IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

K.C., a minor child, by his mother and next friend Africa H.; ALLISON TAYLOR JOHNS; L.S., a minor child, by his father and next friend Ron S.; and D.C., a minor child, by his mother and next friend Penny C.,

Plaintiffs,

M.S., a minor child, through his parent and natural guardian, Rachelle S.,

Intervenor Plaintiff,

v.

LANIER CANSLER, in his official capacity as Secretary of the Department of Health and Human Services; PAMELA L. SHIPMAN, in her official capacity as Chief Executive Officer of PBH; and PBH,

Defendants.

Civil Action No. 5:11-cv-354-FL

DEFENDANTS PAMELA L. SHIPMAN AND PBH's MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

The Motion for Class Certification [D.E. 34] (the "Motion") fails to establish the prerequisites for certification of a class for at least three reasons. First, Plaintiffs' Complaint, Motion and Memorandum fail to identify a precisely defined class. Second, the named Plaintiffs lack standing to raise each class claim and those claims have become or shortly will become moot. Third, the proposed class representatives' claims are not typical of all proposed class members; the proposed class representatives have interests antagonistic to other members of the class and, in addition, three of the proposed class counsel have an actual or potential conflict of interest due to representation of certain proposed class members in other litigation. For these reasons, discussed more fully herein, the Motion for Class Certification should be denied.

CASE SUMMARY

This case involves a lawsuit brought by four minors, through their parents, and one adult in her own name, who are enrollees in a North Carolina-based managed behavioral healthcare (MBHO) Medicaid program known generally as the North Carolina Innovations Waiver (hereinafter, "Innovations Waiver" or "Innovations"), which is operated by the PBH Defendants on behalf of the State of North Carolina. The Innovations Waiver provides funds for home- and community-based services for people with intellectual and developmental disabilities. The program operates using a fixed pool of funds, and therefore PBH works to distribute these fixed and limited Medicaid funds in an efficient, fair, equitable, and sustainable manner.

During the spring and early summer of 2011, there was a federally-reviewed and approved transition of the Innovations Waiver from a funding allocation system known as "Benchmarks" to a more efficient, fair, equitable and sustainable allocation system known as "Support Needs Matrix." As a result of this transition, some Innovations Waiver enrollees received lower funding levels than they had previously received, while other Innovations Waiver enrollees received the same or greater funding levels. The named Plaintiffs, who seek to represent a class of Innovations Waiver enrollees, all received an initial reduction in funding resulting from the transition to the Support Needs Matrix system, and who contend (as a result) that they were deprived of statutory and constitutional due process. The lack of merits of the due process contentions are addressed at length in the PBH Defendants' Memorandum in Opposition to Motion for Preliminary Injunction, the facts and arguments of which are incorporated herein by reference. [D.E. 104] The instant memorandum is presented to the Court in opposition to the Plaintiffs' Motion for Class Certification. [D.E. 34]

STATEMENT OF FACTS

PBH's Role in Managing a North Carolina Managed Care Waiver Approved by the Federal and State Governments

PBH is a multi-county area mental health, developmental disabilities, and substance abuse authority ("area authority") established pursuant to N.C. Gen. Stat. § 122C-115(c) by the Boards of Commissioners of Alamance, Cabarrus, Caswell, Davidson, Rowan, Stanly, and Union Counties. Shipman Decl. [D.E. 41, ¶ 3]. As an area authority, PBH is a "local political subdivision of the State." N.C. Gen. Stat. § 122C-116. As an area authority, PBH is also referred to as a "local management entity" ("LME"). N.C. Gen. Stat. § 122C-3(20b). Defendant Pamela L. Shipman is the Chief Executive Officer of PBH. Shipman Decl. [D.E. 41, ¶ 1].

By an April 7, 2011 agreement between PBH and the North Carolina Department of Health and Human Services (the "Department"), and with the approval of the U.S. Department of Health and Human Services, Centers for Medicaid and Medicare Services ("CMS"), PBH operates as a Prepaid Inpatient Health Plan ("PIHP") pursuant to 42 C.F.R. § 438.2. *Id.* ¶ 4; D.E. 31-5. PBH's operation as a PIHP means that PBH is pre-paid by the State to provide care, and PBH accepts the financial risk for providing that care. Shipman Decl. [D.E 41, ¶¶ 4, 8]. This model is also referred to as managed care Medicaid, as opposed to the more traditional fee-for-service Medicaid. *See, generally*, 67 F.R. 40989 (June 14, 2002) (describing the history of fee-for-service Medicaid and managed care Medicaid).

In traditional fee-for-service Medicaid, an eligible Medicaid recipient is seen by a clinical professional for needed services, and the professional then submits forms to the appropriate state Medicaid agency to obtain his or her fee for the services provided. There is essentially no limit to the amount of services that can be provided to an eligible Medicaid recipient and little to no

ability of the state (or federal) government to predict or contain the resultant costs. Misenheimer Second Decl. [D.E. 105, ¶ 4.]

In managed care Medicaid, such as the Innovations Waiver, the state obtains a waiver from the federal government which allows it to operate a managed care entity in compliance with federal Medicaid requirements. The managed care Medicaid arrangement intentionally creates an incentive for PBH to provide the most efficient and cost-effective care. Shipman Decl. [D.E 41, ¶ 8]. Pursuant to 42 U.S.C. §1396n(b)(3), historical cost savings generated by providing efficient and cost-effective care have been used to provide additional healthcare services, which would not otherwise be available.[1] *See Id.* *See also* 42 C.F.R. § 431.55(e).

The Creation and Amendment of the Innovations Waiver

Pursuant to Sections 1915(b) and (c) of the Social Security Act (42 U.S.C. §§ 1396n(b) and (c)), the Department sought and obtained from CMS a waiver of portions of North Carolina's traditional fee-for-service Medicaid program for behavioral health services, to replace it with a managed care program (the "1915(b)/(c) Medicaid Waiver"). [D.E. 31-3 and 41, ¶ 4]. The 1915(b) waiver, known as the Cardinal Health Plan, is a Medicaid-funded managed care health plan for qualified enrollees who require mental health and/or substance abuse services. [D.E. 41, ¶ 5]. The 1915(c) waiver, titled the "Innovations Waiver," is an optional Medicaid-funded managed care health plan for qualified enrollees who require healthcare services for intellectual and developmental disabilities. *Id.*

In order to obtain the Innovations Waiver under Section 1915(c) of the Social Security Act, the Department (with input from PBH), was required to submit to CMS a lengthy and

[1] PBH is a non-profit entity and therefore does not realize any pecuniary gain or benefit from any cost savings it can generate through providing efficient and cost-effective care. Misenheimer Second Decl. [D.E. 105 ¶ 5.]

detailed application. [D.E. 31-3 and 31-4]. The original Innovations Waiver application was filed on or about April 1, 2008 and was approved by CMS. [D.E. 31-3 and 31-4; D.E. 42, ¶ 3].

CMS Approved, *Inter Alia*, the Transition from the "Benchmarks" Method of Patient Needs Evaluation to the "Support Needs Matrix" Method of Patient Needs Assessment, Including Use of the Supports Intensity Scale (SIS) Assessment Tool to Assist in Allocating Service Dollars

As part of the Innovations Waiver approved by CMS, there was a change in the method used by the State (through PBH) to assess the needs of the enrollees in the Innovations program. The State (through PBH) had previously used a system known as "Benchmarks" to evaluate participant needs and to select funding levels associated with those needs. However, under the Benchmarks program, the amount of funding an enrollee received for services was not always as well related to that enrollee's support needs as it might be. Misenheimer Decl. [D.E. 42, ¶ 4]. In an effort to create a better system of evaluating enrollees' needs and associated funding levels, the State (with input from PBH) received approval from CMS for PBH to change the "Support Needs Matrix" system (hereinafter, "Support Needs Matrix"). [D.E. 42, ¶ 6]

Under the Support Needs Matrix, enrollees with the greatest support needs generally receive more funding than enrollees with fewer support needs. Misenheimer Decl. [D.E. 42, ¶ 5]. PBH obtained and implemented the Support Needs Matrix to distribute limited Medicaid funds in an efficient, fair, equitable, and sustainable manner. Misenheimer Decl. [D.E. 42, ¶ 4]. The Support Needs Matrix is utilization management criteria, which complies with the federal requirement to design and maintain a Quality Assessment and Performance Improvement Program pursuant to 42 C.F.R. § 438.240. Shipman Decl. [D.E. 41, ¶ 10]; Misenheimer Decl. [D.E. 42, ¶ 20].

The level of support that an enrollee needs is measured by PBH using a standardized, nationally-recognized, evaluation tool called the Supports Intensity Scale ("SIS"). Misenheimer

Decl. [D.E. 42, ¶ 7]. The SIS is a valid, reliable instrument administered by trained professionals to assess the level of an enrollee's support needs in major areas of daily living as well as behavioral and medical needs. *Id.* The SIS has been used by PBH since 2005, and was developed over a five-year period by the American Association of Intellectual and Developmental Disabilities, tested on a population of over 1,200 persons with mental retardation and related intellectual disabilities in the U.S. and Canada, and is used in 16 states across the United States and 17 countries. *Id.* It is widely recognized by scholars as well. See, e.g., Fortune, J., Agosta, J., and Bershadsky, J., *2011 Validity and Reliability Results Regarding the SIS* (2011). [D.E. 42-1] PBH uses the SIS because it directly measures the assistance needed by enrollees, rather than enrollees' lack of skills. Misenheimer Decl. [D.E. 42, ¶ 7]

In addition to using the SIS, PBH also uses supplemental questions to identify individuals who present a current, extreme risk to themselves and/or other individuals in the community and who require high levels of support. Such individuals are referred to as having a Community Safety Risk. Misenheimer Decl. [D.E. 42, ¶ 8].

The Support Needs Matrix establishes funding categories for enrollees. These funding categories are based on the following factors: (1) where someone lives, either at home (non-residential) or in a residential facility (residential); (2) the individual's age, child (age 21 and younger) or adult (age 22 and older); and (3) the individual's assessed support needs (which includes the SIS assessment and the assessment of Community Safety Risk). Misenheimer Decl. [D.E. 42, ¶ 9].

Within the Support Needs Matrix, there are four separate groupings (also referred to as matrices): (1) Child Residential; (2) Child Non-Residential; (3) Adult Residential; and (4) Adult Non-Residential. Within each of these groupings, there are approximately seven categories (A –

G). Each category has a specific dollar amount tied to it ("Base Budget"), which reflects the total amount available to fund the typical types of services used by individuals in these categories ("Base Budget Services"). For example, as of July 1, 2011, a child living at home who is in Category A would have a Base Budget of $18,799.60, whereas a child living at home who is in Category G would have greater support needs and would have a Base Budget of $76,665.20. Misenheimer Decl. [D.E. 42, ¶ 10].

The Base Budget is the maximum amount of funding available to pay for Base Budget Services. Base Budget Services include community networking, day supports, in-home intensive supports, in-home skill building, personal care services, residential supports, respite, and supported employment. In addition, there are other services that are Non-Base Budget Services, which do not impact the Base Budget. These are services that are preventative, crisis, and/or equipment and supplies. Some examples of Non-Base Budget Services include assistive technology equipment and supplies, home modifications, vehicle modifications, natural supports education, and specialized consultation. Under the Innovations program, the combination of Base Budget Services and Non-Base Budget Services cannot exceed $135,000 per year ("Waiver Cost Limit"). Misenheimer Decl. [D.E. 42, ¶ 11].

The Support Needs Matrix funding system provides the benefit of a more equitable and sustainable funding system. In addition, it provides the individual with more choice about what array of services he or she would like to obtain, and in what combination, as compared to the previous funding system, which involved more detailed management of each request for services by PBH. Misenheimer Decl. [D.E. 42, ¶ 12].

Within the Support Needs Matrix funding system, there are ways to address temporary and permanent changes to an individual's support needs. If there is an unplanned and unexpected

situation that is expected to last for less than six months (for example, and unexpected surgery needed by a caregiver), the individual's planning team may submit a Temporary Request for additional funding to PBH. If an individual's needs change permanently, the planning team may request a new SIS assessment or a change to a different grouping (such as due to a changed living situation). Misenheimer Decl. [D.E. 42] ¶ 13.

In addition, if an individual needs more services than their Base Budget will provide, the planning team can request Intensive Review to determine if the individual should be classified as an outlier. In the Support Needs Matrix, an outlier is an individual who has behavioral, safety, health and welfare needs that differ significantly from others within the same Support Needs Matrix category and that cannot be met with the funding available in that category. Up to 7% of the participants may receive increased funding as a result of being designated as outliers. Misenheimer Decl. *Id.* ¶ 14.

For those enrollees with a significant change in budget (greater or less than $3,000 from their prior year actual costs), PBH offered six-month phased-in "step-downs" and "step-ups" to further aid in a smooth transition. Misenheimer Second Decl. [D.E. 105] ¶ 23. This was communicated to consumers via a variety of mechanisms, including via Waiver Alerts. *Id. See*, *e.g.*, March 2011 Waiver Alert [D.E. 31-19].

After an individual has been placed into one of the Support Needs Matrix categories, the individual's planning team, which includes one of PBH's Care Coordinators, will work together to develop the Individual Support Plan ("ISP") (sometimes referred to as a Person Centered Plan ("PCP")), which will identify, among other things, the services sought to be obtained through the Innovations program. Misenheimer Decl. [D.E. 42] ¶ 16. Any new ISP or ISP update would be signed by the enrollee or their guardian and submitted by the Care Coordinator, along with a

request for services, to PBH's Utilization Management department for review under the Support Needs Matrix utilization management criteria. An enrollee must have an approved ISP to remain enrolled in the Innovations program. *Id.*

As a managed care plan, the Innovations waiver requires enrollees, usually through their healthcare providers or a Care Coordinator, to formally request services through a Treatment Authorization Request ("TAR"). In response to a TAR, PBH will either approve and authorize the requested service, or deny the requested service. Authorizations are issued for specific services, frequency (such as a number of hours per week of a service), and for a limited duration (time period). Upon expiration of the authorization, a new TAR must be submitted and the process is repeated. Misenheimer Decl. [D.E. 42] ¶ 17.

In accordance with 42 C.F.R. § 438.400, if PBH denies the service requested in a TAR, the enrollee is given the required notice of his or her appeal rights. Likewise, if PBH reduces, suspends, or terminates a service prior to the expiration of an existing authorization, PBH will also provide notice of appeal rights. Misenheimer Decl. [D.E. 42] ¶ 18.

In the context of the Support Needs Matrix funding system, the individual's planning team may submit a TAR for Base Budget Services that exceeds the Base Budget for the individual's Support Needs Matrix category. They may also submit a TAR in which the combination of Base Budget Services and Non-Base Budget Services exceeds the Waiver Cost Limit $135,000 per year. In such scenarios, PBH will authorize the services and amounts which are compliant with the Support Needs Matrix, or Waiver Cost Limit, and deny those services that are not. Enrollees will be given notice of their appeal rights to appeal the denial of those services because they are non-compliant and not available under the Innovations waiver. Misenheimer Decl. [D.E. 42] ¶ 19.

The appeal process consists first of a PBH-level appeal, referred to as Reconsideration Review, in which an independent reviewer who has had no prior involvement in the case will make an independent decision. Shipman Decl. [D.E. 41] ¶ 10. If the individual wishes to appeal further following Reconsideration Review, the next level of appeal is to the North Carolina Office of Administrative Hearings. *Id*. *See also* [D.E. 31-5, pp. 19-24] and N.C. Gen. Stat. § 108A-70.9A(d).

The Funding Mechanism for the Innovations Waiver

The funding for the Innovations Waiver program comes through a fixed, monthly capitation – effectively, a lump-sum allocation – by the North Carolina Department of Health and Human Services (the "Department") to PBH. This allocation from the Department includes, in part, matching funds from the federal government. This lump-sum allocation is the pre-paid amount received from the Department. Misenheimer Second Decl. [D.E. 105] ¶ 6.

This structure creates a finite pool of funds, which must be used by PBH to serve the population of eligible Medicaid recipients who are within the Innovations Waiver program. As a result, the funding available to PBH for the Innovations Waiver is finite and fixed. *Id.* at ¶ 7. As of the filing of the Complaint, the Innovations Waiver authorized a maximum of 675 Medicaid recipients within five counties covered by the program (Union, Stanly, Rowan, Cabarrus, and Davidson counties), and the program has operated (and is expected to continue to operate) at its maximum capacity. *Id.* at ¶ 8.

Therefore, this lump-sum amount provided by the Department for Innovations Waiver consumers in Union, Stanly, Rowan, Cabarrus, and Davidson counties is allocated by PBH to fund these 675 enrollees to meet their individual health care needs as efficiently and equitably as

possible.[2] *Id.* at ¶ 9. From July 2010 through June 2011, over 60 new Innovations enrollees began receiving funding through the Support Needs Matrix system. On July 1, 2011, PBH began implementing the Support Needs Matrix system with enrollees who were already enrolled in Innovations. As a result, by July 1, 2011, PBH had allocated the Innovations funding across all 675 Innovations enrollees. *Id.* at ¶ 10.

This was done by an individual analysis of each client's support needs and placement of each enrollee within the Support Needs Matrix. *Id.* at ¶ 11. Each enrollee was then provided a Support Needs Matrix Base Budget, which could be used to fund Base Budget Services within the Innovation program. *Id.* at ¶ 12. This process resulted in some Innovations enrollees receiving a reduced funding level as compared to their pre-July 1, 2011 funding level, some receiving approximately the same funding level as compared to their pre-July 1, 2011 funding level, and some receiving an increased funding level compared to their pre-July 1, 2011 funding level. *Id.* at ¶ 13.

Changes in Funding to Innovations Waiver Enrollees Due to Federally-Approved Amendment of the Innovations Waiver

The before-and-after summary of these enrollees' funding levels pre-July 1, 2011 (prior to the transition to the Support Needs Matrix system) and as of July 1, 2011 (upon implementation of the Support Needs Matrix system) is as follows:

- approximately 151 enrollees saw a reduction in the total dollar amount of their budgets from pre-July 1 levels;

[2] As of September 16, 2011, there was a waiting list of over 400 eligible enrollees waiting for an open enrollment spot in the Innovations Waiver. [D.E. 41, ¶ 6]. While those eligible enrollees await an open spot within the Innovations Waiver, they continue to receive ICF/MR services. *Id.*

- approximately 141 enrollees saw little to no change in the total dollar amount of their budgets from pre-July 1 levels (*i.e.,* they were within $3,000 of their previous budget, either plus or minus); and
- approximately 372 enrollees saw an increase in the total dollar amount of their budgets from pre-July 1 levels.

Id. at ¶ 14.

On July 1, 2011, approximately 11 slots were open in the Innovations program, as is the case from time to time as individuals move in and out of the program for various reasons. *Id.* at ¶ 15. Because the finite funds available for use in the Innovations program have been allocated among the 675 enrollees in the program, it would not be possible to reinstate to pre-July 1, 2011 funding levels all enrollees whose funding was reduced effective July 1, 2011, without also decreasing the funding to other Innovations enrollees. *Id.* at ¶ 16.

LEGAL ARGUMENT

A. Plaintiffs Bear the Burden of Proof.

While "a district court has broad discretion in deciding whether to certify a class," *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (internal quotation marks omitted), "plaintiffs bear the burden . . . of demonstrating satisfaction of the Rule 23 requirements, and the district court is required to make findings on whether the plaintiffs carried their burden . . . ." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 370 (4th Cir. 2004); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006). It is well established that the proponent of class certification bears the burden of establishing that all of the necessary requirements of Rule 23 have been satisfied. *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); *Int'l Woodworkers of Am. v. Chesapeake Bay Plywood*

Corp., 659 F.2d 1259, 1267 (4th Cir. 1981) ("The burden of establishing the requirements of Rule 23 rests, of course, with the party seeking certification.").

When determining whether a proponent of class certification has met all necessary criteria, "the court may not confine itself to the allegations of the complaint." *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312 (4th Cir. 1978). The district court must take a "close look" at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006).

B. <u>The Court Should Employ a Rigorous Analysis in Evaluating the Motion.</u>

The court must employ a rigorous analysis to verify that the Rule 23 prerequisites are met. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). This rigorous analysis is required, in part, because "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550, 180 L.Ed.2d 374, 389-390 2011 U.S. LEXIS 4567 at *18, quoting *Califano v. Yamasaki,* 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L.Ed.2d 176 (1979); accord, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998). "In order to justify a departure from that rule, 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.,* quoting *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). The purpose of Rule 23(a) is to ensure "that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Id.*

C. <u>The Six Rule 23(a) Requirements.</u>

Rule 23(a) expressly requires Plaintiffs to satisfy each of four requirements:

(1) the size of the proposed class makes joinder of its members impracticable ("numerosity requirement");

(2) common questions of law or fact exist among the proposed class members and class representatives ("commonality requirement");

(3) the class representatives' claims typify those of the proposed class members ("typicality requirement"); and

(4) the class representatives will fairly and adequately protect the interests of the class ("adequate representation requirement").

Fed R. Civ. P. 23; *see also Lienhart v. Dryvit Sys, Inc.*, 255 F.3d 138, 146 (4th Cir. 2001).

In addition to the four express requirements of Rule 23(a), there are two unwritten requirements as well: First, "Rule 23(a) requires that a precisely defined class exist and that the proposed class representatives be members of the putative class." *Beaulieu v. EQ Industrial Services*, 2009 WL 2208131 (E.D.N.C. July 22, 2009); *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976) ("Although not specifically mentioned in the rule, the definition of the class is an essential prerequisite to maintaining a class action"). Second, "[i]t is well-established that 'prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class claim.' Any analysis of class certification must begin with the issue of standing." *Prado v. Bush,* 221 F.3d 1266, 1279-80 (11th Cir. 2000) (quoting *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987)).

In summary, there are six requirements that must be satisfied: (1) a precisely defined class; (2) standing to bring each claim; (3) numerosity; (4) commonality; (5) typicality; and (6) adequate representation. As explained below, Plaintiffs fail to carry their burden of proof as to five of the six requirements, and therefore the Motion should be denied.

D. Plaintiffs' Proposed Class Definition is Unclear.

The first step which should be undertaken by the Court is to understand and determine the definition and scope of the proposed class. Unfortunately, Plaintiffs' proposed class definition and Plaintiffs' prayer for relief leave a rather muddled picture of who would be a member of the proposed class.

In the Motion and the Memorandum in Support, the proposed class definition is stated as:

> All current or future enrollees in the N.C. Innovations Waiver, as it is currently or subsequently named, whose Medicaid services have been or will be denied, reduced, or terminated by [Defendants] through the implementation of the Support Intensities Scale or Supports Needs Matrix.

[D.E. 35, p. 1]

Only 151 out of 675 enrollees in the Innovations Waiver program had their total allocated funding reduced after implementation of the Support Needs Matrix, although there was no denial, reduction or termination of those enrollees' services. Thus, the proposed class could be seen as comprising perhaps 151 persons. However, the proposed class is not made up solely of persons who were impacted in the past; Plaintiffs include in their proposed class definition all persons whom they allege "will be" negatively affected. Under one theory, the definition could encompass all 675 present enrollees in the Innovations Waiver program, since any one of them has the potential to have their funding reduced, or their benefits "denied, reduced, or terminated" in the unknown near or distant future, depending on changes in their particular needs, reductions in program funding, or other similar reasons. On the other hand, predicting which future enrollees' services "will be" affected as described is impossible to define. Therefore, it is unclear whether the proposed class is comprised of 675 individuals or 151 individuals.

In addition to considering the proposed class definition, the Court should also closely scrutinize the relief prayed for in the Complaint in order to determine whether the class is sufficient to encompass all those who would be affected by the proposed relief. Plaintiffs' requested relief creates a similar lack of clarity on who is intended to be within the proposed class.

Among the relief sought by the named Plaintiffs, and therefore by the class if it were approved, is "requiring Defendants to prospectively reinstate services that have been denied, reduced, or terminated to plaintiffs and class members whose services are reduced, denied, or terminated by reason of the Supports Needs Matrix system until the violation [*sic*] of law alleged herein are corrected." Compl. [D.E. 6] p. 30, ¶ 3]. Plaintiffs argue in their class certification memorandum that "[e]ach class representative wants all class members to . . . have their previously authorized and Medicaid-covered services reinstated to pre-July 2011 levels pending Defendants' compliance with the due process requirements." [D.E. 35, p. 16].

Given this language, it appears that the proposed class of Plaintiffs seeks one of the following types of relief for the class:

1. They seek an order requiring that all enrollees whose funding was reduced (approximately 151 persons) be "reinstated" to the level of funding they received prior to July 1, 2011; or
2. They seek an order requiring that all 675 enrollees in the Innovations program be "reinstated" to the level of funding they received prior to July 1, 2011.

These are two different avenues of relief, each of which carries with it a different class definition and scope. If the Plaintiffs seek option one, then the "class" would be comprised solely of enrollees whose funding was reduced; however, if they seek option two, then the

"class" would be comprised of all enrollees, including those whose funding increased due to the Support Needs Matrix transition.

However, regardless of which option defines Plaintiffs' actual proposed class, Plaintiffs run into substantial problems, which arise as a result of the finite pool of funds available for services under the Innovations Waiver program. Under option one, an order requiring any increase in funding to proposed class members who had their funding reduced could not be implemented by PBH without one of the following: either (a) corresponding language in the order reducing funding to non-class members, which raises serious problems with the order's impact on non-party, non-represented individuals; or (b) a unilateral decision by PBH to reduce funding to non-class members in order to free up the funds that would be necessary to comply with such an order, which in turn would likely engender appeals by the affected non-class members, repeating and compounding the issue.

Under option two, an order requiring an increase in funding to class members who had their funding reduced could be implemented, but only by taking money from the class members who received equal allocations or increased allocations. This creates a direct intra-class conflict between proposed class members. Moreover, as discussed in Section F. *infra.*, there is no proposed class representative who represents the interests of those persons whose funding levels remained the same or increased on July 1, 2011.

PBH has a set pool of funds which it has allocated among Innovations enrollees using a reasonable method, which has been approved by the Department and by CMS. The Plaintiffs seek a bigger share of the pie, which can only come at the expense of other enrollees, whether they are within the class or not. For these reasons, the proposed class is both poorly defined and either (1) is insufficient to bind the necessarily-affected non-class members, or (2) is composed

of class members with directly adverse interests. Therefore, the class should not be certified as proposed and the Motion should be denied.

E. Plaintiffs Lack Standing to Bring Their Claims.

The second requirement which Plaintiffs must prove in order to obtain class certification is that there is at least one proposed class representative who has standing to bring each claim in this matter. Independent of the class definition issues discussed above, the Motion should be denied due to the lack of standing of the proposed class representatives to bring the asserted claims. It is only "after the court determines the issues for which the named plaintiffs have standing [that] it should address the question whether the named plaintiffs have representative capacity, as defined by *Rule 23(a)*, to assert the rights of others." *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987), *cert denied*, 486 U.S. 1005, 108 S.Ct. 1729, 100 L.Ed.2d 193 (1988). Making the standing determination requires two inquiries: (1) do Plaintiffs allege violations of federal rights such that there is a "legally protected interest" sufficient to support standing, and (2) is at least one member of the class among the injured with respect to the claims made by members of that class? "[E]ach claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Prado v. Bush,* 221 F.3d 1266, 1280 (11th Cir. 2000).

Where the Court determines that the claim asserted is not cognizable, no class plaintiff has standing to raise the claim and no class should be certified as to that claim. *See*, *e.g.*, *Susan J. v. Riley*, 254 F.R.D. 439 (M.D. Ala. 2008) (finding lack of standing to raise a Fourteenth Amendment substantive due process claim where the court could not "locate, in case law or elsewhere, support for the proposition" underlying Plaintiffs' claim.) With respect to Plaintiffs' lack of standing on each of their three claims, the PBH Defendants incorporate herein by

reference the arguments contained in their Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction [D.E. 104, § III], which explain why each of Plaintiffs' three claims fails to state a valid cause of action and, therefore, Plaintiffs lack standing to bring such claims.

In addition, the claims of each of the named class members are moot. As explained in PBH Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction [D.E. 104, pp. 24-26], K.C., L.S., and Allison Taylor Johns each had their previous authorizations expire in the last six months of 2011, which mooted their claims in this case.

Further, D.C. and M.S. are each receiving increases in their budgets as a result of category changes arising out of a more recent SIS evaluation and Support Needs Matrix analysis. Effective March 31, 2012, D.C. is going from a Category A to a Category E, which results in a change in budget from $18,799.60 to $45,506.80. Covert Decl. [D.E. 106 at ¶ 30.] While this is less than his previous budget referenced in the Support Needs Matrix letter which formed the basis of his original complaint, $47,588.52, it is a difference of less than $3,000.00 dollars. *Id.* at ¶ 31. Also effective March 31, 2012, M.S. is going from a Category B to a Category G, a change from $25,476.40 to $76,665.20. *Id.* at ¶ 46. This amount is substantially greater than M.S.'s pre-Support Needs Matrix budget, which was $51,679.44, and his previous cost of services in 2010, which was $62,881.32. *Id.* at ¶ 47. Thus, M.S. will soon be receiving funds in excess of any which he has previously requested or received. These changes moot the claims of D.C. and M.S., such that they lack standing to bring their claims, both individually and as class representatives in this matter.

Because each of the named plaintiffs' claims are now moot, there is no named plaintiff who can represent the purported class. *See Clay v. Miller*, 626 F.2d 345 (4th Cir. 1980) (prayer

for injunctive relief against county jail mooted when prisoner was released; plaintiff was not a member of the class he purported to represent at the time class certification was denied).

F. Three of the Four Express Requirements of Rule 23(a) Are Not Met.

While the numerosity requirement of Rule 23(a) appears to be satisfied (whether the class is 151 persons or 675 persons), Plaintiffs are unable to show that they meet the final three requirements: typicality, commonality, and adequate class representation. These three requirements can be considered together, since:

> [t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13 (1982); *accord*, *Lienhart v. Dryvit Sys.,* 255 F.3d 138, 147 (4th Cir. 2001), citing *Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F.3d 331, 337 (4th Cir. 1998). As shown in the following discussion, the commonality and typicality arguments in this case are intertwined with the adequacy of representation by class representatives and counsel, and lead to the conclusion that the class should not be certified.

The typicality requirement mandates inquiry into whether the named Plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *Falcon* at 157, n. 13. Given the nature of the intra-class conflict between Innovations enrollees who received equal or greater funding as of July 1, 2011, versus those who received reduced funding as of July 1, 2011, and the fact that the named

Plaintiffs are limited solely to those who received reduced funding as of July 1, 2011, it is apparent that the named Plaintiffs' claims are not typical of those of the entire class.

For the same reason, the named Plaintiffs cannot adequately protect the interests of all class members. The adequacy of the Plaintiffs as putative class representatives is an essential element of Rule 23 certification. As the Fifth Circuit explained in *Berger v. Compaq Computer Corp.*, 257 F.3d 475 (5th Cir. 2001):

> The determination of whether the proposed representative will fairly and adequately protect the interests of the class is a matter of utmost importance and not one which can be made on presumptions. The decision on class representation is of such significance because it implicates the due process rights of all members who will be bound by the judgment.

Id. at 480 n.8, 481.

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Id. at* 157-158, n. 13, 72 L.Ed.2d 740, 102 S.Ct. 2364. "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). *Accord*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-626 (1997). Within this analysis, Plaintiffs have the burden to prove that they (1) possess the same interest as all class members; and (2) suffered the same injury as all class members. *East Tex. Motor Freight* at 403.

Neither of these showings can be made by the named Plaintiffs, assuming that the class is defined as all enrollees within Innovations. Each of the named Plaintiffs, who are also the proposed class representatives, are individuals whose July 1, 2011 authorizations were for lower dollar amounts than their respective prior authorizations. Those Plaintiffs seek an order from

this Court requiring that "their previously authorized and Medicaid-covered services [be] reinstated to pre-July 2011 levels pending Defendants' compliance with the due process requirements." [D.E. 35, p. 16; *accord,* D.E. 6, p. 30].

As explained above, the named Plaintiffs do not have the same interest as all proposed class members. The named Plaintiffs want their pre-July 1, 2011 authorizations reinstated. The approximately 513 members of the proposed class who received or will be receiving equal or greater funding under the Support Needs Matrix compared with their prior budgets presumably would not want their pre-July 1, 2011 authorizations reinstated because they would receive fewer funds *and* would have significantly reduced flexibility in spending those funds as compared to the current program. For the same reasons, it is obvious that the named Plaintiffs have not suffered the same alleged "injury" as the class members whose authorizations were equal or greater as of July 1, 2011.

As noted above at p. 19, the claims of D.C. and M.S. are moot due to the increased funding they will soon be receiving. However, even if the Court were to determine that these increases in funding did not moot the claims of D.C. and M.S., the funding increases create a substantial conflict between D.C. and M.S., on the one hand, and the remaining named Plaintiffs. If the Plaintiffs obtain the relief they seek in the complaint, the funding allocated to D.C. and M.S. would have to be reduced in order to free up funds for the other named plaintiffs (not to mention other potential class members). This conflict is at the core of Plaintiffs' case and, in particular, substantially impacts the typicality, commonality, and adequate representation prongs of the Rule 23(a) test discussed herein.

If the Court were to grant the requested relief, the funds necessary to do so would have to be taken from other enrollees in Innovations. This is a problem endemic to the nature of

Plaintiffs' claim for reinstatement of expired authorizations, and presents either (a) an irreconcilable internal conflict to this proposed class, or (b) a conflict between the proposed class and unrepresented non-class members. For these reasons, the named Plaintiffs hold interests which are actually or potentially antagonistic to other members of the class. *Accord*, *General Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 331, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees. . . . Under Rule 23, the same plaintiff could not represent these classes.")

When addressing class certification for a limited fund arising in a mass tort context, the Supreme Court reminded:

> As we said in Amchem, "for the currently injured, the critical goal is generous immediate payments," but "that goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." No such procedure was employed here, and the conflict was as contrary to the equitable obligation entailed by the limited fund rationale as it was to the requirements of structural protection applicable to all class actions under Rule 23(a)(4).

Ortiz v. Fibreboard Corp., 527 U.S. 815, 856-857 (1999) (internal citations omitted). Accordingly, Plaintiffs' motion for class certification fails to prove that the proposed class representatives meet this requirement of Rule 23(a)(4) and should therefore be denied.

G. Three Class Counsel Have Conflicts of Interest Which Would Impact Their Ability to Represent the Proposed Class.

The adequate representation requirement also necessitates analysis of the adequacy of proposed class counsel. Three of the proposed Plaintiffs' class counsel have a significant conflict of interest which would affect their ability to represent the interests of the proposed

class. Presently pending in the Middle District of North Carolina is the case of *Clinton L., et al. v. Cansler, et al.*, 1:10-cv-123-JAB. John Rittelmeyer and Jennifer Bills of Disability Rights North Carolina ("DRNC"), counsel in the present matter and proposed class counsel, are also counsel of record for the six plaintiffs in the *Clinton L.* case.

Five of the six plaintiffs in the *Clinton L.* case are current members of the Innovations Waiver (*i.e.* they are among the 675 persons whose services are governed by the Support Needs Matrix utilization management criteria). Four plaintiffs in the *Clinton L.* case whose services are governed by the Support Needs Matrix did not receive a reduction of their Innovations funding as of July 1, 2011. In fact, the lead plaintiff, Clinton L., received an increase in his Innovations budget of approximately $46,000 as a result of the implementation of the Support Needs Matrix. Covert Decl. [D.E. 106 at ¶ 58.] Other named plaintiffs in the *Clinton L.* case, Timothy B., Steven C., and Jason A., either received small increases in their budgets or their budgets remained the same as of July 1, 2011. *Id.* at ¶ 59.

In the present case, Mr. Rittelmeyer andd Ms. Bills, and their colleague at DRNC, Morris F. McAdoo, seek to represent a class consisting of enrollees in the Innovations program. Five of the members of that class would be persons who are presently represented on an individual basis by Mr. Rittelmeyer and Ms. Bills and DRNC in the *Clinton L.* case. The relief sought on behalf of the proposed class in the present case would likely have, for the reasons explained above, a direct negative effect on the funding available to four of those individuals. In particular, Clinton L., Timothy B., Steven C., and Jason A. would each be at significant risk of receiving *reduced* funding in the Innovations program if the proposed class relief were granted in a manner permitting Vernon W. (and others) to receive an increase in their funding. In short, Vernon W.'s interest in "hav[ing] [his] previously authorized and Medicaid-covered services reinstated to pre-

July 2011 levels pending Defendants' compliance with the due process requirements" [D.E. 35, p. 16], places his interests in direct conflict with the interests of Clinton L., Timothy B., Steven C., and Jason A. in maintaining their present levels of funding under the Support Needs Matrix system.

Moreover, Rule 1.7 of the North Carolina Rules of Professional Conduct expressly prohibits an attorney from representing a client "if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer." Mr. Rittelmeyer, Ms. Bills, and Mr. McAdoo seek, in this case, to obtain relief which would be directly adverse to four of their Plaintiff-clients in the *Clinton L.* case. For this reason, Mr. Rittelmeyer, Ms. Bills, and Mr. McAdoo should not be approved as class counsel in this matter.

CONCLUSION

Plaintiffs have failed to meet their burden to prove to this Court that certification of a class is appropriate in this matter. First, Plaintiffs' Complaint, Motion and Memorandum fail to identify a precisely defined class. Second, the named Plaintiffs lack standing to raise each class claim and those claims have become or shortly will become moot. Third, the proposed class representatives' claims are not typical of all proposed class members and they have interests antagonistic to other members of the class and, in addition, three of the proposed class counsel have an actual or potential conflict of interest due to representation of certain proposed class members in other litigation. For these reasons, the PBH Defendants respectfully request that the Court deny Plaintiffs' Motion for Class Certification.

Respectfully submitted, this the 1st day of February, 2012.

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By: */s/ Reed J. Hollander*

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CERTIFICATE OF SERVICE

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants Shipman and PBH do hereby certify that on February 1, 2012, I electronically filed the foregoing DEFENDANTS PAMELA L. SHIPMAN AND PBH'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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