who are, have been or will be' denied or delayed entry into or participation in the IEP process." *Id.* This class definition focused the case on alleged violations of the IDEA's "child-find" requirements. *Id.* The alleged common question was thus whether the "potential class members [ ] suffered as a result of MPS' failure to ensure their Child Find rights under IDEA and Wisconsin law." *Id.*, at 497.

In its commonality analysis the court emphasized that "the plaintiffs must show that they share some question of law or fact that can be answered *all at once* and that the *single answer* to that question will resolve a central issue in all class members' claims." *Id.* (emphasis in original.) The court then considered two hypothetical students: one was disabled and eligible for special-ed services, but had never been identified as disabled or had an IEP developed; the second was identified as disabled and received an IEP meeting, but the child's parents did not attend the IEP meeting. *Id.*, at 498. Both students suffered IDEA violations in the strictest sense. *Id.* But MPS' liability for each violation would have to be determined "separately for each child based on individualized questions of fact and law, and the answers [would be] unique to each child's particular situation." *Id.*

The court continued: "Child-find inquiries . . . are necessarily child specific. There is no such thing as a 'systemic' failure to find and refer individual disabled children for IEP evaluation—except perhaps if there was 'significant proof' that MPS operated under child-find *policies* that violated the IDEA." *Id.* (emphasis in original.) Because there was not such an illegal policy, and

there were not any common questions, the proposed class failed to satisfy the commonality requirement. *Id.*

Here, too, hypothetical defendants could be considered. One defendant is facing charges in Sawyer County, one is facing charges in Green County, and the other is facing charges in Brown County. All three defendants are eligible for public defense, but have not been appointed an attorney within the thirty days. How can the reasonableness of those delays be determined with common questions? There are too many variables: the county where the charges are being brought; the reputation of the prosecutor; the circuit court branch the case is assigned to; the facts underlying the charge(s); the severity of the charge(s); SPD staff attorney conflicts; the number of private attorneys in the vicinity, their areas of practice, their existing caseloads, and their experience levels; the SPD's alleged appointment practices and the local SPD office appointing the case; etc.

Even if a thirty-day delay was per se unreasonable, what is the final injunctive relief to make every defendant whole on day thirty-one? There are too many "dissimilarities with the proposed class" to generate common answers. *Dukes*, 564 U.S. at 350. There is also no allegation or suggestion in this record that the SPD has an illegal policy in place to delay the appointment of counsel. *Jamie S.*, 668 F.3d at 498. For these reasons and the additional reasons outlined in Defendant's brief, the Court concludes Plaintiffs cannot demonstrate the commonality factor.

III. Section 803.08(2)(b)

If section 803.08(1) has been satisfied, the plaintiff may maintain a class action on the grounds that 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." § 803.08(2)(b). Section 803.08(2)(b) "applies only when a single injunction or declaratory judgment would provide relief to each member of the

class." *Jennings v. Rodriguez*, 583 U.S. 281, 313 (2018) (quoting *Dukes*, 564 U.S. at 360). Section 803.08(2)(b) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Dukes*, 564 U.S. at 360 (emphasis in original). Stated differently, a section 803.08(2)(b) class receives "an indivisible injunction benefitting all its members at once." *Id.*, at 562. There can be no claims for "*individualized* relief." *Id.* at 360 (emphasis in original). Lastly, the "injunctive or declaratory relief sought must be "final." *Jamie S.*, 668 F.3d at 499.

a. Discussion

When addressing the subsection (2)(b) requirements, the *Jamie S.* court stated:

> That the plaintiffs have superficially structured their case around a claim for class-wide injunctive and declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made; this kind of relief would be class-wide in name only, and it would certainly not be final.

Id. Because the lower court's remedial order against MPS required "thousands of individual determinations of class membership, liability, and appropriate remedies," the class-certification order had to be vacated along with the remedial order. *Id.*

Though *Scott* was a subsection (2)(c) class action, the idea of "final injunctive relief or corresponding declaratory relief . . . respecting the class as a whole" is easier to envision given the facts. § 803.08(2)(b). A final injunction may have been as simple as ordering Cook County to retain at least a part-time oral surgeon on the jail's staff. Every plaintiff's grievance would have been addressed that simply.

Another case where a potential final injunction as to all class members is easier to envision is *Lemon v. International Union of Operating Engineers*, 216 F.3d 577 (7th Cir. 2000).[3] The union

[3] The *Lemon* plaintiffs moved to certify their class under both subsections (2)(b) and (2)(c). *Lemon* is also a good example for the commonality inquiry. The common question was, did the union discriminate against the class

maintained an out-of-work list for its members to post their names and qualifications. *Lemon*, 216 F.3d at 579. The union then connected contractors with the out-of-work members based on the members' seniority, qualifications, and geographic region. *Id.* The class of plaintiffs consisted of out-of-work union members who sought work through the union, but allegedly the union intentionally diverted work from them because they were racial minorities and women. *Id.* The appointment of a referee or receiver to impartially maintain and manage the union's out-of-work list would have likely addressed the class plaintiffs' claims.

This case is more akin to the *Jamie S.* case. The scope of the SPD's alleged liability and the potential remedies available to each member of the class are impossible to reduce to a final order. It cannot be done practically without making "highly individualized determinations" as to each class member. Moreover, such an order cannot be crafted without usurping decision-making authority from those appointed, elected, and entrusted to run each county's judiciary and criminal justice system. How can this Court decide the appropriate remedy for a class-member defendant in another county, or even another branch here in Brown County? If, for example, a defendant in Vilas County has gone more than thirty days or any other length of time without the successful appointment of an attorney at public expense, the obvious answer is that those practitioners with their boots on the ground in Vilas County should figure out what to do; it is impossible to decide sitting here in Brown County.

Plaintiffs cannot satisfy the subsection (2)(b) requirements.

CONCLUSION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that Plaintiffs' renewed motion for class certification is **DENIED**.

members based on their race and gender in its management of the out-of-work list? A "yes" or "no" to that question answered all of the class members' claims.