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.

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ORDER DENYING THE SECOND MOTION TO CERTIFY A CLASS

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 filed a timely motion to certify a class. The order of October 27, 2019 denied the motion. At that time, the plaintiffs' claim was that the state had improperly ranked individuals—that is, proposed class members—on the wait list. Ranking is a zero-sum game. If, as the plaintiffs asserted, an injunction was in order to require the state to change the ranking system, some proposed class members would move up, but others would move down. There was an irreconcilable conflict within the proposed class.

On February 10, 2020—nearly a year after the deadline for a class-certification motion—the plaintiffs filed a second motion to certify a class. By then the plaintiffs had completely changed their theory of the case. Indeed, attempting to discern and track the plaintiffs' shifting theories has been an effort to nail jello to a wall. At a motion hearing on March 27, 2020, the plaintiffs were still unable to propose terms of an injunction complying with the Federal Rule of Civil Procedure 65(d)(1)(C) requirement to "describe in reasonable detail" the "act or acts restrained or required."

This order denies the second motion to certify a class for two reasons.

First, the motion is untimely. Fact discovery already has ended. The expert discovery deadline is approaching. The deadline to move for summary judgment is approaching. Allowing a completely reconstituted proposed class at this late date, so that the class could pursue a new theory, would prejudice the defendants.

Second, the motion fails on the merits. 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, each of which must be satisfied, 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)). In addition to the Rule 23(a) criteria, a party must satisfy at least one Rule 23(b) criterion; the one at issue here is that a defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." These criteria were applied in a Florida Medicaid waiver case in *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 WL 4571904 (N.D. Fla. Oct. 14, 2008).

Without a clearer articulation of the plaintiffs' claim and proposed relief—without knowing what an injunction would require if the proposed class claim succeeded—it is impossible to conclude that the plaintiffs have met the 23(a) or 23(b) prerequisites to class certification. As set out in a separate order that will be issued contemporaneously with this order, the plaintiffs are not entitled to an injunction requiring the defendants to obtain an increase in or to exceed the cap on the state's Medicaid long-term waiver program.

The plaintiffs may assert—whether this part of the jello that will stick is unclear—that there is room under the cap. But even if such a claim goes forward, the record does not show how much room exists under the cap or how many proposed class members might fit. Even if enough might fit to satisfy the numerosity criterion, there would be an irreconcilable conflict among proposed class members vying for a slot.

The plaintiffs also may assert—more jello—that the plaintiffs will be entitled to relief through existing programs the state operates outside the Medicaid system. But the record does not show which programs this might be or how many proposed class members might qualify. The record does not show, for any such unspecified program, whether injunctive relief might ultimately be appropriate respecting the class as a whole. Indeed, other than a fleeting reference during the

March 27 oral argument, it is not clear the plaintiffs have said they wish to receive services through any such program.

The bottom line: the plaintiffs' second motion to certify a class is both untimely and substantively unfounded.

IT IS ORDERED:

The plaintiffs' second motion to certify a class, ECF No. 101, is denied.

SO ORDERED on March 31, 2020.

s/Robert L. Hinkle
United States District Judge