IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

HELEN PITTS, et al.	*	C.A. No. 3:10-cv-00635-JJB-SCR
	*	
PLAINTIFFS	*	
	*	JUDGE JAMES J. BRADY
V.	*	
	*	
BRUCE GREENSTEIN, et al.	*	MAGISTRATE JUDGE STEPHEN
	*	C. RIEDLINGER
	*	
	*	CLASS ACTION

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM
IN OPPOSITION TO CLASS CERTIFICATION

Plaintiffs submit herewith Exhibits 1-4, the declarations of the named Plaintiffs, Rickii Ainey, Helen Pitts, Kenneth Roman, and Denise Hodges; Exhibit 5, the declaration of putative class member Cleo Lancaster; Exhibit 6, the declaration of Carol Congress, Rickii Ainey's mother; Exhibit 7, the declaration of Jeanne Abadie; and Exhibits 8-11, the declarations of counsel, Nell Hahn, Stephen F. Gold, Bruce Vignery, and Kenneth Zeller. These declarations establish that the requirements of Rule 23 are met. This Court should therefore enter an order providing that this case may proceed as a class action under Rule 23(b)(2).[1]

1. Plaintiffs' claims are not atypical.

Defendants' argument that the claims of the named plaintiffs are not typical because defendants may have unique defenses against some plaintiffs (Defendants' Memorandum in Opposition to Class Certification, hereafter "Defendants' Memorandum," at 3-5) is unavailing. The Fifth Circuit has specifically held that the presence of an arguable unique defense does not necessarily destroy typicality. *Feder v. Elec. Data Sys. Corp.,* 429 F. 3d 125, 137 (5th Cir. 2005); s*ee also In re Enron Corp. Securities*, 529 F.Supp.2d 644, 674 (S.D. Tex. 2004). Instead, the

[1] Class certification is necessary to allow plaintiffs to seek class preliminary injunctive relief. To date, one of the named plaintiffs, Rickii Ainey, and one identified class member, Cleo Lancaster, have been faced with imminent cuts in their services to levels that would not permit them to continue to live in the community. Defendants have stipulated that the cuts will be suspended in these two cases, while this action proceeds.

critical inquiry is whether the "class representative's claims have the same essential characteristics as those of the putative class." *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001). If the claims arise from a "similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Id*.; *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000); *Musmeci v. Schwegmann Giant Super Markets*, CIV.A. 97-2757, 2000 WL 1010254 (E.D. La. July 20, 2000) *amended,* CIV. A. 97-2757, 2000 WL 1185510 (E.D. La. Aug. 18, 2000); *Chisholm v. Jindal*, CIV. A. 97-3274, 1998 WL 92272 (E.D. La. Mar. 2, 1998).

This case is not like *Warren v. Reserve Fund, Inc*., 728 F.2d 741 (5th Cir. 1984), (cited in Defendants' Memorandum at p. 3) in which characteristics peculiar to the named plaintiffs make them atypical or weak representatives of the class. *Warren* dealt with class claims that a mutual fund company misled potential investors in prerecorded telephone message. The proposed class representative was a bank president with considerable financial sophistication, making him atypical of the class of persons who might be misled by the mutual fund's message.

Each of the named plaintiffs in this case, Rickii Ainey, Helen Pitts, Denise Hodges, and Kenneth Roman, is an individual with severe disabilities who will be placed at risk of having to go into a nursing home for care, if the number of hours of Long Term Personal Care Service ("LT-PCS") that he or she will be eligible to receive is reduced to an absolute maximum of 32 hours a week. Each raises the same legal claim under the ADA and the Rehabilitation Act. *See* Exhibits 1-4, Declarations of Rickii Ainey, Helen Pitts, Kenneth Roman, and Denise Hodges.

Like most recipients of LT-PCS services, the named plaintiffs are all on a multi-year waiting list for a more comprehensive set of services called the Elderly and Disabled Adult Waiver, which is limited by the State to a certain number of "slots." They seek to represent other individuals who are similarly threatened with institutionalization as a result of Defendants' proposed cuts in the level of LT-PCS while they wait for waiver services. Plaintiffs and putative class members possess the same legal claim and injury – that their unnecessary

institutionalization violates the Americans with Disabilities Act and the Rehabilitation Act. The claims of these four individuals have the same essential characteristics as those of the putative class members, arise from the same course of conduct (Defendants' reduction of the maximum amount of LT-PCS to 32 hours a week) and share the same legal theory (the claim that reducing LT-PCS to a level that would make it impossible for them to safely remain in their homes, which violates the "integration mandate" of the Americans with Disabilities Act and the Rehabilitation Act).

Plaintiffs are requesting a reasonable accommodation under which their LT-PCS hours will not be reduced if they can demonstrate that they would otherwise have to enter a nursing home to obtain this care. Defendants' recently promulgated system does not allow them to make such a demonstration. It provides that no LT-PCS recipient may receive more than 32 hours a week—no matter how acute their need for the additional hours of service, how long it may take them to access other services that can meet this need, and how acute is their risk of institutionalization if adequate home-based services are not available.

This case will not focus on the individual circumstances or defenses to individual claims, because the named plaintiffs are not seeking to have the Court review the individual situations of each class member. What the plaintiffs are seeking, as a reasonable accommodation, is for the State to create a mechanism whereby it will consider class members' needs for additional services, over and above 32 hours a week, to avoid institutionalization, and provide those services if they are necessary to allow them and other class members to remain in the community.

The arguable presence of either individual differences, or what defendants label as "unique defenses," should not defeat class certification here.

Defendants do not even attempt to identify individual circumstances or "unique defenses" that would defeat named Plaintiff Kenneth Roman's ability to serve as a class representative based on typicality.

Moreover, with regards to the other named Plaintiffs, the differences in their circumstances or "defenses" that Defendants attempt to articulate in their memorandum are inadequate. First, they argue that Plaintiff Rickii Ainey'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." Defendants state that Ms. Ainey allegedly declined a slot on the Elderly and Disabled Adults Waiver in 2004, and that this presents a defense to her *Olmstead* claims.

Plaintiffs submit that events that occurred *six or seven years ago* to Ms. Ainey are irrelevant to her claim that Defendants' policies are *currently* placing her at risk of having to enter a nursing home for care in 2011 that could as easily (and more cheaply) be provided to her in the community. As her declaration establishes, her circumstances have significantly changed since 2004, when Defendants contend that she was offered an EDA waiver slot. In 2004, she was living with her boyfriend who assisted with her personal care needs. This relationship ended in 2006, leaving her without natural supports. Exhibit 1, ¶¶18-20. *Currently*, she has to rely on LT-PCS for assistance with all activities of daily living, including bathing, washing her face and hair, dressing and undressing, toileting, feminine hygiene, eating and drinking, transferring from any surface to a standing position, moving once in bed, preparing meals, shopping, household chores and laundry.[2] Exhibit 1, ¶¶2-9,

Next, Defendants contend that another named plaintiff, Helen Pitts, never sought an EDA waiver slot prior to the filing of this lawsuit. They claim that this is a "defense" to her *Olmstead* claim because she had alternatives to institutionalization that she has not pursued.

The facts are otherwise. Ms. Pitts has been seeking an EDA waiver slot since at least 2007. One of Defendant's attorneys, Michael Coleman, emailed Plaintiff's counsel on December

[2] Her mother, though she lives near Ms. Ainey, is not a source of support. She has not helped Ms. Ainey since she was a child. She has been addicted to drugs for many years, has a criminal record, and refuses to assist. Exhibit 1, Declaration of Rickii Ainey, ¶¶8, 10-14; Exhibit 5, Declaration of Carol Congress.

30, 2010, in response to an inquiry, and stated that Ms. Pitts has been on the waiting list for an EDA waiver slot since September 5, 2007. Exhibit 8, Declaration of Nell Hahn ¶¶ 2-4, Attachments A-C.

Defendants next claim that Denise Hodges' claims are subject to the "unique defense" that she has been offered a slot on the EDA waiver, enabling her to obtain additional hours, and thus mooting her *Olmstead* claim to additional LT-PCS hours. Ms. Hodges' circumstances are in fact typical because she, like most LT-PCS recipients, has applied and is waiting for a slot on the EDA waiver. The only reason that class members are not receiving EDA waiver services is that Defendants have not requested sufficient slots from CMS to accommodate all those who need and qualify for those services. Ms. Hodges has been waiting for an EDA waiver slot since September 11, 2007. Exhibit 8, ¶¶ 3-4, Attachment C.

Defendants have not coordinated their programs so that LT-PCS cuts will not take effect for people who have been offered EDA services until those EDA services begin. In connection with Ms. Hodges' status as a class representative, it is crucial to note that it often takes several months for persons who have received an offer for an EDA slot to actually receive services. Exhibit 7, Declaration of Jeanne Abadie, ¶¶3-5. As of January 24, 2011, Ms. Hodges did not have a date for her assessment for the EDA waiver. *Id*. ¶6.

Plaintiffs concede that, when Ms. Hodges actually receives the additional services that the EDA waiver can afford, her interest in this action will end. If this takes place before the district court certifies the class, her interest in this action would be moot, and she would not be an appropriate class representative. *See Weinstein v. Bradford*, 423 U.S. 147 (1975). But Defendants do not contend that Ms. Hodges is actually been provided with services under the EDA waiver, or that these services will actually be in place before her LT-PCS cuts will take effect. She thus currently continues to possess a live stake in the substantive outcome of the case, *see Rocky v. King*, 900 F.2d 864, 867 (5th Cir. 1990).

2. There are no conflicts between the claims of the named Plaintiffs and those of the putative class.

Defendants point to two sources of conflict between the claims of the named plaintiffs and those of members of the putative class, which they contend preclude a finding that the named plaintiffs will fairly and adequately protect the interests of the

Class. First, they contend that at the same time that they imposed the new 32-hour maximum, which is the sole subject of Plaintiffs' claims, Defendants changed the priorities of different groups on the waiting list for EDA services, making it easier for LT-PCS recipients to receive waiver services. If this change in priority groups for the EDA waiver were to be reversed, some members of the class would suffer and some would benefit. *Ergo*, Defendants claim, there is a conflict between the interests of the named plaintiffs and some members of the class.

This argument is specious. Plaintiffs are not challenging the changes Defendants have made in the order of selection of persons on the EDA waiver waiting list. and there is no reason why, if they win their challenge to the reduction in maximum hours of LT-PCS, there will have to be a change in priority groups for the EDA waiver. The order that people on the EDA waiting list are given waiver slots is independent of the maximum number of hours in the LT-PCS program.

Defendant does not articulate any budgetary or other reason why increasing the maximum number of hours of LT-PCS for people who would otherwise need to be institutionalized would require DHH to make changes in the waiting list priority for people who receive LT-PCS. Plaintiffs are *only* challenging the changes in the maximum hours in the LT-PCS program, and this does not place them at odds with any other class members. The posited "conflict" simply does not exist.

The other "conflict" identified by Defendants is entirely speculative. Defendants point to rapid growth in the LT-PCS program (omitting from that discussion the fact that the program did not come into existence until 2004, as a result of *Barthelemy v. Louisiana Department of Health*

and Hospitals,[3] a lawsuit over Louisiana's utter failure to comply with the integration mandate of the ADA). They argue and claim that, "if Defendants are unable to implement the 32-hour services cap *and other cost control measures*,[4] they will be faced with the difficult decision of whether to eliminate the LT-PCS program entirely." Thus, they claim, Plaintiffs' claims conflict with the interests of the class.

If Defendants were to eliminate the LT-PCS program entirely, they would still face a challenge under the Americans with Disabilities Act, but the class would be much larger than only those people face institutionalization if they cannot obtain more than 32 hours of services. Numerous courts have clearly held that a state violates the ADA if it requires people to go into institutions to receive the same services they could receive in the community. See, e.g. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180-81 (10th Cir. 2003); *Townsend v. Qasim*, 328 F.3d 511, 523 (9th Cir. 2003*); Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004); *V.L. v. Wagner*, 669 F. Supp. 1106, 1120 (N.D. Cal. 2009); *Crabtree v. Goetz*, 2008 WL 5330506 (Dec. 19, 2008).

Defendants' argument that the 32-hour cap is essential to the existence of the entire LT-PCS program, is one of the ultimate issues to be decided on the merits. The Court must decide whether the relief that Plaintiffs are requesting constitutes a "reasonable modification" in the program, or whether it would entail a "fundamental alteration" of the State's services and programs. But it is not appropriate to decide that ultimate legal issue at the class certification phase of the proceedings.

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[3] *see* 2001 WL 1254859 (E.D. La. Oct. 18, 2001) (order approving settlement agreement); 2003 WL 1733534 (E.D. La. Mar. 31, 2003) (order approving modifications to settlement agreement); 2007 WL 4589885 (E.D. La. Dec. 28, 2007) (granting in part Plaintiffs' motion to enforce settlement agreement and extending term of agreement); 294 Fed.Appx. 94 (5th Cir. 2008) (denying reconsideration of attorneys' fee order).

[4] Defendants do not identify the "other cost control measures" that they claim are vital to the existence of the program. Whatever they may be, they are not implicated by this action.

"Nothing in either the language or the history of Rule 23 gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 177; *Walker v. Jim Dandy Co.*, 638 F.2d 1330, 1334 (5th Cir. 1981); *Colorado Cross Disability Coalition v. Taco Bell*, 184 F.R.D. 357 (certifying class of people with disabilities in ADA case); *Thrope v. Ohio*, 173 F.R.D. at 488 (same). An argument that a finding for Plaintiffs on the merits could lead to the complete elimination of the LT-PCS program is not the type of conflict that would render the named plaintiffs inadequate representatives of the class of persons similarly affected by Defendants' proposed cuts.

Defendants' attempt to identify groups of putative class members that would oppose the relief Plaintiffs seek in this lawsuit – those who receive less than 32 hours of service; those who currently receive more than 32 hours but who could continue to live in their homes with less than 32 hours of service; and future recipients of the service – ignores that the proposed class includes *only those LT-PCS recipients who are at risk of institutionalization because of Defendants' cut in the maximum level of services*. Defendants point to no conflict between the named Plaintiffs and members of the class they seek to represent.

3. Plaintiffs do not object to a modification of the proposed class definition, though they do not agree with Defendants' proposed definition.

Plaintiffs agree with one of Defendants' contentions regarding the breadth of the class definition. It is true that Defendants' rules permit an individual who can establish that he or she needs at least 32 hours of LT-PCS in order to avoid entering a nursing home to receive 32 hours a week. *See La. Admin. Code* Title 50, § 12901(D); *Louisiana Register* v. 36 no. 8, p. 1749 (Aug. 20, 2010). Therefore, there is no reason for the class definition to include individuals who do not claim that they need more than 32 hours a week of service.

Plaintiffs do not agree to limit the class to persons whose needs can be met with less than *42* hours of LT-PCS. They do note that Defendants' program rules have contained an inflexible

42-hour limitation since March 1, 2009. *Louisiana Register*, v. 35, no. 1 (January 2009) pp. 32–34. However, if exceptions have been made to those limits, persons who have been receiving adequate LT-PCS through such exceptions, and whose continued existence in the community is threatened by the proposed cut to 32 hours, share the named plaintiffs interest and claims and should be included in the class.

The remaining modifications that Defendants suggest are subsumed within the class definition proposed by plaintiffs: that the class includes those who are at risk of being forced to enter a nursing home because of Defendants plan to reduce the level of community-based LT-PCS services. The emphasis Defendants seek to place on alternative sources of care are unnecessary and argumentative.

4. Plaintiffs do not object to the dismissal of their due process claims without prejudice.

In Plaintiffs' Memorandum in Response to Defendants' Motion to Dismiss, they concede that their due process claims may be premature. They do not object to the dismissal of these claims without prejudice.

Plaintiffs do not object to Defendants' submission of affidavits to counter Plaintiffs' evidence. Plaintiffs request that, upon final hearing of this Motion, this Court grant their motion for class certification.

Date: January 25, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2011, 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_____