UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 12-60460-CIV-ROSENBAUM

A.R., by and through her next friend,
Susan Root, *et al*.,

Plaintiffs,

v.

ELIZABETH DUDEK, in her official capacity
as Secretary of the Agency for
Health Care Administration, *et al*.,

Defendants.
_____/

ORDER

This matter comes before the Court upon Plaintiffs' Motion for Class Certification. [D.E. 95]. The Court has reviewed the Motion, the filings supporting and opposing the Motion, and the other materials in the case file. The Court has also heard from counsel for the parties during a hearing held on September 13, 2013.

BACKGROUND

In *Olmstead v. L.C. ex rel. Zimring*, the Supreme Court concluded that under Title II of the Americans With Disabilities Act ("ADA"), states must place individuals with mental disabilities in community settings rather than in institutions when a determination has been made that community placement is appropriate, the transfer from an institution to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated. 527 U.S. 581, 582 (1999). The principle underlying *Olmstead*'s holding is its recognition that unnecessary isolation and segregation of individuals with disabilities constitutes discrimination under the ADA. In this case, Plaintiffs allege that the State of Florida has a history of unnecessarily segregating medically

fragile and complex children in institutions, thus, discriminating against these children on the basis of their disabilities.

Plaintiffs T.H., L.J., A.G., A.C., A.R., C.V., M.D., C.M., and B.M.[1] are children who have been diagnosed as "medically fragile" and who qualify for services through Florida's Medicaid program. Plaintiffs T.H., L.J., and A.G. are children who have been placed in nursing facilities, while Plaintiffs A.C., A.R., C.V., M.D., C.M., and B.M. are children who live at home and claim that they are at risk of unnecessary institutionalization at nursing facilities. *See* D.E. 62 at ¶¶ 4, 14.

Plaintiffs filed this class-action lawsuit against Defendants Elizabeth Dudek ("Dudek"), in her official capacity as Secretary for the Agency for Health Care Administration ("AHCA"); Harry Frank Farmer, Jr. ("Farmer"), in his official capacity as the State Surgeon General and Secretary of the Florida Department of Health ("FDOH"); Kristina Wiggins ("Wiggins"), in her official capacity as Deputy Secretary of the FDOH and Director of Children's Medical Services ("CMS"); and eQHealth Solutions, Inc. ("eQHealth"). On August 23, 2013, Plaintiffs filed their Second Amended Complaint, which is the operative pleading in this case.

The Second Amended Complaint alleges that Defendants are denying Plaintiffs Medicaid services, including private-duty nursing services, due to the adoption of "uniform policies, practices, and regulations to reduce private duty nursing services." *See* D.E. 62 at ¶¶ 18-19. As a result, Plaintiffs complain, children who, if they received all private-duty nursing to which they claim entitlement, could remain in community settings, are unnecessarily being institutionalized. Plaintiffs further contend that Defendants "failed and continue to fail to provide medically necessary services in home and community settings to Medicaid recipient children in Florida." *Id.* at ¶ 20. Based on these allegations, Plaintiffs ask the Court to declare that Defendants' policies, regulations, actions,

[1]Plaintiff T.F. passed away on April 6, 2013. *See* D.E. 147.

and omissions are unnecessarily institutionalizing Plaintiffs and Plaintiff class members or putting Plaintiffs at risk of being placed into segregated facilities, in violation of Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131-12165; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Medicaid Act, 42 U.S.C. §§ 1396-1396v; The Nursing Home Reform Amendments to the Medicaid Act, 42 U.S.C. § 1396r; Early and Periodic Screening, Diagnostic, and Treatment Services, 42 U.S.C. § 1396d(r); and 42 U.S.C. § 1983. *Id*. at 21. Plaintiffs also seek a permanent injunction requiring Defendants to "stop segregating medically fragile and medically complex children in nursing facilities and to provide [Plaintiffs] medically necessary Medicaid services in the most integrated setting appropriate in the community and provide for their medically necessary services and to provide such services in the most integrated setting appropriate." *Id.* at ¶ 22.

Specifically, Plaintiffs allege that Defendants are discriminating against them by engaging in the following activities:

a. Segregating or placing Plaintiffs and Plaintiff class members at risk of segregation and by failing to provide Plaintiffs and Plaintiff class members with appropriate community based services;

b. Denying Plaintiffs and Plaintiff Class members medically necessary services resulting in Plaintiffs and Plaintiff Class members' institutionalization or risk of institutionalization;

c. Denying Plaintiffs and Plaintiff class members access to existing community programs and requiring them to be confined in or to be at risk of being confined in segregated institutional settings in order to receive the care they require;

d. Administering the PASRR program in such a way that the institutionalized Plaintiffs and members of the institutionalized sub-class have been inappropriately admitted to nursing facilities; and

e. Administering the PASRR program in such a way that the institutionalized Plaintiffs and members of the institutionalized sub-

> class are not provided the necessary specialized services to which they are entitled while residing in nursing facilities.

D.E. 62 at 41-43.

Further, Plaintiffs contend that AHCA's definition of "medical necessity" (*i.e.*, Rule 59G-1.010(166)) is preempted by federal law and is invalid under the Supremacy Clause of the United States Constitution. D.E. 62 at ¶ 321.

MOTION FOR CLASS CERTIFICATION

In the Motion for Class Certification, Plaintiffs ask the Court to certify the following class:

> All current and future Medicaid recipients in Florida under the age of 21, who are (1) institutionalized in nursing facilities, or (2) medically complex or fragile and at risk of institutionalization in nursing facilities.

See D.E. 95 at 1. According to Plaintiffs, the proposed class consists of approximately 3,338 children with severe disabilities who are either currently living in nursing facilities or are at risk of being placed in nursing facilities due to the threatened denial or reduction of medical and nursing services. Consequently, the proposed class consists of two sub-classes — the institutionalized sub-class and the at-risk sub-class.

According to Plaintiffs, common to all of the claims set forth in the Complaint are allegations that Defendants routinely deny or reduce community-based medically necessary services to Plaintiffs, and that, as a result, Plaintiffs and Plaintiff class members are unnecessarily institutionalized and are at risk of institutionalization in nursing facilities. In this regard, Plaintiffs allege a systemic problem with the manner in which the State of Florida makes decisions about the provision of community-based programs to medically fragile and medically complex children.

Defendants respond that class certification is not appropriate in this matter because, despite Plaintiffs' contention that they are not seeking individualized relief, the allegations in the Complaint reveal that Plaintiffs are attacking individual medical-necessity decisions as they are applied to each Plaintiff. Because Defendants claim that the case requires individualized factual determinations to ascertain who is "at risk" of institutionalization, Defendants contend that class certification is not appropriate. Put simply, Defendants argue that Plaintiffs do not challenge policies of the State, but rather, the individualized executions of those policies as they apply to medically fragile and medically complex children.

Consequently, this case presents the issue of whether children are unnecessarily denied community-based services because of a policy or systemic practice on Defendants' part or because, in isolated cases, Defendants make errors in executing legal policies and practices. If a systemic problem exists, the case may be appropriately handled as a class action. If, however, the case involves a problem with the individualized application of the challenged policies in a handful of cases, class certification may not be appropriate. At this juncture, however, the record is not sufficiently developed for the Court to be able to discern what may be the case. Accordingly, Plaintiffs' Motion for Class Certification must be denied at this time.

Under the circumstances, however, Plaintiffs shall have the opportunity to conduct discovery in furtherance of their claim that class certification is appropriate in this case and to renew their motion for class certification at the end of that period, should they desire to do so. Discovery is appropriate because Plaintiffs, as the parties moving for class certification, bear the burden of establishing each element of Federal Rule of Civil Procedure 23(a), commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 2548 (2011). And, although a district court is not to determine

the merits of a case at the certification stage, sometimes "'it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'" *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309 (11th Cir. 2008) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982)). Due to the parties' drastically diverging theories in this case, some discovery may be helpful in resolving the class-certification issue.

Accordingly, Plaintiffs shall have an opportunity to conduct discovery that bears on the class-certification issue. Significantly, during the September 13, 2013, hearing on this matter, when questioned by the Court, counsel for the State Defendants advised that he was not necessarily opposed to discovery.[2] Consequently, Plaintiffs shall have seventy-five (75) days to conduct discovery that bears of the class certification issue. At the end of that period, Plaintiffs may, if they so choose, re-file their Motion for Class Certification. For that purpose, Plaintiffs shall have a total of ninety (90) days from the date of this Order to re-file their motion for class certification.

CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Class Certification [D.E. 95] is **DENIED WITHOUT PREJUDICE** to re-file within the next ninety days. During the next seventy-five days, Plaintiffs shall be permitted to conduct discovery bearing on the class-certification issue.

DONE and **ORDERED** at Fort Lauderdale, Florida this 25th day of September 2013.

ROBIN S. ROSENBAUM
UNITED STATES DISTRICT JUDGE

cc: counsel of record

[2]In *Kenneth R. v. Hassan*, 2013 U.S. Dist. LEXIS 132648 (D.N.H. 2013), a cited by Plaintiffs in their recently filed Notice of Additional Authority [D.E. 189], the Court denied without prejudice the plaintiffs' first motion for class certification and allowed discovery on the certification issue. The plaintiffs then re-filed their motion for class certification.