IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JACQUELINE JONES,

Plaintiff,

v. Case No. 3:09-CV-1170-J34JRK

THOMAS ARNOLD, in his official capacity as Secretary, Florida Agency for Health Care Administration, and

Dr. ANNA VIAMONTE ROSS, in her official capacity as Secretary, Florida Department of Health,

Defendants. .

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiff Jacqueline Jones, through her counsel, submits this Memorandum of Law in support of the Motion for Class Certification. Plaintiff respectfully requests the Court to certify the case to proceed on behalf of the following class:

> Florida disabled residents with a spinal cord injury who are Medicaid recipients; reside in the community; desire to continue to reside in the community instead of a nursing facility; could reside in the community with appropriate Medicaid-funded services; and are at risk, as determined by the recipient's treating physician or other treating health professional, of being forced to enter a nursing home because Defendants do not provide adequate community-based services.

While the Plaintiffs bear the burden of showing that the requirements of Rule 23 have been met, "[f]or the purposes of class certification ... the Court accepts the Plaintiffs' substantive allegations as true." *In Re Carbon Dioxide Antitrust Litig.*, 149 F.R.D. 229, 232 (M.D. Fla. 1993).

In addition, "[t]he Court resolves any doubt in favor of class certification." *Id. See also Jackson v. Motel 6 Multipurposes, Inc.*, 175 F.R.D. 337, 340 (M.D. Fla. 1997). Finally, the court is not to conduct an inquiry into the merits of the Plaintiffs' claim as part of the class certification proceedings. As stated by the Supreme Court in *Eisen v. Carlyle & Jacquelin,* 417 U.S. 156, 178 (1974): "in determining the propriety of a class action, the question is not whether ... plaintiffs have stated a cause of action or will prevail on the merits but rather whether the requirements of Rule 23 are met."

Class certification requires that the class meet the four Rule 23(a) requirements of numerosity, commonality, typicality, and adequate representation, and the two Rule 23(b)(2) requirements that the Defendants "acted or refused to act on grounds equally applicable to the class," and that final relief of an injunctive nature or corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole is appropriate. Fed. R. Civ. P. 23(b)(2). As shown below, the prerequisites are met in this case.

I. THE PROPOSED PLAINTIFF CLASS MEETS RULE 23(a) CERTIFICATION REQUIREMENTS.

A. Numerosity

Rule 23 requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs need not know the exact number in the class, but they must "proffer some evidence of the number in the purported class or a reasonable estimate." *Leszcynski v. Allianz Ins*., 176 F.R.D. 659, 669 (S.D. Fla. 1997). The court may then make a "common sense assumption in order to find support for numerosity." *Evans v. U.S. Pipe & Foundry*, 696 F. 2d 925, 930 (11th Cir. 1983). In this Circuit, "generally less than twenty-one is inadequate, more than forty adequate, with numbers in between varying according to other factors." *Cox v. American Cast Iron*

Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986). Other factors that the Court should consider include the geographical dispersion of the class members, judicial economy, and the ease of identifying the members of the class and their addresses. *See Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 598-99 (S. D. Fla. 1991).

The proposed class is so numerous that joinder of all the members is impracticable. *Cox*, 784 F.2d at 1553; *see also Haymons v. Williams*, 795 F. Supp. 1511 (M.D. Fla. 1982) (certifying class of 178 Medicaid-eligible individuals residing in adult congregate living facilities to challenge failure to provide notice and opportunity for hearing concerning termination of home health care services).

According to the recently released Kaiser Commission "Medicaid Home and Community-Based Service Programs: Data Update," at Table 11, there were 434 people with spinal cord injuries on Florida's "wait list" in FY 2008 for Medicaid community-based services. In December 2008, based on a document prepared by one of the Defendants, the Florida Medicaid waiting list for persons with spinal cord injuries had increased to 554 people. [Attachment "A"]. By applying for community-based services, these people have indicated that they would rather live in the community. Joinder is impracticable because class members lack the knowledge and financial means to maintain individual actions. Thus, while the precise number of people is not known, for purposes of numerosity the number of members of the representative class vastly exceeds 40 and is more appropriately estimated at 450 to 550 class members.

Joinder of the proposed class members is also impracticable because of class members' limited resources, physical disabilities and geographic dispersion. *Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986). Class members are located across the entire state of Florida and have limited ability to prosecute their cases individually due to their limited income and disability status. Further, there is judicial economy in rendering a classwide decision on the requested injunctive and

declaratory relief.

In the instant case, the numerosity of the proposed class far exceeds the number of class members which have been certified as a sufficiently numerous class in other cases. *See, e.g., Custom v. Trainor*, 74 F.R.D. 409 (N.D. Ill. 1977), (permitting a class of welfare recipients numbering in excess of 62 members); *National Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 598 (N.D.Cal. 1986), *rev'd on other grounds sub nom., National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583 (9th Cir. 1992) (conditionally certifying class, stating that if 40 benefit claimants could meet the class description, the class would be sufficiently large); *Phillips v. Joint Legislative Comm'n*, 637 F.2d 1014 (5th Cir. 1981)[1] (holding that 33 class members satisfied numerosity); *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974) (certifying class of 51); *Lawson v. Wainwright*, 108 F.R.D. 450, 454 (S.D. Fla. 1986) (certifying class of 59).

In sum, there are approximately 500 individuals in the purported class and all relevant factors support a finding of numerosity.

B. Commonality

Rule 23 also requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Allegations of a "policy" or "practice" of treating the entire class unlawfully generally satisfy the commonality requirement. *International Bd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (finding commonality where racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice); *see also Cooper v. Federal Reserve*, 467 U.S. 867, 878 (1984); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557-58

[1] Decisions of the United States Court of Appeals for the Fifth Circuit, as the court existed on September 30, 1981, handed down by that court prior to the close of business on that date, are binding as precedent on the Eleventh Circuit of Appeals, established October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

(11th Cir. 1986). Where a common scheme is alleged, common questions of law or fact will exist. *See Murray v. Auslander*, 244 F.3d 807, 813 (11th Cir. 2001) (class certified to challenge State's policy of "capping" the per person amount under Florida's Developmental Disabilities Medicaid Waiver Program).

The threshold for commonality is not high. *Forbush v. J.C. Penny Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1990). The Rule does not require complete identity of legal claims among class members. *Johnson v. American Credit Co. of Ga.*, 581 F.2d 526, 532 (5th Cir. 1978).

In this case, the named Plaintiff and purported class are Medicaid recipients who are at risk of unnecessarily institutionalized because of Defendants' failure to cover services and support in appropriate, integrated community settings as required by the ADA. The Amended Complaint lists the challenged practices with specificity. (See Dkt. ¶¶ 57-61).

Common questions of fact and law for all class members include whether Defendants violate the "integration mandate" of the ADA and Section 504 by requiring named Plaintiff and class members to be institutionalized in nursing facilities in order to receive long-term care services, rather than providing those services in appropriate settings in Plaintiff's homes and communities. This common issue satisfies commonality.

While the circumstances of class members vary in terms of the extent and intensity of the community services needed, this does not affect commonality. As stated in *Pottinger v. City of Miami,* 720 F. Supp. 955 (S.D.Fla. 1989): "It is only necessary to find at least one issue common to all class members." (*citing Slaughter v. Levine*, 598 F. Supp. 1035,1044 (D. Minn.1984)).

The fact that there may be minor factual differences in the extent and intensity of the community services needed does not defeat the maintenance of a class action if there are common questions of law. *Id.* at 958; *Coley v. Clinton*,635 F.2d 1364,1378 (8th Cir. 1980). In the instant

case, the fact that class members may require different and varying levels of services and support to live in the community does not negate commonality. Further, any difference in the medical conditions of the class members is irrelevant as to whether there is commonality as all class members seek common relief.

C. Typicality

Rule 23 further requires that the claims or defenses of the representative parties be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). A representative's claim is typical "[1] if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and [2] if his or her claims are based on the same legal theory." H. Newberg, 1 *Newberg on Class Actions* §3.13, at 3 (4th ed. 2007). This Circuit has stated that typicality exists when there is:

> [A] nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class. A sufficient nexus is established 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. Typicality however, does not require identical claims or defenses. A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class.

Kornberg v. Carnival Cruise Lines, 741 F.2d 1332, 1337 (11th Cir. 1984).

The claims of the named Plaintiff and proposed class members are based on the ADA and Section 504, which require that Defendants not unnecessarily confine persons with disabilities in segregated settings such as nursing homes. The class representative, like the class members, is challenging Defendants' failure to provide the class with meaningful choice of community-based long-term care alternatives to nursing facilities. The legal claims and relief sought by the named Plaintiff and the putative class – declaratory and injunctive relief – are identical. The named Plaintiff does not seek individual relief.

As with commonality, the incidental variations in Plaintiffs' factual situations do not defeat typicality, because the basic nature of the injury and the legal theory of recovery is typical for the entire class. *See Miles v. Metropolitan Dade County*, 916 F.2d 1528, 1534 (11th Cir. 1990); *Kornberg v. Carnival Cruise Lines, Inc.*,741 F.2d 1332 (11th Cir. 1984), *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 123 (3d Cir. 1985) (typicality satisfied despite fact that "in a number of areas the class representatives' specific allegations are distinct from those of the class as a whole"), *aff'd on other grounds*, 482 U.S. 656 (1987); *Edmonds v. Levine*, 233 F.R.D. 638, 641 (S.D. Fla. 2006) (differences in medical conditions and prescriptions "irrelevant for purposes of the typicality requirement" because the action of Medicaid agency to deny the service and the underlying rationale for the denial were identical for the named plaintiff to those of each proposed class member).

As stated in *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir.1985):

> subsection a(3) [typicality] primarily directs the district court to focus on whether named representatives' claims have the same essential characteristics as the claims of the class at large...the typicality requirement may be satisfied even if there are factual distinctions between the claims of the named Plaintiffs and those of other class members... Thus courts have found that a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences.

In *Appleyard,* the court focused on the similarity of relief, stating that all class members were similarly interested in the requested relief, that the court "declare the policies and customs of the Defendants invalid" and "enjoin the defendants from determining any member of the class to be ineligible without full compliance with applicable federal law." *Id.* at 958. Similarly, in the present case, the complaint requests the same declaratory and injunctive relief for all class members.

D. Adequacy of Representation

Further, Rule 23 requires that the class representatives be persons who "will fairly and

adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In determining whether named plaintiffs will adequately represent a potential class pursuant to the requirements of Rule 23(a)(4), the Court should consider (1) "whether plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation and ... (2) whether plaintiffs have interests antagonistic to those of the rest of the class." *Kirkpatrick v. Bradford &* Co. , 827 F.2d 718, 726 (11th Cir. 1987) (*quoting Griffin v. Carlin*, 755 F.2d 1516, 1532 (11th Cir. 1985).

Each concern is satisfied here. The proposed class representatives share the interest of the putative class in bringing an end to the unlawful practice of Defendants and in obtaining relief for the violations of Plaintiff's rights. There is no sense in which named Plaintiff's interests can be said to conflict with the interests of other members of the proposed class. The common allegations of Defendants' practices, the nature of the relief sought, and the legal theories advanced demonstrate the required congruity of interests. The second requirement for adequacy is also satisfied. The named Plaintiff has obtained experienced counsel who are skilled and knowledgeable about civil rights litigation, Americans With Disabilities Act, Medicaid law, practice and procedure in the federal courts and the prosecution and management of class action litigation.

Stephen F. Gold is private practitioner who has been practicing law since 1971 and has dedicated most of his career to representing children and adults with disabilities. He has litigated over 50 cases under the Americans With Disabilities Act and Section 504, and dozens of other cases on behalf of persons with disabilities under other statutes. *See, e.g.*, *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003)(holding the ADA's "integration mandate" was violated by requiring people with disabilities to be segregated in nursing homes to receive appropriate community services, i.e., unlimited prescriptions); *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995), *cert denied*, 116 S.Ct. 64 (1995) *sub nom. Secretary of DPW of Pa. v. Idell S.* (DPW's unnecessary

segregation of persons in a nursing home and its failure to provide attendant care in "most integrated setting appropriate," instead of only in a nursing home, violated ADA); *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert denied*, 105 S.Ct. 955 (1985) (Department of Public Welfare violated Section 504 by not providing blind employees with reasonable accommodations, including readers – Cited with approval by Congress in the legislative history to define the scope of the ADA); *American Disabled For Accessible Pub. Transp. (ADAPT) v. Skinner*, 676 F. Supp. 635 (E.D. Pa. 1988), 867 F.2d 1471 (3d Cir. 1989), 881 F.2d 1184 (3d Cir. 1989) (en banc) (federal regulation which permitted transportation authorities to cap funds expended on disabled persons violated minimum service criteria; required U.S. DOT to promulgate new regulations – Concurrence opinion cited with approval by Congress in legislative history of ADA); *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004) (challenged Medicaid services' delivery under "reasonable promptness").

Plaintiff's counsel bring substantial relevant experience to the prosecution of this case. The common interests of the proposed class will be fairly and adequately represented.

E. Defendants Have Acted Or Refused To Act On Grounds Generally Applicable To The Class Making Final Injunctive And Declaratory Relief Appropriate For The Class As A Whole

Certification under Rule 23(b)(2) further requires a finding that the defendant "acted or refused to act on grounds equally applicable to the class" and "final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole," is appropriate. Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) was intended primarily to facilitate civil rights class actions, where, as here, "the class representatives typically seek broad injunctive or declaratory relief against Defendants' discriminatory practices." *Penson*, 634 F.2d 989, 993 (11th Cir. 1981); *see also Ass'n for Disabled Am.*, 211 F.R.D. 457, 465 (S.D. Fla. 2002)

(certifying class of persons with disabilities alleging failure to meet accessibility requirements under ADA).

The focus of this litigation is on Defendants' failure to provide the class with appropriate community-based long-term care alternatives to nursing facilities. Injunctive or declaratory relief settling the legality of Defendants' behavior with respect to the class as a whole is appropriate. Class actions pursuant to Fed. R. Civ. P. 23(b)(2) are especially appropriate where the Plaintiff class seeks declaratory or injunctive relief from unlawful and/or discriminatory policies and practices in government benefit programs. *See Doe v. Chiles,* 136 F.3d 709 (11th Cir. 1998) (concerning certified class of individuals with developmental disabilities waiting for intermediate care facility services); *Hernandez*, 209 F.R.D. 665 (certifying class of current and future Medicaid recipients who have or will have prescription drug coverage denied without due process); *Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994) (challenging failures in provision of mental health counseling services to deaf clients by therapists fluent in sign language); *Haymons*, 795 F. Supp. at 1522 (certifying class where Defendants refused to grant reinstatement, notice and hearing to Medicaid recipients whose home health care benefits were terminated). *See also Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974).

Plaintiff has met the requirements of Rule 23(a) and (b)(2). As such, the proposed class should be certified.

II. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court certify the Plaintiff class pursuant to Rule 23(a)&(b)(2).

Respectfully submitted,

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LOCAL RULE 3.01 (g) CERTIFICATION

The undersigned counsel has attempted to discuss the matters raised with counsel for Agency for Health Care Administration and Florida Department of Health and has been informed by their office that they object to the relief sought herein.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of filing, to the following: **Andrew T. Sheeran**, Agency for Health Care Administration, Office of the General Counsel, 2727 Mahan Drive, Building 3, MS #3, Tallahassee, Florida 32308; **George L. Waas**, Florida Department of Health, Office of the Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399, this 6th day of January, 2010.

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