IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARKETRIC HUNTER a minor child, by and through his mother and legal guardian, Thelma Lynah, et al., Plaintiffs, v. DAVID A. COOK Commissioner of the Georgia Department of Community Health, Defendant.	CIVIL ACTION FILE NO. 1:08-CV-2930-TWT

ORDER

This is an action seeking injunctive relief against the Georgia Department of Community Health. It is before the Courton the Plaintiffs' Motion to Certify a Class [Doc. 93]. For the reasons set forth below, the Court DENIES the Plaintiffs' motion.

I. Background

When the First Amended Complaint was filed, the Plaintiff Marketric Hunter was a seven-year-old Medicaid beneficiary. Marketric now lives with his adoptive mother, Thelma Lynah, in Savannah, Georgi a. He experienced brain damage as a toddler and now suffers from a number of neurological conditions including static

encephalopathy, cerebral palsy, and seizure disorders. He participates in the Georgia Pediatric Program ("GAPP"), a subprogram of the Georgia Medicaid program through which eligible children receive in-home private duty skilled nursing services.

Defendant David Cook is the Commissioner of Georgia's Department of Community Health ("DCH"), which administers the Medicaid program in Georgia. Defendant Georgia Medical Care Foundation, Inc. ("GMCF") is a non-profit corporation that, through a contractual relationship with DCH, reviews and decides all requests for private duty skilled nursing services made on behalf of Medicaid-eligible children under 21 in Georgia.

Hunter's treating physicians have prescribed in-home private duty skilled nursing hours since 2005. According to the Complaint, Hunter's allotted nursing hours have been consistently reduced in accordance with GAPP policies. Further, in August 2008, Hunter's physician requested an increase in hours in connection with Hunter's upcoming spinal surgery. GMCF did not grant the request. On September 18, 2008, Hunter sued Rhonda Medows[1] and GMCF under 42 U.S.C. § 1983, alleging that the Defendants had violated his rights under the EPSDT provisions of the Medicaid Act. On October 1, 2008, the Court enjoined Medows from enforcing a

[1]When Hunter filed his Complaint, Rhonda Medows was the Commissioner of the Georgia Department of Community Health.

policy to limit medically necessary private duty skilled nursing services for eligible Medicaid beneficiaries under the age of 21 using criteria not based on medical necessity. The Court also ordered the state to provide Hunter with the private duty skilled nursing hours provided for in a schedule set forth by GMCF [Doc. 9].

On February 11, 2010, Hunter filed a Second Motion for Temporary Restraining Order and Preliminary Injunction [Doc. 39]. The Court granted the Plaintiff's Motion on February 18, 2010 [Doc. 47] On July 7, 2011, the Plaintiff filed a Second Motion to Amend the Complaint [Doc. 65]. On September 27, 2011, the Court granted this motion [Doc. 77]. The Second Amended Complaint added claims under Title II of the ADA, 42 U.S.C. § 12132, class claims, and joined four new plaintiffs [see Doc. 66] On September 12, 2011, Hunter filed a Motion to Voluntarily Dismiss GMCF [Doc. 75]. The Court granted this motion on September 14, 2011 [Doc. 76]. Finally, on April 11, 2012, the Plaintiffs filed a Motion to Certify a Class of:

> all persons who now, or at any time in the future, are or will be Medicaid-eligible Georgia residents under the age of 21 whose Medicaid services have been or will be denied, delayed, reduced or terminated by application of illegal or unconstitutional policies and practices of the Georgia Pediatric Program (GAPP).

[Doc. 93]. The Defendant argues that the Plaintiffs' motion is untimely and that the proposed class does not comply with Federal Rule of Civil Procedure 23.

II. Motion to Certify Class Standard

To maintain a case as a class action, the party seeking class certification must satisfy each of the prerequisites of Rule 23(a) and at least one of the provisions of Rule 23(b). Klay v. Humana, Inc., 382 F.3d 1241, 1250 (11th Cir. 2004). Rule 23(a) sets forth the four prerequisites to maintain any claim as a class action:

> [o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). These prerequisites are commonly referred to as: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Cooper v. Southern Co., 390 F.3d 695, 711 n.6 (11th Cir.2004). Failure to establish any one of the four factors precludes certification. In addition, under Rule 23(b), the Plaintiffs must convince the Court that: (1) prosecuting separate actions by or against individual members of the class would create a risk of prejudice to the party opposing the class or to those members of the class not parties to the subject litigation; (2) the party opposing the class has refused to act on grounds that apply generally to the class, necessitating final injunctive or declaratory relief; or (3) questions of law or fact common to the members of the class predominate over any questions affecting only

individual members and that a class action is superior to other available methods for fair and efficient adjudication of the controversy. FED. R. CIV. P. 23(b). The party seeking class certification bears the burden of proving that the requirements of 23(a) and one of the requirements of 23(b) are satisfied. General Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982); Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1187 (11th Cir. 2003).

The decision to grant or deny class certification lies within the sound discretion of the district court. Klay, 382 F.3d at 1251; Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1386 (11th Cir. 1998) (en banc). When considering the propriety of class certification, the Court should not conduct a detailed evaluation of the merits of the suit. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974). Nevertheless, the Court must perform a "rigorous analysis" of the particular facts and arguments asserted in support of class certification. Falcon, 457 U.S. at 161; Gilchrist v. Bolger, 733 F.2d 1551, 1555 (11th Cir. 1984). In doing so, the Court is permitted to look beyond the pleadings to determine if certification is appropriate. Falcon, 457 U.S. at 160.

III. Discussion

A. Timeliness

The Defendant contends that the Plaintiffs' Motion to Certify a Class is untimely under Local Rule 23.1(B). That rule states:

> The plaintiff shall move within ninety (90) days after the complaint is filed for a determination under Fed. R.Civ. P. 23(c)(1) as to whether the suit may be maintained as a class action.
> . . .
> The court may extend the time upon a showing of good cause.

LR 23.1(B) NDGa.

Here, the Court granted Hunter's motion to file the Second Amended Complaint on September 27, 2011 [see Doc. 77]. The Plaintiffs filed this Motion to Certify a Class on April 11, 2012, more than 90 days after filing the Second Amended Complaint [see Doc. 93]. The Plaintiffs, however, were unaware of the time limit imposed by the Court's Local Rule. Further, the Defendant has not argued that he has been prejudiced in any way by the delay. Nor has the Defendant argued that the Plaintiffs acted improperly to delay the proceedings. The motion was filed soon enough to allow the Court to comply with the mandate of Rule 23(c)(1)(A). For these reasons, the Court will consider the Plaintiffs' Motion to Certify a Class.

B. Rule 23(a)

To warrant class certification, the Plaintiffs must satisfy all four requirements under Rule 23(a) and at least one of the requirements of Rule 23(b). Rule 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements are referred to as "numerosity," "commonality," "typicality," and "adequacy."

To satisfy the numerosity requirement, the Plaintiffs must show that joinder of all members of the putative class would be "impractical." Fed. R. Civ. P. 23(a). "Practicability of joinder depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986). "[W]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) (internal

quotations omitted). Further, "[w]hen the exact number of class members cannot be ascertained, the court may make 'common sense assumptions' to support a finding of numerosity." Susan J. v. Riley, 254 F.R.D. 439, 458 (M.D. Ala. 2008) (quoting Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 930 (11th Cir. 1983)). Nevertheless, "a plaintiff still bears the burden of making some showing, affording the district court the means to make a supported factual finding, that the class actually certified meets the numerosity requirement." Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1267 (11th Cir. 2009).

In Riley, the plaintiffs sought to certify a subclass of those wrongly denied an available waiver slot in Alabama's Home and Community Based Waiver program. The plaintiffs presented evidence that over 1,600 people were on the waiting list for the program. The court, however, found that the plaintiffs had not established the numerosity requirement. Specifically, the court reasoned that there was no evidence showing how many open waiver slots existed, or how many individuals on the waiting list had been denied an open slot.

Similarly, in Vega, the plaintiff sought to certify a class consisting of T-Mobile associates employed in Florida. The plaintiff produced evidence that T-Mobile had employed thousands of associates over the relevant period. Based on this testimony, the district court certified a class of Florida employees. The Eleventh Circuit

reversed, finding insufficient evidence of numerosity. The court reasoned that although there was evidence relating to a nationwide class, "[the plaintiff] has not cited, and we cannot locate in the record, any evidence whatsoever . . . of the number of retail sales associates T-Mobile employed during the class period *in Florida* who would comprise the membership of the class, as certified by the district court." Vega, 564 F.3d at 1267 (emphasis in original). The court noted that "T-Mobile is a large company, with many retail outlets, and, as such, it might be tempting to assume that the number of retail sales associates the company employed in Florida during the relevant period can overcome the generally low hurdle presented by Rule 23(a)(1)." Id. Nevertheless, "the district court's inference of numerosity for a Florida-only class without the aid of a shred of Florida-only evidence was an exercise in sheer speculation." Id.

Here, as in Riley and Vega, the Plaintiffs have offered testimony that more than 500 individuals receive private-duty nursing services through the GAPP program [see Docs. 93-2 & 93-3].[2] Also as in Riley and Vega, however, the Plaintiffs have not produced any evidence as to the number of individuals who have had their benefits altered under GAPP policies. Compare Pashby v. Cansler, 279 F.R.D. 347, 353

[2]The Plaintiffs also allege that the class consists of "600-800 persons" [Doc. 66, ¶ 109]. "[M]ere allegations of numerosity, [however], are insufficient to meet" the numerosity requirement. Evans, 696 F.2d at 930.

(E.D.N.C. 2011) (certifying class of current and future Medicaid recipients who have or will have benefits cut where plaintiffs showed that 2,405 putative class members had benefits cut as a result of defendant's policies); Belton v. Georgia, No. 10-CV-0583, 2011 WL 925565, at *3 (N.D. Ga. March 14, 2011) (certifying class of deaf mentally ill individuals who could not receive therapeutic care under Georgia policy where plaintiff presented testimony that there were 3,387 individuals who might need such care).

The proposed class does not consist of *all* individuals receiving benefits under GAPP. Rather, the putative class includes only those whose benefits have been reduced, delayed, or denied due to GAPP policies. The Plaintiffs have offered no evidence indicating how large this class of individuals might be. Indeed, the Plaintiffs have presented no evidence of the number of individuals whose benefits have been cut for any reason. Although it is tempting to assume that some percentage of the 500 to 600 individuals in the GAPP program have or will have their benefits reduced or eliminated, "a plaintiff still bears the burden of establishing every element of Rule 23." Vega, 564 F.3d at 1267 (finding district court's "inference of numerosity for a Florida-only class without the aid of a shred of Florida-only evidence was an exercise in sheer speculation."). Thus, "[w]hile it is true that the Court could make common sense assumptions to estimate the size of the putative [] class, Plaintiffs have not

provided even enough information for the Court to guess if the []class members are too numerous to join."[3] Riley, 254 F.R.D. at 458. For thisreason, the Plaintiffs have failed to establish numeros ity under Rule 23. The Court need not address the remaining requisites for certification under Rule 23.

IV. Conclusion

For the reasons set forth above, the Court DENIES the Plaintiffs' Motion to Certify a Class [Doc. 93].

SO ORDERED, this 2 day of August, 2012.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

[3]As discussed above, the Plaintiffs "need not show the precise num ber of members in the class." Evans, 696 F.2d at 930. Rather,evidence showing how often the Defendant reduced or elim inated benefits, along with the total num ber of individuals in the GAPP program, could aid the Court in making a "common sense" assumption. The Plaintiffs have offered no such evidence here.