IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM R. HAMPE, by and through his mother / guardian Jill Hampe, individually and on behalf of a class, Plaintiff,	)	
vs.	)	No. 10-3121
JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, Defendant.	)	Judge: William J. Hibler Magistrate: Arlander Keys

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF CLASS CERTIFICATION

Now comes the Plaintiff, by and through his attorney and files this Memorandum of Law in support of the Plaintiff's Motion for Class Certification as follows:

INTRODUCTION

The Plaintiff, a medically fragile person, on behalf of himself and others similarly situated, has been found by the State of Illinois to be eligible and have been enrolled in the Illinois "Medicaid Home and Community-Based Services (HCBS) Waiver for Children that are Medically Fragile, Technology Dependent" program (MF/TD) or Medicaid. Enrollment in the MF/TD program is only available to persons under the age of 21 and when William will turn 21 on June 18, 2010 or when any person enrolled in the program turns 21 in the MF//TD program, the Defendant's policy and practice is to reduce the existing medical funding by approximately 50% based solely on the fact that the person is now 21. The reduction in funding is not due to a change in a person's medical needs but on the fact that the person's funding at age 21 comes

from a different State program, which has significant caps on funding. The reduction in funding will either result in William and others similarly situated becoming institutionalized (hospitalized) or if the person remains in his family home without sufficient skilled nursing care, then that person faces a strong possibility of imminent death.

The Plaintiff has brought this action to enjoin the policy and/or practice of the Defendant to reduce funding for necessary and needed medical services when aging out of the State of Illinois Medically Fragile, Technology Dependent program (MF/TD). The Plaintiff claims that the Defendant's practice to reduce necessary medical funding when aging out of the MF/TD program or Medicaid violates the Americans with Disabilities Act, 42 U.S.C. Sec. 12132 and Section 504 of the Rehabilitation Act, 29 U.S.C. Sec. 794(a) and their implementing regulations, 28 C.F.R. Sec. 35.130(d), 41.51(d).

CLASS DEFINITION

The Plaintiffs seek certification as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The proposed class is defined as follows:

> All persons who are enrolled or will be enrolled or were enrolled in the State of Illinois Medically Fragile, Technology Dependent Medicaid Waiver Program (MF/TD) or Medicaid and when they obtain the age of 21 years are subjected to reduce Medicaid funding which reduces the medical level of care which they had been receiving prior to obtaining 21 years.

ARGUMENT

Parties seeking class action certification must first satisfy the provisions of Rule 23(a) of the Federal Rules of Civil Procedure. Then, in addition, the case must fit within at least one of the three subcategories under Rule 23(b). *Rosario v. Lividitis*, 963 F.2d 1013, 1017 (7th Cir.

1992), *cert. denied*, 506 U.S. 1051, 113 S. Ct.972 (1993). All four 23 (a) prerequisites are quite undoubtedly satisfied here, and this case falls squarely under the 23 (b)(2) category.

On a motion for class certification, the Court must accept as true all facts alleged in Plaintiffs' complaint. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178, 94 S. Ct. 2140, 2152 (1974) ("We find nothing in either the language or history of Rule 23 that gives 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."); *Gammon v. GC Services Limited Partnership*, 162 F.D.R. 313, 315, n. 2 (N.D. Ill. 1995) (When evaluating a motion for class certification, the Court accepts all well-pleaded facts as true."); *Pertiz v. Liberty Loan Corp.*, 523 F.2d 349, 353-54(7th Cir. 1975); *Gomez v. Illinois State Bd. Of Educ.*, 117 F.R.D. 394, 396 (N.D. Ill. 1987): *Newburg on Class Actions*, Sec. 3.20, p. 3-124 ("It is settled law that any preliminary inquiry into or consideration of the merits of litigation is improper in connection with a determination of the propriety of a class action,") Moreover, "the interests of justice require that in a doubtful case...any error, if there is to be one, should be committed in favor of allowing a class action." *Eisenberg v. Gagnon,* 766 F.2d 770, 785 (3rd Cir.), *cert. Denied*, 474 U.S. 946 (1985); *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir), *cert denied*, 394 U.S. 928 (1969); *Tapken v. Brown*, 1992 WL 17894, *26 (S.D. Fla); *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 487, n. 32 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32,50 (E.D. Va. 1981).

Additionally, civil rights cases alleging discriminatory policies or practices are "by definition" class actions, provided they meet the other requirements of Rule 23(a). *General Telephone Co., v. Falcon,* 457 U.S. 147, 157 (1982); see also *Robert E. v. Lane,* 530 F.Supp.

930, 944 (N.D. Ill. 1980) (a case alleging civil rights violations represent a "prototypical candidate" for class certification). Class certification is routinely allowed in civil rights cases alleging states' violations of the community integration mandates of the Americas with Disabilities Act. See *Colbert v. Blagojevich,* 2008 U.S. Dist. LEXIS 75102, *28 (N.D. Ill. Sept. 29, 2008) (J. Lefkow) (certifying class consisting of "all Medicaid-eligible adults with disabilities in Cook County, Illinois, who are being, or may in the future be, unnecessary confined to nursing facilities and who, with appropriate supports and services, may be able to live in a community setting").

1. Plaintiff Has Established The Prerequisites For A Class Action Pursuant To Rule 23(a)

A. Numerosity

The Class is so numerous that joinder of all persons is impracticable. The Illinois Department of Healthcare and Family Services "Report of Medicaid Services for Persons who are Medically Fragile, Technology Dependent" dated December, 2009 stated that as of September 1, 2009, 504 children were receiving services in the MF/TD program on that specific date. The report further states that from July 1, 2007 through June 30, 2008, 606 children had received services in the MF/TD program. (See Exhibit "A" attached to Plaintiff's Motion for Class Certification at page 3, Section 1)

37 individuals aged out of the waiver for the period of July 1, 2007 through December, 2009. (See Exhibit "A" attached to Plaintiff's Motion for Class Certification at page 9, Section 6) In *Jones v. Maram,* 373 Ill.App.3d 184 (3rd Dist. 2007), Barbara Ginder from the State of Illinois stated in an affidavit "there were 34 active cases of 18 to 20-year-old individuals, 19 of

whom were ventilator dependent" in the MFTDC program. *Id.*, at 192. "Ginder stated these individuals are likely to transition from MF/TD to HSP [Home Services Program] (if they select) at age 21." *Id.* The class members have limited financial resources and are unlikely to institute individual actions.

Courts have ruled that a class action can proceed with a group which would encompass the size of the persons either enrolled or exiting the MF/TD program. See *Barner v. City of Harvey,* 1997 U.S. Dist. LEXIS 3570, No. 95 C 3316, 1997 WL 139469, at *3 (N.D. Ill. Mar. 25, 1997) (class of 13 sufficiently numerous); *Davy v. Sullivan,* 354 F.Supp. 1320 (M.D. Ala. 1973) (class of 10 adequate).

Case law has also recognized that courts should make "common assumptions" to support a finding of numerosity. *Grossman v. Waste Management, Inc.*, 162 F.R.D. 322, 329 (N.D. Ill. 1995). The numerosity requirement should be construed liberally in civil rights actions. *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir, 1975).

Other circumstances also point to impracticability of joinder. As Medicaid recipients, class members are located throughout the state and do not have the financial means to bring individual lawsuits. *Fields v. Maram,* 2004 U.S. Dist. LEXIS 16291, *18 ("Because the class members reside throughout the state, and because they are disabled and therefore are often of limited financial resources, joinder would be particulary difficult in this case."). Finally, judicial economy plainly would be served by consolidating the actions of all similarly-situated persons rather than having them litigate individually. *Arenson v. Whitehall Convalescent & Nursing Home,* 164 F.R.D. 659, 663 (N.D. Ill. 1996). Accordingly, in this case, numerosity is satisfied because the joinder of all individuals affected by the Defendant's policy is impracticable.

B. Commonality

Rule 23(a) requires that there "need be only a single issue common to all members of the class." *Edmondson v. Simon,* 86 F.R.D. 375, 380 (N.D. Ill. 1980); *Hispanics United v. Vill. of Addison,* 160 F.R.D. 681, 688 (N.D. Ill. 1995). "A common nucleus of operative fac is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992). See also *Lightbourn v. County of El Palso,* 118 F.3d 421, 425 (5th Cir. 1997) ("The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.") (citations omitted); *Baby Neal v. Casey,* 43 F.3d 48, 55 (3rd Cir. 1994) (commonality met where "named plaintiffs share at least one question of fact or law with the grievances of the prospective class"); *Marisol A. v. Guiliani,* 126 F.3d 372, 375 (2nd Cir. 1997) (class must "share a common question of law or fact").

In fact, "[w]hen the party opposing the class has engaged in some course of conduct that effects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected." *Newburg on Class Actions*, Sec. 3.10, p 3-51. So long as one issue of law or fact is common to the class, "the presence of individual questions will not prevent satisfaction of the Rule 23 (a) (2) prerequisite." *Id.* at p. 3-60. See also *Ivy v. Meridian Coco-Cola Bottling Co.*, 108 F.R.D. 118, 123 (S.D. Miss. 1985) (holding that commonality and typicality were satisfied in an employment discrimination case despite the defendant's argument that individual questions would predominate concerning each hiring decision); *Patrykus*, 121 F.R.D. at 361 (holding that "[d]ifferences in individual cases concerning treatment or damages does not defeat commonality"); *Krislov v. Rednour*, 946

F.Supp. 563, 568 (N.D. Ill 1996).

Even when the effect on each class member differs, an allegation that the defendant's discriminatory policy or practice affects the class as a whole will suffice to prove commonality of claims. *Rosairio v. Livaditis,* 963 F.2d 1013, 1017 (7th Cir. 1992) ("The fact that there is some factual variation among class grievances will not defeat a class action.") (citing *Patterson v. General Motors Corp.,* 631 F.2d 476, 481 (7th Cir.) *cert. denied,* 451 U.S. 914 (1980)). Thus, even if each class member's remedy differs, there is commonality if the injury flows from the same discriminatory acts or omissions. See *Marisol A. v. Guiliani,* 126 F.3d 372, 376 (2nd Cir. 1997) (in class action involving foster children, "[t]he unique circumstances of each child do not compromise the common question of whether, as plaintiffs allege, defendants have failed to meet their federal and state law obligations.")

The common questions of law and fact in the present case are as follows:

(a) Whether the Defendant violated the ADA and Rehabilitation Act by reducing the level of funding for persons enrolled in the Illinois Medically Fragile, Technology Dependent Medicaid Waiver Program or Medicaid which resulted in a reduction of medical services.

(b) Whether the ADA and Rehabilitation Act permits the Defendant to reduce the level of funding which results in a reduction of medical services for disabled persons after the age of 21, even though there has been no change in their medical needs.

(c) Whether a fundamental alteration of the Illinois disability programs would occur if the Defendant provided funding to continue the same level of services for the Plaintiff and the putative class when they turn the age of 21 years.

(d) Whether compelling an increase in the "exceptional care rate" for persons exiting the MF/TD program into the Illinois Home Services Program is unreasonable under the ADA and Rehabilitation Act.

(e) Whether the Illinois disability programs can reasonable accommodate a

> modification to their existing programs to allow the Plaintiff and putative class to continue to receive the same level of care in the community when they turn 21 years of age.

Accordingly, this Court should find that commonality exists.

C. Typicality

Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 152 (1982). 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 met irrespective of varying fact patterns which underlie individual claims. *Id*; *see also Robidoux v. Celani*, 987 F.2d 931, 936-937 (2nd Cir. 1998); *Baby Neal ex rel Kanter v. Casey*, 43 F.3d 48, 56 (3rd Cir. 1994). Courts should look to the elements of the cause of action that the class representative must prove in order to establish the defendant's liability. If they are substantially the same as those needed to be proved by the class members' claims, the representative's claim is typical. *Johns v. DeLeonardis*, 145 F.R.D. 480, 483 (N.D. Ill. 1992).

As with commonality, typicality does not require that all class members suffer the same injury as the named plaintiff. "Instead, we look to the defendant's conduct and the plaintiff's legal theory to satisfy Rule 23(a)(3)." *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992); see also *De La Fuente v. Stokely-Van Camp,* 713 F.2d 225, 232 (7th Cir. 1983) (typicality satisfied regardless of whether "there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus, similarity of legal theory may control even in the face of differences of fact.").

Here, the Plaintiffs claims are typical of the claims of the class. The Plaintiff, a medically fragile person, on behalf of himself and others similarly situated, has been found by the State of Illinois to be eligible and have been enrolled in the Illinois "Medicaid Home and Community-Based Services (HCBS) Waiver for Children that are Medically Fragile, Technology Dependent" program. (MF/TD) When the Plaintiff turns 21 or when any person enrolled in the MF/TD turns 21, the Defendant's policy and practice is to reduce the existing medical funding by approximately 50% based solely on the fact that the person is now 21. The reduction in funding is not due to a change in a person's medical needs but on the fact that the person's funding at age 21 comes from a different State program, which has significant caps on funding.[1] The reduction in funding will either result in the Plaintiff and others similarly situated becoming institutionalized (hospitalized) or if the person remains in his family home without sufficient skilled nursing care, then that person faces a strong possibility of imminent death.

Because the named Plaintiff and the class share the same deprivations of federal rights, typicality is met here.

D. Adequacy of representation

The two factors that are universally recognized as the guidelines for adequate representation are: 1) the representative must not have interests antagonistic to or conflicting with the interests of the class, and 2) the representative must appear able to prosecute the action

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[1] William currently receives funding from the Defendant for approximately 16 hours a day skilled nursing level of care at his home (112 hours per week) plus he is eligible for 336 respite skilled nursing hours per year. (Plts. Complaint par. 18(a)). The current level of funding is approximately $18,000 per month, so that he does not have to be institutionalized or hospitalized at a rate of approximately $55,000 per month. (Plts. Compl. par. 19). When William turns 21, the Defendant reduces his level of funding to an "exceptional care rate" of $9,426 per month if he wishes to remain living at home. (Plts. Compl. par. 20-21).

vigorously through qualified counsel. *Newberg on Class Actions*, Sec. 3.22, p. 3-126. See also *Prudential*, 148 F.3d at 312; *Amchen Products, Inc. v. Windsor*, 521 U.S. 591, 626, n. 20, 117 S.Ct. 2231 (1997). *In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Secs. Litig.*, 122 F.R.D. 251, 257 (C.D. Cal. 1988) (holding that the plaintiffs were adequate representatives for the class where they expressed an interest in and understanding of the case and participated in depositions). The party opposing a class has the burden to establish that representation is inadequate. *Lewis v. Curtis*, 671 F.2d 779, 788 (3rd Cir. 1982), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176 (1982).

The Plaintiff is an adequate representative of the putative class. The ability of the Plaintiff to represent the class goes to whether he has "sufficient interest in the outcome to insure vigorous advocacy," *Rosario,* 963 F.2d at 1018, as well as any interests "antagonistic to the interests of the class." *Riordan,* 113 F.R.D. 60, 64 (N.D. Ill. 1986). Courts may deny certification based on grounds of antagonism only if that antagonism "goes to the subject matter of the litigation." *Id.* Potential conflicts that are remote or speculative will not defeat class certification. *Hispanics United,* 160 F.R.D. at 689.

In this case, the Plaintiff's interest is entirely coextensive with those of the class. The Plaintiff and the putative class share the same claim to prevent the Defendant from reducing the level of necessary medical funding when they turn 21 years of age in order to avoid institionalization (hospitalization) or avoid remaining in the community with reduced funding without sufficient skilled nursing care faces a strong possibility of imminent death. There are no conflicts or antagonism, whether actual or apparent, between the named Plaintiff and the class.

Counsels for the Plaintiff is an experienced civil rights attorney with experience in

complex class action litigation. Robert H. Farley, Jr. has been class counsel in *Bullock v. Sheahan*, No. 04 C 1051 (Judge Bucklo); *Streeter v. Sheriff of Cook County,* No. 08-732 (Judge Castillo); *Phipps v. Sheriff of Cook County,* No. 07-3889 (Judge Bucklo); and *Gary v. Sheahan*, No. 96 C 7294 (Judge Coar).

2. Plaintiffs Meet The Requirements Of Rule 23(b)(2)

Plaintiffs meet the requirements of Rule 23(b)(2), which allows courts to certify a class if the defendant "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.Proc.23(b)(2). Civil rights cases against parties charged with broad-based discrimination are "prime examples" of actions under Rule 23(b)(2). *Amchem Products v. Windsor,* 521 U.S. 591, 613 (1997).

This case is exemplary of a Rule 23(b)(2) action because the Defendant's policies and practices affect all members of the class as well as the named Plaintiffs, the remediation of which is well-suited for and requires declaratory and injunctive relief. Plaintiffs do not seek monetary damages for themselves or the class. Indeed, it is commonplace for courts to certify classes under Rule 23(b)(2) in cases where Medicaid recipients seek to enforce their rights to benefits. See *Doe by Doe, v. Chiles*, 136 F.3d 709, 712 (11th Cir. 1998); *Marisol v. Guiliani,* 126F.3d 372, 278 (2nd Cir. 1997); *Baby Neal v. Casey,* 43 F.3d 48, 64 (3rd Cir. 1994); *Boulet v. Cellucci,* 107 F.Supp.2d 61, 81 (D. Mass. 2001); *Benjamin H. v. Ohl,* 1999 U.S.Dist.LEXIS 22454, **11-12 (S.D.W.V. Oct. 8, 1999); *Memisovski v. Maram,* 2004 U.S.Dist.LEXIS 16722 (N.D. Ill. 2004); and *Fields v. Maram,* 2004 U.S.Dist.LEXIS 16291 (N.D. Ill. 2004). See also, *Bzdawka v. Milwaukee County,* 238 F.R.D. 469, 476 (E.D. Wis. 2006) (class of elderly disabled persons in

claim under ADA integration mandate); *Makin v. Hawaii,* 114 F.Supp. 2d 1017, 1020 (D. Haw. 1999) (class of persons living at home certified in claim under ADA integration mandate).

CONCLUSION

Wherefore, for the foregoing reasons, the Plaintiffs respectfully request that this Court grant Plaintiffs Motion for Class Certification and certify the proposed class.

Respectfully submitted,

/s/ Robert H. Farley, Jr.
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I, Robert H. Farley, Jr., Attorney for the Plaintiff, deposes and states that he caused the foregoing Plaintiffs' Motion For Class Certification to be to be served by electronically filing said document with the Clerk of the Court using the CM/ECF system, this 2nd day of June, 2010.

/s/ Robert H. Farley, Jr.