Page 1 of 3

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

BENJAMIN ALEXANDER et al.,

Plaintiffs,

v. CASE NO. 4:18cv569-RH-MJF

MARY MAYHEW et al.,

Defendants.

_______________________________/

**ORDER DENYING CLASS CERTIFICATION**

The plaintiffs in this proposed class action are adults with physical disabilities or limitations. They need services that could be provided in a long-term-care facility—a nursing home—but they live and prefer to continue to live in the community. They allege they are eligible for home and community-based services through the State of Florida's Medicaid long-term-care waiver program. But they are on the program's waitlist; they are not currently receiving waiver services. The plaintiffs say this puts them at risk of unnecessary institutionalization, violating the state's duty under the Americans with Disabilities Act, as interpreted in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), to provide needed services in the community, when this can be done without

fundamentally altering a state's programs. The plaintiffs seek injunctive relief against the Secretaries of the Florida Agency for Health Care Administration and the Florida Department of Elder Affairs, the agencies that administer the waiver program.

The plaintiffs have moved to certify a class consisting of adult residents of Florida who live in the community, are eligible for long-term-care waiver services, and are on the waitlist. This order denies the motion.

Federal Rule of Civil Procedure 23 governs class certification. The party who moves to certify a class has the burden of establishing that the Rule 23 criteria are met. *See, e.g.*, *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009). The Rule 23(a) criteria are commonly referred to as "numerosity, commonality, typicality, and adequacy of representation." *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1190 (11th Cir. 2009) (*quoting Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1187-88 (11th Cir. 2003)). The criteria were applied in a Florida Medicaid waiver case in *Long v. Benson*, 4:08cv26-RH/WCS (Oct. 14, 2008).

The plaintiffs' motion has a fatal flaw that permeates several of the 23(a) criteria, making it unnecessary to go further in the analysis.

There is an irreconcilable conflict within the class. The waitlist does not operate on the principle of first-come-first-served. Instead, the State applies a

methodology intended to move the most critical cases to the front of the line. One of the named plaintiffs' claims is that the methodology is flawed—that some individuals, including the named plaintiffs, are farther down the list than they should be.

Ranking is a zero-sum game. If the named plaintiffs move up, someone else must move down. The ones who would move down cannot adequately be represented by the named plaintiffs. The named plaintiffs' claims are not typical of the claims of those who would move down. And this, together with other analysis, calls into question numerosity; there are more than 54,000 individuals on the waitlist, but the record does not show how many would benefit from the named plaintiffs' proposed changes to the ranking methodology, how many are at risk of institutionalization, or even how many are eligible for waiver services. *See, e.g.*, *Vega*, 564 F.3d at 1267-68 (holding that numerosity cannot be established by unsupported assumptions).

IT IS ORDERED:

The class-certification motion, ECF No. 28, is denied.

SO ORDERED on October 27, 2019.

s/Robert L. Hinkle
United States District Judge