UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:11-cv-354

K.C., et al., individually and on behalf of all others similarly situated,	)
Plaintiffs,	)
v.	)
LANIER CANSLER, in his official capacity as Secretary of the Department of Health and Human Services, et al.,	)
Defendants.	)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

The named Plaintiffs have moved the Court to certify this case a class action pursuant to Fed. R. Civ. P. Rules 23(a) and (b)(2). The class should be defined as: All current or future participants in the N.C. Innovations Waiver, as it is currently or subsequently named, whose Medicaid services have been or will be denied, reduced, or terminated by Defendant Secretary of the North Carolina Department of Health and Human Services, Defendant PBH, or any of their employees, contractors, agents or assigns through the implementation of the Supports Intensities Scale or Supports Needs Matrix. Undersigned counsel have also moved the Court to appoint them as class counsel pursuant to Fed. R. Civ. P. Rule 23(g).

Background

The class is composed of Medicaid recipients who have disabilities significant enough to qualify them for institutional placement in an intermediate care facility for the developmentally or intellectually disabled. These disabilities include cerebral palsy, seizure

disorders, intellectual disabilities (sometimes referred to as cognitive disabilities or mental retardation), and autism.

Plaintiffs and the members of the class have been receiving health care services and supports in the community through the N.C. Innovations Waiver. This waiver, obtained by the N.C. Department of Health and Human Services (DHHS) and administered for DHHS by PBH, covers home and community based services for individuals whose disabilities qualify them for care in an intermediate care facility.

Prior to July 1, 2011, Defendants determined that Plaintiffs' services were medically necessary and authorized Medicaid coverage of their services for a one-year period, to be reviewed annually. Some time prior to July 1, 2011, however, PBH employees began to use a tool, called the Supports Intensity Scale (SIS), to assign a score to waiver participants based on an assessment of their medical and behavioral needs and daily activities. As demonstrated in the evidence filed with Plaintiffs' Motion for Preliminary Injunction, the named Plaintiffs and class members were not informed of the importance of the SIS or of the limited time period within which they could challenge the score. *See* Class Action Compl. ¶¶ 3, 50-51, 73, 81, 92, 97, 108-122; Mem. of Law in Supp. of Mot. for Prelim. Inj. at 7. PBH describes use of the SIS for children as a "test" in the "research phase" that has "not yet been normed or finalized." Sea Aff. in Supp. of Mot for Prelim Inj. Ex. T (hereinafter Sea Aff. 1); Dec. of Penny C., Ex. M .[1]

Based on the SIS score, PBH employees categorized waiver participants using a new "Supports Needs Matrix" system. In late March 2011, PBH mailed an undated notice and brochure to class members telling them that application of the Supports Needs Matrix

[1] All affidavits and declarations not otherwise specified are those filed with Plaintiffs' Motion for Preliminary Injunction on August 24, 2011 (D.E. 31).

required their Medicaid services to be reduced. The notice did not include an individualized explanation of how or why the SIS/SNM processes caused their services to change; information about how to file a grievance or appeal to contest the scoring accuracy, category assignment, budget limit, or service reduction; or any explanation of the right to continued benefits at the previously authorized level pending the outcome of a fair hearing. Class Action Compl., ¶¶ 1-8. 52-62, 69-70, 75-76, 54, 95, 108-122; Mem. in Supp. of Mot. for Prelim. Inj. at 8-9.

The Complaint alleges that the policies and practices Defendants use to deny, reduce or terminate Medicaid home and community based services violate Plaintiffs‟ and class members‟ rights under the Medicaid Act, 42 U.S.C. § 1396a(a)(3), and the Due Process Clause of the Fourteenth Amendment. Class Action Compl. ¶¶ 123-34. The only relief sought is declaratory and injunctive relief. *See Id.* Relief Requested.

ARGUMENT

The party seeking class certification bears the burden of proof. *In re Panacryl Sutures Prod. Liab. Cases*, 263 F.R.D. 312, 318 (E.D.N.C. Nov. 13, 2009). As the moving party, the Plaintiffs must satisfy the four provisions of Rule 23(a) and one subdivision of Rule 23(b). *See*, *e.g.*, *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 595 n.2 (4th Cir. 1976). Rule 23 is to be interpreted flexibly and given a "liberal rather than a restrictive construction." *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir. 1989), *abrogated on other grounds*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

A. Rule 23(a)(1): Numerosity

Rule 23(a)(1) requires the class to be so numerous that joinder of all parties is impracticable. "No specified number is needed to maintain a class action." *Brady v. Thurston*

Motor Lines, 726 F.2d 136, 145 (4th Cir. 1984). For example, classes of 18 and 74 persons have been found to satisfy the requirement. S*ee Id.* (class of 74 persons is "well within the range appropriate for class certification"); *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (class of 18 members); *see also Rodger v. Elec. Data Sys.*, 160 F.R.D. 532, 535-36 (E.D. N.C. 1995) (certifying class of at least 57 individuals and citing *In Re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 78 (D. Md. 1991), as holding that a class of as few as 25-30 members raises a presumption that joinder would be impracticable). Moreover, where, as here, the only relief sought for the class is injunctive and declaratory in nature, "even speculative and conclusory representations as to the size of the class suffice as to the requirement of many." *Doe v. Charleston Area Med. Ctr., Inc.,* 529 F.2d 638, 645 (4th Cir. 1975).

Moreover, the impracticality requirement of Rule 23 does not focus solely on a numerical test. *See Ballard v. Blue Shield of S. W. Va.*, 543 F.2d 1075, 1080 (4th Cir. 1976). Relevant considerations of impracticality include geographic dispersion of class members, limited financial resources of class members, and the negative impact on judicial economy if individual suits are required. *See, e.g., Rodger*, 160 F.R.D. at 536 (citation omitted).

Here, the number of class members easily meets the test for impracticality. According to Defendant PBH, as of April 18, 2011, there were approximately 675 people with disabilities enrolled in the NC Innovations Waiver, and PBH had implemented new budget limits using the Support Needs Matrix procedures for all of them. *See* Sea Aff. 1, Ex. D (Mem. from Steve Tomlinson, Director of PBH Network Operations, to PBH Network Providers of IDD). PBH admits that it reduced the services of about 25 percent of these

persons—approximately 169 persons. *See* Sea Aff. 1, Ex L, p. 2. Thus, the class is composed of at least 169 persons.

In addition to having numerous class members, other factors evidence the impracticality of joinder of all parties in this case. The Medicaid beneficiaries whose services are being terminated and reduced using the notices and procedures at issue are geographically dispersed throughout PBH"s catchment area, currently consisting of Stanly, Cabarrus, Rowan, Davidson, and Union counties in North Carolina. *See* Sea Aff. 1, Ex. C (Contract Between N.C. Dep"t of Health & Human Services Div. of Med. Assistance and PBH, § 2 Contract #2011-301). The class consists of individuals who qualify for Medicaid because they have disabling conditions and their financial resources are insufficient to meet their subsistence and health care needs—individuals who, almost by definition, lack the financial means to hire an attorney and pursue individual legal actions. *See Carr v. Wilson-Coker*, 203 F.R.D. 66, 73 (D. Conn. 2001) (citation omitted) (finding joinder impractical when "many of the class members … by reason of ignorance, poverty, illness, or lack of counsel, may not … [be] in a position to seek [a hearing] on their behalf" or obtain information concerning their rights). Certification of this case as a class action will also ensure judicial economy by assuring that the Defendants are not subjected to various rulings by differing courts in instances where recipients would be able to file individual legal actions.

Finally, the named plaintiffs seek to represent future Medicaid recipients, another factor that supports numerosity. *See* 1 Newberg on Class Actions § 3:17 at 265 (4th ed. 2002). *See also, e.g.*, *Weaver v. Reagen,* 701 F. Supp. 717, 721 (W.D. Mo. 1988) (finding numerosity satisfied in a Medicaid case because class included future members); *Bruce v.*

Christian, 113 F.R.D. 554, 557 (S.D.N.Y. 1986) (finding impracticality where class included individuals who would be affected in the future, and fluid nature of the class meant identity of individuals would change even as harm and basic parameters of the group affected would remain constant). In addition to future Medicaid beneficiaries in the current five county catchment area, the Defendants will soon expand the catchment areas served by PBH and subject to the procedures challenged herein to the following additional counties: Alamance and Caswell Counties, effective October 1, 2011; Vance, Granville, Franklin, Halifax, and Warren Counties, effective January 1, 2012; and Orange, Person, and Chatham Counties, effective April 1, 2012. *See* PBH Admin. Communication Bulletin, FY 1112 AA 01, to PBH Network Providers (July 22, 2011) (attached as Ex. D to Sea Aff. in Supp. of Mot. to Disqualify (hereinafter Sea Aff. 2)).

Joinder of all members is impracticable due to the class size, its geographic dispersion, and the fluidity of the class composition. Rule 23(a)(1) is met.

B. Rule 23(a)(2): Commonality

Rule 23(a)(2), the "commonality" factor, requires there to be a common thread among all class members, namely "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The requirement can be satisfied by the existence of even a single common question of law or fact. *Wal–Mart Stores, Inc., v. Dukes,* 131 S.Ct. 2541, 2556 (2011); *see also* 1 *Newberg on Class Actions*, § 3.10 (3d ed. 1992).

The commonality factor has been "liberally construed," and courts have given it a "permissive application so that common questions have been found to exist in a wide range of contexts." *Rodger*, 160 F.R.D. at 537 (citation omitted). Moreover, the Rule "does not require that all, or even most issues be common, nor that common issues predominate, but

only that common issues exist." *Beaulieu v. EQ Indus. Servs.*, No. 5:06-cv-00400-BR, 2009 WL 2208131, at *11 (E.D. N.C. July 22, 2009) (quoting *Central Wesleyan College v. W.R. Grace & Co.,* 143 F.R.D. 628, 636 (D. S.C.1992)) (Att. A to Mot. for Class Certification).

Nevertheless, highly generalized allegations will not do. The Supreme Court has clarified that, to satisfy this factor, the plaintiff must "demonstrate that the class members „have suffered the same injury,"" *Wal–Mart Stores,* 131 S.Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U .S. 147, 156 (1982)), and that the claim "depend[s] upon a common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2545; *cf. Martin v. State Farm Mut. Auto. Ins. Co*., No. 3:10-0144, 2011 WL 3667456, at *3 (S.D. W. Va. Aug. 22, 2011) (Att. B to Mot. for Class Certification) (citing *Wal-Mart* and stating "Nevertheless, the Court is to give Rule 23 a liberal, rather than a restrictive, construction and apply a standard of flexibility that will "best serve the ends of justice for the affected parties and ... promote judicial efficiency." (quoting *Gunnells v. Healthplan Servs., Inc .,* 348 F.3d 417, 424 (4th Cir.2003)).

Significantly, when "the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action," the commonality requirement has been described as "easily met." 1 *Newberg on Class Actions*, § 3.10 (3d ed. 1992). And, the Supreme Court has stated:

> Class relief is "particularly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." [cite omitted] For in such cases, the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.

Falcon, 457 U.S. at 155 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

The common factual contentions in this case include the following: All of the approximately class members live in or will live in PBH catchment areas and have been found or will be found eligible for and receiving Medicaid home and community based services through the DHHS N.C. Innovations Waiver administered by PBH. Class Action Compl. ¶¶ 24-31. Prior to July 1, 2011, the Defendants authorized coverage of the services contained in each class member"s plan of care as necessary for that individual. The Defendants authorized the coverage for a one-year period, to be reviewed annually unless the individual"s condition changed. *See* Mem. in Supp. of Mot. for Prelim Inj. at 6; Sea Aff. 1, Ex. B App. D-2, F-1, F-2, Att. 1:7, Ex. C at 70-75, Ex. P at 12, 46, 48; *see also* Dec. of Penny C. ¶ 18 and Ex. K; Dec. of Patricia Holzlohner ¶ 8; Dec. of Paul Peters ¶ 5; *but see* PBH *Waiver Alert* (Aug. 2011) (attached to Sea Aff. in Supp. of Class Certification (hereinafter Sea Aff. 3) (purporting to implement a six-month authorization period effective July 1, 2011 for individuals who are being "transitioned" to lower budget limits).

Prior to March 2011, PBH assessed each class member"s needs using a Supports Intensity Scale (SIS). The class members received a similarly formatted letter from PBH that provided a summary of the SIS score. The notice did not explain the SIS scoring system, why the score was important, how to request a review of the SIS score, or the deadline for doing so. *See* Dec. of Africa Heath, Ex. A; Dec. of Linda Johns, Ex. A.; Dec. of Ron S, Exs. A, E; Penny C. Dec., Ex. B; Holzlohner Dec. Ex. A; Dec. of Melissa W, Ex. C. PBH used the SIS score, along with the person"s age and living arrangements, to categorize each class member into a Support Needs Matrix and calculate a budget limit for their waiver services. *See* Sea Aff. 1, Exs. E, G. In late March 2011, PBH sent class members a similarly formatted notice and brochure informing them that application of the Supports Needs Matrix had resulted in a

new budget limit on their services and that their services would be reduced or terminated to come within the budget limit. The notice did not adequately explain the basis for the action, contain information on how to appeal the decision, provide deadlines for filing grievances or appeals, or explain how to continue benefits pending appeal. The notice did not explain that individuals who disagreed with the budget limit could request a review by PBH"s Intensive Review Committee (which can decide to allow additional services for up to seven percent of participants whom it finds to be "outliers"). *See* Mem. in Supp. of Mot. for Prelim. Inj. at 8-9; Health Dec., Ex. G; Ron S. Dec., Ex. F; Penny C. Dec., Ex. G; Holzlohner Dec. ¶¶ 12-14 and Ex B; Melissa W. Dec. ¶¶ 8-15, Ex. A; *see also* Dec. of Paul Peters ¶¶ 9-17 (describing PBH"s common application of Supports Needs Matrix reviews, inadequate written notices of action, and lack of appeal rights for his patients enrolled in the N.C. Innovations Waiver). Class members were discouraged by PBH employees from challenging the service reductions. *See* Class Action Compl. ¶¶ 24-31 112-114; Heath Dec. ¶¶ 20, 24; Johns Dec. ¶¶ 20, 24; Ron S. Dec. ¶¶ 16-17, 31; Penny C. Dec. ¶ 31; Melissa W. Dec. ¶ 17-18; Peters Dec. ¶ 14.

To be sure, there are some factual differences from one class member to the next. However, Rule 23(a)(2) does not require facts to be identical. Moreover, "[f]actual differences among the class members" cases do not violate the rule, so long as a common legal theory is shared." *Woodward v. Online Info. Servs.*, 191 F.R.D. 502, 505 (E.D. N.C. 2000) (citing *Brown v. Eckerd Drugs, Inc*., 663 F.2d 1268, 1275 (4th Cir. 1981)). *See also Dajour B. v. City of N.Y. & Novello,* No. 00 Civ. 2044 (JGK), 2001 WL 1173504, at *5 (S.D. N.Y. Oct. 3, 2001) (Att. C to Mot. for Class Certification) (finding commonality where "entire controversy turns on common question of law," whether the defendants are required

under the Medicaid Act to provide for services as the plaintiffs allege). Here, there are at least three legal questions common to the class:

(1) Whether the Defendants provided the class members with an adequate pre-termination notice and opportunity for a fair and impartial pre-termination hearing prior to reducing or eliminating their services, as required by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution;

(2) Whether the Defendants provided the class members with an adequate pre-termination notice and opportunity for a fair and impartial pre-termination hearing prior to reducing or eliminating their services, as required by the Medicaid Act, 42 U.S.C. § 1396a(a)(3).

(3) Whether the Defendants violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution by using standards and procedures for determining eligibility for and extent of medical assistance that were unascertainable and arbitrary.

In *Hernandez v. Medows*, 209 F.R.D. 665 (S.D. Fla. 2002), a case with due process claims similar to those here, the plaintiffs challenged practices being used by the Florida Medicaid agency and its agents. The court found common questions of fact that included whether the "Defendant has failed to ensure that Plaintiffs receive adequate notice and the opportunity for a fair hearing when their prescription drug coverage is denied, delayed, terminated, or reduced" and whether the "Defendant has failed to ensure Plaintiffs the opportunity to pursue pretermination hearings when their prescription drug coverage is reduced or terminated." *Id.* at 669. *Hernandez* found common questions of law that included whether the "the Defendant has violated the federal Medicaid Act and procedural due process

under the Fourteenth Amendment to the United States Constitution by failing to ensure that Plaintiffs receive adequate notice and hearing rights when their prescription drug coverage is denied, delayed, terminated, or reduced" and whether the Defendant "has violated the federal Medicaid Act and procedural due process under the Fourteenth Amendment to the United States Constitution by failing to ensure Plaintiffs the opportunity to pursue pretermination hearings when their prescription drug coverage is reduced or terminated." *Id.* This Court should apply the reasoning of *Hernandez* and certify this class as requested by the Plaintiffs. *See also, e.g.*, *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir.1997) (finding commonality and typicality requirements satisfied where each class member's claim arose from the same course of events, and each class member was making essentially the same legal and factual arguments to prove the government official's liability); *Carr*, 203 F.R.D. at 73 (finding commonality, noting that "while there is variation in the specifics of their individual circumstances, the [Medicaid] plaintiffs do not allege that they have suffered isolated difficulties, but rather, that they face systemic barriers"); *Susan J. v. Riley*, 254 F.R.D. 439, 460-61 (M.D. Ala. 2008) (finding commonality and typicality where class of disabled persons receiving Medicaid benefits were adjudged ineligible and/or denied services without notice and opportunity for hearing).

Finally, "proposed class actions seeking injunctive and declaratory relief, … 'by their very nature' present common questions of law and fact." *Disability Rights Council of Greater Washington v. Washington Metro. Area Transit Auth.*, 239 F.R.D. 9, 26 (D.D.C. 2007) (quoting 7A Charles A. Wright *et al.*, Federal Practice and Procedure § 1763, at 176 (3d ed. 2005 & Supp. 2010)). In this case, the Class Action Complaint seeks uniform

declaratory and injunctive relief for all class members, thus evidencing the commonality of the legal claims. *See* Class Action Compl. ¶¶ 123-134.

In sum, the class members bring common experiences and contentions to the Court, along with identical legal claims and requests for relief. The class satisfies the commonality requirement of Rule 23(a)(2), and the Court"s determination of the truth or falsity of their contentions will resolve their claims "in one stroke." *Wal-Mart*, 131 U.S. at 2545.

C. Rule 23(a)(3): Typicality

Rule 23(a)(3), the "typicality" factor, says the claims or defenses of the representative parties must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). "Typicality does not mean identicalness." *Woodward,* 191 F.R.D. at 505. Rather, this test requires a relationship between the plaintiff"s claims and those of the class.

> A plaintiff"s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns, which underlie individual claims.

1 *Newberg on Class Actions,* § 3.13 (3d ed. 1992) (footnotes omitted). "In government benefit class actions, the typicality requirement is generally satisfied when the representative plaintiff is subject to the same statute, regulation, or policy as class members." *Carr*, 203 F.R.D. at 75 (quoting *Newberg*); *Rodger*, 160 F.R.D. at 538 (stating that courts "will generally look to the defendant"s alleged conduct and the legal theory advanced by the plaintiff to determine whether certification is appropriate.… A court may determine that the typicality requirement is satisfied even when the plaintiffs" claims and the claims of the class members are not identical.") (citation omitted).

The typicality requirement is satisfied here. The named Plaintiffs' claims arise from the same legal theories as the claims of the class, namely whether the Defendants improperly terminated or reduced their Medicaid coverage pursuant to policies and practices in violation of the due process requirements of constitutional and federal Medicaid law. *See* Class Action Compl. ¶¶ 108-134 (describing legal claims). The named Plaintiffs' factual allegations are also typical of and arise from the same practices challenged on behalf of the class. *Id.* at ¶¶ 63-107.

Like the class members, all of the named plaintiffs are individuals living in PBH catchment areas who are receiving home and community based services through a DHHS Medicaid waiver program administered by PBH. *See* Dec. of Africa Heath ¶¶ 1, 8 (stating Plaintiff K.C. resides in Union County, North Carolina and receives Medicaid services through the N.C Innovations Waiver administered by PBH); Dec. of Linda Johns ¶ 1, 6 (stating Plaintiff Allison Taylor Johns resides in Union County, N.C. and receives Medicaid services through the N.C. Innovations Waiver); Ron S. Dec. ¶¶ 1, 8 (stating Plaintiff L.C. resides in Cabarrus County, N.C. and receives Medicaid services through N.C Innovations Waiver); Penny C Dec. ¶¶ 2, 15 (stating Plaintiff K.C. resides in Indian Trail, N.C. and receives Medicaid services through NC Innovations Waiver); Holzlohner Dec. ¶ 3, 6 (stating she is legal guardian of class member Kimberly Beare, a Medicaid recipient living in Marshville, N.C. who receives Medicaid services through the N.C. Innovations Waiver); Dec. of Melissa W. ¶¶ 1-2, 9 (stating she is legal guardian of class member F.A., a Medicaid recipient living in Davidson County, N.C. who receives Medicaid services through the N.C. Innovations Waiver).

Some time prior to March 2011, PBH assessed each named Plaintiff's needs using the Supports Intensity Scale. The Plaintiffs received a notice from PBH that provided a summary of the SIS score. The notice did not explain the SIS scoring system, why the SIS score was important, how to request a review of the SIS score, or the deadline for doing so. *See* Heath Dec. Ex. A, ¶¶ 9, 25; Johns Dec. Ex. A, ¶¶ 10-11; Ron S Dec. Ex. A, ¶¶ 18-23 (explaining confusion with SIS process); Penny C Dec. Ex. B, ¶¶ 20-23 (describing confusion of receiving SIS score, the lack of information about the importance of the score and ability to amend it so that "[e]ven if I had otherwise learned that I could contest the assessment scores, I had no way of knowing why contesting the scores was important").

In fact, the SIS score was important because PBH used it in March 2011 to decide where to place waiver participants in its Supports Needs Matrix. In late March 2011, PBH sent each named Plaintiff an undated letter informing them that PBH's application of the Supports Needs Matrix system had resulted in a new budget limit on services and that, beginning July 1, 2011, their services would be reduced or terminated to come within the budget limit. The notice did not adequately explain the basis for the action, contain information on how to appeal the action, provide deadlines for filing a grievance or appeal, or explain how to receive continued benefits pending appeal. The notice did not explain that individuals who disagreed with the budget limit could request a review by PBH's Intensive Review Committee (which can decide to allow additional services for up to seven percent of participants whom it finds to be "outliers"). *See* Johns Dec. ¶¶ 12-16, Ex. D; Heath Dec. ¶¶ 12-15, 17, 24, Ex. G; *id.* at ¶ 25 ("I did not, and still have not, received any explanation about the criteria PBH used to assign K.C. to a specific category and budget."); Ron S Dec. ¶¶ 9-15, Ex. F; Penny C Dec. ¶¶ 28, 30, Ex. G; *see also Id.* at ¶¶ 39, 41 (describing additional

confusion and inadequate notices of PBH"s Intensive Review response); *see* Sea Aff.1 Ex. F p. 11.

Creating further confusion regarding their due process rights, each named Plaintiff was similarly discouraged by PBH"s employees from challenging their service reductions. *See* Heath Dec. ¶¶ 20, 35; Johns Dec. ¶¶ 17-18, 20, 28-38; Ron C. Dec. ¶ 16, 24 (PBH case manager stated she was "no longer an advocate for L.S."s behalf" and her role was to "make sure that „parents don"t trump up their child"s condition""); Penny C. Dec. ¶¶ 31, 35 (stating that PBH Care Coordinator "informed me repeatedly" that neither D.C."s SIS nor his SNM could be appealed" and "[o]nly after we repeatedly and forcefully continued to object" were we told for the first time that we could request an „Intensive Review"").

In sum, the named Plaintiff and class members received similarly formatted notices from Defendant PBH which provided incomplete explanations of the reasons and basis for the Defendants" actions, include no information regarding how to file a grievances or appeals, did not explain deadlines for filing grievances or appeals, and did not explain the individual"s rights to continued benefits pending an appeal. Rule 23(a)(3) has been met.

D. Rules 23(a)(4) and 23(g): Adequacy of Representation

The final prong of Rule 23(a) requires the Court to find that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Fourth Circuit looks for two separate requirements: named plaintiffs whose interests are not antagonistic to the class and adequate counsel. *See Woodward,* 191 F.R. D. at 506 (citations omitted).

The named Plaintiffs do not have interests antagonistic to the class as a whole. The individual plaintiffs have sworn to "fairly and adequately represent the interests of all class

members" and to "zealously prosecute this lawsuit" so as to obtain the requested relief for all class members and not just themselves or their children. *See* Heath Dec. ¶¶ 36-38; Johns Dec. ¶¶ 47-49; Ron S. Dec. ¶¶ 39-41; Penny C. Dec. ¶¶ 52-54. The named plaintiffs have also sworn that they know of "no conflict" between the named plaintiff and the interests of the class as a whole. *See* Heath Dec. ¶ 39; Johns Dec. ¶ 50; Ron S. Dec. ¶ 42; Penny C. Dec. ¶ 55. The requested relief further evidences the lack of conflict between the named Plaintiffs and the unnamed class members: All of the claims in the case involve the same policies and course of conduct by the Defendants, and the case seeks the same prospective injunctive and declaratory relief. *See* Class Action Compl., Prayer for Relief. Each class representative wants all class members to receive the due process to which each of North Carolina‟s Medicaid-eligible individuals are entitled and to have their previously authorized and Medicaid-covered services reinstated to pre-July 2011 levels pending Defendants‟ compliance with the due process requirements.

Furthermore, Disability Rights North Carolina, Legal Services of the Southern Piedmont, and the National Health Law Program will adequately represent the interests of the class members. Counsel is "qualified, experienced, and able to vigorously conduct the proposed litigation." *See* 1 *Newberg on Class Actions*, § 3.22 (3d ed. 1992). Plaintiffs‟ counsel are working steadily and competently to investigate and identify the claims in this case. The law firms representing the Plaintiffs have each committed the necessary resources to adequately represent the class. The attorneys from each of these firms are experienced in prosecuting class action litigation on behalf of Medicaid recipients. *See generally* Dec. of John Rittelmeyer (Att. D to Mot. for Class Certification); Dec. of Jennifer Bills (Att. E to Mot. for Class Certification), Aff. of Doug Sea in Supp. of Class Certification (Att. F to Mot.

for Class Certification) (hereinafter Sea Aff. 3); Dec. of Jane Perkins (Att. G to Mot. for Class Certification). Lead counsel is Disability Rights North Carolina (DRNC), through John Rittelmeyer. Mr. Rittelmeyer has practiced law in North Carolina since 1990 and is currently the Litigation Director of DRNC. *See* Rittelmeyer Dec.¶¶ 2, 4. In addition to disability law, Mr. Rittelmeyer has extensive experience in general civil and consumer class action litigation. *Id.* at ¶ 3. Jennifer Bills, another DRNC attorney, is representing the Plaintiffs. *See* Bills Dec. ¶¶ 1, 4. Ms. Bills has been practicing law for over eight years, focusing on disability, civil rights, and constitutional law. *Id.* at ¶¶ 3-4. Legal Services of the Southern Piedmont, through Douglas Stuart Sea, is also representing the class. Mr. Sea has practiced law for over 30 years, focusing primarily on Medicaid, other public benefits, and complex litigation. Sea Aff. 3. ¶¶ 2-3. He has participated in at least 12 federal and state class action cases against government agencies, most of them as lead counsel. *Id*. at ¶ 3. Mr. Sea has been a speaker for at least 40 continuing legal education events on issues of Medicaid or complex litigation. *Id.* Finally, the National Health Law Program, through Jane Perkins, is serving as class counsel. Perkins Dec. ¶ 2. Ms. Perkins has participated in more than 35 complex and/or class action cases in the federal district and circuit courts of appeals, spoken at well over 200 continuing legal education events on Medicaid and federal court procedure, and published more than 50 articles on Medicaid, health law, and federal court access. *Id.* at ¶ 6. The requirements of Rule 23(a)(4) and Rule 23(g) are met.

5. Rule 23(b)(2)

This lawsuit squarely meets the Rule 23(b)(2) requirement 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…." Fed. R. Civ. P. 23(b)(2). Indeed, Rule 23(b)(2) class actions were designed specifically this type of case—"civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons…." 1 *Newberg on Class Actions*, § 4.11 (3d ed. 1992) (footnotes omitted).

As discussed previously, Defendants" illegal policies and practices concerning the termination or reduction of services to people with disabilities is affecting hundreds of similarly situated Medicaid recipients in the Piedmont region. The Defendants" actions have equal application to all class members, as current or future recipients of Medicaid. Plaintiffs ask the Court to enter final injunctive and declaratory relief with respect to the class as a whole. Because the Defendants" actions and inactions have affected all the class members in the same or very similar ways, this action should be certified pursuant to Rule 23(b)(2). *See Gratz v. Bollinger*, 539 U.S. 244, 267-68 (2003) (affirming (b)(2) class certification and noting that certification saved resources of both the court and the parties); *Carr,* 203 F.R.D. at 75 (certifying (b)(2) class because Medicaid plaintiffs sued the commissioner of the single state agency charged with administering Medicaid services and continuance of the commissioner"s policies might require injunctive relief).

CONCLUSION

For the reasons stated above, the Plaintiffs ask the Court to certify this case as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) and, pursuant to Rule 23(g), to appoint the following law firms to represent the class: Disability Rights North Carolina, Legal Services of Southern Piedmont, and National Health Law Program.

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Dated: August 29, 2011

Respectfully submitted,

ATTORNEYS FOR PLAINTIFFS

/s/ John R. Rittelmeyer_____
John R. Rittelmeyer
N.C. State Bar No. 17204
Jennifer L. Bills
N.C. State Bar No. 37467
DISABILITY RIGHTS NC
2626 Glenwood Avenue, Suite 550
Raleigh, NC 27608
Phone: (919) 856-2195
Fax: (919) 856-2244
john.rittelmeyer@disabilityrightsnc.org
jennifer.bills@disabilityrightsnc.org

/s/ Douglas S. Sea_____
Douglas Stuart Sea
State Bar No. 9455
LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
1431 Elizabeth Avenue
Charlotte, North Carolina 28204
Telephone: (704) 376-1600
dougs@lssp.org

/s/ Jane Perkins_____
Jane Perkins
State Bar No. 9993
NATIONAL HEALTH LAW PROGRAM
101 E. Weaver Street, Ste. G-7
Carrboro, NC 27510
Telephone: (919) 968-6308
perkins@healthlaw.org

CERTIFICATE OF SERVICE

I certify that on this day, I served a true copy of the Plaintiffs‟ Memorandum in Support of Motion for Class Certification upon the Defendants‟ attorneys via electronic means through the CM/ECF system to:

Ms. Belinda Smith, N.C. Department of Justice
Wallace C. Hollowell and Stephen D. Martin, Nelson Mullins Rile & Scarborough
Raboteau T. Wilder, Jr., Womble Carlyle Sandridge & Rice

This the 29th day of August 2011.

/s/ Douglas Stuart Sea