UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

HELEN PITTS, KENNETH ROMAN, DENISE HODGES, and RICKII AINEY, on behalf of themselves and all others similarly situated, **Plaintiffs** **v.** **BRUCE GREENSTEIN, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, and LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,** **Defendants.**	)	**Civil Action No. 3:10-cv-00635-JJB-SCR** **Judge James J. Brady** **Magistrate Judge Stephen C. Riedlinger** **CLASS ACTION**

DEFENDANTS' MEMORANDUM IN OPPOSITION TO CLASS CERTIFICATION

On December 20, 2010, Plaintiffs moved to certify a class of:

> 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.

On behalf of themselves and the proposed class, the named plaintiffs seek declaratory and injunctive relief to prevent Defendants, the Louisiana Department of Health and Hospitals ("DHH") and Secretary Bruce Greenstein, from capping at 32 the number of hours of long-term personal care services ("LT-PCS") they may receive weekly.

For the reasons discussed below, the Court should deny certification as to Plaintiffs' ADA and Rehabilitation Act claims and dismiss their remaining claims for lack of jurisdiction. In any event, the proposed class definition sweeps far beyond the scope of plaintiffs' claims; even if the Court believes that certification is appropriate, the proposed class should be redefined to make clear that it is limited to LT-PCS recipients who need more than 32 hours, and less than 42 hours, of state-funded personal care services each week.

I. Class Certification Should Be Denied.

Before certifying a class action, the Court must find 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." FED. R. CIV. P. 23(a). Because Plaintiffs seek certification under Rule 23(b)(2), the Court must also find that Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

Defendants oppose certification of the proposed class on the grounds that the named plaintiffs' claims are atypical of those of absent class members and that conflicts of interest within the class preclude a finding that the named plaintiffs will adequately protect the interests of the class.[1]

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[1] In the interests of judicial economy, Defendants ask the Court to exercise its discretion to defer ruling on the motion for class certification until after it decides the pending motion for summary judgment. *See Floyd v. Bowen*, 833 F.2d 529, 534-35 (5th Cir. 1987); *see also* FED. R. CIV. P. 23(c)(1) advisory committee's note (2003); ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 7:15, at 53 (4th ed. 2002); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 21.133, at 253 (2004) ("[C]ourts *should* rule early on motions to dismiss, challenging whether the plaintiffs have stated a cause of action. Early resolution of these questions may avoid expense for the parties and burdens for the court . . . ." (emphasis added)).

A. The named plaintiffs' claims are atypical of those of other class members.

Rule 23(a)(3) requires Plaintiffs to demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement is not satisfied here because, if the named plaintiffs' claims survive summary judgment, Defendants anticipate raising various defenses to their claims that are not available as to other members of the proposed class. *See, e.g.*, *Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 747 (5th Cir. 1984); *Garonzik v. Shearson Hayden Stone, Inc.*, 574 F.2d 1220, 1221 (5th Cir. 1978). *But cf. Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 136-39 & n.7 (5th Cir. 2005) (finding no abuse of discretion where the named plaintiff was "arguably," but not necessarily, subject to unique defenses).

One named plaintiff's claim presents the question of whether a Medicaid recipient can state a claim under *Olmstead* after declining placement in a waiver program that would have provided the services sought in the lawsuit. DHH records indicate that one of the named plaintiffs, Rickii Ainey, was offered a slot in the Elderly and Disabled Adult ("EDA") waiver program in approximately 2004 but refused EDA services. Had Ms. Ainey accepted that offer, her personal care services would not be subject to the 32-hour cap she now challenges.[2]

A plaintiff in Ms. Ainey's circumstances cannot prevail on an *Olmstead* claim. First, a State should not be subject to claims of discriminatory and "unjustified placement or retention of persons in institutions," *Olmstead v. L.C.*, 527 U.S. 581, 596 (1999), by an

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[2] Additionally, the Complaint states that Ms. Ainey's mother "lives nearby" but does not contribute to her personal care (Doc. 1, ¶90). Although the Complaint alleges Ms. Ainey's mother "refuses to assist her daughter," *id.*, the Complaint does not allege that her mother is incapable of providing the nine hours of care between the new 32-hour maximum and the 41 hours that Ms. Ainey has been receiving, or that she will continue to refuse if her assistance is needed to keep her daughter from entering a nursing home.

individual who enters a nursing facility after having declined adequate Home and Community Based ("HCBS") services. Second, even if relief under *Olmstead* were sometimes available to such an individual, where other persons remain on the waiting list for such services, "immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* at 604. Third, when the plaintiff is so situated, a federal court should be reluctant to exercise its equitable discretion to restructure and impose substantial financial burdens on a state program. *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."). Although Defendants do not know what portion of the proposed class would be subject to each of these defenses, each argument presents a unique defense applicable to Ms. Ainey but not to the class as a whole. As a result, the typicality requirement of Rule 23(a)(3) is not satisfied.

The claims of another named plaintiff, Helen Pitts, face a different but related problem. While Ms. Ainey has previously turned down a slot in the EDA waiver program, DHH records indicate that Ms. Pitts never sought an EDA waiver slot prior to the filing of this lawsuit. Although Defendants anticipate challenging Ms. Pitts' claims with defenses similar to those outlined above with respect Ms. Ainey, the defenses applicable to Ms. Pitts rest on different grounds. Put simply, when an *Olmstead* plaintiff's temporary institutional placement results in part from her failure to have pursued available services sooner, that placement is not "unjustified"; granting her relief would be inequitable in light of the State's obligations to others; and the court should not exercise its discretion to grant declaratory or injunctive relief. Ms. Pitts' claims are therefore atypical of those of absent class members who have pursued adequate alternative services and, under Plaintiffs' understanding of the ADA, presumably have a stronger claim for relief.

A third named plaintiff, Denise Hodges, is also subject to a defense not equally applicable to the rest of the proposed class. As discussed below, *infra* at 6-7, rule changes associated with those challenged in this lawsuit have dramatically reduced the time that some members of the proposed class would have waited for a slot in the EDA waiver. *See* Defendants' Exh. 1, Declaration of Hugh R. Eley, at ¶¶18-21 [hereinafter Eley Decl.]. Denise Hodges is among that group. On January 10, 2011, Defendants offered slots in the EDA waiver to 158 individuals. Ms. Hodges is the recipient of one of these offers. As a result, Ms. Hodges' claims are moot. Additionally, because the 32-hour cap was unlikely ever to be applied to Ms. Hodges, she may have lacked standing to sue in the first instance.[3] The same defenses are not equally applicable to most absent members of the proposed class, making Ms. Hodges' claims atypical.

Defendants have not been able to identify -- based on the Complaint and their own records -- a defense uniquely applicable to the fourth named plaintiff, Kenneth Roman. Nevertheless, the diverse circumstances of the four named plaintiffs alone suggests even greater diversity among the proposed class as a whole and raises serious doubts that any named plaintiff could adequately represent the entire class. In any event, without further factual development, Defendants are not prepared to concede that Mr. Roman's claims are typical of those of the class.

For the foregoing reasons, the claims of three of the four named plaintiffs are atypical of those of the absent class members. The diverse circumstances of the class members

[3] Ms. Hodges also now lacks any incentive to vigorously pursue class-wide relief, so she is not an adequate class representative under Rule 23(a)(4).

suggest the fourth named plaintiff is likewise an inadequate representative of the class as a whole. Regardless, no class should be certified without further factual development as to Mr. Roman's adequacy as a class representative.

B. Plaintiffs cannot fairly and adequately protect the interests of the putative class.

Conflicts of interest between named plaintiffs and members of the proposed class preclude a finding that the named plaintiffs will "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4). The adequacy inquiry "serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997), and "'[i]t is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent.'" *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 810 (5th Cir. 1982) (quoting 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1768, at 638 (1st ed. 1972)). Certification of Plaintiffs' proposed class would violate "the cardinal principle that a class representative may not head a class including persons whose interests substantially conflict with his or her own." *Id.*

It is important to understand that the 32-hour services cap for LT-PCS services was only one of several related adjustments made to the State's comprehensive HCBS program. In light of the new cap, Defendants revised the priority groups for the EDA Request for Services Registry so that current recipients of LT-PCS no longer fall into a low-priority group. *See* Eley Decl., at ¶¶18-21. As a result of this package of reforms, some of the proposed class members will receive offers for the more comprehensive services offered through the EDA waiver sooner than they would have absent the reforms. Indeed, a number will be offered EDA slots before their next annual assessment and never be subject to the limit on LT-PCS services. (As discussed above, Denise Hodges has already benefited from the new rules.) Because many putative class members will only benefit from the reforms challenged by the named plaintiffs, there is a clear conflict of interests within the proposed class.

The interests of the proposed class are fundamentally conflicted for another reason as well. Personal care services are an optional benefit. The Medicaid Act does not require States to provide them. *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(viii)(24). Both the size and cost of this optional service have considerably exceeded the State's expectations when it created the LT-PCS program. *See generally* Eley Decl., at ¶¶31-43. The program now serves nearly three times the number of recipients as it did only five years ago, but it costs nearly five times as much. *See id.* at ¶34. Because the costs of the LT-PCS program have been soaring while state revenue continues to decline, the program has drawn the attention of the state legislature, which has directed DHH to develop cost-control mechanisms. *See* Declaration of Emergency, 36 La. Reg. 1749, 1749 (Aug. 20, 2010) (citing Senate Resolution 180 and House Resolution 190 of the 2008 Regular Session).

If Defendants are unable to implement the 32-hour services cap and other cost-control measures, they will be faced with the difficult decision of whether to eliminate the LT-PCS program entirely. *See* Defendants' Motion to Dismiss at 13-14. The State's choice will be between placing reasonable limits on the amount of LT-PCS service available to each recipient -- an approach that allows the State to serve an ever-growing population of individuals with disabilities -- and amending the state Medicaid plan to eliminate the LT-PCS program -- an approach that may allow the State to provide a greater amount of services to a smaller number of recipients. Although the State fortunately is not immediately faced with this dilemma, the choice has bearing on the sustainability of the proposed class action.

The Supreme Court addressed a comparable problem in *Amchem Products, Inc. v. Windsor*, a case involving certification of a class of individuals who had been, or may in the future be, adversely affected by exposure to asbestos. *See* 521 U.S. at 597. The Court held that class certification was improper because of the disparity of interests between the plaintiffs who were currently injured and those who might suffer future injury as a result of their exposure, as well as the diversity within each category. *See id.* at 626-27. The Court explained: "Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interests of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* at 626.

A similar conflict of interests permeates the proposed class in this case. Here, the question is whether class members favor a fiscally sustainable LT-PCS program that offers recipients up to 32 hours of services every week, or a LT-PCS program with a higher maximum and a greater probability that the program will be discontinued.

Differently situated members of the putative class are likely to answer this question differently. At least three categories of putative class members are likely to favor sustainability over immediate relief: (1) those who currently receive fewer than 32 hours of LT-PCS; (2) those who currently receive greater than 32 hours of LT-PCS but who could continue to live in their current residence with 32 hours of LT-PCS and either a better allocation of their LT-PCS services or supplemental assistance from family, friends, or other supports; and (3) "prospective recipients" of LT-PCS regardless of their current circumstances. Putative class members who fall into none of these categories may well favor immediate relief over a sustainable program, but that is not necessarily so.

For these reasons -- that some class members benefit from the challenged policies and that class members have divergent interests in the long-term sustainability of the LT-PCS program -- the named plaintiffs cannot adequately represent the interests of the class as a whole.[4]

II. In Any Event, The Proposed Class Definition Is Overly Broad.

Although Plaintiffs' complaint alleges that it is brought on behalf of "nearly 11,000 low-income people with severe disabilities" (Doc. 1, at ¶1) who have been receiving LT-PCS," the named plaintiffs each fall within the minority of LT-PCS recipients who have been receiving in excess of 32 hours of services per week. Plaintiff's Memorandum in Opposition to the Motion to Dismiss also acknowledges that "many, if not most, people with disabilities, could adequately reside in the community with a maximum of 32 hours a week of LT-PCS" and that "[i]t is only the minority of people with disabilities . . . who require more than 32 hours" (Doc. 17, at 5). The Memorandum also asserts that Plaintiffs' claims "are very limited" in that the reduction from 42 to 32 hours "implicates ADA and Section 504 . . . <u>only</u> when it puts people with disabilities at risk of being institutionalized." *Id.* at 9. Similarly, Plaintiffs' production requests have defined the "people in the proposed class" as "those people who receive more than

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[4] Plaintiffs' motion suggests that Defendants' concession that Plaintiffs can satisfy Rule 23(a)(2) necessitates the conclusion that they can also satisfy the typicality and adequacy criteria of Rules 23(a)(3) and (4). *See* Memorandum in Support of Class Certification at 7-8. This is incorrect, and the Supreme Court has said as much. *See General Telephone Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (explaining that the typicality and commonality criteria "tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest."). "There is considerable overlap among the Rule 23(a) prerequisites, though each serves discrete purposes and has discrete tests." NEWBERG ON CLASS ACTIONS § 3.22. Plaintiffs conflate the requirements of Rule 23(a)(2), (3), and (4) entirely; they flatly assert the absence of conflicts of interest within the class, but their assertion is conclusory, unsupported by factual allegations or record evidence, and based on a faulty understanding of what Rule 23 demands.

32 hours of LT-PCS before the reduction to 32 hours is implemented for them." (Request Number 62 in Plaintiffs' First Set of Requests for Production of Documents).

Despite these assertions that their claims are limited and that only a minority of individuals are affected by the challenged actions, the proposed class definition broadly (and vaguely) refers only to those "who can reside in the community with appropriate Medicaid-funded LT-PCS services." It is not limited to those who have been receiving in excess of 32 hours; nor is it clear that it is limited to those whose needs can be met within the current 42 hour cap. Nor does it refer to the availability (or lack thereof) of family or other community support, or state services such as Adult Day Health Care ("ADHC") available to supplement their LT-PCS services. All of these limitations are necessary if a class is to be certified.

First, as Defendants' rules make clear, an individual who can establish that he or she needs additional LT-PCS hours in order to avoid entering a nursing home can request and/or appeal for additional hours, up to the 32 hours maximum. *See* La. Admin. Code tit. 50, § 12901(D); 36 La. Reg. 1749, 1749 (Aug. 20, 2010). Therefore, there is no basis for the class definition to include individuals who do not claim that they need in excess of 32 hours, as there is already a process for requesting additional hours, up to the maximum.

Second, if a class is to be certified, the definition must make clear that the Plaintiffs are challenging only the most recent reduction from a maximum of 42 hours to 32 hours, and that the class does not include individuals whose needs can only be met with more than 42 hours of care.

Third, the definition should make clear that state-funded services are intended to supplement, not supplant, the natural supports that individuals with disabilities can and do receive from their families and communities. Therefore, the class should not include individuals who have available natural supports or who can make arrangements, for example, to share living quarters, that may reduce the need for state-funded services.

Fourth, the definition should clearly exclude individuals who could remain in the community by supplementing their LT-PCS services with services offered through other state programs such as the ADHC waiver. *See* Eley Decl., at ¶26.

In light of the above, Defendants propose that, if a class is to be certified, the class definition be as follows:

> Louisiana residents with disabilities who have been receiving Medicaid-funded services through the LT-PCS program; who desire to reside in the community instead of a nursing facility; who require more than 32 and less than 42 hours of Medicaid-funded personal care services per week in order to avoid entering a nursing facility, and who do not have available (including through family supports, shared living arrangements, or enrollment in the ADHC waiver) other means of receiving personal care services.

III. Further Development Of The Record Is Necessary Before The Court Can Rule On Plaintiffs' Motion For Class Certification.

"The plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification," *Unger v. Amedisys Inc.*, 401 F.3d 216, 321 (5th Cir. 2005), and "the party seeking certification bears the burden of proving all elements of rule 23 (a)," *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482 (5th Cir. 2001). Plaintiffs have not yet established an evidentiary record sufficient to support their class allegations. Once Plaintiffs make the necessary prima facie showing, Defendants may submit affidavits to counter Plaintiffs' evidence and may seek class discovery. Should material facts remain in dispute, a hearing may be warranted. *Cf. Bradford v. Sears, Roebuck & Co.*, 673 F.2d 792 (5th Cir. 1982). In any event, certification on the pleadings alone would be premature.

IV. The Court Should Dismiss All Claims Not Arising Under The ADA or Rehabilitation Act.

Plaintiffs' motion for class certification barely gestures at their Third Claim for Relief, which they have all but abandoned (Doc. 30, at 5). Plaintiffs have previously conceded that all of their claims not founded on the ADA or the Rehabilitation Act "may be premature." Plaintiffs' Memorandum in Opposition to the Motion to Dismiss at 22. This is in effect an acknowledgement that the claims are unripe and that the Court lacks jurisdiction to hear them. *See Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.12 (5th Cir. 2008). Because introduction of matters outside the pleadings is no bar to dismissal under Rule 12(b)(1), *see Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981), the Court should dismiss the Third Claim for Relief now without awaiting further proceedings on Defendants' motion for summary judgment or Plaintiffs' motion for class certification.

V. Conclusion

For the foregoing reasons, class certification should be denied. In any event, the proposed class is overly broad and any class certified should be limited to those LT-PCS recipients requiring between 32 and 42 hours of service per week. Additionally, the Court should dismiss as unripe Plaintiffs' Third Claim for Relief.

Dated: January 10, 2011

Respectfully submitted,

/s/ Kimberly Humbles

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CERTIFICATE OF SERVICE

I certify on this 10th day of January, 2011, that a true and correct copy of the foregoing **Defendants' Memorandum in Opposition to Class Certification** was filed electronically using the CM/ECF system. Notice of this filing will be sent via operation of the Court's electronic filing system to the following:

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