

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

REBECCA FRENCH, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 97-24-B-C
)	
KEVIN CONCANNON, Commissioner,)	
Maine Department of Human Services,)	
)	
Defendant)	

RECOMMENDED DECISION ON
MOTION FOR CERTIFICATION OF PLAINTIFF CLASS

In this action seeking declaratory and injunctive relief, the plaintiffs allege that certain policies and practices of the Maine Department of Human Services (“DHS”) result in an illegal deprivation of home-based services to children with mental impairments who are eligible for benefits under the federal Medicaid program. Now before the court is the plaintiffs’ motion for certification of the following class:

All current or future recipients of Medicaid in the State of Maine who are under age twenty-one, have a mental impairment and for whom it is medically necessary to receive home based mental health services to correct or ameliorate defects and mental illnesses but who[] are unable to obtain such services due to the policies and practices of the Defendant.

Second Amended Complaint (Docket No. 18) ¶ 16; Amended Motion for Certification of Plaintiffs’ Class (Docket No. 19).

There are four basic prerequisites to maintaining a class action. The court must determine that

(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). Additionally, the court must be satisfied that the lawsuit meets one of the criteria set forth in Fed. R. Civ. P. 23(b):

(1) [T]he prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) 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; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b). The plaintiffs bear the burden of establishing their right to maintain a class action pursuant to these requirements. *Curtis v. Commissioner, Maine Dept. of Human Servs.*, 159 F.R.D. 339, 340 (D.Me. 1994).

In support of their motion, the plaintiffs initially relied on the allegations in their Second Amended Complaint and on an affidavit of Jack Comart (“Comart Aff.”) (Docket No. 21), the attorney who filed the original complaint in this matter but who was subsequently granted leave to

withdraw his appearance.¹ On July 14, 1997, following the end of the discovery period specified in the court's scheduling order, I ruled that the plaintiffs could conduct two additional depositions relevant to the issue of class certification, and I gave both the plaintiffs and the defendant an opportunity to supplement the record to be considered by the court in connection with the Rule 23 motion. Report of Hearing and Order Re: Discovery Dispute (Docket No. 27) at 2.² The plaintiffs have therefore submitted two deposition transcripts and four additional affidavits, which the parties discuss in the plaintiff's reply memorandum and the defendant's surreply, respectively, consistent with the July 14 order.

I. Numerosity

The plaintiffs originally estimated the putative class to number approximately 500. Memorandum in Support of Plaintiffs' Amended Motion for Class Certification (Docket No. 20) at 2-3 (citing Comart Aff. at ¶¶ 5-6). They now contend this estimate is, if anything, a conservative one in light of the evidence adduced subsequent to July 14. Specifically, they rely on the deposition testimony of Larry Sexton, a children's mental health program coordinator with the Maine

¹ The defendant moves to strike the Comart Affidavit on the grounds that it contains evidence that would be inadmissible at trial because it is hearsay, improper opinion and information gleaned during settlement negotiations. Although those contentions might justify such a motion in another context, *see, e.g.*, Fed. R. Civ. P. 56(e) (requiring affidavits cited in summary judgment proceedings to set forth "such facts as would be admissible in evidence"), I am not aware of any such requirement under Rule 23. *Cf. Ardrey v. Federal Kemper Ins. Co.*, 142 F.R.D. 105, 112 and n.12 (E.D.Pa. 1992) (characterizing as unpersuasive and unreliable affidavit opposing class certification and containing hearsay). The motion to strike is therefore denied.

² Notwithstanding the plain language of this order, the defendant contends the court should not consider the additional affidavits submitted by the plaintiff in light of their alleged failure to reply to any of the positions originally stated by the defendant in opposition to the certification motion. In the circumstances, the affidavits are properly before the court.

Department of Mental Health, Mental Retardation and Substance Abuse Services.³ Sexton testified that in the region he covers — consisting of three of Maine’s 16 counties — there is a waiting list of approximately 600 children who are in need of home-based mental health services, and that roughly three-quarters of them are Medicaid-eligible. Deposition of Larry C. Sexton (“Sexton Dep.”) at 4, 10. Sexton testified to “similar” problems in other regions of the state. *Id.* at 19. The defendant responds by pointing to the plaintiffs’ failure to establish that any of the children mentioned by Sexton are on a waiting list because of the challenged policies and practices of DHS. Such a nexus obviously goes to the heart of the plaintiff’s case, but is relevant to issues other than numerosity. The existence of at least 450 potential plaintiffs — indeed, the reasonable likelihood that the number is well beyond 500 — makes joinder of all affected persons impracticable and thus the numerosity requirement is met. *Curtis*, 159 F.R.D. at 340-41.

II. Commonality

The Rule 23(a) requirement of commonality means that some, but not necessarily all, of the issues of law or fact raised by the litigation must be common to all class members. *Id.* at 341. “Varying fact patterns may underlie individual claims as long as a common pattern of unlawful conduct by the defendant is directed at class members.” *Id.* The plaintiffs therefore acknowledge that each class member has a different treatment plan and set of medical needs, but maintain that the common legal and/or factual issue is the failure of the defendant to provide *any* home-based services to class members as allegedly required by federal law. This is sufficient to meet the commonality

³ The Department of Mental Health, Mental Retardation and Substance Abuse Services provides certain Medicaid case management services to DHS by contract. Comart Aff. at ¶ 5; Affidavit of Garvin Golding (Docket No. 30) at ¶ 4.

requirement.

III. Typicality

Rule 23(a) also requires the plaintiffs to establish that their claims or defenses are typical of those of the class they seek to represent. According to the complaint, all named plaintiffs are eligible for the Medicaid program's "early and periodic screening, diagnostic, and treatment services" ("EPSDT") as set forth under 42 U.S.C. § 1396d(r). Second Amended Complaint at ¶ 23. DHS provides these services under its Preventive Health Program ("PHP"). *Id.* at ¶¶ 25, 34; Affidavit of Audrey Savoie (Docket No. 10) at ¶ 3. The defendant contends that the requisite typicality is missing because there is no allegation that any of the named plaintiffs has been refused services by the PHP or "is currently suffering through an untimely delay." Defendant's Memorandum of Law in Opposition to Plaintiffs' Amended Motion for Class Certification (Docket No. 25) at 6. The plaintiffs' response is that lack of refusal by the PHP program is not the issue. The plaintiffs aver that the wrong they allege and that is common to class members is a failure by DHS to inform eligible children that they are entitled to home-based services and then actually to provide those services. *See* Second Amended Complaint at ¶ 25 (alleging statutory obligation "to correct, or ameliorate defects and physical and mental illnesses and conditions discovered by screening services whether or not such services are covered under the State plan") (emphasis omitted). While the scope and practices of the PHP program are obviously relevant to the issues in this litigation, I agree with the plaintiffs that typicality is not necessarily missing simply because they do not allege they have been refused services by this program. Paragraph 28 of the Second Amended Complaint sets forth eleven discrete policies and practices the plaintiffs seek to challenge on behalf of the class as

preventing them and others similarly situated from gaining access to home-based treatment. None turns on whether a particular plaintiff has or has not been refused services by the PHP program. The defendant does not contend, and there is no reasonable basis for concluding, that the named plaintiffs and all other members of the putative class are subject to whatever policies and practices the Amended Complaint actually challenges. In these circumstances the requirement of typicality is satisfied. *Curtis*, 159 F.R.D. at 341.

IV. Adequacy of Representation

The next requirement involves adequacy of representation, and requires the court to determine whether the class representatives have any conflicts of interest as to the common issues raised and whether the plaintiffs' counsel will vigorously prosecute the litigation. *Id.* (citations omitted). The defendant does not allege, and I am not aware of any sense in which, the interests of the named plaintiffs conflict with those of the putative class as to the issues raised in the Second Amended Complaint. Further, counsel for the plaintiffs has considerable experience in litigating class actions that raise issues involving federally-mandated services provided by agencies of state government. This is sufficient to meet the requirement that the plaintiffs adequately represent the putative class. *Id.*

V. The Rule 23(b) Factors

Concerning the requirement that the class certification be justified by one of the factors enumerated in Rule 23(b), the plaintiffs rely on the second criterion, requiring a determination that “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.” Fed. R. Civ. P. 23(b)(2). Although the defendant does not specifically address the contention that the case is appropriate for class certification under Rule 23(b)(2), he does take the position that class certification is unnecessary because granting the requested relief to the individually-named plaintiffs would automatically inure to the benefit of the putative class.

Notwithstanding the authorities cited by the defendant from district courts in other circuits, it would appear that this is precisely the sort of action contemplated by Rule 23(b)(2). *See Griffin v. Burns*, 570 F.2d 1065, 1073-74 (1st Cir. 1978) (noting that “acted . . . on grounds generally applicable to the class” language in Rule 23(b)(2) means such class actions “may be more rough-hewn than those in which the court is asked to award damages”); *Curtis*, 159 F.R.D. at 341 (“Cases seeking declaratory or injunctive relief regarding government benefits are particularly appropriate for class certification.”); *Bond v. Stanton*, 372 F. Supp. 872, 875 (N.D.Ind.) (certifying class under Rule 23(b)(2) in action challenging state failure to implement EPSDT program), *aff’d on other grounds*, 504 F.2d 1246 (7th Cir. 1974); 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (1986) § 1775 at 470 (“If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).”). The defendant further maintains that certification of the class proposed by the plaintiffs is inappropriate because the court would have to inquire into the circumstances of each member. As I read the Second Amended Complaint, no such inquiry would be necessary because the plaintiffs seek to challenge only general policies and practices of DHS, not any case-specific determinations. *See Griffin*, 570 F.2d at 1074 (noting that a Rule 23(b)(2) action “does not require that the district court look into the particular circumstances of each member of the class.”) (citation

and internal quotation marks omitted).⁴

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiffs' motion for class certification be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 5th day of September, 1997.

*David M. Cohen
United States Magistrate Judge*

⁴ The defendant further requests that, in the event the court allows the lawsuit to proceed as a class action, the court certify sub-classes of persons who are affected by particular policies and practices challenged in the Second Amended Complaint. Rule 23 contemplates such a possibility, and also permits the court to alter or amend its class certification as necessary before a decision on the merits. Fed. R. Civ. P. 23(c)(1) and (4). Although I am unable to conclude at present that certification of sub-classes is necessary, and therefore do not so recommend, I would not rule out such action at a later stage in the proceedings.