

ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C.-Atlanta

AUG 20 2004

LUTHER D. THOMAS, Clerk
By: *[Signature]*
Deputy Clerk

MICHAEL BIRDSONG, KELLEY
DOTSON, SUSAN EDWARDS,
BOBBY JONES, MIA MURRAY
LARRY PRITCHARD, and
PATRICIA REDMOND,
on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

SONNY PERDUE, in his official capacity
as Governor of the State of Georgia,
GEORGIA DEPARTMENT OF
COMMUNITY HEALTH,
GEORGIA DEPARTMENT OF HUMAN
RESOURCES, JIM MARTIN,
Commissioner, Georgia Department of
Human Resources, in his official capacity,
GARY REDDING, Commissioner, Georgia
Department of Community Health,
in his official capacity,

Defendants.

CIVIL ACTION NO.

1:03 – CV – 0288 -JEC

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs hereby request that this Court issue an order pursuant to Federal Rule of Civil Procedure 23(c)(1) determining that this case may proceed as a class action, defining the class and the class claims, and appointing class counsel. The

proposed plaintiff class consists of all persons with physical disabilities who have been, or are at risk of being, unnecessarily segregated in nursing homes because of Defendants' failure to provide them with long-term health-care services in the community as required by federal law.

In support of this motion, Plaintiffs show the following:

1. the class is so numerous that joinder of all members is impracticable;
 2. there are questions of law and fact common to the class;
 3. the claims of the representative parties are typical of the class;
 4. the representative parties will fairly and adequately protect the interests of the class; and
5. Defendants have acted or refused to act on grounds generally applicable to the class.

For these reasons, and as argued in the accompanying Memorandum of Law, Plaintiffs respectfully request that this Court enter the requested order.

Dated: August 20, 2004



Charles T. Lester, Jr.
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Teresa Wynn Roseborough
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the accompanying
Motion for Class Certification upon counsel of record by first class mail properly
addressed as follows:

Thurbert E. Baker
Attorney General
Kathleen M. Pacious
Deputy Attorney General
David E. Langford
Assistant Attorney General
40 Capitol Square
Atlanta, GA 30334-1300

This 20th day of August, 2004.



Joseph A. White
Georgia Bar Number 754315

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MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION

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ARGUMENT

I. Overview

The named Plaintiffs bring this action on behalf of themselves and all persons with physical disabilities who: (1) are qualified to receive long-term health-care and supportive services under Medicaid and state-funded programs administered by Defendants, and (2) would prefer, and are qualified (with or without reasonable accommodations) to receive such services in a more integrated setting than a nursing home (*i.e.*, hereinafter, to receive “community-based services”); but (3) are either unnecessarily confined and segregated in nursing homes, or on community-based services waiting lists that do not move at a reasonable pace.¹

Defendants’ failure to provide class members with community-based services violates the Americans with Disabilities Act (the “ADA”), 42 U.S.C. §§ 12101-12213, and implementing regulations; § 504 of the Rehabilitation Act of

¹ Plaintiffs intend the term “qualified” in the class definition to have the same meaning that it has in the ADA and in Section 504, or, if these meanings differ, then the broader of the two. A person may be “qualified” in this sense even if the State has not determined him or her to be eligible for Medicaid community-based services; however, everyone whom the State *has* determined to be eligible for such services is necessarily “qualified.” See *Olmstead v. L.C.*, 527 U.S. 581, 602-603 (1999) (holding that there was “no genuine dispute” over whether plaintiffs were qualified under the ADA, where the State had determined them eligible for the applicable programs).

1973, 29 U.S.C. § 794(a) (“Section 504”), and implementing regulations; Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396v (“Title XIX” or the “Medicaid Act”), and implementing regulations; and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (“Section 1983”). Plaintiffs seek injunctive relief designed to end and remedy this violation.

Plaintiffs have moved to certify the above-described class, pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2). In support of this Motion, Plaintiffs submit the following argument and authorities.

II. The Proposed Class Meets the Requirements of Rule 23.

To be certified as a class action under Rule 23, this case must satisfy the four prerequisites of Rule 23(a), as well as at least one of the grounds of certification set forth in Rule 23(b). Rule 23(a) provides that a class may be certified only if:

(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.

Under Rule 23(b)(2), an action that meets the above requirements is maintainable as a class action, as long as “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole” Fed. R. Civ. P. 23(b)(2).

Although the language just quoted may appear to require a determination of fact regarding Defendants’ actions, the Supreme Court has held that the merits of a plaintiff’s underlying claims are not at issue in determining whether the case may proceed as a class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Instead, “[f]or the purposes of class certification[,] . . . the Court accepts the Plaintiffs’ substantive allegations as true.” *In re Carbon Dioxide Antitrust Litigation*, 149 F.R.D. 229, 232 (M.D. Fla. 1993). The standards of Rule 23 are liberally construed, *Walco Investments v. Thenen*, 168 F.R.D. 315, 323 (S.D. Fla. 1996), and “[t]he Court [should] resolve[] . . . any doubt in favor of class certification,” *Carbon Dioxide Antitrust*, 149 F.R.D. at 232. Plaintiffs’ claims are appropriate for class treatment under these standards.

A. The Proposed Class Meets the Numerosity Requirement.

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” Plaintiffs have clearly met this requirement.

To establish numerosity, Plaintiffs need not present an exact number for the class, *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925 (11th Cir. 1983), but need only make a reasonable estimate, *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986). What constitutes a sufficient number of class members varies, depending on the specific facts of each case. *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D. Fla. 1992). However, as a rule of thumb, “less than twenty-one is inadequate, more than forty adequate.” *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

The proposed class is so numerous that individual joinder of all members would be impracticable. Upon information and belief, there are presently over 4,800 people on waiting lists for community-based services in Georgia, and still others who are eligible for and would welcome such services but who are not on waiting lists, either because their applications have not been processed or have been wrongfully denied, or because Defendants have not effectively informed them that they have the choice to receive community-based services in place of nursing-home care. The proposed class also includes future members, likely to number in the thousands. Even if the number of class members were on the order of tens rather than thousands, it would probably be sufficient, in view of Plaintiffs’ physical disabilities, geographic dispersion throughout the state, and financial inability to pursue individual claims. *See, e.g., Armstead v. Pingree*, 629 F. Supp.

273, 279 (M.D. Fla. 1986) (considering these circumstances in assessing numerosity of proposed class of Medicaid recipients). The numerosity requirement of Rule 23(a) has clearly been met, and Plaintiffs expect that the State will not contend otherwise.

B. Plaintiffs' Claims Present Common Questions of Law and Fact.

Rule 23(a)(2) requires the existence of “questions of law or fact common to the class.” There is no requirement that *all* questions of law or fact be common to *all* class members, however. *Johnson v. American Credit Co. of Ga.*, 581 F.2d 526, 532 (5th Cir. 1978). Factual differences among class members do not preclude the required commonality, as long as common questions of law exist. *Murray v. Auslander*, 244 F.3d 807, 813 (11th Cir. 2001). The commonality rule requires only that one issue of law or fact be common to all or a significant number of proposed class members. *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982).

This requirement is met here. Not one of Plaintiffs' claims seeks relief that would be limited to the particular circumstances of an individual plaintiff. Rather, as shown below, each claim raises a legal challenge to a policy or practice that applies to a class of persons similarly situated. *Cf. Murray*, 244 F.3d at 813 (certifying class to challenge State's policy of “capping” the per-person amount under Florida's Developmental Disabilities Medicaid Waiver Program). The legal theory underlying each claim therefore constitutes a common issue of law, and the

allegations regarding Defendants' actions with respect to the class constitute common issues of fact.

1. The Case Presents Common Issues of Law.

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court held that, absent a sufficient showing of necessity, Georgia's practice of institutionalizing persons who preferred and were qualified to receive community-based services would constitute illegal discrimination. 527 U.S. at 597 ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability."). The same legal theory approved by the Supreme Court in *Olmstead* is one basis for the relief Plaintiffs seek on behalf of all class members. See Complaint, Count I, ¶¶ 102-104. In keeping with this theory of relief, the proposed class is limited to persons who are qualified and willing to receive community-based services but who either have already been unnecessarily segregated in nursing homes or are at risk of such segregation due to the fact that the waiting lists for Georgia's community-based-services programs do not move at a reasonable pace. The fact that this theory is common to all class members is itself sufficient to satisfy Rule 23(a)(2).

Plaintiffs also contend that Defendants have violated Section 504 by unnecessarily segregating persons qualified for community-based services or subjecting them to an unnecessary risk of institutional segregation. Complaint, Count II, ¶¶ 105-107; see *Frederick L. v. Houston*, 364 F.3d 487, 490 (3d Cir.

2004) (noting congruence of integration mandates under the ADA and Section 504). This claim likewise applies to all class members, and likewise provides a common issue for purposes of Rule 23(a)(2).

The remaining counts of the Complaint raise issues of law that are common to substantial groups within the proposed class. Counts III and IV challenge a variety of program criteria and administrative methods that unnecessarily prevent certain class members from receiving community-based services in place of nursing-home care. The issues of law presented under Counts III and IV would be common to all such persons to whom the challenged criteria and methods of administration apply. Count V is brought on behalf of all persons within the class who have been adversely affected by Defendants' failure to comply with 42 C.F.R. section 441.302(d), which requires Defendants to provide Medicaid recipients with the choice of community-based services at the point when they are determined likely to require the level of care provided in a nursing home or hospital. Count VI applies to all persons within the class who are on waiting lists that do not move at a reasonable pace, and raises the common issue of whether this circumstance constitutes a violation of the requirement that Medicaid services be provided with "reasonable promptness." *See* 42 U.S.C. § 1396a(a)(8). The issues of law raised in these counts are common to all members of the applicable groups within the class.

2. The Case Presents Common Issues of Fact.

Numerous common issues of fact are also presented. These include the basic structure of the relevant programs and the manner in which they are administered; the rate at which Defendants' community-based-services waiting lists move; the manner in which Defendants provide information and choices relating to community-based services when a program participant is determined to need the level of care available in a hospital or nursing facility; and the factual basis, if any, for Defendants' claim that the requested relief would amount to a "fundamental alteration" of existing programs. One or more of these common issues of fact is pertinent to every claim Plaintiffs have raised.

C. The Claims of the Named Plaintiffs Are Representative of the Claims of the Proposed Class.

Rule 23(a)(3) requires that, if a set of plaintiffs is to represent a class, their claims must represent the claims of the class. The claims need not be identical in every respect; rather, it is sufficient "if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines*, 741 F.2d 1332, 1337 (11th Cir. 1984). This requirement is met here. As argued above, the Complaint asserts claims of systemic discrimination that are common to the class as a whole or a substantial group within the class. Each claim in the Complaint is urged at an individual level by at least one named Plaintiff.

1. Plaintiffs' Integration-Mandate Claims

Counts I and II of the Complaint allege that Defendants have systemically violated the ADA and Section 504, respectively, by failing to make long-term health-care and supportive services under Medicaid reasonably available in the community rather than in nursing homes. Class members are harmed by this violation because it effectively requires them to forego the level of care they need and are qualified to receive, unless they are willing to accept confinement in a nursing home as a condition of such care. In either case, class members who apply and are determined eligible for community-based services languish on unreasonably slow waiting lists. All of the named Plaintiffs allege that they have been harmed by Defendants in one of these ways. *See* Complaint at ¶¶ 41-48 (Michael Birdsong); 49-53 (Kelley Dotson); 54-58 (Susan Edwards); 59-63 (Bobby Jones); 64-69 (Mia Murray); 70-72 (Larry Pritchard); and 73-76 (Patricia Redmond).

2. Plaintiffs' Discriminatory-Criteria Claims

Counts III and IV of the Complaint allege that certain eligibility criteria and administrative practices arbitrarily exclude qualified individuals from Defendants' community-based-services programs. Several named Plaintiffs allege that they have been denied enrollment in such programs because of such criteria and practices. Plaintiff Michael Birdsong, for instance, was denied enrollment in the

ICWP and ShepherdCare programs on the basis that he did not need the level of care provided in a nursing home, even though he was *already* receiving Medicaid-funded care in a nursing home and had also been approved for Defendants' CCSP program, which has the same eligibility requirement. Likewise, Patricia Redmond was approved for ShepherdCare and denied ICWP, even though those programs have the same eligibility criteria. Mr. Birdsong and Ms. Redmond seek injunctive relief requiring Defendants to coordinate among programs with respect to factual determinations that establish eligibility. Such relief would benefit all similarly situated class members, and these claims are therefore representative of class claims.

Plaintiff Bobby Jones has been denied access to ICWP and ShepherdCare because applications for those programs are not accepted from persons over 64 years of age, even though persons over 64 are served in these programs if they applied before reaching that age. Defendants' refusal to provide services to otherwise-eligible applicants over age 64 uniformly affects a group within the proposed class. Mr. Jones seeks injunctive relief abolishing that criterion. Such relief would benefit all similarly situated class members, and Mr. Jones's challenge to that practice is therefore representative of class claims.

Plaintiffs Mia Murray and Patricia Redmond were both denied admission to ICWP due to the requirement that participants be able to direct their own care. They seek injunctive relief either abolishing or modifying this requirement. Such relief would benefit all similarly situated class members, and their claim is therefore representative of class claims.

Plaintiff Larry Pritchard was denied access to the CCSP on the asserted bases that he was not “ambulatory,” and that the program does not allocate an adequate amount of money per day to serve his needs in the community. He was originally denied enrollment in ICWP also for “cost” reasons, but successfully appealed that decision administratively and was retroactively placed on a waiting list as of October 2001. He seeks injunctive relief to end the exclusion of wheelchair users from CCSP’s personal care home option, and to raise or eliminate the cost-of-care limits Defendants have imposed in CCSP and ICWP. Such relief would benefit all similarly situated class members. These claims are therefore representative within the meaning of Rule 23(a)(c).

3. Plaintiffs’ Freedom-of-Choice Claim

Plaintiffs also claim that Defendants have failed to provide class members with adequate information and a genuine choice concerning community-based services. *See* Complaint, Count V, ¶¶ 111-112. Several named Plaintiffs urge such a claim on their own behalf as well as on behalf of the class. *See* Complaint at ¶¶

42 (Michael Birdsong); 50 (Kelley Dotson); 60 (Bobby Jones); 66 (Mia Murray).

These claims are representative of class claims.

4. Plaintiffs' Reasonable-Promptness Claim

In Count VI of the Complaint, Plaintiffs claim that Defendants have failed to establish reasonably fast-moving waiting lists, and that this failure violates Title XIX's requirement that states provide Medicaid services to eligible applicants with "reasonable promptness." *See* 42 U.S.C. § 1396a(a)(8). Several named plaintiffs have been personally affected by this violation and seek injunctive relief against it on their own behalf as well as on behalf of the class. For example, Mr. Birdsong has been on a CCSP waiting list for almost three years, since November 27, 2001. Complaint, ¶ 43. Both Ms. Edwards and Ms. Murray have been on waiting lists for ICWP and CCSP since 2002. Complaint, ¶ 56. Mr. Jones has been on a waiting list for CCSP since December 2001. Complaint, ¶ 61. Both Mr. Pritchard and Ms. Redmond spent years on slow-moving waiting lists for ShepherdCare. Complaint, ¶¶ 71, 74. The named Plaintiffs' reasonable-promptness claims are representative of those of the class.

D. The Named Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.

The final requirement of Rule 23(a) is that the named plaintiffs must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). As the Fifth Circuit stated in *Calagaz v. Calhoon*, 309 F.2d 248, 254 (5th Cir. 1962):

The theory of the class action is that all the members of the class are before the court in the person of their representatives; and, therefore, can justly be bound by the court's decree. The class must, however, be adequately represented, for it is only through the self-interest of their representatives that adequate litigation of the common issues is assured.

Here, the self-interest of the representatives is more than sufficient to ensure adequate litigation of the common issues. Each named Plaintiff stands to benefit from the injunctive relief awarded in just the same way as any other similarly situated class member, and no named Plaintiff has a conflict of interest that would inhibit full and fair litigation.

“The adequacy heading also factors in competency and conflicts of class counsel.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997). Plaintiffs’ legal team has expertise and experience in federal civil litigation at all levels, including considerable experience with anti-discrimination lawsuits, representation of the indigent, and protection of persons with disabilities. The team includes counsel who represented the plaintiffs in the controlling Supreme

Court precedent, *Olmstead v. L.C.*, 527 U.S. 581 (1999). There are no conflicts of interest that would impede counsel's zealous advocacy in this case.

E. Defendants Have Acted or Refused to Act on Grounds Generally Applicable to the Class.

Rule 23(b)(2) provides that a proposed class action may be certified if, in addition to the threshold requirements of Rule 23(a), the proponent of certification can show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole" This ground of certification was designed to facilitate anti-discrimination class actions, "where the class representatives typically [seek] broad injunctive or declaratory relief against discriminatory practices." *Penson v. Terminal Transport Co.*, 634 F.2d 989, 993 (5th Cir. Jan. 1981).

Plaintiffs' claims for relief arise from Defendants' actions or failure to act with respect to the class as a whole. Specifically, Plaintiffs allege that Defendants have failed to provide class members with long-term health-care and supportive services in the most integrated appropriate setting, as required by the ADA and Section 504. The class is defined to include only persons who could be served in more integrated settings with the appropriate services. Rather than offer reasonable access to such services, Defendants offer unreasonably slow waiting

lists and long-term institutionalization. Whether this is described as action or as failure to act, the essential point is that it affects the entire class, making class-wide injunctive relief appropriate. Because the requirements of Rule 23(a) are also met, this showing warrants certification of the proposed class under Rule 23(b)(2).

III. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order certifying the proposed class.

Dated: August 20th, 2004



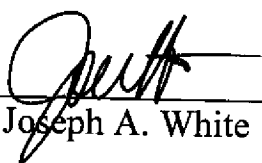
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CERTIFICATE OF COMPLIANCE

This is to certify that this document has been prepared using Times New Roman font, 14 point type, which is one of the font and print selections approved by the Court in L.R. 5.1B.

This 20th day of August, 2004.

By: 
Joseph A. White

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the accompanying
Memorandum of Law in Support of Motion for Class Certification upon
counsel of record by first class mail properly addressed as follows:

Thurbert E. Baker
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Kathleen M. Pacious
Deputy Attorney General
David E. Langford
Assistant Attorney General
40 Capitol Square
Atlanta, GA 30334-1300

This 20th day of August, 2004.



Joseph A. White
Georgia Bar Number 754315