IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

MELINDA FISHER, SHANNON G. by and through her guardian, BRANDON R. by and through his guardian, MARTY M. by and through his guardian, MISTY M. by and through her guardian, and NEAL SIEGEL,	**No. 17-cv-0208**
on behalf of themselves and all others similarly situated,	**BRIEF IN RESISTANCE TO MOTION FOR CLASS CERTIFICATION**
PLAINTIFFS,	
vs.	
KIM REYNOLDS, in her official capacity of Governor of Iowa; JERRY FOXHOVEN In his official capacity as Director of the Iowa Department of Human Services,	
DEFENDANTS.	

Defendants offer this Brief in support of their Resistance to the Motion for Class Certification, stating:

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I. Objections to Class Certification Motion

a. Putative Class Definition

Plaintiffs suggest this as a definition of the putative class:

> The Class consists of Iowans over the age of 21 who
> (i) were enrolled in the Intellectual Disability, Brain Injury, or Health and Disability Home and Community-Based Services (HCBS) Waivers on or after April 1, 2016;
> (ii) have received HCBS Waivers since April 1, 2016; and
> (iii) have had, or will have their hours, budgets, or staffing levels for HCBS waivers directly or indirectly terminated, reduced, denied or not provided with reasonable promptness by the Defendants or their agents after April 1, 2016, based on the Defendants and their agents refusal to modify their policies and practices.

(Doc. 2).

B. Standard for Class Certification

Rule 23(a) provides that no class action may be certified unless the court determines:

> (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.

Elizabeth M. v. Montenez, 458 F.3d 779, 786 (8th Cir. 2006). As Plaintiffs now seek certification pursuant to Fed. R. Civ. P. 23(b)(2), Plaintiffs must also show that "the party opposing the class has acted or refused to act on grounds that

apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2).

Plaintiffs bear the burden of proving the proposed class certification satisfies the requirements of Federal Rule of Civil Procedure 23. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982), *Bishop v. Comm. On Prof. Ethics*, 686 F.2d 1278, 1288 (8th Cir. 1982). Class certification is only permitted when all its members "possess the same interest and suffer the same injury." *Gen. Telephone*, 457 U.S. at 156. *See E. Texas Motor Freight Sys. v. Rodriguez,* 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L.Ed.2d 453 (1977) ("A class representative must be part of the class and possess the same interest and suffer the same injury as the class members."). Federal courts should not lightly grant themselves authority to manage a state agency's implementation of its own laws. *Elizabeth M.*, 458 F.3d at 784 (finding district court abused its discretion in certifying a class where individual claims and issues eclipsed common issues).

C. The Proposed Class Definition is Too Vague to Support Class Certification.

The definition of the putative class is vague with respect to the third contingent subpart: "have had, or will have their hours, budgets, or staffing levels for HCBS waivers directly or indirectly terminated, reduced, denied or not provided with reasonable promptness by the Defendants or their agents after April 1, 2016, based on the Defendants and their agents refusal to modify their

policies and practices." In order to be included as a member of the proposed class, the potential member's services must have been reduced (or delayed, terminated, or denied) based upon the State's refusal to modify its policies and practices. However, the definition does not identify which policies and practices are at issue. A reduction in service alone does not necessarily qualify someone for class membership as the final contingent element of the definition is not met. It is unclear exactly what "policies and practices" caused the reductions in services for the six named Plaintiffs, and without additional clarity, the proposed class is impractically amorphous.

The allegations here are different than several other previously certified Medicaid class actions where the class action attacked a rule or decision that was applicable to *all* Medicaid members. *See, e.g., Planned Parenthood Arkansas & E. Oklahoma v. Selig*, 313 F.R.D. 81, 91 (E.D. Ark. 2016) (challenging decision to disenroll Planned Parenthood provider); *Doran v. Missouri Dep't Social Servs.*, 251 F.R.D. 401 (W.D. Mo. 2008) (action challenging statute requiring signing over workers compensation benefits met commonality requirement). In contrast to these cases, here, the alleged rule in question is undefined.

The differences in the definition of the putative class and in the claims alleged set this lawsuit apart and demonstrate why it should not proceed as a certified class or otherwise. The definition is too vague to support a class action. *Vietnam Veterans Against the War v. Benecke*, 63 F.R.D. 675, 680 (W.D. Mo. 1974) (rejecting putative class definition for vagueness) (citing, *e.g., Ihrke*

v. N. States Power Co., 459 F.2d 566 (8th Cir. 1972), *judgment vacated and remanded as being moot*, 409 U.S. 815 (1972)). "The primary concern underlying the requirement of a class capable of definition is that the proposed class not be amorphous, vague, or indeterminate." 1 H. Newberg, *Newberg on Class Actions* 75 (1977) as cited in *In re Tetracycline Cases*, 107 F.R.D. 719, 728 (W.D. Mo. 1985).

D. Prerequisites for Class Certification

i. Numerosity.

As of June 30, 2017, there were 599,696 Medicaid members, 12,004 of which are served by the Intellectual Disability Waiver, 1,480 are served by the Brain Injury Waiver, and 2,178 are served by the Health and Disability waiver. These numbers alone do not demonstrate numerosity. The definition advanced by Plaintiffs contains several material limitations. To qualify, there must be (1) a reduction, termination, denial or delay of services (2) because Defendants or their agents refused to modify policies and practices. Alleging the number of persons served in the three waivers does not indicate how many Medicaid members satisfied both elements of the final contingent subpart. Further, as will be shown through this litigation, any reduction, termination, denial or delay are for sufficient reason, and not as a result of any wrongful refusal to modify policies and procedures. Even if Plaintiffs' allegations are credited and there is an unidentified policy that is, de facto, rationing care, there is no estimate provided in the motion of how many Members this de facto rationing affects. In addition, the Plaintiffs offer no clear procedure for determining

which waiver-enrolled Medicaid recipients would be included in the class, underscoring the impracticality of the proposed class.

Finally, while Plaintiffs cite a "fear of retaliation," in support of their motion for class certification, such fear is not only unwarranted, but is also unsupportable. The State of Iowa, the Iowa Department of Human Services, and the Iowa Medicaid Enterprise support and provide for Iowans throughout the state. Defendants do not retaliate or or permit retaliation against Medicaid members. For reasons such as these, the state utilizes substantial program oversight, checks, and member remedies to ensure the integrity of its Medicaid administration. In the absence any support, Plaintiffs' unsubstantiated "fear of retaliation" should be rejected.

ii. Common Questions of Law or Fact

The "commonality" requirement is both a prerequisite under Fed. R. Civ. P. 23(a) and related to (b)(3), which requires common questions of law or fact to predominate over other questions, rendering a class action superior. The question of whether services were reduced for any Member will be individualized, fact-intensive and specific inquiries that are unsuitable for class certification.

Any denial, reduction, termination or delay of services for Medicaid members receiving waiver services in one of the three specified waivers would need to be evaluated individually for applicability of the putative class definition and for relevance to the claims made. Each Medicaid member has unique needs. As Plaintiffs' Complaint acknowledges, the State's "exception to

policy" practices stem from Iowa Code § 17A.9A. As this statute acknowledges, any individual denial, termination, reduction, or delay, is and will be based on "the unique, individual circumstances" of the Medicaid member and is subject to the agency's "sole discretion." Iowa Code § 17A.9A. Other than membership in the waivers and a desire to remain in the community, there are few commonalities among the named Plaintiffs. The 56 page Amended Complaint is testament to the unique and complex facts that surround each member and each decision.

To be certified as a class under Fed. R. Civ. P. 23(b)(3), class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997). Individual issues would have to be decided such that there is no predominance of issues rendering class action not the superior method of resolving any controversy. *Rattray v. Woodbury Cty., Iowa*, 253 F.R.D. 444, 464 (N.D. Iowa 2008), *aff'd sub nom Rattray v. Woodbury Cty., Iowa*, 614 F.3d 831 (8th Cir. 2010) (holding individual inquiry into strip search practices rendered class action not the superior means of adjudicating the claims).

Although Plaintiffs identify five allegedly "common questions of law or fact," they are insufficient to support class certification for the following reasons:

(A) – Plaintiffs allege Defendants use "vague, subjective, arbitrary, and secret" criteria to determine HCBS and service budgets. To the contrary, Defendants have published criteria for HCBS budget caps,

set out in administrative rule and the elements for requesting a waiver of administrative rule, also known as an exception to policy, in Iowa Code § 17A.9A(2).

(B) and (C) - To ascertain whether there was a violation in providing written notice or in the notice and hearing requirements, each individual case must be reviewed.

(D) and (E) - In asserting that coverage is being rationed "de facto," Plaintiff's concede there is no identified rule or policy at issue. It is premature to ascertain whether Plaintiffs can establish any pattern or practice, or any violation.

The questions posed are not easily resolved through class-wide resolution. Claims are individual and complex. Indeed, under the Supreme Court's ruling in *Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999), cited in Plaintiffs' Complaint, courts are required to determine the "reasonableness" of policies, practices, and procedure – a necessarily fact-specific inquiry. A person's medical care and needs must be assessed in determining whether any particular funding decision is appropriate to meet those needs. Medicaid members have access to grievance and appeal procedures with respect to notices of decision. Medicaid members then have the right of judicial review. Indeed, some of the members are proceeding with administrative appeals. *See, e.g.*, Docket 15-5. Those actions are proceeding separately from this filed action. If those actions are pursued through judicial

review, class action litigation risks not only inconsistent results, but also oversimplification of complicated, fact-specific health care inquiries.

iii. Typicality

Each of the named Plaintiffs is served by 1 MCO. There are three MCOs presently administering Medicaid. Each of the named Plaintiffs previously received an exception to policy to obtain HCBS services above the cap set out in the governing administrative rule. The putative class definition is far broader than changes to exceptions to policy. The putative class definition encompasses *any* reduction, denial, or delay; thus, the 6 named Plaintiffs are not typical of the much more broadly defined putative class.

To Plaintiffs' due process claims, the named Plaintiffs are also not typical, nor do they share common facts with the appeal and grievance system. Although some have used the appeal and grievance system, some have not. This means that only some claims are ripe for adjudication by this Court. Some are in the process of exhausting administrative remedies, others have already done so, or opted for judicial resolution prematurely. The issues are not identical. "It is not necessary that the defense asserted against the proposed class representative ultimately succeed. Rather, the presence of even an arguable defense peculiar to the proposed representative may destroy typicality of the class." *In re Genesis Intermedia, Inc. Sec. Litig.*, 232 F.R.D. 321, 329 (D. Minn. 2005 (citing *Irvin E. Schermer Trust by Kline v. Sun Equities Corp.*, 116 F.R.D. 332, 336-37 (D. Minn. 1987)).

"The presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry." *In re Teflon Prod. Liab. Litig.*, 254 F.R.D. 354, 365 (S.D. Iowa 2008) (rejecting typicality of putative class action); *citing Elizabeth M.*, 458 F.3d at 787. "[I]n situations where claims turn on individual facts, no economy is achieved, and the typicality requirement cannot be met." *Id.* (internal citations omitted).

iv. Representativeness

Plaintiffs must show "that (1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously and (2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will change." *In re Genesis Intermedia, Inc. Sec. Litig.*, 232 F.R.D. 321, 330 (D. Minn. 2005) (*citing In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 268, 270 (D. Minn. 1989)). Inquiry into the personal characteristics of the proposed representatives as well as counsel is in order. *Id.*; *Sondel v. Northwest Airlines Inc.,* 1993 WL 559031, at *9 (D. Minn. Sept. 30, 1993).

Due to the high cost of the named Plaintiffs' needs, and the relative nature of the average aggregate cap calculation, Plaintiffs cannot adequately represent the needs of other Medicaid waiver members. For what it costs to serve each of the named Plaintiffs on the exceptions to policy, two other Medicaid members could receive services.

In claiming no notice to class members is necessary, Plaintiffs admit they are unable to identify and communicate with the putative class members.

Plaintiffs also admit they would rely heavily on DHS. Plaintiffs have not alleged broad-based support within the putative Plaintiff class for their claims. Plaintiffs have not even addressed whether and how they have authority to request the confidential, protected information of putative class member's individual medical history and services with the Medicaid program, and if they did gain such permission, how it would be treated over the course of litigation.

Plaintiffs do not address how they can receive information about putative class members without valid authorization. Medicaid member protected health information is protected as confidential by HIPAA. 45 C.F.R. § 164.500 *et seq.*; Iowa Code § 217.30; Iowa Code § 228.1 *et seq.* There is no class action exception to an individual Medicaid member's right to self-determination with respect to his or her protected health information, nor have Plaintiffs points to any such authority. Individuals can elect to sign a waiver, allowing protected health information to be shared with counsel and used in court. 45 C.F.R. § 164.512(e) (requiring notice and the opportunity to object before subpoenaing protected health information of others or protective order with satisfactory assurances).

e. Defendants have not acted or refused to act on generally applicable grounds.

DHS's role in Medicaid under managed care is that of a policy maker in terms of crafting administrative rules and informational letters and as a contract manager. Decl. Elizabeth Matney, Docket 19-3 The Contract forbids de facto rationing and requires service to be based on current assessment of

need. Docket No. 15-1, Provision 3.2.15.1; Provision 3.3.4. DHS monitors critical data points and demands corrective action plans where noncompliance is identified. This corrective action and noncompliance affects the "withholding" – two percent of the contract value that was reserved to serve as a performance incentive. Pertinent to these claims, DHS has required corrective action on five identified noncompliance issues related to due process and administrative appeals. DHS has issued 169 informational letters clarifying policy and procedure under managed care. DHS has implemented an urgent member team that addresses critical needs and ensures that members needs are attended so. Decl. Richard Shults, Docket 19-2. DHS has acted on grounds applicable to all of the putative class members and continues to actively manage the contract, engage meaningfully with the MCOs, and assist in the resolution of specific member concerns. Decls of Elizabeth Matney and Richard Shults, Docket 19-2 and 19-3.

II. Class Certification is Unnecessary

Class certification serves no useful purpose because the requested declaratory or equitable relief may be obtained from an individual action and would automatically accrue to the benefit of other putative class members. *Gray v. Int'l Brotherhood of Electrical Workers,* 73 F.R.D. 638, 640 (D.D.C. 1977) (denying class certification and holding that if plaintiffs are entitled to a determination that defendants engaged in and continue to engage in certain discriminatory practices, the court would have to fashion an equitable decree, and this would afford injunctive relief to all victims of such discrimination, not

merely to the plaintiffs bringing the action); accord *DC Podiatry Society v. District of Columbia,* 65 F.R.D. 113, 115 (D.D.C. 19 74); *Edwards v Schlesinger,* 377 F. Supp. 1091, 1093 & n.9 (D.D.C.), rev'd on other grounds sub nom *Waldie v. Schlesinger,* 166 US App DC 175, 509 F.2d 508 (D.C. Cir. 1974); *Kinsey v. Legg, Mason & Co, Inc.,* 60 F.R.D. 91, 100-01 (D.D.C. 1973). *Stewart v. Butz,* 356 F Supp 1345 (W.D. Ky. 1973); *Bermudez v. United States Dep't of Agric.,* 348 F. Supp. 1279 (D.D.C., 1972); *Bond v. Dentzer,* 325 F. Supp. 1343, 1352 (N.D.N.Y. 1971); *United States v. Bexar County,* 484 F. Supp. 855, 858 (W.D. Tex. 1980). Plaintiffs have sued Governor Reynolds and DHS Director Foxhoven in their official capacities. Plaintiffs have sued only for injunctive relief (and fees). "The very premise of class actions is that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Cal. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2054 (2017) (internal citations and quotation marks omitted). The "very premise" of class actions referred to by the Court does not apply here, illustrating the impropriety of class certification. Additionally, any injunctive or declaratory relief granted against the Defendants in their official capacities could apply to all Medicaid members without need for class action litigation.

III. Objection to Class Counsel

Should the court determine class counsel is appropriate, Defendants object to the appointment of three law firms as requested by Plaintiffs. Regardless of whether all three firms are qualified and capable, Plaintiffs have

pled a demand for attorney's fees. Three independently capable law firms are not necessary to prepare this matter and will unnecessarily increase the fee claim.

IV. Conclusion

Defendants object to the motion for class certification. The definition is fatally vague. Although there are numerous Medicaid members in the three waivers, the vague contingency of the definition impairs numerosity. The individual nature of the services changes impairs commonality, predominance, typicality, and adequacy. Defendants have not refused to act. The contract clearly prohibits the alleged de facto rationing and the Department regularly monitors, issues corrective actions, and remediates specific issues. Appointment of three law firms is unnecessary.

WHEREFORE, Defendants object to the motion for certification of this matter as a class action. Defendants seek an order rejecting the putative class and for any other relief appropriate under the circumstances.

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I certify that the attached was filed via CM/ECF on August 2, 2017.
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