IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

BENJAMIN H., by his next friend, Georgann H., DAVID F., by his guardian, Carolyn B., LORI BETH S., by her next friend, Janie J., THOMAS V., by is next friend, Patricia V., and JUSTIN E., by his next friend, Sherry E., individually and on behalf of all others similarly situated,

Plaintiffs,

v. CIVIL ACTION NO. 3:99-0338

JOAN OHL, Secretary of the Department of Health and Human Resources,

Defendant.

MEMORANDUM OPINION AND ORDER

Currently pending before the Court is the plaintiffs' motion for class certification. For the reasons that follow, the Court **GRANTS** the plaintiffs' motion.

Facts

The plaintiffs are Medicaid beneficiaries who are mentally retarded or developmentally disabled and, as a result, are eligible for intermediate care level services. The plaintiffs have been placed on waiting lists for the home and community based waiver program. The plaintiffs claim that the defendant is violating federal law resulting in failure of the plaintiffs to receive the benefits to which they are entitled in a prompt manner.[1]

[1] A thorough discussion of the statutory framework involved in this program as well as the Court's findings of fact may be found in the July 15, 1999 Order granting the Preliminary Injunction.

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Procedural History

On April 30, 1998, the plaintiffs filed suit under 42 U.S.C. §§ 1983 and 12133. Their complaint asserted five violations of Title XIX of the Social Security Act, that is, the provisions establishing Medicaid, 42 U.S.C. § 1396 *et seq*. In addition, the complaint asserted one violation of the Due Process Clause of the United States Constitution, or in the alternative, the due process provisions of Medicaid, and one violation of the Americans With Disabilities Act, 42 U.S.C. §§ 12101 – 12213 (the "ADA"). The plaintiffs sought, *inter alia*, declaratory and injunctive relief, and the certification of a class of similarly situated individuals. Upon filing their complaint, the plaintiffs contemporaneously moved for a preliminary injunction. The issues were briefed and the Court held a hearing on June 30 and July 1, 1999.

By order dated July 15, 1999, the Court issued a preliminary injunction. The Court did not address the plaintiffs' request for certification of a class of similarly situated individuals. The plaintiffs propose certification of the following class:

> All current and future West Virginia residents with developmental disabilities or mental retardation who are Medicaid beneficiaries and who are eligible for the level of services funded under the Intermediate Care Facility for the Mentally Retarded (ICF/MR) service and/or the Mentally Retarded/Developmentally Disabled Home and Community Based Waiver (MR/DD/HCBW) service.

The Court now turns to this request.

Standard for Class Certification

Federal Rule of Civil Procedure 23 governs certification of class actions. The party seeking certification has the burden of proving that the requirements of the Rule are satisfied. *See Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156 (S.D.W.Va. 1996); *see also Windham v. American Brands,*

Inc., 565 F.2d 59 (4th Cir. 1977). The prerequisites for maintenance of any suit as a class action under Rule 23(a) are: "(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). Not only must the party seeking certification meet the four requirement of Rule 23(a), but the party must also qualify under one of the subdivisions of Rule 23(b). *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 163 (1974). Rule 23(b) sets forth several factual scenarios under which a class action may be maintained. In the present case, the plaintiffs argue that they qualify under Rule 23(b)(2), which provides that a class action is maintainable if, in addition to meeting the requirement of Rule 23(a), "... the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In order to qualify under this section, the nature of the relief sought must be solely or predominantly injunctive or declaratory. *See Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976).

Discussion

Rule 23(a)

1. Numerosity

In order to meet the numerosity requirement of Rule 23(a)(1), the plaintiffs have the burden of proving that the class is so numerous that joinder of all members is impracticable. It is important to note that Rule 23(a)(1) requires not only numerosity, but also that the class be "so numerous" that joinder is impracticable. Thus, the specific facts of the case must be analyzed, and the rule imposes

no absolute limitation on the number required to certify a class. *See General Telephone Company of Northwest Inc. v. EEOC*, 446 U.S. 318, 330 (1980) . Courts in the Fourth Circuit have upheld classes consisting of as few as 18 members, to as many as an estimated 2,000 to 5,000 members. *See Cypress v. Newport News General and Nonsectarian Hospital Ass'n.,* 375 F.2d 648 (4th Cir. 1967) (upholding a class of 18 doctors in a discrimination suit); *Black v. Rohone-Poulenc*, 173 F.R.D. 156 (S.D.WVa. 1996) (certifying a class estimated to be between 2,000 - 5,000 people affected by toxic gas from a plant fire). What this vast range in the number of class members suggests, and several Fourth Circuit cases have noted, is that the circumstances surrounding the case are the key to determining whether or not the class is so numerous that joinder is impracticable. *See e.g., Brady v. Thurston Motor Lines,* 726 F.2d 136 (4th Cir. 1984); *Ballard v. Blue Shield of Southern West Virginia,* 543 F.2d 1980 (4th Cir. 1976), *cert. denied* 430 U.S. 922 (1977); *Cypress v. Newport News General and Nonsectarian Hospital Ass'n.,* 375 F.2d 648, 653 (4th Cir. 1967).

The crux of the defendant's argument on this issue is that the class proposed by the plaintiff is too speculative. Defendant argues for a limited class of those people currently on the waiting list, arguing that they may all be joined in the current action. However, the defendant cites no authority to support her argument that the size of the class cannot be speculative. Indeed, it appears to be the prevailing view that "the plaintiff need not allege the exact number or identity of the class members." 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.05 (3d ed. 1992). The alternative class proposed by the defendant does not encompass a sufficient range of individuals who are affected by the challenged action. Not only are people currently on the waiting list affected, but

also the people who have been deterred from joining the waiting list,[2] as well as people who may need these services in the future.[3]

Given the potential size of the class, along with the scope of the proposed class, the Court finds that the plaintiffs have established the numerosity of the class and the impracticability of joinder.

2. Commonality

To satisfy the commonality requirement, "there need be only a single issue common to all members of the class." 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.10 (3d ed. 1992). In the present case, there are numerous issues of both fact and law common to all members of the proposed class. As the plaintiffs note in their Memorandum of Law in Support of Class Certification, the class members are all DD/MR, they are all eligible for Medicaid, they all need a similar range of treatment, they all have a preference for community based service, and they all are receiving care below the level they require. In addition, each class members claim arises from the same legal theory, and each is seeking the same relief which will benefit the entire class. The

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[2] In the hearing held on June 30, 1999 and July 1, 1999, the Court found that there were a large number of individuals who were eligible for services but were deterred from being fully evaluated by the regional behavior health centers because of the length of the waiting list. The Court recognizes that there may be other individuals who, while otherwise qualified, will not even go to the regional health centers because of the length of the waiting lists. The Court is concerned that if it were to adopt an alternative class definition such as that suggested by the defendant, these types of individuals would be excluded from the class.

[3] The evidence at the hearing on June 30, 1999 and July 1, 1999 also suggested that the number of eligible individuals would significantly increase over the next five years. The defendant's argument that future applicants will not be affected because the government is in the process of formulating a plan to remedy the situation is without merit. The fact that the defendant has been permitted to submit a plan to help structure the relief in this action is insufficient to find that no individual in the future will be affected by the challenged government action.

defendant maintains that there is no common question of law or fact because some members of the class need a different type or a different amount of care; some members of the class are currently receiving care while on the wait list, while other are not; and some are on the waiting list in the planning stage and will not need treatment until the future. The Court is of the opinion that these subtle differences noted by the defendant are insufficient to find that the class members share no common issues of law or fact. The Rule does not require that each and every class member have identical factual and legal situations. Rather, the plaintiffs need only identify a common question of law or fact. The plaintiffs have met their burden.

3. Typicality

The typicality requirement is "said to limit the class claims to those fairly encompassed by the named plaintiff's claims." *See General Telephone Company of Northwest Inc. v. EEOC*, 446 U.S. 318, 330 (1980). According to Newberg, the focus is on the relationship between the plaintiffs' claims and the class claims. *See* 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.13 (3d ed.1992).

The Court is of the opinion that the individual plaintiffs' claims are sufficiently related to the class claims to satisfy the requirements of Rule 23(a)(3). Here, the interest of the named plaintiffs are aligned with the interest of the proposed class. Any benefit received by a plaintiff in this suit will be shared by each member of the proposed class.

4. Adequacy of Representation

Rule 23(a)(4) requires adequate representation of the class. This requirement is "typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class." *See General Telephone Company of Northwest Inc.*

v. EEOC, 446 U.S. 318, 330 (1980). The Court looks at both the abilities of the class representatives and the abilities of the attorney representing the class. *See America, Local 899 v. Phoenix Assocs., Inc.*, 152 F.R.D. 518 (S.D.W.Va. 1994).

As was seen at the hearing held on June 30, 1999 and July 1, 1999, the class representatives are devoted to the lawsuit and the Court sees no reason why they would not be adequate representatives of the class. Also, the Court sees no reason why counsel for the class representatives would not be an adequate representative of the class. Counsel have a wide range of professional experience in health care and public entitlement issues, as well as in representing class action litigants in other cases. One teaches health policy at the University of North Carolina at Chapel Hill and has published numerous articles on Medicaid and health care related law topics. Counsel have the experience necessary to adequately represent the class.

Rule 23(b)

Having found that the plaintiffs have proved that the proposed class meets the requirements of Rule 23(a), the Court must now turn its attention to Rule 23(b). As previously noted, the plaintiffs must prove that they qualify for class certification under one of the factual scenarios presented in Rule 23(b). The plaintiffs maintain that they qualify under Rule 23(b)(2), which provides that a class action may be maintained if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Here, this case fits squarely into the requirements of Rule 23(b)(2). The defendant, in her official capacity, has acted and may act in the future in a manner that affects the entire class' ability to receive needed benefits in a timely manner. The effects on the class members are uniform, and

the plaintiffs are seeking declaratory and injunction relief that will benefit the class as a whole. Therefore, maintenance of this action as a class action is permissible under Rule 23(b)(2).

Conclusion

The Court **GRANTS** plaintiffs' motion for class certification. The class certified shall consist of all current and future West Virginia residents with developmental disabilities or mental retardation who are Medicaid beneficiaries and who are eligible for the level of services funded under the Intermediate Care Facility for the Mentally Retarded service and/or the Mentally Retarded/Developmentally Disabled Home and Community Based Waiver service. The Court notes that pursuant to Rule 23(c)(1) this order may be altered or amended prior to a decision on the merits.

The Court **DIRECTS** the Clerk to send a copy of this Memorandum Opinion and Order to counsel of record and any unrepresented parties.

ENTER: October 8, 1999

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE