UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BENJAMIN ALEXANDER, et al.,

Plaintiffs,

vs. Case No. 4:18-cv-00569-RH-MJR

MARY MAYHEW, et al.,

Defendants.
_____/

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF LAW AND EVIDENCE IN SUPPORT

Pursuant to Fed. R. Civ. P. 23(a) and (b)(2), Plaintiffs move this Court for an order certifying this case as a class action. As grounds therefor, Plaintiffs state:

1. This is a statewide class action lawsuit brought by older adults and adults with disabilities on a waitlist for Medicaid long-term care services. They bring this suit because they seek, but cannot obtain, long-term care services in their homes or in other community based settings.

2. Florida's Statewide Medicaid Managed Care Long-Term Care Program includes both nursing facility care and home and community-based services in a managed care system. Plaintiffs have sought care and treatment through the part of the program that would allow them to remain in their most

integrated setting, termed herein as the "Long-Term Care Waiver."

3. Defendants' failure to provide needed home and community based services to the Named Plaintiffs and proposed class violates the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132.

4. The proposed class consists of:

> Adult residents of Florida who are at risk of unnecessary institutionalization without home and community based long-term care services because they: (1) are residing, and wish to remain, at home or in a community residential setting; (2) qualify or would qualify if allowed to enroll in the Long-Term Care Waiver; and (3) have been placed on the Long-Term Care Waiver waitlist.

5. Numerosity: The proposed class is so numerous that joinder of all its members is impracticable. There are more than 54,000 people on the waitlist for home and community based services through the Long-Term Care Waiver.

6. Commonality: There are common questions of law or fact, as detailed below, including whether Defendants' failure to provide needed home and community based services to the Named Plaintiffs and proposed class members violates the ADA. Declaratory and injunctive relief would be common to the class.

7. Typicality: The claims of the Named Plaintiffs are typical of the

class as they are all qualified individuals with disabilities who wish to remain in the community, but who, without Medicaid long-term care services, are at risk of unnecessary institutionalization.

8. Adequate representation: The Named Plaintiffs will fairly represent and adequately protect the interests of the proposed class as a whole. The Named Plaintiffs do not have any interests antagonistic to those of other proposed class members. The relief sought by the Named Plaintiffs will inure to the benefit of members of the proposed class generally. The Named Plaintiffs are represented by counsel who are skilled and knowledgeable about civil rights litigation, disability discrimination, Medicaid law, practice and procedure in the federal courts, and the prosecution and management of class action litigation.

9. Defendants have acted or refused to act on grounds generally applicable to the proposed class, thereby making final injunctive relief appropriate with respect to the proposed class as a whole under Fed. R. Civ. P. 23(b)(2). Although the specific disabilities and needs of the proposed class members vary, they share a common need for Medicaid-funded home and community based services. A class action is superior to individual lawsuits for resolving this controversy.

WHEREFORE, Plaintiffs respectfully request that this Court certify this case as a class action pursuant to Fed. R. Civ. P. 23(b)(2), and appoint class counsel.

Certificate of Conference. Pursuant to N.D. Loc. R. 7.1(B), counsel for Plaintiffs conferred with counsel for Defendants who state they oppose the motion.

Certificate of Word Count. Pursuant to N.D. Loc. R. 7.1(F), the above motion and memorandum contain 5,800 words.

MEMORANDUM IN SUPPORT

Class certification requires that the putative class meet the four Rule 23(a) requirements of numerosity, commonality, typicality, and adequate representation, and the two Rule 23(b)(2) requirements that the Defendant "acted or refused to act on grounds equally applicable to the class," and that final relief of an injunctive nature or corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Fed. R. Civ. P. 23.

A party seeking class certification must "affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,

etc." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis in original). While the Plaintiffs bear the burden of showing that the requirements of Rule 23 have been met, "[f]or the purposes of class certification ... the Court accepts the Plaintiffs' substantive allegations as true." *In Re Carbon Dioxide Antitrust Litig.*, 149 F.R.D. 229, 232 (M.D. Fla. 1993). In addition, "[t]he Court resolves any doubt in favor of class certification." *Id.; see also Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975). Although the Rule 23 analysis will frequently "entail some overlap with the merits of the plaintiff's underlying claim," 131 S. Ct. at 2551, "the question is not whether ... plaintiffs have stated a cause of action or will prevail on the merits but rather whether the requirements of Rule 23 are met." *Eisen v. Carlyle & Jacquelin,* 417 U.S. 156, 178 (1974) (citation omitted). *See also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.") (Internal citations omitted).

A. Class Definition

The proposed class consists of:

> Adult residents of Florida who are at risk of unnecessary institutionalization without home and community based long-term care services because they: (1) are residing, and wish to remain, at home or in a community residential setting; (2) qualify or would qualify if allowed to enroll in the Long-Term Care Waiver; and (3) have been placed on the Long-Term Care Waiver waitlist.

While the Eleventh Circuit has held that in order to obtain certification in Fed. R. Civ. P. 23(b)(3) cases a class must be sufficiently definable and ascertainable, *see Carriulo v. Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016), this judicially-created requirement of ascertainability has only been applied in the context of a Rule 23(b)(3) damages class. *Braggs v. Dunn*, 137 F.R.D. 634, 671 (M.D. Ala. 2016) ("Defendants have not cited, and the court is not aware, of any cases within this circuit applying the ascertainability requirement to a Rule 23(b)(2) class, much less any binding precedent doing so."). Those circuits that have addressed this issue have concluded that ascertainability is not a prerequisite for a 23(b)(2) class. *Id.*; *Shelton v. Bledsoe*, 775 F.3d 554, 561 (3d Cir. 2015). Because of the absence of procedural safeguards such as notice and the indivisible nature of the remedy in a suit for declaratory and injunctive relief, a Rule 23(b)(2) class definition need not be as precise as that of a 23(b)(3) class. *See Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972).

Even if, however, the ascertainability factor does apply, Plaintiff's class definition is ascertainable. A class is "identifiable" when "its members can be ascertained by reference to objective criteria." *Bussey v. Macon Co. Greyhound Park, Inc.*, 562 Fed. Appx. 782, 787 (11th Cir. 2014). The proposed class members are all individuals on Defendants' waitlist for long-term care services who would qualify for these services if allowed to enroll. The assessment process by which an applicant for long-term care services is first placed on the waitlist and then evaluated for eligibility for enrollment provides objective criteria by which to identify the class. The 701S screening tool used by Defendants to prioritize an individual's placement on the waitlist collects information necessary to determine if that individual would qualify for services if allowed to enroll. (Ex. 4 ¶ 27.)

Future class members also may be included. *See, e.g. Armstead v. Coler*, 914 F.2d 1464, 1465 (11th Cir. 1990) (class included current and future residents of mental health institution). In this case, the waitlist is fluid and proposed class members will continue to be placed on it during the pendency of this litigation.

B. Numerosity

Rule 23 requires that "the class is so numerous that joinder of all

members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs need not know the exact number in the putative class, but they must "proffer some evidence of the number in the purported class or a reasonable estimate." *Leszcynski v. Allianz Ins.*, 176 F.R.D. 659, 669 (S.D. Fla. 1997). The court may then make a "common sense assumption in order to find support for numerosity." *Evans v. U.S. Pipe & Foundry*, 696 F. 2d 925, 930 (11th Cir. 1983). In this Circuit, "generally less than twenty-one is inadequate, more than forty adequate, with numbers in between varying according to other factors." *Cox v. Am. Cast Iron Pipe Co.,* 784 F.2d 1546, 1553 (11th Cir. 1986). Other factors that the Court should consider include the geographical dispersion of the putative class members, judicial economy, and the ease of identifying the members of the putative class and their addresses. *See Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 598-99 (S. D. Fla. 1991).

In December 2018, there were 54,069 people on Defendants' waitlist for long-term care services. (Ex. 1.) The waitlist is comprised of adult residents of Florida who have been screened and ranked by priority for risk of institutionalization if not provided home and community based long-term care services. Thus, the putative class is so numerous that joinder of all the members is impracticable. *See Long v. Benson*, Case No. 4:08-cv-26-RH-

WCS (N.D. Fla., Order of Oct. 14, 2008) (certifying class of approximately 8,500 Medicaid-eligible individuals residing in nursing homes who could and would live in a community setting with appropriate services) (Ex. 2); *Haymons v. Williams*, 795 F. Supp. 1511 (M.D. Fla. 1982) (certifying class of 178 Medicaid-eligible individuals residing in adult congregate living facilities to challenge due process violations in terminating home health care services).

Joinder of the putative class members also is impracticable because of class members' limited resources, physical disabilities and geographic dispersion across the state. *See Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986). Further, there is judicial economy in rendering a classwide decision on the requested injunctive and declaratory relief. *See Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 415 (5th Cir. 1998). In sum, there are tens of thousands of individuals in the putative class and all relevant factors support a finding of numerosity.

C. Commonality

Rule 23 also requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). As the Supreme Court explained, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'" and whether there is "capacity of a classwide

proceeding to generate common answers." *Wal-Mart Stores,* 131 S. Ct. at 2551, citing *General Tel. Co. of Sw. v. Falcon*, 102 S. Ct. 2364, 2370 (1982). Allegations of a "policy" or "practice" of treating the entire class unlawfully generally satisfy the commonality requirement. *Int'l Bd. of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977) (finding commonality where racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice); *see also Cooper v. Fed. Reserve*, 467 U.S. 867, 878 (1984); *Cox*, 784 F.2d at 1557-58. Where a common scheme is alleged, common questions of law or fact will exist. *See Murray v. Auslander*, 244 F.3d 807, 813 (11th Cir. 2001) (class certified to challenge State's policy of "capping" the per person amount under Florida's Medicaid Waiver for Developmental Disabilities);*see also Steward v. Janek*, 315 F.R.D. 472, 493 (W.D. Tex. 2016) (certifying class of individuals with intellectual and developmental disabilities at risk of being or actually institutionalized); *N.B. v. Hamos*, 26 F. Supp. 3d 756, 776 (N.D. Ill. 2014) (certifying class of children with mental health disorders denied Medicaid services).

In certifying a class of homeless persons, Judge Atkins stated: "It is only necessary to find at least one issue common to all class members.... The mere presence of factual differences will not defeat the maintenance of a

class action if there are common questions of law." *Pottinger v. City of Miami,* 720 F. Supp. 955, 958 (S.D. Fla. 1989) (citations omitted).

In this case, the Named Plaintiffs and putative class are all adult residents of Florida who sought Medicaid home and community based services, have been placed on a long waitlist for those services, and are at risk of unnecessary institutionalization while they wait. Common questions of fact and law for all putative class members include:

- Whether Defendants' failure to provide needed home and community based services to the Named Plaintiffs and proposed class members violates the ADA.
- Whether the Named Plaintiffs and proposed class members can access needed long-term care services outside of entry to a nursing facility.
- Whether Defendants Medicaid-funded long-term care system favors institutional services to the detriment of the Named Plaintiffs and members of the proposed class seeking home and community based services.
- Whether Defendants move people off the waitlist and into LTC Waiver services at a reasonable pace.
- Whether Named Plaintiffs and members of the proposed class remain

on the waitlist without needed services as a result of Defendants' underestimation of risk in the calculation of prioritization for services (ranking on the LTC Waiver Waitlist).

The answers to these questions raise systemic issues applicable to the Defendants' treatment of all class members. All class members are injured by the Florida Medicaid program's overreliance on nursing facility services, and underutilization of home and community based services. According to H. Stephen Kaye, a national expert on long-term care systems (Ex. 3 ¶¶ 1-5), "the primary problem is that the Florida Medicaid program provides home and community-based services through a capped-enrollment program, enrollment is capped at an unreasonably low number resulting in a wait for services often lasting several years, the program does not adequately account for the risk of institutionalization, and no comparable services are available through any other program offered by the State." (Ex. 3 ¶ 21.) He further declares that: "Florida's Medicaid program spends more than 4 times as much on nursing home care as it does on providing home and community-based services to seniors and other adults with physical disabilities." (Ex. 3 ¶ 21.)

Class members also are injured by the inadequacies of the screening process used by the Florida Medicaid program. Dr. Amber Willink has studied

risk factors for nursing facility entry. (Ex. 4 ¶¶ 1, 3.) She has examined Florida's screening process for prioritization on the Long Term Care Waiver Waitlist and found that the priority scoring system underestimates a person's risk of nursing facility placement, because the scoring system focuses on "frailty." Under Florida's rubric, receiving a priority score ranking of 5 reflects the most frail, and a rank of 1 reflects the least frail. (Ex. 4 ¶ 8.) However, measuring frailty is part of, but by no means a complete way of measuring risk of nursing facility placement, e.g., factors that place individuals at greater risk for nursing home placement include factors of their physical, functional, and cognitive health, as well as their enabling resources such as income, living arrangement, presence of a caregiver, and the health and financial wellbeing of the caregiver. (Ex. 4 ¶ 9.) Florida's priority scoring system underestimates a person's risk of nursing facility placement by failing to fully account for severity of risk associated with: caregiver age, previous nursing facility stays, dementia or cognitive impairment, reliance on a proxy for responding to questions, number of falls in previous twelve months, requiring assistance with activities of daily living and bathing, circumstances and wellbeing of caregiver, financial strain on caregiver, and financial strain on the individual. (Ex. 4 ¶¶ 13-26.) The systematic underestimation of risk embedded in the

Defendants' screening process for ranking someone on the Long-Term Care Wait List impacts all Named Plaintiffs and members of the proposed class.

These common issues satisfy commonality. Although the specific disabilities of the class members vary, as well as the extent and intensity of community services that they need, they share a common desire to remain in the community, are all subject to the same flawed system, and need to receive home and community based long-term care services, which the State is failing to provide.

D. Typicality

Rule 23 further requires that the claims or defenses of the representative parties be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The Eleventh Circuit has stated that typicality exists when there is a:

> nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class. A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Typicality however, does not require identical claims or defenses. A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class.

Kornberg v. Carnival Cruise Lines, 741 F.2d 1332, 1337 (11th Cir. 1984); *see also Piazza v. Ebsco Indus. Inc.*, 273 F.3d 1341, 1351 (11th Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1278-79 (11th Cir. 2000).

The United States Supreme Court held that the class representative has to "possess the same interest and suffer the same injury as the class members." *Falcon*, 102 S. Ct. at 2370. The typicality requirement centers on "whether the class representative's claims have the same essential characteristics as those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Stirman v. Exxon Corp*., 280 F.3d 554, 562 (5th Cir. 2002) (citations omitted). The Named Plaintiffs here meet this requirement.

Plaintiffs' claim is that Defendants are violating the ADA's requirement that States provide community based treatment for persons with disabilities when the treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated. *See Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176, 2190 (1999).

According to N. Russo, a registered nurse (Ex. 5 ¶ 2) who conducted a clinical review of each Named Plaintiff, all of the named Plaintiffs:

- Meet the nursing facility level of care standard for Florida and have health conditions that support the need for nursing facility level of care.
- Meet the criteria for having a disability under the Americans with Disabilities Act.
- Have unmet care needs that could be delivered under the Florida Long-Term Care Waiver if they were enrolled.
- Have family members that are paying out of pocket for and/or actually delivering or ensuring the delivery of services that could be delivered under the Long Term-Care Waiver if the Named Plaintiffs were enrolled.
- Would be at imminent risk of institutionalization, such as nursing facility placement, should the family members stop paying out of pocket, or actually delivering or ensuring the delivery of services.
- Have family members that reported financial, physical, and emotional strain from the burden of caring for the Named Plaintiffs.
- Reported more than once that they were knowledgeable of nursing facilities, and it was their choice to live in the community and to not forego community living for institutionalization in a nursing facility.

(Ex. 5 ¶ 11.)

More specifically, the Named Plaintiffs are qualified persons with disabilities. (Ex. 5 ¶¶ 12, 18, 26, 33; Ex. 6 ¶¶ 2-3; Ex. 7 ¶¶ 2-3; Ex. 8 ¶¶ 2-3; Ex. 9 ¶ 2; Ex. 10 ¶¶ 2-5.) They desire to continue to live in the community. (Ex. 5 ¶¶ 17, 25, 36; Ex. 6 ¶ 4; Ex. 7 ¶ 4; Ex. 8 ¶¶ 4, 9; Ex. 9 ¶ 6; Ex. 10 ¶ 9.) They have unmet long-term care needs. (Ex. 5 ¶¶ 14-15, 19-23, 29-30, 35; Ex. 6 ¶¶ 10-12; Ex. 7 ¶¶ 4, 6-10; Ex. 9 ¶¶ 3, 5; Ex. 10 ¶ 8.) They are at risk of unnecessary institutionalization without home and community based long-term care services provided by Defendants. (Ex. 6 ¶ 13; Ex. 7 ¶ 11; Ex. 8 ¶ 10; Ex. 9 ¶ 8; Ex. 10 ¶ 11.) They cannot afford to pay for the level of services they need. (Ex. 5 ¶¶ 15, 23, 31, 36; Ex. 6 ¶ 6; Ex. 8 ¶ 11; Ex. 9 ¶ 4; Ex. 10 ¶ 10.) Their families are under significant financial and emotional stress and strain. (Ex. 5 ¶ 32; Ex. 6 ¶ 9; Ex. 7 ¶ 4.) They have been placed on Defendants' waitlist for long-term care services, and have been waiting for services from one to six years. (Ex. 5 ¶¶ 24, 31; Ex. 6 ¶ 5; Ex. 7 ¶ 5; Ex. 8 ¶ 5; Ex. 9 ¶ 7; Ex. 10 ¶ 10.)

The scope of Defendants' systemic violations of the ADA is emphasized by the experiences of Florida Elder Law attorneys whose practice is focused on advising clients about long-term care options, including both Medicaid nursing facility services and home and community based services. According

to the Declarations of experienced, Board Certified Elder Law attorneys, clients have been known to stay on the waitlist for years (Ex. 12 ¶ 4; Ex. 13 ¶ 4.) These attorneys state that they are personally aware of clients who go directly from the waitlist to nursing home placement when they run out of funds for community services or their caregivers can no longer handle care needs in the home (Ex. 11 ¶ 4, 6; Ex. 12 ¶ 4, 6; Ex. 13, ¶ 4). Other clients forgo the waitlist entirely, reluctantly choosing nursing facility placement because it is the only option immediately available that will meet their care needs. (Ex. 11 ¶ 5; Ex. 12 ¶ 6; Ex. 13 ¶ 5). One attorney has had at least three clients die while waiting for services. (Ex. 13 ¶ 4.) The experience of these attorneys with the Medicaid LTC Waiver waitlist is that they are unable to tell clients how long to expect to remain on the waitlist without services. (Ex. 12, ¶ 5; Ex. 13, ¶ 3.) Howard Krooks, a past president of the National Academy of Elder Law Attorneys, has stated that in the past he was able to advise his clients that the wait for Medicaid Waiver enrollment could range from several weeks to several months. In the last several years, however, the waits are long and he has no way of knowing how long clients should expect to stay on the waitlist. (Ex. 13 ¶ 3.)

As with commonality, the incidental variations in Plaintiffs' factual situations do not defeat typicality because the basic nature of the injury and the legal theory of recovery is typical for the entire class. *See Miles v. Metropol. Dade Cnty.*, 916 F.2d 1528, 1534 (11th Cir. 1990); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 123 (3d Cir. 1985) (typicality satisfied despite fact that "in a number of areas the class representatives' specific allegations are distinct from those of the class as a whole"), *aff'd on other grounds*, 482 U.S. 656 (1987); *Edmonds v. Levine,* 233 F.R.D. 638, 641 (S.D. Fla. 2006) (differences in medical conditions and prescriptions were "irrelevant for purposes of the typicality requirement" because the action of Medicaid agency to deny the service and the underlying rationale for the denial were identical for each named plaintiff to those of each proposed class member). Factual variations in the individual claims will not normally preclude class certification under the typicality requirement if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory. *See Postawko v. Missouri Dep't. of Corrections*, 910 F.3d 1030 (6th Cir. 2018).

In *Long*, where nursing home Medicaid recipients were seeking Medicaid Waiver services, this Court explained:

> Here the named plaintiffs are individuals who were confined in nursing homes when the lawsuit was filed but assert they could be treated as effectively and efficiently in the community. Each named plaintiff's precise medical circumstances are of course unique; no two individuals are ever medically identical in all respects. But the claims of the named plaintiffs are very much typical of the claims of class members generally.

(Ex. 2, at 3.) *Accord Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir.1985), *abrogated on other grounds by Green v. Mansour*, 474 U.S. 64 (1985) ("strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences"). In *Appleyard,* the court focused on the similarity of relief, stating that all class members were similarly interested in the requested relief, that the court "declare the policies and customs of the Defendant invalid" and "enjoin the Defendant from determining any member of the class to be ineligible without full compliance with applicable federal law." *Id.* at 958.

Similarly, in the present case, the complaint requests the same declaratory and injunctive relief for the Named Plaintiffs and all putative class members. There are no unique defenses to the Named Plaintiffs' claims. The Named Plaintiffs' claims are therefore typical of the claims of the putative class.

E. Adequacy of Representation

Rule 23 requires that the class representatives be persons who "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine if the Named Plaintiffs will adequately represent a potential class pursuant to the requirements of Rule 23(a)(4), the Court should consider (1) "whether Plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation and ... (2) whether Plaintiffs have interests antagonistic to those of the rest of the class." *Kirkpatrick v. Bradford &* Co., 827 F. 2d 718, 726 (11th Cir. 1987) (*quoting Griffin v. Carlin*, 755 F.2d 1516, 1532 (11th Cir. 1985). Each concern is satisfied here.

The Named Plaintiffs have no interests that are potentially antagonistic to the putative class in obtaining long-term care waiver services. There is no sense in which Named Plaintiffs' interests can be said to conflict with the interests of other members of the putative class. They all want to be appropriately ranked on the waitlist and to receive long-term care services within a reasonable period of time. *See Berger v. Compaq Computer Corp*., 257 F.3d 475, 480 (5th Cir. 2001) (differences between named plaintiffs and class members render named plaintiffs inadequate only when those differences create conflicts). There are no claims for individual monetary

damages; the claims are for declaratory and injunctive relief common to the entire putative class. The common allegations of Defendants' practices, the nature of the relief sought, and the legal theories advanced demonstrate the required congruity of interests.

Fed. R. Civ. P. 23(g)(1)(A) lists the factors that courts must consider in appointing class counsel. *See Sheinberg v. Sorenson*, 606 F.3d 130 (3d Cir. 2010). They include pre-filing investigation, experience in class actions or similar claims, knowledge of law, and resources that counsel will commit to representing the class. These requirements are satisfied. The Named Plaintiffs have obtained experienced counsel who are skilled and knowledgeable about civil rights litigation, Medicaid law, practice and procedure in the federal courts and the prosecution and management of class action litigation. Defendants admitted this in their answer. (ECF 16, at 4 ¶ 22.) Plaintiffs are represented by non-profit organizations Disability Rights Florida, Southern Legal Counsel, and Justice in Aging, and private attorneys Nancy Wright and attorneys at the Cozen O'Connor Law Firm.

Jodi Siegel was class counsel before this Court in *Long, et al. v. Benson, et al.,* Case No. 4:08-cv-26-RH-WCS (N.D. Fla.) (unnecessary institutionalization of individuals with disabilities in nursing facilities) and

Washington, et al. v. DeBeaugrine, et al., 658 F. Supp. 2d 1332 (N.D. Fla. 2009), Case No. 4:09cv189-RH/WCS (denial of due process to Medicaid beneficiaries). Siegel and Nancy Wright were class counsel in *Moreland, et al. v. Palmer*, Case No. 4:12-cv-00585-MW-CAS (N.D. Fla.) (denial of due process in reduction of benefits to Medicaid beneficiaries), and counsel in *Guinagh, et al. v. Debeaugrine*, Case No. 4:10-cv-00317-SPM-WCS (N.D. Fla.) (failure of state agency to provide Medicaid assistance with reasonable promptness). Wright, Amanda Heystek and Siegel were counsel in *Parrales v. Dudek*, Case No. 4:15-cv-00424-RH-CAS (N.D. Fla.) (challenges under ADA to Long-Term Care Medicaid managed care program). Heystek also was counsel in *M.H., et al v. Dudek,* Case No. 4:10-cv-00088-RH-WCS (N.D. Fla.) (challenges to provision of Medicaid services to eligible children), and, along with Wright, counsel in *Wheaton, et al. v. Palmer*, Case No. 4-13-cv-00179-MW-CAS (N.D. Fla.) (challenges to due process in provision of services through a Medicaid waiver program).

Regan Bailey is the Director of Litigation at Justice in Aging and has been an attorney for 25 years. During the course of her career, she served at the United States Department of Justice, Civil Rights Division enforcing the Americans with Disabilities Act. She also has served as class counsel in

numerous lawsuits, including *Alexander v. Azar*, Civ. No. 11-cv-1703) (D. Conn.) (due process rights in Medicare context for observation services); *T.R. v. Dreyfus,* Civ. No. 209-cv -01677-JPD (W.D. Wash.) (Medicaid class action seeking access to community-based mental health services for children). Carol Wong is a Senior Staff Attorney at Justice in Aging. During her time at Justice in Aging, she has worked on the class action case of *Alexander v. Azar*, Civ. No. 11-cv-1703 (D. Conn.) and developed additional cases in the areas of healthcare and economic security. Prior to her current position, she spent over nine years as a Senior Trial Attorney at the Department of Justice, Civil Rights Division, litigating several large pattern or practice employment discrimination cases. Eric Carlson is a Directing Attorney at Justice in Aging with over 25 years of experience in representing individuals in need of long-term services and supports. He was lead counsel in *Price v. Medicaid Director*, 838 F.3d 739 (6th Cir. 2016) (class action litigation against the Ohio Medicaid program), and also has represented Medicaid beneficiaries in cases, including *Kerr v. Holsinger*, 2004 U.S. Dist. LEXIS 7804 (E.D. Ky. 2004) (preliminary injunction against Kentucky Medicaid program), and *Darling v. Douglas*, 2012 WL 5904728, 2012 U.S. Dist. LEXIS 168206 (N.D. Cal. 2012) (stipulated judgment against California Medicaid program).

Cozen attorneys John Sullivan and David Reichenberg, along with their colleagues, have extensive experience litigating claims in federal courts across the country, including in class actions. Reichenberg has been appointed by the Second Circuit Court of Appeals and the Eastern District of New York to represent previously *pro se* parties in civil rights litigation. Sullivan has significant experience litigating class actions in both federal and state court. Specifically, Sullivan served as lead counsel to the former deputy executive director of the Port Authority of New York & New Jersey in two class actions arising out of the "Bridgegate" scandal relating to lane realignments of the George Washington Bridge in September 2013. Sullivan also has extensive experience in handling class actions involving securities law and RICO class claims.

Plaintiffs' counsel bring substantial relevant experience to the prosecution of this case. Further, counsel will commit all necessary resources to effectively prosecute this case. The common interests of the putative class will be fairly and adequately represented.

F. Defendant has acted or refused to act on grounds generally applicable to the putative class making final injunctive and declaratory relief appropriate for the putative class as a whole.

Certification under Rule 23(b)(2) requires finding that the defendant "acted or refused to act on grounds equally applicable to the class" and "final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole" is appropriate. Rule 23(b)(2) was intended primarily to facilitate civil rights class actions, where, as here, "the class representatives typically seek broad injunctive or declaratory relief against Defendant's discriminatory practices." *Penson v. Terminal Transport Co., Inc.*, 634 F.2d 989, 993 (5th Cir. Unit B 1981); *see also Ass'n for Disabled Am., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 465 (S.D. Fla. 2002) (certifying class of persons with disabilities alleging failure to meet accessibility requirements under ADA).

In *Wal-Mart Stores*, the Court held that Rule 23(b)(2) is only satisfied when "a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." 131 S. Ct. at 2557.

The central focus of this litigation is on Defendant's failure to provide needed home and community based long-term care services to the Named Plaintiffs and proposed class members. The Named Plaintiffs and the proposed class are subject to the continuing injury of being at risk of unnecessary institutionalization as a result of the Defendants' failure to provide long-term care services in the community. Injunctive or declaratory relief settling the legality of Defendants' behavior with respect to the putative class as a whole is appropriate.

Class actions pursuant to Fed. R. Civ. P. 23(b)(2) are especially appropriate where the Plaintiff class seeks declaratory or injunctive relief from unlawful and/or discriminatory policies and practices in government benefit programs. *See Doe v. Chiles,* 136 F.3d 709 (11th Cir. 1998) (class of individuals with developmental disabilities who were placed on waiting lists for intermediate care facility services by State); *Hernandez v. Medows*, 209 F.R.D. 665 (S.D. Fla. 2002) (class of current and future Medicaid recipients who have or will have prescription drug coverage denied by State without due process); *Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994) (challenging state agency failures in provision of mental health counseling services to deaf clients by therapists fluent in sign language); *Haymons*, 795 F. Supp. at 1522

(certifying class where state agency refused to grant reinstatement, notice and hearing to Medicaid recipients whose home health care benefits were terminated). *See also Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974). Similarly, here, the putative class seeks injunctive relief as a whole against the state, and not particularized relief for each class member.

G. Conclusion

Plaintiffs have met the requirements of Rule 23(a) and (b)(2) by showing that they are capable of proving their claims through common evidence. *See S.R. v. Pa. Dep't of Human Servs.*, 325 F.R.D. 103, 112 (M.D. Pa. 2018) (class certified where evidence needed to prove the systemic failures and discriminatory impact of state agency's practices will be substantially the same for all putative class members). Plaintiffs request that the class be certified, and that the Court appoint class counsel.

Dated: March 12, 2019 Respectfully submitted,

/s/ Jodi Siegel

AMANDA HEYSTEK, Fla. Bar No. 285020
amandah@disabilityrightsflorida.org
Disability Rights Florida
1000 N. Ashley Dr. Ste. 640
Tampa, FL 33602
(850) 488-9071

JODI SIEGEL, Fla. Bar No. 511617
jodi.siegel@southernlegal.org
CHELSEA DUNN, Fla. Bar No. 1013541
chelsea.dunn@southernlegal.org
Southern Legal Counsel, Inc.
1229 NW 12th Avenue
Gainesville, FL 32601
(352) 271-8890

NANCY E. WRIGHT, Fla. Bar No. 309419
newright.law@gmail.com
Law Office of Nancy E. Wright
3231 NW 47th Place
Gainesville, FL 32605
(352) 871-8255

REGAN BAILEY, *pro hac vice*
rbailey@justiceinaging.org
CAROL A. WONG, *pro hac vice*
cwong@justiceinaging.org
Justice in Aging
1444 Eye Street, NW Suite 1100
Washington, D.C. 20005
(202) 683-1990

ERIC CARLSON, *pro hac vice*
ecarlson@justiceinaging.org
Justice in Aging
3660 Wilshire Blvd., Suite 718
Los Angeles, CA 90010
(213) 674-2813

DAVID H. REICHENBERG, *pro hac vice*
dreichenberg@cozen.com
JOHN J. SULLIVAN, *pro hac vice*
jsullivan@cozen.com
Cozen O'Connor
45 Broadway Suite 1600

New York, NY 10006
(212) 453-3729

ASHLEY GOMEZ-RODON,
Fla. Bar No. 1010237
agomez-rodon@cozen.com
Cozen O'Connor
200 South Biscayne Boulevard, Suite 3000
Miami, FL 33131
(786) 871-3996

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2019, a true copy of the foregoing has been filed with the Court utilizing its CM/ECF system, which will transmit a notice of electronic filing to all plaintiffs' and defendants' counsel of record registered with the Court for that purpose.

/s/ Jodi Siegel

ATTORNEYS FOR PLAINTIFFS