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Helen Pitts, Kenneth Roman,	*	
Denise Hodges, and Rickii Ainey, on	*	C.A. No. 3:10-cv-00635-JJB-SCR
behalf of themselves and all others	*	
similarly situated,	*	
Plaintiffs,	*	
	*	Judge James J. Brady
v.	*	
	*	
Bruce Greenstein, in his official	*	
capacity as Secretary of the Louisiana	*	
Department of Health and Hospitals, and	*	Magistrate Judge Stephen C.
Louisiana Department of Health and	*	Riedlinger
Hospitals,	*	
Defendants,	*	
	*	CLASS ACTION
	*	

I. INTRODUCTION

1

Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”). In this action, named and class Plaintiffs seek declaratory and injunctive relief to prevent the Louisiana Department of Health and Hospitals from reducing services to a maximum of 32 hours per week.

II. PROPOSED CLASS DEFINITION

The proposed class is defined as:

Louisiana residents with disabilities who are recipients or prospective recipients of Medicaid-funded services through the LT-PCS program; who desire to continue to reside in the community instead of in a nursing facility; who can reside in the community with appropriate Medicaid-funded LT-PCS services; and who are at risk of being forced to enter a nursing home because Defendants plan to reduce the level of community-based services.

III. THE PROPOSED CLASS MEETS THE REQUIREMENTS OF FED. R. CIV. P. RULE 23(a) AND 23(b)(2)

A class should be certified if plaintiffs have satisfied the requirements of Fed. R. Civ. P. 23 (a) and any of the requirements of subsections (b) (1), (2), or (3). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Fed. R. Civ. P. 23(a) provides that a class should be certified if “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.” Plaintiffs in this case seek class certification under Rule 23(b)(2), because Defendant has acted or failed to act on grounds generally applicable to the class, making injunctive and declaratory relief appropriate. Plaintiffs are not seeking damages.

A. Numerosity

In Defendants’ Memorandum in Support of their Motion to Dismiss this case (Doc. No. 11-1), Defendants state: “Of the approximately 12,000 individuals receiving

LT-PCS services, 28% currently receive services in excess of 32 hours per week”). *See* Declaration of Hugh Eley, Doc. No. 11-2, ¶37. As the Eley Declaration makes clear, all of these people have been found by the Department not only to have disabilities, but also (1) to meet medical necessity criteria that would qualify them for services in a nursing home, and (2) to be at imminent risk of having to enter a nursing facility if they do not receive personal care services. Eley Decl., ¶32.

Courts in this circuit have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement. *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1039 (5th Cir. 1981); *Bywaters v. United States*, 196 F.R.D. 458, 465 (E.D. Tex. 2000). The court may make common-sense assumptions in order to find support for numerosity. *See Zeidman* at 1039; *Leszczynski v. Allianz Insurance Co.*, 176 F.R.D. 659, 669 (S.D. Fla. 1997) (*quoting Evans v. United States Pipe & Foundry*, 696 F.2d 925, 930 (11 Cir. 1993)). While it is not presently known how many of the approximately 3,300 individuals who are currently receiving more than 32 hours of LT-PCS per week are at risk of institutionalization if their services are reduced to the 32-hour maximum, it is reasonable to believe that the number may be in the hundreds or even thousands.

The Fifth Circuit has held that classes with 100 to 150 members generally satisfy the numerosity requirement. *See, e.g., Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 624 (5th Cir. 1999). *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001) (court certified class with at least 100 members); *Jones v. Diamond*, 519 F. 2d 1090 (5th Cir. 1975); *Phillips v. Joint Legislative Committee*, 637 F. 2d 1014, 1022 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982) (at least 33 members, plus future members, sufficient); *see also Cox v. American Cast Iron Pipe Co.*, 784 F. 2d 1546, 1553 (11th Cir. 1986), (*quoting 5 Moore's Federal Practice* §23.22(1)(b) n.6 (2005) (“Eleventh Circuit has stated that ‘generally less than 21 is inadequate and more than 40 is adequate, with

numbers in between varying according to other factor.'')). The instant case clearly meets this standard.

The practicality of joining the members of the proposed class is the primary issue raised by the numerosity requirement of Rule 23(a). *Zeidman*, 651 F.2d at 1038; *Phillips*, 637 F.2d at 1022; *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Murillo v. Musegades*, 809 F.Supp. 487, 502 (W.D. Tex. 1992). The size of the proposed class and the inclusion of future members are separate and independent factors that make joinder patently impracticable in the instant action. *See Pederson v. Louisiana State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000); *see also Zeidman*, 651 F.2d at 1038. Other relevant considerations include geographic dispersion, the financial resources of class members and the ability of claimants to institute individual suits. *Mullen*, 186 F.3d at 624, *Zeidman*, 651 F.2d at 1038.

The instant case involves a very large, geographically dispersed class of people whose financial resources and ability to bring individual actions are severely reduced by their status as being severely disabled.. The members of the proposed class may number as many as 3,300. The requirement that "the class [be] so numerous that joinder of all members is impracticable," Fed. R.Civ. P. 23(a)(1), is clearly met.

B. Commonality

The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members. *Mullen*, 186 F.3d at 625; *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997); *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993); *Washington v. CSC Credit Services, Inc.*, 178 F.R.D. 95, 100 (E.D. La.), *modified*, 180 F.R.D. 309 (E.D. La. 1998). Here, there are questions of both law and fact common to all the members of the proposed class, including:

- (a) Whether Defendants violate the ADA and Section 504 statutory “integration mandate” and the “methods of administration” prohibition, by requiring named Plaintiffs and class members to enter nursing facilities in order to receive long-term care services, rather than providing those services in appropriate settings in Plaintiffs’ homes and communities;
- (b) Whether DHH violates the Medicaid Act, 42 U.S.C. §1396a(a)(3), 42 C.F.R. §431.200 et seq.; the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and 42 U.S.C. §1983, by allocating hours to new service recipients, or reducing services to existing recipients, based on notices that fail to give them a meaningful opportunity to understand, review, and, where appropriate, challenge the department's action.

Thus, there are thus questions of law or fact common to the proposed class in this case, satisfying the requirement of Fed. R. Civ.P. 23(a)(2).

Differences in the specific services needed by plaintiffs because of differing disabilities or levels of need do not defeat commonality. The essence of plaintiffs’ claims is that Defendants’ arbitrary maximum of 32 hours per week of personal care services, regardless of the needs of individuals in the plaintiff class, will result in their unnecessary segregation and isolation in nursing facilities, in violation of the rights of plaintiffs and similarly situated individuals under the ADA and Section 504 of the Rehabilitation Act. In order for class members to receive personal attendant services, which are currently being provided in the community and which could appropriately be continued to be provided to them in their homes and communities, they will be forced to enter segregated institutions to receive those services.

It is the reduction of community-based services to 32 hours a week and the resultant unnecessary institutionalization that satisfy the commonality requirements.

C. Typicality

The test for typicality in the Fifth Circuit is not demanding. *See Lightbourn*, 118 F.3d at 426, *citing Forbush*, 994 F.2d at 1106; *See also Shipes v. Trinity Industries*, 987 F.2d 311, 316, (5th Cir. 1993), *cert. denied* 114 S.Ct. 548 (1993); *In re Am. Commer. Lines, LLC*, 2002 U.S. Dist. LEXIS 10116, at * 33 (D. La. May 28, 2002). The typicality requirement is satisfied when the named plaintiffs advance legal and remedial theories similar to those that would be advanced by class members if they were pursuing parallel actions. *Mullen*, 186 F.3d at 625; *Lightbourn*, 118 F.3d at 426; *Robidoux*, 987 F.2d at 935. Class representatives need only be “part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” *General Telephone Co. v. Falcon*, 457 U.S. 147, 156 (1982) (*quoting East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

Each of the four named plaintiffs in this case is a Louisiana Medicaid recipient who has been found eligible for, and has been receiving, Long-term Personal Care Services at home in excess of 32 hours per week. Each has severe disabilities and multiple chronic conditions. In the case of each named plaintiff, the Department of Health and Hospitals has previously determined that their level of medical need qualifies them for care in a nursing facility and that they are at risk of entering a nursing facility for care if they do not receive home care. And each was found by Defendants to need hours in excess of the 32-hour maximum in the past. None of them wants to leave her or his homes, friends, and families and go into a nursing home in order to receive the same Medicaid-funded services that they presently receive in the community. They are all at risk of institutionalization if their Long Term-Personal Care Services are reduced and capped as defendants propose. Therefore, as was the case with the *Lightbourn* class (all voting-age Texas citizens with blindness or mobility impairments), “[i]n the event that

class members were to proceed in a parallel action, they would advance legal and remedial theories similar, if not identical, to those advanced by the named plaintiffs." *Lightbourn*, 118 F.3d at 426. The requirement of Fed. R. Civ. P. 23(a)(3) that "the claims or defenses of the representative parties are typical of the claims of the class" is met in this case.

D. Adequacy

Adequate representation depends primarily on three factors. The named class representatives must have an interest in common with unnamed class members and must not have interests antagonistic to members of the class. Further, it must appear that the representatives will vigorously prosecute those interests through qualified counsel. *See Amchem Products, Inc. v. Windsor*, 521 U.S. at 614; *see also East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. at 403. As the *Amchem Products* Court noted, "the adequacy-of-representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether ... maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Id.* at 2251 n. 20, (citing *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. at 157 n. 13 (1982)). Any differences between the named plaintiff and class members render the named plaintiff inadequate only if those differences create conflicts between the interests of the named plaintiff and those of the class. *Mullen*, 186 F.3d. at 625-26.

Here, there is no conflict of interest between the named plaintiffs and the other members of the class. As was shown in connection with the typicality requirement, the named plaintiffs in this case have the same claims and seek the same remedies for the

class as a whole. Such sharing of common objectives and legal and factual issues among class members satisfies Rule 23(a)(4)'s requirement that representatives' interests be coextensive with those of the class. *See id.*; *Bertulli v. Independent Assn. of Continental Pilots*, 242 F.3d 290, 298.

The qualifications of counsel will be discussed in Section IV, *infra*.

E. Rule 23(b)(2)

The present action is well suited for certification pursuant to Rule 23(b)(2) because it alleges that Defendants' policies and practices generally applicable to class members as a whole have operated to discriminate against them in violation of the federal law. The 23(b)(2) class action is "an effective weapon for an across-the-board attack against systematic abuse" and discrimination, such as that alleged by the plaintiffs here. *Jones v. Diamond*, 519 F.2d at 1090, 1100 (5th Cir. 1975). The term "generally applicable" in Rule 23(b)(2) requires only that the defendants' actions affect all persons similarly situated, or that their actions apply generally to the whole class. *See Johnson v. American Credit Co.*, 581 F.2d 526, 532 (5th Cir. 1978).

This provision has been interpreted to mean that the party opposing the class has acted either in a consistent manner toward members of the class, so that his actions may be viewed as part of a pattern of activity, or has established a regulatory scheme or set of practices common to all class members. *Leszeczynski*, 176 F.R.D 659 at 673-74; *Quigly v. Braniff Airways, Inc.*, 85 F.R.D. 74, 79 (N.D. Tex. 1979); *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd per curiam*, 458 F. 2d 1360 (5th Cir.) *cert. denied*, 409 U.S. 1027 (1972). Plaintiffs intend to prove that Defendants' proposed reduction in the maximum hours of LT-PCS presents a challengeable common pattern of activity.

Cases seeking declaratory or injunctive relief are particularly appropriate for certification under Rule 23(b)(2). *Curtis*, 159 F.R.D. at 341; 7A C. Wright, et al., *Federal Practice and Procedure* §1775 (1986) ("If the Rule 23(a) prerequisites have been

met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).") A number of courts have recognized the propriety of class action treatment under Rule 23(b)(2) in actions brought for injunctive relief regarding physical and programmatic accessibility for people with disabilities. *Lightbourn*, 118 F.3d at 426; *Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd.*, 197 F.R.D. 522 (S.D. Fla 2000); *Neff v. VIA Metropolitan Transit Authority*, 179 F.R.D. 185 (W.D. Tex. 1998); *Thrope v. Ohio*, 173 F.R.D. 483 (S.D. Ohio 1997); *Arnold*, 158 F.R.D. at 454; *Civic Association of Deaf of New York City v. Guiliani*, 915 F. Supp. 622 (S.D.N.Y. 1996).

Class certification not only protects class members from the burden of multiple actions, it also guarantees a hearing for individuals, such as many of the class members here, who, by reason of poverty, disability, and inability to secure counsel, may not be in a position to seek one on their own behalf. *Glover v. Crestwood Lake Section 1 Holding Corp.*, 746 F. Supp. 301, 305 (S.D.N.Y. 1996); *Adderly v. Wainwright*, 58 F.R.D. 389, 405-07 (M.D.Fla. 1972); *c.f. United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976). In addition, failure to certify a class could preclude notice relief informing the class of their rights and their ability to obtain the relief afforded by the suit, as authorized by *Quern v. Jordan*, 440 U.S. 332 (1979). *See Mitchell*, 701 F.2d at 344-45.

IV. PROPOSED CLASS COUNSEL WILL FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF THE CLASS

Proposed class counsel will fairly and adequately protect the interests of the class, satisfying the requirements of Fed. R. Civ. P. 23(g). Plaintiffs are represented by a team of law firms, and counsel are well qualified to handle this action and will prosecute it vigorously on behalf of the class. Lead counsel, Nell Hahn is employed by the Advocacy Center, which is the independent organization charged with protecting and advocating for the rights of persons with disabilities in the State of Louisiana, pursuant to the

Development Disabilities Assistance and Bill of Rights Act, as amended, 42 U.S.C. §§ 15041 – 15045 (2000); the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801 – 10807 (1986), and the Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e(a) (2000). The Advocacy Center has been providing legal representation to individuals with disabilities in the State of Louisiana since 1979.

Nell Hahn has been practicing law for over 30 years, and has successfully handled a number of class actions (*See e.g., Barthelemy v. Louisiana Department of Health and Hospitals*, 2003 WL 1733534, (E.D. La., Mar 31, 2003); *Chisholm v. Jindal*, 1998 WL 92272 (E.D. La. Mar. 2, 1998) (class certification, Duval, J.), *Chisholm v. Hood* 110 F. Supp. 2d 499 (E.D. La. 2000) and 133 F.Supp.2d 894 (E.D. La. 2001) (merits); *Shipes v. Trinity Industries, Inc.*, *supra*).

Co-counsel Stephen F. Gold Counsel Stephen F. Gold, is a national expert in disability-rights litigation with an extensive resume of teaching, consulting, and litigation experience. He has 40 years of experience in Medicaid and disability discrimination, including litigation throughout the country in many landmark cases in the field.

Plaintiffs are also represented by experienced attorneys with AARP Foundation Litigation, Kenneth Zeller and Bruce Vignery. Both counsel have practiced over 30 years and are experienced class action litigators.

V. CONCLUSION

Plaintiffs therefore respectfully move this court to certify that this action may proceed as a class action on behalf of the following class:

Louisiana residents with disabilities who are recipients or prospective recipients of Medicaid-funded services through the LT-PCS program; who desire to continue to reside in the community instead of in a nursing facility; who can reside in the community with appropriate Medicaid-funded LT-PCS services; and who are at risk of being forced to enter a nursing home because Defendants plan to reduce the level of community-based services.

Date: December 20, 2010.

Respectfully submitted,

/s/ Nell Hahn

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2010, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/EDF system. Notice of this filing will be sent to all counsel by operation of the court's electronic filing system.

/s/ Nell Hahn