UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION FILE NO. 5:11-CV-354(FL)

K.C. a minor child, by his mother and next friend AFRICA H.; ALLISON TAYLOR JOHNS; L.S., a minor child, by his father and next friend RON S.; D.C., a minor child, by his mother and next friend PENNY C.; and M.S., a minor child, through his parent and natural guardian, Rachelle S.,on behalf of themselves and all others similarly situated, Plaintiffs, vs. LANIER CANSLER, in his capacity as the Secretary of the Department of Health and Human Services, PAMELA SHIPMAN, in her official capacity as Area Director of Piedmont Behavioral Health Care Area Mental Health, Developmental Disabilities, and Substance Abuse Authority, and PIEDMONT BEHAVIORAL HEALTHCARE AREA MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE AUTHORITY doing business as PBH, Defendants.	**DEFENDANT CANSLER'S RESPONSE IN OPPOSITION TO THE MOTION FOR CLASS CERTIFICATION** [F.R. Civ. P. 7]

NOW COMES Defendant Lanier Cansler, by and through his counsel Roy Cooper, Attorney General of the State of North Carolina, Belinda A. Smith, Special Deputy Attorney General and Iain Stauffer, Assistant Attorney General, pursuant to Rule 7 of the Federal Rules of Civil Procedure and Local Civil Rules 7.1, 7.2 and 10.1, and files this response in opposition to the motion for class certification.

NATURE OF THE CASE

On 29 August 2011, Plaintiffs moved to certify a statewide class of plaintiffs pursuant to Federal Rule of Civil Procedure 23(a) and (b)(2), 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."

On behalf of themselves and the proposed class, the five named Plaintiffs seek declaratory and injunctive relief preventing Defendants from using the "PBH Supports Needs Matrix system" and to "prospectively reinstate services that have been denied, reduced or terminated to plaintiffs and class members whose services are reduced, denied, or terminated by reason of the Supports Needs Matrix system." Plaintiffs claim that use of the Supports Needs Matrix system is inconsistent with the Due Process Clause of the Fourteenth Amendment and that Defendants' practices and procedures associated with the Supports Needs Matrix system violate the Medicaid Act and the Due Process Clause.

STATEMENT OF THE FACTS

The Medicaid program was established in 1965 in Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq*. It is a cooperative federal-state program that provides federal financial assistance to participating states to furnish medical assistance "as far as practicable under the conditions in such State," by reimbursing providers for covered health care services rendered to certain categories of individuals and for "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." 42 U.S.C. § 1396-1.

The Plaintiffs in this action are Medicaid recipients enrolled in and receiving benefits from the Medicaid Innovations Waiver. The North Carolina Department of Health and Human Services ("Department") is the single state agency designated to administer or supervise the administration of the State's Medicaid program under Title XIX of the Social Security Act. 42 U.S.C. § 1396a(a)(5); N.C. Gen. Stat. § 108A-54. The Department's Division of Medical Assistance is responsible for the day-to-day administration of the Medicaid program. Secretary Cansler is the head of the Department, duly appointed by the Governor and vested with the statutory responsibility to oversee the operations of the Department and its various Divisions and Offices. N.C. Gen. Stat. § 143B-9; § 143B-10.

Defendant PBH is a multi-county area mental health, developmental disabilities and substance abuse authority. Shipman Aff. ¶ 3 [D.E. 41]; [D.E. 31-5, p. 6]. The Division of Medical Assistance entered into a contract with Defendant PBH to arrange for and manage the delivery of services and perform other waiver operational functions under the § 1915(c) Waiver through its Prepaid Inpatient Health Plan ("PIHP") for Medicaid recipients in its catchment area. Shipman Aff. ¶ 4 [D.E. 41]; [D.E. 31-3, p. 5]; [D.E. 31-5, p. 6]. Defendant PBH manages the PIHP through which all mental health, developmental disabilities and substance abuse services are authorized for Medicaid. Shipman Aff. ¶ 5 [D.E. 41]. Regulations controlling the administration and operation of managed care organizations and PIHPS are found in 42 C.F.R. Part 438.

Through its PIHP, Defendant PBH administers the Innovations Waiver, a § 1915(c) Home and Community Based Services Waiver which supports people with intellectual and developmental disabilities. Shipman Aff. ¶¶ 5, 6 [D.E. 41]. This § 1915(c) Waiver allows North Carolina to furnish an array of home and community-based services to assist Medicaid recipients to live in the

community and avoid institutionalization. [D.E. 31-3, Application p. 1]. North Carolina's participation in the waiver program was approved by the federal agency that administers the Medicaid program, the Centers for Medicare and Medicaid Services ("CMS"). 42 C.F.R. § 430.25(e); Shipman Aff. ¶ 4 [D.E. 41]; Misenheimer Aff. ¶ 3 [D.E. 42].

ARGUMENT

I. Standard of Review.

"The burden of establishing that a case meets the requirements for class certification under the Rule rests on the party seeking certification." *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989). The assessment required for class certification "is the responsibility of the District Court, which is to make its decision after 'a rigorous analysis' of the particular facts of the case." *Id.*, quoting *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986). Federal Rule of Civil Procedure 23 sets forth a two-part test that plaintiffs must satisfy to demonstrate that their claims are suitable for class resolution. First, the plaintiffs bear the burden of establishing that the proposed class satisfies all four prerequisites contained in Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy of representation). Fed. R. Civ. P. 23(a); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541, 2548 (June 20, 2011); *Thorn v. Jefferson-Pilot Life Ins. Co.,* 445 F.3d 311, 318-319 (4th Cir. 2006).

Second, the proposed class must satisfy at least one of the three requirements listed in Rule

23(b). *See Gunnells v. Healthplan Servs.*, 348 F.3d 417, 423 (4th Cir. 2003). Here, Plaintiffs rely on Rule 23(b)(2), which applies when "the party opposing the class has 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). Certification under Rule 23(b)(2) does not allow individuals to opt out of the class, so the result is binding on all members. *A.H. Robins Co.*, 880 F.2d at 728.

II. Plaintiffs Have Not Demonstrated a Need for Rule 23(b)(2) Class Certification.

Plaintiffs are attempting to bring a class action for declaratory and injunctive relief under Rule 23(b)(2). The nature of the claims for relief in this case are such that a class action would be unnecessary, inappropriate and unduly burdensome. Defendant Cansler urges this Court to exercise its discretion and deny the motion.

Granting class status is soundly within the discretion of the district court. *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993); *Jenkins v. Raymark Industries, Inc*., 782 F.2d 468, 471-72 (5th Cir. 1986). The Fourth Circuit has intimated that a court does not abuse its discretion by denying certification of a class where granting it would provide plaintiff with no more protection than would injunctive relief alone. The Fourth Circuit has observed that the settled rule is that "[whether] plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack." *Sandford v. R.L. Coleman Realty Co., Inc*., 573 F.2d 173, 178 (4th Cir. 1978), citing 7 Wright & Miller, Federal Practice and Procedure, § 1771, pp. 663-664 (1972); *see also Bailey v. Patterson* (5th Cir. 1963) 323 F.2d 201, 206, *cert. denied* 376 U.S. 910, 11 L. Ed. 2d 609, 84 S. Ct. 666, (stating in a discrimination case, "whether or not appellants may properly

represent all Negroes similarly situated, the decree to which they are entitled is the same.") This ruling was reaffirmed in *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974). In *Gray v. International Broth. of Elec. Workers*, the Court said:

> Insofar as this aspect of the plaintiffs' suit is concerned, then, there exists no need for this case to be certified as a class action. This Court has consistently and emphatically adhered to the view that when, as here, 'the relief being sought can be fashioned in such a way that it will have the same purpose and effect as a class action,' the certification of a class action is unnecessary and inappropriate.

73 F.R.D. 638, 640-641 (D.D.C. 1977). The *Gray* court found that with respect to the predominant part of the plaintiff's prayer seeking declaratory and injunctive relief, "no useful purpose would be served by permitting this case to proceed as a class action." *Id.*

Where, as here, Plaintiffs seek a declaration that a governmental practice is unconstitutional, there is no need for class certification because the Court may presume the good faith of government officials to respect such a ruling on a broadly applicable basis. Numerous federal decisions highlight this point. For example, in *Feld v. Berger*, 424 F. Supp. 1356 (S.D.N.Y. 1976), the court faced a constitutional challenge to certain policies adopted in the implementation of social service and benefits programs. The court "deem[ed] class certification superfluous," reasoning that because "[t]he defendants [we]re public officials charged with compliance with and enforcement of federal as well as state laws," the court could "assume[] these public officials, mindful of their responsibilities, w[ould] apply the determination [of constitutionality in the instant case] to all persons similarly situated." *Id*. at 1363.

Likewise, in *Kow v. New York City Housing Authority*, 92 F.R.D. 73 (S.D.N.Y. 1981), a plaintiff sought declaratory and injunctive relief with respect to the Housing Authority's rent

policies. The court denied class certification because it "assume[d] the[] public officials, mindful of their responsibilities, w[ould] apply the determination here made equally to all persons similarly situated." *Id*. at 74. The court relied on the principle that "[w]here . . . there is no reason to doubt that the defendants would accord to all members of the proposed class the benefits of any judgment accorded the plaintiff, class certification has been denied." *Id*. *See also McArthur v. Firestone*, 690 F. Supp. 1018, 1019 (S.D. Fla. 1988) (citing *Kow* for the proposition that "[t]here [is] no benefit to having a class when there is no reason to doubt that the defendants would accord all members of the proposed class the benefits of any judgment accorded to the plaintiffs.").

In *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (6th Cir. 1976), individual plaintiffs challenged a city's policy of terminating and refusing to connect power and water services, sought a declaratory judgment that the policy was unconstitutional, and sought an injunction barring prospective enforcement of the policy. The district court refused to certify a proposed class and the court of appeals agreed, explaining that "the district court properly recognized that such relief to the extent granted would . . . accrue to the benefit of others similarly situated and, consequently, . . . no useful purpose would be served by permitting this case to proceed as a class action because the determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action." *Id.* at 686 (quotation marks and alterations omitted) (collecting cases in accord). *See also Ihrke v. Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972) ("The determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class

action. No useful purpose would be served by permitting this case to proceed as a class action.")

This Court should refuse to certify the proposed class because the determination of the constitutional questions can be made by the Court regardless of whether this action is treated as an individual action or a class action and Defendant Cansler will be bound by any such decision.

Respectfully submitted, this the 1st day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on 1 February, 2012, I electronically filed the foregoing **DEFENDANT CANSLER'S RESPONSE IN OPPOSITION TO THE MOTION FOR CLASS CERTIFICATION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: John R. Rittelmeyer, Jennifer L. Bills, Douglas Stuart Sea, Jane Perkins and Morris McAdoo, Attorneys for Plaintiffs; Stephen D. Martin, Wallace C. Hollowell, III, and Reed Hollander Attorneys for Defendants Shipman and PBH, and I hereby certify that I have mailed the document to the following non CM/ECF participants: none.

/s/ Belinda A. Smith
Belinda A. Smith
Special Deputy Attorney General