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, **RICHARD L. WINFREY, III, ADAM CALE, OLIVIA WELTER**, by and through her parents/guardians John Welter and Tamara Welter, **PHILLIP BARON**, by and through his mother/guardian Barbara Baron, **JESSICA L. LYTLE**, by and through her mother/guardian Judith A Lytle, **JACOB STRACKA**, by and through his parents/ guardians, David Stracka and Nicole Stracka, and **CHARLES STOUT** individually and on behalf of a class,	)	
Plaintiffs,	)	
	)	No. 10 C 3121
vs.	)	
	)	Judge William J. Hibbler
JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	Magistrate Judge Arlander Keys
Defendant.	)	

DEFENDANT HAMOS' COMBINED MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFF'S MOTION TO FILE A FOURTH AMENDED COMPLAINT INSTANTER AND IN SUPPORT OF HER MOTION TO DISMISS CERTAIN PLAINTIFFS AS MISJOINDED PARTIES

NOW COMES Defendant, JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, by and through her attorney, LISA MADIGAN, Attorney General of Illinois, and submits this memorandum of law in response to Plaintiffs' Motion to File a Fourth Amended Complaint *Instanter* and in support of her Motion to Dismiss Certain Plaintiffs as Misjoined Parties pursuant to Fed. Rules Civ. P. 20 and 21, stating as follows:

STATEMENT OF FACTS

The original named Plaintiff to this action, William R. Hampe, seeks declaratory relief on his own behalf, and on behalf of a class, because the Defendant allegedly violates the Americans with Disabilities Act, 42 U.S.C. § 12132 (hereinafter "ADA"), Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) (hereinafter "Section 504"), and their implementing regulations, 28 C.F.R. §§ 35.130(d) and 41.51(d) (appended as Defendant's Exhibit A), by reducing funding and concomitant medical services when they reach age 21 and lose eligibility for the State of Illinois' Medical Fragile and Technology Dependent Children's Medicaid Waiver. (*Hampe v. Hamos*, U.S. Civil Docket, 10 C 3121 at Doc. No. 1, Request for Relief (b), p. 27, hereinafter cited as "Civil Docket Doc. No. ___"). Plaintiff Hampe and the putative class also seek preliminary and permanent injunctive relief "requiring the Defendant to restore the level of funding to maintain the existing medical services for the Plaintiffs and putative class prior to aging out of the State of Illinois Medically Fragile, Technology Dependent program (MF/TD)." (*Id*. at Request for Relief (c), p. 28).

Plaintiff Hampe alleged that before he reached age 21, he was eligible to participate in a federally-approved Medicaid Waiver that allowed him to receive certain services in his home that would not otherwise be available to Medicaid recipients. (*Id*. at ¶¶ 1, 2). Plaintiff alleged that these services ended when he reached the age of 21 because the federally-approved Medicaid Waiver involved, the State of Illinois Medically Fragile and Technology Dependent Children's Waiver (hereinafter "MF/TD"), is limited to individuals under the age of 21. (*Id*. at ¶ 1). Plaintiff alleged and Defendant denied that he received 16 hours per day of skilled nursing care in his home through MF/TD. (*Id*. at ¶ 1; Civil Docket at Doc. No. 16, ¶ 1).

Plaintiff Hampe did not allege that Defendant intentionally discriminated against him, or

that any act on Defendant's part had a disparate impact on him. Rather, Plaintiff's claim is that Defendant "systemically" or "per se" violates the ADA, Section 504 and the implementing regulations by "reducing" funding and medical services simply because he and the putative class members "aged out" of MF/TD when they reached age 21. Defendant vigorously contests this claim. (Civil Docket at Doc. No. 1, ¶¶ 3, 4; Doc. No. 16, ¶¶ 3, 4). Among other things, Defendant offered each Plaintiff an opportunity to participate in a home and community-based services program for adults based on their individual circumstances and needs.

Defendant answered the original Complaint on June 14, 2010. (Civil Docket at Doc. No. 16). Before the Defendant filed her Answer, Plaintiff Hampe and Defendant agreed to maintain the *status quo* for him. (Civil Docket at Doc. No. 11). Within a month of the filing of the Answer, Plaintiff moved for leave to file an Amended Complaint to add a new Plaintiff, Richard L. Winfrey, III (Civil Docket at Doc. No. 22), and filed the Amended Complaint on July 15, 2010. (Civil Docket at Doc. No. 21).

Plaintiff Richard L. Winfrey, III made identical allegations as to Defendant's purported systemic violations of the ADA, Section 504 and the implementing regulations (Civil Docket at Doc. No. 21, ¶¶ 1, 2), and sought the same relief as Plaintiff Hampe. (*Id.* at Prayer for Relief (a) through (d), pp. 21-22). However, the factual allegations of each Plaintiff set forth at Paragraphs 19(a) through 34 and Paragraphs 45 through 74 demonstrate that the situations of each Plaintiff are dissimilar. (Civil Docket at Doc. No. 21, ¶¶ 19(a)-34, 45-74). Each Plaintiff has alleged different disabilities and differing needs. (*Id.*) The factual allegations show that the degrees to which each Plaintiff requires assistance with the activities of daily living vary. (*Id.*) The factual allegations of each Plaintiff require different proof, including the introduction of differing medical histories and opinions from different physicians. (*Id.*) The alleged threatened loss of in-home skilled nursing

services resulted, not from any adverse action taken against any Plaintiff by any State employee, but because each Plaintiff lost eligibility for a home and community-based services program due to age. (*Id.*) The actions complained of occurred at different times. (*Id.*) There are no allegations that there is a causal link between a common and identifiable wrongful act on Defendant's part and adverse actions taken with respect to each Plaintiff. (*Id.*) No Plaintiff alleged that there is any relationship between them as to their alleged threatened loss of in-home nursing. (*Id.*) The alleged "policy" to which each Plaintiff claims to have been subjected is not a policy at all, but, rather, loss of eligibility for Medicaid-funded benefits due to age. (*Id.*)

Shortly before Defendant answered the Amended Complaint, Plaintiff Winfrey secured an Agreed Order to maintain his pre-21st birthday *status quo*. (Civil Docket at Doc. No. 33). Defendant answered the Amended Complaint on August 3, 2010 (Civil Docket at Doc. No. 37), and Plaintiff repeated the pattern of obtaining leave to add a new Plaintiff, Adam Cale, filing a Second Amended Complaint, and securing an Agreed Order to maintain Adam Cale's pre-21st birthday *status quo*. (Civil Docket at Doc. Nos. 38, 41, 49). A comparison of Plaintiff Cale's factual allegations to those of the other two Plaintiffs demonstrates that all the dissimilarities previously described between Plaintiffs Hampe and Winfrey are present among the three named Plaintiffs in the Second Amended Complaint. (Civil Docket at Doc. No. 41, ¶¶ 20(a)-43, 54-98).

Plaintiff Hampe's motion for class certification was fully briefed as of July 16, 2010. (Civil Docket at Doc. Nos. 12, 17, 27). The motion for class certification is awaiting decision. Additionally, by order entered September 7, 2010, the Court set the Pretrial Scheduling Order. (Civil Docket at Doc. No. 51). Discovery has been progressing since the entry of the Pretrial Scheduling Order. The Scheduling Order gave the parties until October 29, 2010 to amend the pleadings and to "add new parties." (*Id.*)

On October 28, Plaintiffs filed a Third Amended Complaint that added five new Plaintiffs. (Civil Docket at Doc. No. 54). A comparison of Plaintiff Welter's, Baron's, Lytle's, Stracka's, and Stout's allegations to those of Plaintiffs Hampe, Winfrey and Cale, shows that all the dissimilarities previously identified between the Plaintiffs are present among all eight. (Civil Docket at Doc. No. 54, ¶¶ 27(a)-92, 103-209). Plaintiff, Olivia Welter, on November 2, 2010, secured an Agreed Order maintaining her pre-21st birthday *status quo*. (Civil Docket at Doc. No. 58). Before the time for Defendant to answer or otherwise plead to the Third Amended Complaint elapsed, Plaintiffs moved for leave to file a Fourth Amended Complaint *instanter*. (Civil Docket at Doc. No. 61). The Fourth Amended Complaint seeks to add a new Plaintiff, Kristen Kocourek. A comparison of Ms. Kocourek's factual allegations to those of the eight Plaintiffs already in the case under the Third Amended Complaint shows that all the dissimilarities previously identified between the Plaintiffs are present among all nine individuals. (Civil Docket at Doc. No. 61, Exhibit A at ¶¶ 28(a)-99, 110-240).

ARGUMENT

I. PLAINTIFF'S MOTION FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT INSTANTER SHOULD BE DENIED.

The decision to grant or deny a party's request to amend a complaint rests with the sound discretion of the District Court. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Under *Foman*, leave to amend should ordinarily be freely given, unless the non-moving party establishes undue prejudice by virtue of the allowance of the amendment. *Foman*, *Id.*; *Ferguson v. Roberts*, 11 F.3d 696, 706 (7th Cir. 1993); *Lover v. District of Columbia*, 248 F.R.D. 319, 322 (D.D.C. 2008). The Seventh Circuit has recognized that amendment of a complaint will result in prejudice to the Defendant when the amended complaint contains new complex and serious charges which would undoubtedly require additional discovery for the Defendant to rebut, or when it appears to be a

tactic to postpone presentation of the case on the merits. *Ferguson*, 11 F.3d at 706. In *Ferguson*, plaintiff sought to amend the complaint one month before the close of discovery. *Id.* The Seventh Circuit found that denying leave to amend the complaint comported with *Foman*. *Id.*

Here, Plaintiff's Motion for Leave to File a Fourth Amended Complaint came after the time for amending pleadings and adding parties set by the Court's Pretrial Scheduling Order. First, the Court should simply enforce its Pretrial Scheduling Order and summarily deny leave to amend the Complaint yet again. Second, even if Plaintiffs satisfy the Court that they had valid reasons to disregard the time limit as to amendment of pleadings, allowing the Fourth Amended Complaint to be filed is unduly prejudicial to Defendant by expanding the scope of discovery that Defendant would be required to take in order to prepare to rebut Ms. Kocourek's case. Defendant is engaged in attempting to complete discovery as to the three Plaintiffs (Hampe, Winfrey and Cale) who were in the case when the Pretrial Scheduling Order was entered. The parties have not even begun the process of disclosures required by Fed. R. Civ. P. 26 or discovery as to any other Plaintiffs. Fact discovery is set to close on January 31, 2011 and Defendant does not believe that discovery could be completed in that time in light of the state of the pleadings. Defendant must start the disclosure and discovery process anew if Ms. Kocourek joins the case as a Plaintiff. Additionally, as the Statement of Facts shows, Plaintiffs are simply engaged in pressing new claims from time to time so as to delay close of discovery and disposition of the merits of the case. Under *Ferguson*, leave to file the Fourth Amended Complaint must be denied.

Finally, if a proposed amendment would add additional parties to the litigation, the Court must also consider Fed. R. Civ. P. 20 which governs permissive joinder. *Lover v. District of Columbia*, 248 F.R.D. 319, 322-23 (D.D.C. 2008) citing *Robinson v. Gillespie*, 219 F.R.D. 179, 188 (D. Kan. 2003). The addition of Ms. Kocourek does not satisfy the criteria for permissive

joinder set forth in Fed. R. Civ. P. 20(a)(1) under all the arguments and authorities set forth in Argument II which Defendant fully adopts here.

II. CERTAIN PLAINTIFFS SHOULD BE DISMISSED AS MISJOINDED PARTIES AND DIRECTED TO PURSUE THEIR CLAIMS AGAINST DEFENDANT IN SEPARATE, INDIVIDUAL ACTIONS BECAUSE THE REQUIREMENTS FOR PERMISSIVE JOINDER PURSUANT TO Fed. R Civ. P. 20(a)(1) HAVE NOT BEEN MET.

Fed. R. Civ. P. 21 states that, "On motion or on its own, the court may at any time, on just terms, add or drop a party." Since Rule 21 does not provide any standards by which district courts can determine if parties are misjoined, courts have looked to Fed. R. Civ. P. 20 for guidance. *Acevedo v. Allsup's Convenience Stores, Inc*., 600 F.3d 516, 521 (5th Cir. 2010) citing *Pan Am. World Airways, Inc. v. U.S. District Court*, 523 F.2d 1073, 1079 (9th Cir. 1975). Rule 21 authorizes the court to dismiss any misjoined party at any stage of a lawsuit. *Bailey v. Northern Trust Co*., 196 F.R.D. 513, 515 (N.D. Ill. 2000). In such a case, the court can dismiss all but the first named plaintiff without prejudice to the institution of new, separate lawsuits by the dropped plaintiffs against the present defendant based upon the claims attempted to be set forth in the present complaint. *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997).

Fed. R. Civ. P. 20 provides in pertinent part:

> (1) Plaintiffs. Persons may join in one action as plaintiffs if:
>
> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> (B) any question of law or fact common to all plaintiffs will arise in the action.

Parties are misjoined when they fail to satisfy either of the preconditions for persmissive joinder set forth above in Rule 20(a)(1). *Bailey*, 196 F.R.D. at 515; *Harris v. Spellman*, 150 F.R.D. 130, 131 (N.D. Ill. 1993) (two independent prerequisites must be present to support permissive joinder

under Rule 20(a): a right to relief arising from a single occurrence or series of occurrences *and* a common question of law or fact). Emphasis in original.

A. The Claims Asserted By Plaintiffs Do Not Arise Out Of The Same Transaction Or Occurrence.

The Third Amended Complaint does not even purport to allege that the eight named Plaintiffs are asserting a right to relief jointly or severally within Rule 20(a)(1)(A). (Civil Docket at Doc. No. 54). Moreover, the eight named Plaintiffs' alleged right to relief does not arise out of the "same transaction, occurrence, or series of transactions or occurrences" within Rule 20(a)(1)(A). In determining whether plaintiffs have been misjoined, a case-by-case approach is generally pursued because no hard and fast rules have been established. *Grayson v. K-Mart Corp*. 849 F. Supp. 785, 787 (N.D. Ga. 1994); *Berry v. Illinois Department of Human Services*, 2001 WL 111035 at *17 (N.D. Ill. February 2, 2001) (appended as Defendant's Exhibit B); 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1653, ns. 8, 9 (3d ed.).

In order to satisfy the "same transaction or occurrence" requirement, some similarity among the plaintiffs in the factual background of their claims must be present. *Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997) (an allegation of general delay in processing pending immigration petitions does not suffice to create a common transaction or occurrence); *Harris v. Spellman*; 150 F.R.D. 130, 132 (N.D. Ill. 1993) (allegedly similar procedural errors occurring at different times by different tribunals does not convert independent prison disciplinary hearings into the same series of transactions or occurrences); *Papagiannis v. Pontikis*, 108 F.R.D. 177, 179 (N.D. Ill. 1985) (the fact that there were similarities in the methods used to commit fraud in different transactions with plaintiffs does not satisfy Rule 20 so as to permit joinder of plaintiffs); *Smith v. North American Rockwell Corp*., 50 F.R.D. 515, 522-23 (N.D. Okla. 1970) (even an allegation that plaintiffs were subjected to discrimination under a general policy does not support

joinder, because the court would have to consider how the alleged general policy affected each plaintiff and focus in detail on the separate histories of each plaintiff); *Lover v. District of Columbia*, 248 F.R.D. 319, 324-25 (D.D.C. 2008) (joinder of plaintiffs is not proper where, although the claims levied against defendants are substantially the same for each plaintiff, factual dissimilarities exist in the events that gave rise to each plaintiff's claims); *Bailey v. Northern Trust Co*., 196 F.R.D. 513, 515-17 (N.D. Ill. 2000) (plaintiffs could not properly join their employment discrimination claims because adverse employment actions taken against them were not a single action by defendant and a general claim of hostility toward African-American employees does not transform separate decisions into the same transaction or occurrence); *Rohlfing v. Cat's Paw Rubber Co*., 99 F. Supp. 886, 894 (N.D. Ill. 1951) (plaintiffs, owners of shoe repair shops, are not properly joined when their alleged antitrust claims against defendants are premised on individual facts arising between each plaintiff and defendant). Factors that have been considered in determining whether discrimination claims arise from the same transaction, occurrence, or series of transactions or occurrences include the time period during which the alleged acts occurred, whether the alleged acts of discrimination are related, and whether the plaintiff challenges an across the board policy. *Berry v. Illinois Department of Human Services*, 2001 WL 111035 at *17 (N.D. Ill. February 2, 2001). (Defendant's Exhibit B).

Here, a review of the factual allegations of the eight Plaintiffs proceeding under the Third Amended Complaint (Civil Docket at Doc. No. 54, ¶¶ 27(a)-92, 103-209), establishes that the alleged injury to each Plaintiff is premised on individual facts that exist between each Plaintiff and the Defendant, and that the alleged injury could only have arisen from the unique circumstances of the individual relationship with the Defendant. The Court should apply the cases cited in the preceding paragraph to conclude that Plaintiffs Winfrey, Cale, Welter, Baron, Lytle, Stracka and

Stout have been misjoined and must be dismissed. Admittedly, each Plaintiff is advancing the same claims against Defendant, but under the cases cited on pages 8 and 9 of this memorandum, pursuit of the same claims, alone, does not support permissive joinder pursuant to Rule 20(a)(1)(A). Here, the times at which the alleged loss occurred to each Plaintiff are separate and discrete events. The alleged disabilities, needs and strengths of each Plaintiff are unique so that the question of whether an age limit in a program can or should be modified or waived turns on highly individualized facts. The viability of each Plaintiff's claim against Defendant will involve each individual's medical conditions and medical history. Similarly, since the Plaintiffs' claims involve to what extent, if any, a modification of the eligibility requirements of Defendant's programs (including the age requirement) is reasonable, the facts that underlie the reasonableness analysis are discrete, unique and highly individualized for each Plaintiff. Lastly, under the authorities cited above, the fact that each Plaintiff claims to be challenging a "policy" does not support permissive joinder pursuant to Rule 20(a)(1)(A). Accordingly, Plaintiffs fail to satisfy the "same transaction or occurrence" prong of Rule 20(a)(1)(A).

B. No Question Of Law Or Fact Common To All Plaintiffs Will Arise In This Action.

The Plaintiffs cannot meet the criteria set forth in Rule 20(a)(1)(B). No question of law or fact common to all Plaintiffs will arise in this action. The ADA at, Section 12132, provides in pertinent part that ". . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To establish a violation of Title II of the ADA, the Plaintiff must show that 1) he is a qualified individual with a disability, 2) he was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and 3) such an exclusion

was by reason of his or her disability. *Sandison v. Michigan High School Athletic Ass'n., Inc*., 64 F.3d 1026, 1036 (6th Cir. 1995). Under the law of the Seventh Circuit, the public entity's failure to grant a reasonable accommodation is a theory of liability separate from intentional discrimination. *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 561-62 (7th Cir. 2003); *Wisconsin Community Services, Inc., v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006). In this Circuit, a plaintiff pursuing a reasonable accommodation claim under Title II need not allege either disparate treatment or disparate impact. *Wisconsin Community Services*, *Id*.

Turning, next, to Section 504, it provides in pertinent part that, ". . . [n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794(a). To establish a violation of Section 504, the Plaintiff must show that 1) he is handicapped within the meaning of Section 504, 2) he is otherwise qualified for the benefit or services sought, 3) he was denied the benefit solely by reason of his handicap, and 4) the program providing the benefit or services received federal financial assistance. *Plummer by Plummer v. Branstad*, 731 F.2d 574, 577 (8th Cir. 1984); *Sandison*, 64 F.3d at 1030-31.

In *Alexander v. Choate*, 469 U.S. 287, 301-08 (1985), the Supreme Court held that meaningful access to Medicaid services for the disabled did not restrict the State's discretion under federal Medicaid law to choose the proper amount, scope and duration limitations on covered services. The Court observed that Section 504 does not require the State to alter the benefits offered under its Medicaid program simply to meet the reality that disabled persons have greater medical needs because, to conclude otherwise, would be to find that the Rehabilitation

Act requires that States view certain medical conditions as more important than others and more worthy of cure through government subsidization. *Alexander*, 469 U.S. at 303-04. Thus, Tennessee's limitation on hospital days covered by Medicaid did not offend Section 504 because the denial of benefits, even when left unmodified, was not linked in any way to those plaintiffs' particular disabilities. *Accord*: *Frances J. by Murphy v. Bradley*, 1992 WL 390875 at *7 (N.D. Ill. 1992) *vacated on other grounds* 19 F.3d 337 (7th Cir. 1994) (appended as Defendant's Exhibit C).

Both the plain language of the ADA and Section 504, together with the purposes for which Congress enacted these statutes, make clear that each Plaintiff must establish whether he or she is a member of the group that Congress intended to benefit by proving whether he or she is a "qualified individual with a disability" or "otherwise qualified." 42 U.S.C. § 12132; 29 U.S.C. § 794(a). Those questions, in turn, include an analysis of whether each Plaintiff can meet the essential eligibility requirements of Defendant's program, with or without a reasonable modification. Each Plaintiff, thus, must submit proof of his or her own unique circumstances as part of the claim, call different witnesses, and submit different documentary proof. The court must determine for each individual not only whether discrimination occurred, but also whether such discrimination was unlawful. *Cf. Hohider v. United Parcel Service, Inc*., 574 F.3d 169, 191-94 (3rd Cir. 2009).

Moreover, Defendant, here, was ready, willing and able to give individualized consideration of each Plaintiff's needs for participation in a home and community-based services program for adults. All factual and legal questions between the Plaintiffs and Defendant are based upon the wholly separate acts of Defendant with respect to each Plaintiff, and, there is a complete lack of common questions of law and fact. *See Grayson v. K-Mart Corp*., 849 F. Supp. 785, 789 (N.D.

Ga. 1994). *See also Harris v. Spellman*, 150 F.R.D. 130, 132 (N.D. Ill. 1993) (because a claim of denial of procedural due process is in part a function of the severity of the loss to the plaintiff, the legal issues raised by each plaintiff are not logically related in any way); *Smith v. North American Rockwell Corp*., 50 F.R.D. 515, 524 (N.D. Okla. 1970) (the fact that each plaintiff is pursuing the same theory of law against the defendant is not sufficient because the question whether a defendant unlawfully discriminated against one plaintiff is not common with the question whether a defendant discriminated against another plaintiff); *Grayson v. K-Mart Corp*., 849 F. Supp. 785, 789 (N.D. Ga. 1994) (no common questions of law or fact arise within the meaning of Rule 20 when the factual and legal questions between the plaintiffs and the defendant are based upon wholly separate acts of the defendant with respect to each plaintiff).

C. Assuming, *Arguendo*, That Plaintiffs Satisfy The Requirements For Permissive Joinder Set Forth In Fed. R. Civ. P. 20(a)(1), The Court Should Exercise Its Discretion To Refuse Joinder To Avoid Prejudice To Defendant And Delay.

Even if Plaintiffs can satisfy the Court that they have met the criteria for permissive joinder set forth in Rule 20(a)(1), the court has the discretion to refuse joinder in the interest of avoiding prejudice and delay. *Acevedo v. Allsup's Convenience Stores, Inc*., 600 F.3d 516, 521 (5th Cir. 2010). If permissive joinder were proper, the Court should refuse joinder in any event because the repeated pattern of adding Plaintiffs to this lawsuit is likely to expand discovery and delay final disposition of this case, to the detriment of Defendant. First, when counsel crafted the Pretrial Scheduling Order, counsel for Defendant evaluated the likely time and resource needs for discovery in light of the fact that three Plaintiffs were in the case. The time for fact discovery under the Pretrial Scheduling Order will close on January 31, 2011. (Civil Docket at Doc. No. 51). The Third Amended Complaint on October 28, 2010 added five new Plaintiffs. These new parties have not made disclosures as required by Fed. R. Civ. P. 26(a)(1) and there has, as yet, been no

time set in which to do so. Discovery that Defendant is presently conducting is taking place with Plaintiffs Hampe, Winfrey and Cale.

Moreover, individuals participating in the MF/TD Waiver reach their 21st birthdays at different times. Defendant is aware of the identities of individuals who will attain the age of 21 between now and 2015. In theory, Plaintiffs' counsel can keep repeating the pattern of amending the Complaint to add a new party, securing an agreed order to maintain the pre-21st birthday *status quo*, and indefinitely delaying final disposition of this case. Indeed, once each Plaintiff reaches agreement with Defendant to maintain the *status quo*, he or she has no incentive to press this case to judgment. This is highly prejudicial to Defendant. Also, prejudice is likely if an amended complaint contains new, complex and serious charges which would undoubtedly require additional discovery for defendant to rebut or require postponing resolution of the merits. *Ferguson v. Roberts*, 11 F.3d 696, 706 (7th Cir. 1993). Each new Plaintiff requires the Defendant to start the discovery process from scratch. This is nothing more than seriatem presentation of facts and issues and, as such, prejudices the Defendant. *Parish v. Frazier*, 195 F.3d 761, 764 (5th Cir. 1999).

Second, delaying a decision on the merits by the practice of adding a Plaintiff from time to time requires Defendant to continue to pay medical assistance under the terms of the Agreed TROs without any end point.

Finally, the failure to meet the criteria for permissive joinder dooms Plaintiff's motion for class certification. *Harris v. Spellman*, 150 F.R.D. 130, 132, n.2 (N.D. Ill. 1993). Since every class action requires an identity of questions of law or fact common to the class plus a finding that the claims of the representative parties are typical of the claims of the class, since Plaintiffs here themselves raise disparate claims, the case clearly does not qualify for class certification. *Id.*; *see also Robinson v. Gillespie*, 219 F.R.D. 179 (D. Kan. 2003).

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services prays that:

A. Plaintiff's Motion for Leave to File Fourth Amended Complaint *Instanter* be denied;

B. Defendant Hamos' Motion to Dismiss Certain Plaintiffs as Misjoined Parties be granted; and

C. Plaintiffs Winfrey, Cale, Welter, Baron, Lytle, Stracka and Stout are dismissed from this case without prejudice to their filing of separate actions that assert the same claims against the Defendant as those that are asserted here;

D. The Amended Complaint, the Second Amended Complaint and the Third Amended Complaint are dismissed. Plaintiff's original Complaint and Defendant's Answer to the original Complain are reinstated and shall be the pleadings for this case.

E. The Pretrial Scheduling Order entered September 7, 2010 shall remain in effect.

Respectfully submitted,

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