UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MELINDA FISHER, et al., Plaintiffs, v. KIM REYNOLDS, et al., Defendants.	Case No. 4:17-cv-00208-RGE-CFB **PLAINTIFFS' REPLY TO DEFENDANTS' RESISTANCE TO MOTION FOR CLASS CERTIFICATION**

Plaintiffs, by and through undersigned counsel, hereby offer the following Reply to the Defendants' Resistance to Motion for Class Certification ("Resistance"). This Court should certify the class because all of the requirements of Fed.R.Civ.P. 23(a) and (b)(2) are satisfied.

A. <u>The Class is Sufficiently Ascertainable at the Commencement of this Action and Can Be Further Refined during Discovery</u>.

The Defendants disingenuously contend that third prong of Plaintiffs' proposed class definition is "vague" because the "Plaintiffs do not identify which policies and procedures are at issue." (Resistance, p. 4). However, the Plaintiffs have repeatedly identified the Defendant's illegal policies and practices throughout their Class Action Complaint and in their Brief in Support of Plaintiff's Motion for Class Certification at pp. 10-11. The Plaintiffs are challenging the Defendants' actions, policies, patterns, and practices related to authorizing services under the Medicaid waivers as approved, including the exceptions to policy process. The challenge is not about whether Defendants appropriately decreased Plaintiffs' services based on changes in the class members' assessed needs, treatment team recommendations or individualized services plans.

The Defendants also argue that a class action is appropriate only "where the class action attacked a rule or decision that was applicable to *all* Medicaid members." (Resistance, p. 4). However, to certify Medicaid class actions, courts have not required that there be a "rule" or

"decision" applicable to "all" Medicaid members and have often certified classes in which illegal policies or practices have impacted similarly-situated groups of Medicaid recipients. *See, e.g., Perley v. Palmer*, 157 F.R.D. 452 (N.D. Iowa 1994) (certified class of Medicaid applicants only involving those who are veterans or spouses of veterans); *K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D. 479, 488 (D. Idaho 2014), *aff'd*, 789 F.3d 962 (9th Cir. 2015) (certified class of Medicaid beneficiaries who had to undergo the annual evaluation process for a waiver).

As the parties engage in discovery, the extent of the Defendant's illegal policies and practices affecting the putative class will be further refined. *In re Tetracycline Cases*, 107 F.R.D. 719, 728 (W.D. Mo. 1985) ("The class need not be so ascertainable from the definition that every potential member can be identified at the commencement of the action.") The Court will have the opportunity to alter or amend its order for class certification before final judgment. Fed.R.Civ.P. 23 (c)(1)(C). However, if the Court wishes to clarify which policies and practices the Plaintiffs are challenging, the Court can add the following phrase at the end of the third prong of the class definition: "for reasons other than changes in assessments, treatment recommendations, or individualized services plans of class members."

B. <u>The Plaintiffs Have Reasonably Estimated the Number of Class Members</u>.

The Defendants also allege that the Plaintiffs have not met the numerosity requirement of Fed.R.Civ.P. 23(a) because the Plaintiffs have not <u>yet</u> determined how many of the more than 12,000 HCBS waiver recipients have had their services terminated, reduced, or denied because of the Defendant's illegal policies and practices. (Resistance, p.5). "Where it is difficult to determine class size with precision, plaintiff need make only a reasonable estimate of the number of class members." *Fitzgerald v. Schweiker*, 538 F. Supp. 992, 1000 (D. Md. 1982). Plaintiffs will be able to establish the exact number of class members once discovery has been completed. Even if there

are only 1,000, rather than 12,000 class members, that number is too great for each class member to bring an individual lawsuit and later join their claims, especially since individuals on HCBS waivers are unlikely to have the financial, cognitive, or even the emotional wherewithal, to pursue litigation on their own behalves. *Raymond v. Rowland*, 220 F.R.D. 173, 179 (D. Conn. 2004)(multiple factors indicate that impoverished service recipients are unlikely to maintain individual actions for relief).

C. <u>There are Sufficiently Common Issues of Law and Fact for the Court to Issue Declaratory and Injunctive Relief.</u>

The Defendants are erroneously using the standards for Fed.R.Civ.P. 23(b)(1) and 23(b)(3) class actions, (Resistance, pp. 7-9) rather than Rule 23(b)(2) class actions, the types of class action requested in this case. Here, the Plaintiffs are not seeking relief based on an evaluation of each putative class member's individual needs. Instead, the Plaintiffs are asking this Court to provide declaratory and injunctive relief to class members arising out of the Defendants' illegal policies and practices that apply to the Plaintiffs and all other HCBS waiver recipients. Courts have long recognized that lawsuits alleging class-wide discrimination are particularly important in, and an appropriate vehicle for, civil rights actions. *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 614 (1997). As the court in *Steward v. Janek*, 315 F.R.D. 472(W.D. Tex. 2016) at 492 aptly stated:

> Defendants argue that classwide injunctive relief is not possible because such relief would require the Court to determine which services and supports were appropriate for each individual class member based on their individual needs....Plaintiffs are not asking the Court to order individualized relief, but seek injunctions targeted at the deficiencies that they allege exists within Defendant's Medicaid service system…[t]his relief—seeking to rectify [Defendants'] systemic failure to comply [with] specific statutory duties—is not only an appropriate structure under Rule 23(b)(2) for relief in this case, but fits the most frequent []. . . vehicle for civil rights actions and other institutional reform cases that receive class action treatment.

"As in other cases certifying class actions under the ADA and Rehabilitation Act, commonality exists even where class members are not identically situated." *Lane v. Kitzhaber*, 283 F.R.D. 587,

598 (D. Or. 2012); *see, Kenneth R. ex rel. Tri-County CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 269 (D.N.H. 2013) (differences in class members preferences and needs do not change the fact that the State's patterns and practices affect all class members).

D. <u>The Plaintiffs are Typical of the Class Members Despite Immaterial Differences</u>.

The Defendants allege that the named Plaintiffs are not typical of the putative class because they may be enrolled in different managed care organizations, have different service histories and are at different stages in the administrative appeal process (Resistance, p. 9). None of these differences are relevant to the declaratory and injunctive relief that the Plaintiffs and others like them are seeking for the Defendants' violations of constitutional and statutory law. *See DeBoer v. Mellon Mortgage Co*., 64 F.3d 1171, 1175 (8th Cir. 1995) ("When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.") (citation omitted). This suit is filed against state officials who are ultimately responsible for Iowa's Medicaid system, not the three managed care organizations contracting with the state. Moreover, the status of any administrative appeals that the named plaintiffs filed to preserve their services prior to the initiation of this action do not impact whether the Defendants have a pattern and practice of violating constitutional and statutory requirements.

E. <u>The Plaintiffs Adequately Represent the Class.</u>

The Defendants claim that the named Plaintiffs do not adequately represent other HCBS waiver recipients because the cost of their services may be greater than other waiver recipients, implying that the named plaintiffs would be taking away services from other recipients. (Resistance, p. 10). Defendants have provided no evidence to back up this speculation or case law to support this theory. Class certification is routinely granted in similar Medicaid waiver cases where policies or practices, such as the failure to provide due process regarding the exception to policy process in

this case, may affect waiver participants broadly. *See, e.g., L.S. by and through Ron S. v. Delia***,** 2012 WL 12911052 at *8 (E.D.N.C., March 29, 2012). Furthermore, states are expected to use limited entry and other mechanisms to control costs, not deny some members the services to which they are entitled because other members may need services. 42 C.F.R. § 441.303(f)(6); *Murphy by Murphy v. Minnesota Dep't of Human Servs*, No. 16-2623, 2017 WL 2198133 at 14 (D. Minn. May 18, 2017)(citing CMS, SMDL 01-006, Olmstead Letter No. 4, p. 7 (Jan. 10, 2001)). The Defendants also contend that the named Plaintiffs are not adequate representatives of the class because they cannot obtain confidential medical information about class members. However, this issue is easily remedied with an appropriate protective order, as is commonly done in other Medicaid class cases, and is no reason to deny class certification. Plaintiffs' present inability to identify and communicate with putative class members is also not a reason to deny class certification. As explained above, class members will be readily identifiable through discovery because the Defendants' and their agents keep extensive records on all HCBS waiver recipients. Under Fed.R.Civ. P. 23(c)(2)(A), notice is not required for Rule 23(b)(2) class members, but if the Court may direct Class members to receive appropriate notice in the future if it has reason to do so.

Dated this August 9, 2017.

Respectfully submitted,
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