UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.J., *et al.*, **Plaintiffs,** **v.** **DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Civil Action No.** **1:18-cv-01901 (EGS/GMH)**

MEMORANDUM OPINION AND ORDER

Plaintiffs, L.R., D.M., and J.J.,[1] three children who suffer from mental illnesses, and University Legal Services, Inc., the designated protection and advocacy organization for such individuals in the District of Columbia, have brought a putative class-action lawsuit against Defendants, the District of Columbia and its officials, on behalf of mentally disabled, Medicaid-eligible children who are institutionalized or at risk of institutionalization. According to Plaintiffs, Defendants are not adequately providing certain services to such children as required by federal law.

Presently before the Court is Plaintiffs' motion to compel discovery, in which they seek from Defendants the contact information of (1) 198 children who are potential members of the putative class, (2) those children's guardians, and (3) those children's mental health professionals or facilities that have treated them since their birth. Plaintiffs claim that this information is relevant to their efforts to gather evidence for class certification. Defendants object to disclosing this information, asserting that it is not relevant prior to class certification, that Plaintiffs have not demonstrated an adequate need for it, that releasing it would constitute an unwarranted invasion of the

[1] Pursuant to Rule 5.2 of the Federal Rules of Civil Procedure and Local Civil Rule 5.4, the minor individual Plaintiffs in this action are identified by their initials. Fed. R. Civ. P. 5.2(a)(3); LCvR 5.4(f)(2). After the Complaint was filed in this action, M.J. withdrew from the case. Minute Order dated Feb. 21, 2020.

children's privacy, and—with respect to Plaintiffs' request for the contact information of the children's treating mental health professionals or facilities—that it would be unduly burdensome to provide.[2]

Because Plaintiffs have shown that the contact information of the children and of their guardians is discoverable, their motion to compel is granted in part. However, Plaintiffs' motion is denied with respect to the disclosure of the contact information of the children's treating mental health professionals or facilities, as its production would be unduly burdensome and unnecessary at this time.

I. BACKGROUND

In August 2018, Plaintiffs filed a putative class-action lawsuit on behalf of Medicaid-eligible children in the District of Columbia who have been diagnosed with a mental health disability and who, according to Plaintiffs, have been unnecessarily institutionalized or are at risk of institutionalization due to Defendants' alleged failure to provide adequate mental health services in violation of the Medicaid Act, the Americans with Disabilities Act, and the Rehabilitation Act. ECF No. 55-1 at 3 (citing ECF No. 3, ¶¶ 1–9). Plaintiffs have not yet moved for class certification, pending the completion of discovery of information relevant to filing such a motion. *See* ECF No. 55-1 at 3.

[2] Judge Emmet G. Sullivan referred this matter to the undersigned for resolution pursuant to Local Civil Rule 72.2. Minute Order dated Apr. 6, 2020. Under that Rule, "a magistrate judge may hear and determine any pretrial motion or matter other than those specified in [Local Civil Rule] 72.3, and may conduct proceedings and enter orders pursuant to [Local Civil Rule] 16.4." LCvR 72.2(a). The relevant docket entries considered by the undersigned for purposes of resolving Plaintiffs' motion are (1) the Complaint (ECF No. 3), (2) the Protective Order (ECF No. 54), (3) Plaintiffs' motion to compel discovery (ECF No. 55) and its attachments, (4) Defendants' opposition to Plaintiffs' motion to compel discovery (ECF No. 59) and its attachments, and (5) Plaintiffs' reply in further support of their motion to compel discovery (ECF No. 61). The page numbers cited herein are those assigned by the Court's CM/ECF system.

Plaintiffs served initial discovery requests on Defendants on September 6, 2019. *Id.* Plaintiffs requested that Defendants identify, on an anonymized basis using unique identification numbers,[3] Medicaid-eligible children with a diagnosed mental health disability who, from August 14, 2016, through September 6, 2019, have been institutionalized or have received mental health services indicating that they are at risk of institutionalization. *Id.*; ECF No. 59-2 at 3–7. In November 2019, Defendants responded to Plaintiffs by identifying a population of approximately 1,900 such children, with each child represented not by name but by a unique identification number. ECF No. 55-1 at 3.

Meanwhile, the parties negotiated a Protective Order addressing the production of confidential information in discovery, which the Court entered in October 2019. *Id.* at 4. Under the terms of that Order, the following categories of information produced by a party in this matter may be designated as confidential:

> 1. personal information, including but not limited to, an individual's home address, telephone number, date of birth, social security number, all personal information that pertains to the financial affairs and health (physical or mental) of the plaintiffs including any state or federal identification number, or any other personal information unique to such individual;
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> 2. information protected by or specifically prohibited from release by statute or regulation, including protected health information and mental health information under [the Health Insurance Portability and Accountability Act ("HIPAA")] and/or [the District of Columbia Mental Health Information Act ("DCMHIA")];
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> 3. non-public records relating to the District of Columbia's internal operations; and,
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> 4. other information that a producing party reasonably and in good faith determines should be subject to the terms of this Protective Order.

[3] During a hearing before the Court on Plaintiffs' motion, Plaintiffs clarified that, for purposes of this case, a unique identification number is an individualized string of random numbers or characters associated with a specific child. Draft Transcript ("Draft Tr.") at 17–18 (on file with the Chambers of the undersigned).

ECF No. 54 at 1–2. Importantly, the Order requires, among other things, that information designated as confidential be used only for purposes of this action and that any such information obtained through discovery must be returned to the producing party or destroyed following the conclusion of this litigation. *See id.* at 2, 4, 10.

In December 2019, Plaintiffs served on Defendants the three interrogatories presently at issue. ECF No. 55-1 at 5. Those interrogatories seek information concerning 198 of the approximately 1,900 children anonymously identified by Defendants in response to Plaintiffs' initial discovery requests; according to Plaintiffs, this number of children (198) is necessary to obtain a statistically significant sample of responses. Draft Tr. at 6. Specifically, the interrogatories request the following information about those children:

> INTERROGATORY NO.1: Identify by full name, mailing address, email address, telephone number, and date of birth, each Uniquely Identified Child.[4]
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> INTERROGATORY NO.2: Identify by full name, mailing address, email address, telephone number, all Legal Custodians for each Uniquely Identified Child.
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> INTERROGATORY NO.3: Identify by full name, mailing address, email address, telephone number, all Mental Health Professionals or Mental Health Facilities that provided Mental Health Services for each Uniquely Identified Child from the Uniquely Identified Child's birth to the present.

ECF No. 55-1 at 5 (footnote in original). Plaintiffs plan to use the information requested in Interrogatories 1 and 2 to contact those children and their parents or guardians to obtain their authorization to review the children's personal histories, request mental health records, and conduct interviews of them as part of Plaintiffs' efforts to establish the requirements for certifying a class under Rule 23(a) of the Federal Rules of Civil Procedure. Specifically, Plaintiffs seek information

[4] "The 'Uniquely Identified Children' are identified on a schedule to the [i]nterrogatories using the same unique identifying numbers provided by Defendants in response to Plaintiffs' earlier discovery requests." ECF No. 55-1 at 5 n.1.

concerning the sample of 198 potential class members to demonstrate that (1) "the class is so numerous that joinder of all members is impracticable," (2) "there are questions of law or fact common to the class," (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class," and (4) "the representative parties will fairly and adequately protect the interests of the class." ECF No. 55-1 at 9 (quoting Fed. R. Civ. P. 23(a)(1)–(4)). After receiving the children's and their parents' or guardians' authorization, Plaintiffs intend to direct requests for medical records to the treating mental health professionals or facilities of the children who wish to assist Plaintiffs in their efforts.[5] ECF No. 55-1 at 5–6.

In January 2020, Defendants lodged objections to the interrogatories. ECF No. 59-4. With respect to the information requested by all three interrogatories, Defendants contended that (1) it was protected from disclosure without prior consent under D.C. and federal law, and (2) it was not relevant or proportional to the needs of the case or to issues related to class certification. *Id.* at 3–5. With respect only to the information requested in Interrogatory 3—*i.e.*, the contact information of the mental health professionals or facilities that have treated the 198 putative members since their birth—Defendants asserted that producing it would be unduly burdensome because doing so would require Defendants to collect numerous records spanning multiple decades. *Id.* at 5. Defendants also noted with respect to Interrogatory 3 that it improperly requests information outside the stated time period of Plaintiffs' initial discovery requests, which begins on August 14, 2016. *Id.*; *see* ECF No. 59-2 at 3–7.

Before Plaintiffs filed the motion to compel, the parties met and conferred regarding Defendants' objections to the interrogatories. ECF No. 55-1 at 7. Those conversations resolved one

[5] Plaintiffs note that they will ask consenting putative members for the names of all of their treating mental health professionals or facilities, but that, because it is unlikely that those putative members will possess all of that information, they are requesting that information in Interrogatory 3. Draft Tr. at 20.

objection, as Defendants agreed that HIPAA did not bar disclosure of medical information where, as here, there is a protective order limiting the permitted uses of confidential information solely to litigation and providing that such information must be returned to the producing party or destroyed once the action has concluded. *Id.* Defendants maintained their relevance and proportionality objections to the interrogatories, as well as their undue burden objection to Interrogatory 3. *Id.* at 8.

Shortly thereafter, Plaintiffs filed the instant motion to compel discovery, seeking production of the information requested in the interrogatories. ECF No. 55. In support of the motion, Plaintiffs argue that the information is relevant for gathering evidence to establish the four requirements for certifying a class under Rule 23(a)—*i.e.*, numerosity, commonality, typicality, and adequacy of representation. ECF No. 55-1 at 9 (citing Fed. R. Civ. P. 23(a)(1)–(4). Plaintiffs also contend that the D.C. statutes Defendants have invoked prohibiting the disclosure of mental health information—even pursuant to a protective order sufficient under HIPAA—are inapplicable in a federal-question lawsuit brought in federal court, and that Defendants have failed to demonstrate that the production of the information requested in Interrogatory 3 would be unduly burdensome. *See* ECF No. 55-1 at 10–14.

In response, Defendants raise four primary arguments. Three of those arguments concern only Interrogatories 1 and 2: (1) the putative members' contact information is not discoverable at this stage because no class has been certified; (2) Plaintiffs have failed to show a sufficient need for obtaining that information; and (3) disclosing that information would constitute an unwarranted invasion of the putative members' privacy. ECF No. 59 at 6–12. Defendants' remaining argument—that producing the contact information of the putative members' treating mental health

professionals or facilities would be unduly burdensome—concerns only Interrogatory 3. *Id.* at 12–13.

Plaintiffs' motion is fully briefed and ripe for adjudication.

II. LEGAL STANDARD

Rule 26(b)(1) of the Federal Rules of Civil Procedure permits discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). This right is subject to Rule 26(b)(2)(C), which limits discovery that is, among other things, burdensome or outside the scope of Rule 26(b)(1). Fed. R. Civ. P. 26(b)(2)(C). When the parties are unable to resolve a discovery dispute, "a party may move for an order compelling disclosure of discovery." Fed. R. Civ. P. 37(a). "The party that brings the motion to compel bears the initial burden of 'proving that the opposing party's answers were incomplete' and 'explaining how the requested information is relevant.'" *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 5–6 (D.D.C. 2017) (first quoting *Equal Rights Ctr. v. Post Prop., Inc.*, 246 F.R.D. 29, 32 (D.D.C. 2007), then quoting *Jewish War Veterans of the U.S., Inc. v. Gates*, 506 F. Supp. 2d 30, 42 (D.D.C. 2007)). "Once that showing has been made, 'the burden shifts to the non-moving party to explain why discovery should not be permitted.'" *English v. Wash. Metro. Area Transit Auth.*, 323 F.R.D. 1, 8 (D.D.C. 2017) (some quotation marks omitted) (quoting *Jewish War Veterans*, 506 F. Supp. 2d at 42). "Trial courts have considerable discretion when handling discovery matters, and 'a district court's decision to permit or deny discovery is reviewable only for an abuse of discretion.'" *United States ex rel. Shamesh v. CA, Inc.*, 314 F.R.D. 1, 9 (D.D.C. 2016) (quoting *Food Lion, Inc. v. United Food and Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1012 (D.C. Cir. 1997)).

III. DISCUSSION

For the reasons discussed below, the Court finds that Plaintiffs have shown that the information requested in Interrogatories 1 and 2 is discoverable. The Court will therefore grant Plaintiffs' motion with respect to those interrogatories. However, to ensure that putative class members' privacy interests are respected, the Court will impose two conditions on the production of information pursuant to those interrogatories. Furthermore, because Defendants have demonstrated that the production of the information requested in Interrogatory 3 would be unduly burdensome and unnecessary, Plaintiffs' motion will be denied with respect to that interrogatory.

As noted previously, Defendants raise three arguments that concern only Interrogatories 1 and 2 and one argument that pertains only to Interrogatory 3.[6] Accordingly, the undersigned will first consider Interrogatories 1 and 2 together and then examine Interrogatory 3.

A. Interrogatories 1 and 2

To begin, Plaintiffs have met their "initial burden of . . . 'explaining how the requested information [in Interrogatories 1 and 2] is relevant.'" *Oxbow*, 322 F.R.D. at 6 (quoting *Jewish War Veterans*, 506 F. Supp. 2d 42). As Plaintiffs fairly assert without contradiction from Defendants, Interrogatories 1 and 2 are targeted toward gathering information relevant to the numerosity, commonality, typicality, and adequate representation prongs of Rule 23(a). ECF No. 55-1 at 9; *see generally* ECF No. 59. Specifically, medical information concerning cooperating putative class members will shed light on whether and to what extent the medical services that the named

[6] In their initial objections to the interrogatories, Defendants, using boilerplate wording, raised the same general relevance and privacy objections to Interrogatory 3 as they did for Interrogatories 1 and 2. *See* ECF No. 59-4 at 4–5. However, in their opposition to Plaintiffs' motion, they raise no such arguments for this interrogatory, focusing instead on undue burden. ECF No. 59 at 13–14. Thus, the Court will consider only Defendants' undue burden argument with respect to Interrogatory 3. *See Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 95 (D.D.C. 2019) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005))).

Plaintiffs in this action have received are similar to the medical services that other similarly-situated children have received. *See* Draft Tr. at 6–7 (noting that the information sought by Plaintiffs is necessary for determining the number of putative members and for ascertaining whether "the harms that . . . [the named Plaintiffs have] suffered and the remedies [they request] are common to the class as a whole," whether the named Plaintiffs' "experiences are typical of other members of the class," and whether they are "adequate representative[s] of the class"); *cf. G.D. v. Riley*, No. 2:05-CV-980, 2007 WL 2206559, at *1, 3–4 (S.D. Ohio July 30, 2007) (in a putative class-action lawsuit where the plaintiffs alleged the defendant had failed to provide appropriate medical services to Medicaid-eligible children, granting the plaintiffs' pre-certification motion to compel disclosure of putative members' medical information for purposes of gathering evidence to satisfy Rule 23(a), and noting that such information was "relevant to the [plaintiffs'] motion to certify").

Defendants respond to Plaintiffs' showing not by arguing that the information Plaintiffs seek is irrelevant to class certification, but by arguing that pre-certification discovery of putative class members' contact information is generally prohibited other than when class representatives seek to provide notification of opt-in or opt-out rights to those putative members. ECF No. 59 at 7. Defendants' sole support for this statement is their assertion that "[a]t least one court has cast doubt on the propriety of obtaining . . . [putative members' contact] information in class discovery" for purposes other than providing notification of opt-in or opt-out rights. *Id.* (citing *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 628 n.2 (7th Cir. 2014)). However, Defendants' reliance on *Sterk* is misplaced. There, the Seventh Circuit affirmed the district court's denial of the plaintiffs' pre-certification request for putative members' contact information because the district court had determined that such information was irrelevant to resolving a pending summary judgment motion that was unrelated to class certification. *See Sterk*, 770 F.3d at 628 n.2 (noting

that the district court denied the plaintiffs' request for putative members' contact information because summary judgment hinged on an unrelated legal question, and "[a]ll material information pertaining to that question had been sought and received by [the] plaintiffs prior to summary judgment"). It did not, as Defendants claim, cast doubt on the propriety of obtaining putative members' contact information in class discovery for purposes other than providing notification of opt-in or opt-out rights.

Indeed, "[t]he Supreme Court has recognized the importance of allowing class counsel to communicate with potential class members for the purpose of gathering information . . . prior to class certification." *Minns v. Advanced Clinical Emp't Staffing LLC*, No. C 13–03249 SI, 2014 WL 4352343, at *2 (N.D. Cal. May 9, 2014) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102–03 (1981) (holding that a district court's order prohibiting plaintiffs' counsel from communicating with putative members to gather evidence for class certification was an abuse of discretion because "[t]he record reveal[ed] no grounds on which the District Court could have determined that it was necessary or appropriate to impose this order")); *see Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[D]iscovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation."). As such, pre-certification discovery of putative members' contact information "is likely warranted where it will help resolve factual issues necessary for the determination of whether the action may be maintained as a class action, such as whether there are grounds for a class." *Ahmed v. HSBC Bank USA, Nat'l Ass'n*, No. ED CV 15–2057–FMO (SPx), 2017 WL 4325587, at * 2 (C.D. Cal. Sept. 25, 2017) (citing *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975)). That is the case here with respect to the information requested in Interrogatories 1 and 2. ECF No. 55-1 at 9; *cf. Minns*, 2014 WL

4352343, at *2 (granting pre-certification discovery of putative members' contact information because that information was "likely to lead to evidence relevant to commonality and typicality"); *Wellens v. Daiichi Sankyo Inc.*, No. C–13–00581–WHO (DMR), 2014 WL 969692, at *2, 3 (N.D. Cal. Mar. 5, 2014) (same where the plaintiffs "intend[ed] to contact [ ] putative class members for investigatory purposes to gather evidence in support of class certification"); *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011) (same where "[t]he contact information and subsequent contact with potential class members [was] necessary to determine whether [the plaintiff's] claims [were] typical of the class, and ultimately whether the action [could] be maintained as a class action").

Having found the information requested in Interrogatories 1 and 2 relevant and that its discovery is not generally prohibited, the Court must then consider whether the information is proportional to the needs of the case. Defendants raise two arguments concerning proportionality: (1) Plaintiffs have not demonstrated a sufficient need for the information, and (2) disclosing the information would constitute an unwarranted intrusion into the putative class members' privacy. Neither argument is availing.[7]

Defendants first contend that Plaintiffs have failed to show a need for the information requested in Interrogatories 1 and 2 because they already have access to sufficient information to seek class certification. ECF No. 59 at 7–8. However, Defendants provide no support for this contention beyond the vague assertion that Plaintiffs may gather evidence for class certification

[7] In considering whether information is proportional to the needs of a case, courts ordinarily weigh the following six factors: "(1) the importance of the issues at stake in [the] action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit." *Oxbow*, 322 F.R.D. at 6 (quoting *Williams v. BASF Catalysts, LLC*, No. 11-1754, 2017 WL 3317295, at *4 (D.N.J. Aug. 3, 2017)). Here, however, neither party seeks application of *Oxbow*, and Defendants' two arguments concerning the proportionality of the information requested in Interrogatories 1 and 2 are narrower than the factors considered in *Oxbow*. *See generally* ECF Nos. 55-1, 59. In any event, because both of Defendants' proportionality arguments are unavailing, as discussed below, the Court need not apply *Oxbow* in full.

using the "[anonymized] information provided by the District in class discovery thus far, and based on other information, such as state reports, that are readily available." ECF No. 59 at 7 (footnote omitted). Defendants nowhere explain how Plaintiffs could gather evidence using the anonymized information that Defendants have provided, nor have they elaborated on which state reports are "readily available" to Plaintiffs and what those reports contain. *See id.* More, in weighing the parties' relative access to relevant information, "courts look for 'information asymmetry'—a circumstance in which one party has very little discoverable information while the other party has vast amounts of discoverable information. In such a case, 'the burden of responding to discovery lies heavier on the party who has more information, and properly so.'" *Oxbow*, 322 F.R.D. at 8 (citation omitted) (quoting Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment). During the hearing before the Court on Plaintiffs' motion, Plaintiffs asserted that, based on the material currently available to them, they have information concerning perhaps a dozen putative members out of a total (by Plaintiffs' estimation) of around 2,000 potential class members, while Defendants possess all potential members' contact information. Draft Tr. at 10, 30. Defendants did not dispute or cast doubt on those assertions at the hearing. *See generally id.* Thus, "information asymmetry" weighs in Plaintiffs' favor. *Cf. Oxbow*, 322 F.R.D. at 8 (granting the defendants' motion to compel in part because another party possessed all relevant information). Additionally, the fact that Plaintiffs acted appropriately by collecting information about some putative members prior to filing a motion for class certification should not weigh against them now in assessing their need for obtaining information about additional potential members; "otherwise, the [C]ourt would effectively penalize [Plaintiffs'] counsel for having engaged in efforts to locate putative class members." *Wellens*, 2014 WL 969692, at *2.

More persuasive, although ultimately unavailing, is Defendants' contention that allowing disclosure of the information in Interrogatories 1 and 2 would result in an invasion of the putative members' privacy. ECF No. 59 at 8–10. Indeed, while Rule 26 "contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n.21 (1984). As Defendants correctly observe, D.C. law robustly protects the confidentiality of third-party mental health information because it does not permit the disclosure of such information in a civil matter, even when the parties have entered into a protective order sufficient under HIPAA. *See* D.C. Code § 7-1204.03(a) (prohibiting the disclosure of mental health information in a civil proceeding except when a party "initiates his mental or emotional condition or any aspect thereof as an element of the claim or defense"). Defendants, however, appear to concede that D.C. law does not govern in this federal case asserting federal claims. ECF No. 59 at 8. Such a concession would be well-taken; "state laws relating to the privacy of mental health information that are 'more stringent' than [ ] HIPAA regulations . . . are unenforceable with regard to federal claims in federal court." *Kalinoski v. Evans*, 377 F. Supp. 2d 136, 140 (D.D.C. 2005) (quoting *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 925 (7th Cir. 2004)). Nevertheless, D.C. law's strong privacy protections are instructive because, "in determining which interests to weigh in the Rule 26 balance, courts look to statutory confidentiality provisions, even if they do not create enforceable privileges." *In re Sealed Case*, 381 F.3d at 1215–16. Thus, "[a]ny protection provided by [a] statute"—even if that statute does not govern in a particular case—is "relevant to the balancing of interests required under Rule 26." *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 897 n.7 (D.C. Cir. 2006); *cf. In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 754 (D.C. Cir. 2006) (in a federal-question case, noting that whether certain documents

"would have been treated as privileged under various State laws" constituted "an important consideration" in Rule 26 balancing); *In re Sealed Case*, 381 F.3d at 1216–17 (in a federal-question case, holding that the district court abused its discretion in ordering disclosure of mental health records where it did not take into account, among other things, D.C. law protecting the privacy of such information). As such, the Court must weigh putative members' privacy interests, taking D.C. law into account—even if that law does not strictly apply to this case—against Plaintiffs' need for the requested information.

Here, the Court is mindful of the extremely sensitive nature of the information Plaintiffs seek and of the privacy interests at stake. Although Plaintiffs are requesting only the contact information of certain children and their guardians, it is undisputed that, in obtaining this information, Plaintiffs will be made aware of highly sensitive mental health information pertaining to those children, such as the fact that they have been institutionalized, placed in foster care, or are at risk of institutionalization due to a diagnosed mental disability. Draft Tr. at 25. And D.C. law undoubtedly evinces a strong policy of protecting third parties' privacy interests in their mental health information, as demonstrated by its prohibition on the disclosure of third-party mental health information even where there is a protective order in place. D.C. Code § 7-1204.03(a).

However, as discussed above, Plaintiffs have shown a strong need for the information requested, as it is necessary for them to gather evidence to satisfy Rule 23(a). More, the presence of a protective order—a tool commonly used "to protect the privacy interests of putative class members," *Wellens*, 2014 WL 969692, at *3 (collecting cases)—alleviates that privacy concern because, in compliance with HIPAA, the order stipulates that any material labelled as confidential by the disclosing party cannot be used for purposes other than litigating this case and must be

destroyed or returned to the disclosing party at the conclusion of this action.[8] ECF No. 54 at 4, 10; 45 C.F.R. § 164.512(e)(1)(ii), (e)(1)(v); *cf. G.D.*, 2007 WL 2206559, at *3–4 (granting discovery of putative members' medical information under the condition that the parties enter into a protective order prohibiting the improper use of that information). In addition, University Legal Services, Inc., one of the named Plaintiffs in this matter, is no ordinary litigant, but rather has "for decades, . . . served as the District's designated Protection and Advocacy Organization . . . empowered under federal statutes to ensure [that] the rights of individuals with mental illnesses are protected." ECF No. 61 at 9. It is therefore unlikely that Plaintiffs would misuse putative members' contact or mental health information.

Furthermore, in recognition of the fact that "the information sought by [P]laintiffs is worthy of extraordinary protection," *G.D.*, 2007 WL 2206559, at *4, the Court will impose two conditions on all information produced pursuant to Interrogatories 1 and 2. *See Downey v. Am. Nat'l Prop. and Cas. Co.*, No. 11-587 MCA/ACT, 2013 WL 12166323, at *4 (D.N.M. Mar. 8, 2013) ("The recognized need for pre-certification discovery is subject to limitations which may be imposed by the court, and any such limitations are within the sound discretion of the court."). First, all information must be decoupled from the putative members' unique identification numbers.[9] This condition will ensure that Plaintiffs will not be able to identify which medical services each child received, thereby further alleviating privacy concerns. *See In re Nat'l Hockey League Players' Concussion Injury Litig.*, 120 F. Supp. 3d 942, 955 (D. Minn. 2015) ("[T]he privacy interests of a

[8] Under HIPAA regulations, a covered entity may, in response to a discovery request in a civil proceeding, disclose medical records without a patient's written authorization or court order, as long as "reasonable efforts have been made" by the requesting party "to secure a qualified protective order" that "[p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation" and that "[r]equires the return to the covered entity or destruction of the protected health information . . . at the end of the litigation." 45 C.F.R. § 164.512(e)(1)(ii), (e)(1)(v). The parties do not dispute that Defendant District of Columbia is an entity covered by HIPAA. *See generally* ECF Nos. 55-1, 59.

[9] Notably, Plaintiffs have represented that they would not object to such a condition. ECF No. 61 at 9.

patient in his or her medical records [are] tied to identity information contained in the records. Once the identifying information is removed from the record, the patient's privacy interest is essentially eliminated." (alteration in original) (quoting *United States ex rel. Roberts v. QHG of Ind., Inc.*, No. 1:97–CV–174, 1998 WL 1756728, at *8 (N.D. Ind. Oct. 8, 1998))). If the putative members choose to disclose their medical history to Plaintiffs, they may do so. Second, any birthdates disclosed to Plaintiffs must omit the precise day of each putative member's birth and include only the birth month and year, because only the latter information is relevant for when putative members will age (or have aged) out of the putative class.[10] With these restrictions, the putative members' privacy interests will be adequately protected. *Cf. Allen v. Woodford*, No. CV-F-05-1104 OWW LJO, 2007 WL 309485, at *6–7 (E.D. Cal. Jan. 30, 2007) (granting disclosure of third-party medical information outside of the class-action context and noting that "a protective order and proper redaction will safeguard third parties' privacy issues").

Accordingly, Plaintiffs' motion is granted with respect to the information requested in Interrogatories 1 and 2, subject to the conditions set forth above.

B. Interrogatory 3

While Defendants' arguments regarding Interrogatories 1 and 2 are unavailing, their assertion that producing the information requested in Interrogatory 3 would impose an undue burden is correct. Again, that interrogatory seeks the contact information of the putative members' treating mental health professionals or facilities dating back to the putative members' birth. Responding to that request would require Defendants to comb through numerous records dating back to the births of 198 individuals. ECF No. 59 at 12–13. Specifically, Defendants would be required first

[10] Plaintiffs have stated that the age of each of the 198 children is all they need in order to ascertain when each child will age (or has aged) out of the putative class; they do not need to know the exact date each child was born. Draft Tr. at 14–15.

to locate all the billing records in their possession regarding each putative member's medical procedures. Draft Tr. at 32. From those billing records, Defendants would then have to extract the contact information of the mental health professionals or facilities associated with each procedure. *Id.* at 33. Multiply that task by the 198 individuals covered by Interrogatory 3 and by every year of each individual's life since birth, and the burden of the undertaking is self-evident.

In addition to being burdensome to produce, the information would presently be of no benefit to Plaintiffs prior to obtaining the putative members' and their parents' or guardians' consent to access their medical records. Until such consent is provided, the treating mental health professionals or facilities would be unable to disclose to Plaintiffs any medical information pertaining to the putative members. *Id.* Put differently, the information requested in Interrogatory 3 is of no value to Plaintiffs before they obtain the information requested in Interrogatories 1 and 2 and secure the consent of the putative members and their parents or guardians to access their medical records. And if any putative member or her parent or guardian declines consent, all contact information produced pursuant to Interrogatory 3 would have been for naught, as Plaintiffs would remain unable to access any non-consenting individual's medical records from their treating mental health professionals or facilities—or, indeed, from any other source. *Id.*

Thus, granting Plaintiffs' motion with respect to Interrogatories 1 and 2 so that Plaintiffs can secure the consent of putative members and their parents or guardians, and denying that motion with respect to Interrogatory 3, is both more efficient and more respectful of putative members' privacy. *See Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 299–300 (D.C. Cir. 2020) ("'[D]istrict courts have broad discretion in structuring discovery' to limit unnecessary or overly burdensome requests . . . ." (quoting *Hussain v. Nicholson*, 435 F.3d 359, 363 (D.C. Cir. 2006))). Plaintiffs should first contact the putative members using the information provided pursuant to

Interrogatories 1 and 2 and seek the information requested in Interrogatory 3 from the putative members who choose to assist Plaintiffs. If Plaintiffs are unable to obtain that information from any consenting putative member, they may seek it from Defendants through a new discovery request.[11]

Accordingly, Plaintiffs' motion to compel with respect to Interrogatory 3 is denied.

IV. CONCLUSION

For the reasons stated above, it is hereby

ORDERED that Plaintiffs' motion to compel discovery (ECF No. 55) is **GRANTED IN PART** and **DENIED IN PART**. Specifically, the motion is granted with respect to the information requested in Interrogatories 1 and 2, subject to the requirements that (1) any contact information produced pursuant to those interrogatories shall be decoupled from unique identification numbers, and (2) any birthdates produced pursuant to those interrogatories shall include only the birth month and year. With respect to the information requested in Interrogatory 3, Plaintiffs' motion is denied.

SO ORDERED.

Date: July 1, 2020

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G. MICHAEL HARVEY
UNITED STATES MAGISTRATE JUDGE

[11] Defendants have represented that, if Plaintiffs first secured the consent of putative members and their parents or guardians to access their medical records, and if Interrogatory 3 were worded such that Plaintiffs were requesting information associated with consenting putative members, there would be "no privacy concern" with respect to disclosing such information, and the burden of producing that information would be "significantly reduced." Draft Tr. at 25. In light of these representations, the Court expects that the parties will cooperate in requesting and producing any contact information of treating mental health professionals or facilities that consenting putative members do not possess.