UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Raleigh Division
Civ. No. 7:08-CV-57-H

DEVON TYLER MCCARTNEY, a minor child, by his mother Penny McCartney; ERIC CROMARTIE, a minor child, by his mother Selena McMillan; KATIE TIPTON, a minor child, by her father, Greg Tipton, individually and on behalf of all others similarly situated, Plaintiffs, v. DEMPSEY BENTON, Secretary, North Carolina Department of Health and Human Services, Defendant.	)	**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Plaintiffs seek injunctive and declaratory relief to halt system-wide policies and practices of the Defendant and his agents that are alleged to violate the Due Process Clause of the U.S. Constitution and the Medicaid Act. Plaintiffs have moved the court for an order certifying this action as a class action, defined as "all current or future North Carolina Medicaid recipients who have, or will have, their claims for behavioral health and developmental disability services denied, delayed, interrupted, terminated, or reduced by the Department of Health and Human Services directly or through its agents or assigns." (Mot. for Class Certification.) As the Supreme Court recently noted, "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." *Gratz v. Bollinger,* 539 U.S. 244, 267 n.17 (2003) (per Rehnquist, CJ) (quoting *Califano v. Yamasaki*, 442 U.S.

682, 701 (1979)). Defendant has established no basis for denying or delaying certification of the class as Plaintiffs have requested.

I. Defendant's substantive objections rest inappropriately on the merits.

Defendant complains that the representative Plaintiffs should not be able to challenge the lack of basic due process protections for Medicaid recipients because they do not have property interests enforceable under § 1983, because they have not completed the entire "process" themselves to be able to complain that something was "due," and because there are differences in constitutional rights among Medicaid populations. (Opp'n to Pls. Mot. for Class Certification (Opp'n) at 3-4.) These arguments inappropriately critique the merits of Plaintiffs' claims.

While the district court may certainly "probe behind the pleadings" to determine whether the Rule 23 factors have been met, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982), there is "nothing in either the language or history of Rule 23 that gives a 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," *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). *See also, e.g., Rodger v. Elec. Data Sys. Corp.*, 160 F.R.D. 532, 538 (E.D. N.C. 1995) ("[I]n considering whether certification is proper, a court should not delve into the merits of the case."). Defendant's arguments as to the merits should not be considered here. In any case, the arguments are without merit. (*See* Pls. Resp. to Mot. to Dismiss at 11-14.)

II. Plaintiffs meet the prerequisites for class certification under Rule 23.

Class certification depends on meeting the factors of Rule 23(a) and at least one Rule 23(b) requirement, in this case Rule 23(b)(2). Defendant has opposed class certification

based largely on unsupported assertions and without any citation to evidence, the complaint, or case law.

A. Numerosity

Defendant challenges numerosity on the ground that Plaintiffs have not established how many children have been affected by the alleged violations. (*See* Opp'n at 4.) Granted, Plaintiffs cannot state exactly how many people have been affected; however, "[n]o specified number is needed to maintain a class action." *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984). When class size cannot be determined with precision, a plaintiff need make only a reasonable estimate of the number of class members. *See Fitzgerald v. Schweiker*, 538 F. Supp. 992, 1000 (D. Md. 1982) (citations omitted). Here, Plaintiffs have submitted data produced by the Defendant and his agents and a report issued by the North Carolina General Assembly estimating that the class numbers into the thousands. (*See* Mem. in Supp. of Pls. Mot. for Class Certification at 3-7 and Ex. A-G attached thereto.) Defendant did not challenge any of this evidence or offer any contradictory evidence. Defendant does complain that Exhibits H-K do not support Plaintiffs' arguments (Opp'n at 4) but these exhibits were not introduced to support numerosity. (*See* Mem. in Supp. of Class Certification at 7-11 (citing Exhibits H-K as support for commonality of the class.) Plaintiffs have easily met their burden under Rule 23(a)(1).

B. Commonality

Because the named plaintiffs are children, Defendant asks the Court to limit the class to children who have applied for Community Support Services or CAP-MR/DD. According to Defendant, there is "no basis" for the named Plaintiffs to represent persons who need other types of behavioral health/developmental disability services. Defendant does not explain

how "different services under the Medicaid Act for adults and children" are relevant to the system-wide due process violations being challenged in this case (Opp'n at 3.) Moreover, in determining commonality, "the appropriate focus is [on] the conduct of the defendant, not the plaintiffs." *Doran v. Mo. Dep't of Soc. Servs.*, No. 07-4158-CV-C-NKL, 2008 WL 1990794 (W.D. Mo. May 2, 2008) (Attach. 1, hereto).

Defendant's argument also comes without citation to any court decisions. It should be rejected because it goes against the full weight of legal authority. "The Rule 23(a) test for commonality is not demanding." *Bussian v. Daimlerchrylser Corp.*, No. 1:04CV00387, 2007 WL 1752059, at *5 (M.D. N.C. June 18, 2007) (Attach. 2, hereto) (citing *Woodard v. Online Info., Servs.*, 191 F.R.D. 502, 505 (E.D. N.C. 2000)). Here, Plaintiffs seek injunctive and declaratory relief to halt system-wide policies and practices of Defendant and his agents that are alleged to violate the Due Process Clause and the Medicaid Act. (*See* Am. Compl. ¶¶ 5, 19, Prayer for Relief.) These policies and practices are not dependent upon the age of the individual or their behavioral health/disability service needs. (*See* Mem. in Supp. of Class Certification at 8-10 (listing common questions of fact and law).)[1] According to Professor Newberg, "Generally speaking, … the plaintiffs' counsel may rely on the rule of thumb that it is proper and desirable to define a class, in an action seeking to enforce a legal duty owed by the defendant to a class of persons generally, to encompass the entire class of persons affected." 2 *Newberg on Class Actions* § 6.15 (3d ed. 1992).

[1] Defendant says there is no common legal claim because the named Plaintiffs' are complaining about "having requests for medical assistance denied" and "Medicaid applicants do not have the same constitutional rights to medical assistance as do recipients." (Opp'n at 4.) This is a merits-based argument that is inappropriate here, and it is simply wrong on the alleged facts and the law. (*See* Am. Compl. ¶¶ 9-11, 13; Pls. Resp. to Mot. to Dismiss at 12.) *See generally Brown v. Giuliani*, 158 F.R.D. 251, 266 (E.D.N.Y. 1994) ("A class is clearly delineated if confined to eligible recipients of a government aid program").

Defendant's assertions should also be rejected because they call for identicalness between the named Plaintiffs and the class members and for the questions of law or fact common to the class to predominate. However, Rule 23(a)(2) only requires commonality, not identicalness. *See, e.g., Hassine v. Jeffes,* 846 F.2d 169, 176-77 (3d Cir. 1988) (noting that the prerequisites of Rule 23 do not require that all class members have identical claims). And, because Plaintiffs seek certification under Rule 23(b)(2), there is no requirement that they meet the "far more demanding" requirement under Rule 23(b)(3) that common issues of law or fact predominate. *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 623-24 (1997); s*ee also, e.g*, *Rodger*, 160 F.R.D. at 537 (finding that common questions do not need to predominate, but must exist); *Kenny A. v. Perdue,* 218 F.R.D. 277, 300-01 (N.D. Ga. 2003) (finding commonality plainly met where plaintiffs and putative class members claimed entitlement to the same legally-mandated rights under federal Medicaid law and all sought the same system-wide declaratory and injunctive relief). Rule 23(a)(2) is met in this case.

C. Typicality

Because the representative plaintiffs have experienced a range and variety of due process problems (*see* Am. Compl. ¶¶ 29-116) Defendant argues they are not typical to each other or the purported class.[2] (Opp'n at 5.) However, this argument demands too much, namely that the representative plaintiffs' share identical fact patterns. "[T]he typicality requirement is not exacting." *Bussian*, 2007 WL 1752059, at *5. Typicality does not mean identicalness. (*See* Mem. in Supp. of Class Certification at 11-13 and cases cited therein.)

[2] Defendant's attempt to boil the Plaintiffs' factual allegations down to trivialities (Opp'n at 5) should be disregarded because it ignores most of the allegations contained in the Amended Complaint; *see also* Exhibits P-R (declarations of Plaintiffs' parents). Defendant seeks to strike the parents' declarations, but the request should be denied. (*See* Pls. Resp. to Mot. to Strike at 5.)

Indeed, some courts have found factual differences in the named plaintiffs' allegations to be a "virtue because the plaintiff class allege[d] that the defendants committed several procedural violations . . . [and] . . .a mix of named plaintiffs with varying backgrounds [was] needed to comprise an appropriately typical class representative." *Ortiz v Eichler*, 616 F. Supp 1046, 1055 (D. Del. 1985). Similarly, *Kenny A.* held that typicality

> does not require that the proposed class representatives each personally experience every difficulty outlined in the complaint. Rather, it is sufficient that the claims of the proposed class representative are substantially similar to the claims of the class…. Furthermore, where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice.

Kenny A., 218 F.R.D. at 300-01 (citations omitted); *see also, e.g., Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) ("Commentators have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims."); *Cyrus v. Walker*, 233 F.R.D. 467, 471 (S.D. W.Va. 2005) (finding "Rule 23 does not require that each and every class member have identical factual and legal situations" and disregarding variations in individual cases where "the basis for Plaintiffs' action is to ensure the process is fair to all individuals in … providing adequate notice").

The named Plaintiffs allege that they and the class members experience systemic problems with Defendant's policies and practices denying, reducing, or terminating their claims for behavioral health/developmental disability services. Irrespective of the varying fact patterns underlying their individual claims, Plaintiffs meet the typicality requirement.

D. Adequacy of Representation

Rule 23(a)(4) provides that the representative parties must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). As noted in Plaintiffs' opening

memorandum, courts within the Fourth Circuit interpret this rule to require, first, that plaintiffs have adequate counsel, and, second, that named plaintiffs not have any interests antagonistic to the class. *See Woodard v. Online Information Services,* 191 F.R.D. 502, 506 (E.D.N.C. 2000) (citations omitted). "The burden is on the defendant to demonstrate that representation will be inadequate." *Haywood v. Barnes,* 109 F.R.D. 568, 579 (E.D.N.C. 1986).

With respect to the first requirement, Defendant asked the Court to strike supporting declarations from two of Plaintiffs' attorneys; however, as established in their opposition to the motion, this request should be denied. (*See* Pls. Resp. to Mot. to Strike at 7.)[3] Otherwise, Defendant did not challenge the competency or qualifications of Plaintiffs' counsel. As to the second requirement, apart from making the summary statement that Plaintiffs are "not in a position" to represent the class (Opp'n at 3) Defendant neither argues nor provides support for an argument that Plaintiffs have any interests that are at all antagonistic to the class.[4] Defendant has not demonstrated that representation will be inadequate; rather, the adequacy of representation requirement is met.

III. The Court Should Not Delay Ruling on Class Certification.

Defendant asks the Court to delay deciding certification until it has ruled on his pending motions to dismiss and to strike. Defendant argues that the ruling should be deferred because his motion to dismiss "rests in substantial part" upon whether the Eleventh Amendment precludes the Court from requiring him to participate in the litigation. (Opp'n at 1.) As Plaintiffs have argued in their Response to Motion to Dismiss, the Court can easily

[3] In the alternative, Plaintiffs seek to file these declarations through a Motion to File Declarations *Nunc Pro Tunc*.

[4] Plaintiffs oppose Defendant's Motion to Strike the declarations of the named Plaintiffs' parents. (*See* Pls. Resp. to Mot. to Strike.)

dispense with these immunity arguments because they are baseless and have already been rejected by this Court and the Fourth Circuit Court of Appeals in a similar case. (*See* Pls. Resp. to Mot. to Dismiss at 6-10 (citing *Antrican v. Odom*, 158 F. Supp. 2d 663 (E.D. N.C. 2001), *aff'd*, 290 F.3d 178 (4th Cir. 2002)).)

Next, Defendant asks the Court to defer ruling on class certification until it has decided his motion to strike several of Plaintiffs' exhibits in support of class certification. However, Plaintiffs have provided the Court with more than ample grounds for immediately denying this motion. (*See* Pls. Resp. to Mot. to Strike.)

Finally, Defendant argues that his response to the motion for class certification is somehow incomplete and that additional discovery may be needed if the Court denies the motion to strike.[5] (Opp'n at 2.) Defendant does not specify what facts he wants to discover that bear on class certification. *See generally Galloway v. Am. Brands, Inc.*, 81 F.R.D. 580, 587 (E.D. N.C. 1978) (rejecting party's contention that their need for additional, unspecified discovery made a decision on class certification premature). At any rate, as director of the Medicaid agency, he should already have full information on Plaintiffs' Medicaid cases. Moreover, the suggestion for additional discovery is based almost entirely on the mistaken belief that any facts which may be unique to particular recipients will permit Defendant to demonstrate that the class cannot meet the requirements of commonality and typicality. As Plaintiffs have established, however, this is not the law. While there are and will be difference in the details of the members' claims, the essence of them all is the alleged

[5] This argument hinges upon the challenged exhibits being essential to the certification decision. Assuming for the sake of argument that the statements in the challenged exhibits were not considered, the Rule 23 factors would still be met based on the well-pled allegations of the Amended Complaint and the remaining, unrebutted evidence submitted by Plaintiffs in support of certification.

unlawful failure of the Defendant to account for notice and opportunity for a fair hearing as required by the Due Process Clause and the Medicaid Act. If there were something else that Defendant wanted to say, argue or show, he should have done so in his Opposition.

CONCLUSION

Rule 23(c) requires the Court to decide certification at an early practicable time and authorizes the Court to manage the class by altering or amending the order, if necessary, as the case proceeds. *See* Fed. R. Civ. P. Rule 23(a)(1)(A), (B); *see generally Curtis v. Norfolk S. Ry.*, 206 F.R.D. 548, 549 (M.D. N.C. 2002) ("The Fourth Circuit has strongly disapproved of lackadaisical pursuit of class certification…."). Plaintiffs' Motion for Class Certification is now fully briefed, and there are no grounds for delaying a ruling. Plaintiffs ask the Court to enter an order certifying this action as a class action pursuant to Rule 23(a) and (b)(2) and to appoint undersigned counsel as class counsel pursuant to Rule 23(g).

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Respectfully submitted,

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