UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BENJAMIN ALEXANDER, GEORGE COLLIER by his next friend, Timothy Collier, JEFFERSON LANGLAISE, GERALDINE DAVENPORT by her next friend, Barbara Roti, DAVID WRIGHT, JEANNIE HAYRE, SHERYL SCHNEDIER, and JOHN DEETER, on behalf of themselves and all others similarly situated,

Plaintiffs,

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

MARY MAYHEW, in her official capacity as Secretary, Florida Agency for Health Care Administration, and RICHARD PRUDOM, in his official capacity as Secretary, Florida Department of Elder Affairs,

Defendants.
_____/

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pursuant to the Court's Order (ECF 61), Plaintiffs submit this Supplemental Memorandum in support of Plaintiffs' Motion for Class Certification (ECF 28).

Additional Named Plaintiffs

This Court granted Plaintiffs' motion to amend the complaint to add Plaintiffs. (ECF 58.) Plaintiffs request this Court appoint all eight Named Plaintiffs to represent the proposed class. The facts as alleged in the Amended Complaint (ECF 43 ¶¶110-46) and attached declarations (Exs. 1-5) support that the new Named Plaintiffs meet the typicality requirements in the same manner as the original Named Plaintiffs (*see* ECF 28, at 17). Each new Plaintiff meets the nursing facility level of care and have unmet care needs that could be delivered under the Florida Long-Term Care Waiver ("Waiver") if they were enrolled. (Ex. 1 ¶11.) They also are at risk of unnecessary institutionalization, desire to remain in the community, requested services from the Waiver, and were placed on a waitlist. (Exs. 2 ¶¶8&9; 3 ¶¶6&7; 4 ¶¶8&10; 5 ¶¶8&10.)

Plaintiffs Have Established Standing

Standard

Plaintiffs do not dispute they must establish standing. As explained below, the level of proof varies for different stages of litigation and for Named Plaintiffs and class members, and the burden has been met.

The doctrine of standing requires: injury-in-fact that is concrete and particularized, and actual or imminent; causal connection between injury

and conduct complained of; and the likelihood, as opposed to speculation, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Defendants assert that the "legally cognizable injury" under the Americans with Disabilities Act (ADA) is unjustified institutionalization, and therefore Plaintiffs must show they are either institutionalized or face imminent institutionalization to have standing. (ECF 41, at 4.) This is incorrect. Defendants conflate the standing requirement of injury with the merits of Plaintiffs' ADA claim that they are at risk of unnecessary institutionalization.

"[U]njustified institutional isolation of persons with disabilities is a form of discrimination." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). People with disabilities who are not institutionalized also may have a claim for discrimination under the ADA. *See, e.g., Parrales v. Dudek*, No. 4:15cv424-RH/CAS, 2015 WL 13373978, at *5 (N.D. Fla. Dec. 24, 2015) (ADA and *Olmstead* decision not limited to individuals currently in institutional or other segregated settings); *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) (individuals who must enter institutions to obtain services may raise ADA claim because they face a risk of institutionalization).

To establish standing under the ADA, there must be actual or imminent risk of injury, which may include, but is not limited to, risk of imminent institutionalization. Other types of harm stemming from discrimination under the ADA may meet this standard. For example, languishing on a waitlist is sufficient harm for standing purposes. *Dykes v. Dudek*, No. 4:11cv116-RS/WCS, 2011 WL 4904407, *2 (N.D. Fla. Oct. 14, 2011). In that case, Secretary Dudek (same agency defendant as instant case, although prior AHCA Secretary) made the identical argument that class members in the community who are on a Waiver waitlist lacked standing "because they are 'neither institutionalized nor at imminent risk of being institutionalized.'" *Id.* (internal cites omitted). The Court rejected Defendants' argument and found that "waiting lists for enrollment on the DD Waivers where [the community plaintiffs] languish for years without services" are the injury. *Id*. Whether plaintiffs "succeed or fail will be determined on the merits of their arguments," but that will be determined outside the standing context. *Id.* at *3.

In another waitlist case, plaintiffs sufficiently alleged injury-in-fact from lack of necessary supports and services that could enable them to live independently in the community. *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 992 (D. Minn. 2016). Additionally, arbitrary delays, denials, or

insufficient provision of Waiver services were adequate allegations of injury-in-fact under the ADA. *Parrales,* 2015 WL 13373978, at *4. And, being forced to leave one's home due to depleted funds from lack of Medicaid reimbursement is sufficient harm to establish standing under the ADA. *Leocata v. Wilson-Coker*, 343 F. Supp. 2d 144, 147-48 (D. Conn. 2004). As detailed below, Plaintiffs' harm satisfies *Lujan's* first prong.

Lujan's second prong is met as Plaintiffs' harm is causally connected to Defendants' actions or inaction. Plaintiffs have been placed on a waitlist. Defendants fail to accurately screen plaintiffs by systemically underestimating their risk of unnecessary institutionalization. (ECF 28-4 ¶¶13-26.) Plaintiffs, at risk of nursing facility placement, are not provided community-based services and face the choice of going without needed care, depleting critical personal or family resources, or entering a nursing facility to obtain services. This Hobson's choice is brought on by the action and inaction of Defendants, including their failure to provide sufficient Waiver services to meet the need demonstrated by the waitlist.

Lujan's final prong also is satisfied. Class members must have an injury that can be commonly remedied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The common remedy here is increased service capacity; valid and reliable assessment process; and a process that moves

people off the waitlist at a reasonable pace. The relief sought is systemic in nature, not individualized.

Named Plaintiffs' actual injury

Each Named Plaintiff suffers an injury-in-fact by Defendants' failure to provide Waiver services. They therefore have standing and can represent the class. *Cf. A&M Gerber Chiropractic LLC v. GEICO General Ins. Co.*, No. 17-15606, 2019 WL 2292326, *4 (11th Cir. May 30, 2019) (if no named plaintiff establishes standing, none may seek relief on behalf of any class member).

Benjamin Alexander has been on the waitlist since early 2018. (ECF 28-6 ¶5.) He is paralyzed and relies on his 88-year-old mother for assistance, but she cannot meet his needs. (*Id.* ¶¶6-11.) He needs assistance with bathing, hygiene, incontinence care, dressing, transferring and transportation. (*Id.* ¶¶7-11.) Alexander's home is not fully accessible. (*Id.* ¶10.) He is not receiving adequate pain management care and lacks transportation to medical appointments. (ECF 28-5 ¶¶14-15.) He has multiple health problems that are not being appropriately managed. (ECF 41-2, at 2-3.)

George Collier has been on the waitlist since 2015. (ECF 28-7 ¶5.) Collier needs assistance with showering and dressing. (ECF 28-5 ¶22.) He

is at risk of falls, wounds, infections and hospitalizations. (*Id.* ¶¶19-20.) He needs close monitoring of his blood glucose levels to prevent further dizziness and falls. (ECF 43 ¶91.) He receives no assistance with this. (ECF 28-5 ¶19.) His diabetes is not under control, yet he receives no assistance with repositioning and foot care. (*Id.* ¶20.) He does not receive needed physical or occupational therapy. (*Id.* ¶22.)

Jefferson Langlaise has been on the waitlist since 2017. (ECF 28-9 ¶7.) He is isolated and segregated from the community because he does not have the attendant care he needs due to an uncontrolled seizure disorder. (ECF 28-5 ¶2; ECF 28-9 ¶3; ECF 45-1, 90:14-22) There is no plan to address his seizure disorder. (ECF 41-4, at 3.) Medication side effects are not monitored. (*Id.* at 2.)

Geraldine Davenport has been on the waitlist since 2013. (ECF 28-8 ¶5.) She needs rehabilitation and gait training with recommended medical equipment. (ECF 28-5 ¶35.) She is at high risk for falls, but has no assessment, plan, fall risk reduction strategies/interventions, or monitoring. (ECF 41-5, at 2.) She needs medication management and monitoring of side effects and adverse reactions. (*Id.* at 3.) She needs monitoring for edema. (*Id.*) She goes without some care, including transportation to the community and for doctor's appointments. (*Id.* at 11.)

David Wright has been on the waitlist since 2016. (Ex. 2 ¶9.) He uses assistive devices for walking, and does not have transportation for shopping and medical appointments. (*Id.* ¶¶3&6.) He needs assistance with transferring in and out of bed and bath, ambulation, bathing, dressing, housekeeping, preparing meals, and taking his medications on time. (*Id.* ¶4.) He is at risk of falls. (*Id.*)

Jeannie Hayre has been on the waitlist since early 2019. (Ex. 3 ¶7.) She uses a wheelchair for mobility. (*Id.* ¶2.) Her mobile home is not accessible and needs help getting in and out of her house. (*Id.* ¶3.) She needs assistance with transferring, meals, housekeeping and laundry. (*Id*.) She cannot independently take care of herself and does not have a continuous and reliable caregiver or transportation. (*Id.* ¶4.)

Sheryl Schneider has been on the waitlist since 2016. (Ex. 4 ¶10.) She needs assistance with bathing, dressing and transferring. (*Id.* ¶6.) She uses a walker or scooter to ambulate and is a fall risk due to depth perception difficulties. (*Id.* ¶4.) She has limited mobility and cannot use her stove or clean her home. (*Id.* ¶7.)

John Deeter has been on the waitlist since 2016. (Ex. 5 ¶10.) He uses a walker or scooter to ambulate. (*Id.* ¶4.) He needs assistance with meals, housekeeping and dressing. (*Id.* ¶¶6-8.)

Each Named Plaintiff has unmet care needs which could be met under the Waiver. (ECF 28-5 ¶¶12,18,26,35; Exs. 1 ¶¶14-15,19,21-23,40,43,29-30,32-34,36-37; 2 ¶4; 3 ¶¶3-4; 4 ¶¶4-7&9; 5 ¶¶6-7&9.) They have languished on the waitlist due to Defendants' decision to place them on a waitlist rather than provide the services they need outside of an institution. Their injuries could be remedied though injunctive relief. Each representative plaintiff has shown sufficient injury to establish standing. *See Guggenberger*, 198 F. Supp. at 991-92 (lack of necessary supports and services that could enable living independently in community was sufficient injury-in-fact).

Class members' actual injury

Plaintiffs need not establish at the class certification stage that every member of the proposed class has standing in order to certify the class. *Northrup v. Innovative Health Ins. Partners, LLC*, 329 F.R.D. 443, 449 (M.D. Fla. 2019). Courts have adopted two approaches for evaluating standing for purposes of class certification under Fed. R. Civ. P. 23. *See In re Deepwater Horizon*, 739 F.3d 790, 800-01 (5th Cir. 2014). One focuses on the standing of named plaintiffs and "ignore[s] the absent class members entirely." *Id*. The other requires courts to "ensure that absent class members possess Article III standing by examining the class

definition." *Id*. The latter approach "does not contemplate scrutinizing or weighing any evidence of absent class members' standing or lack of standing during the Rule 23 stage." *Id.* Instead, the inquiry is whether the class is "defined in such a way that anyone within it would have standing." 443 F.3d at 264.

The Eleventh Circuit has not established how to evaluate class standing at the certification stage. *See Randolph v. J.M. Smucker Co.,* 303 F.R.D. 679, 690-91 (S.D. Fla. 2014). However, under either approach, Plaintiff's proposed class definition sufficiently establishes standing for purposes of class certification.

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, which is determined by meeting the following: (1) they are residing, and wish to remain, at home or in a community residential setting; (2) they qualify or would qualify if allowed to enroll in the Long-Term Care Waiver; and (3) they have been placed on the Long-Term Care Waiver waitlist. By requesting home and community-based long-term care services, every putative class member has expressed a wish to remain at home or in a community setting. Due to Defendants' assessment process, they have not been permitted to show that they ultimately would

qualify if allowed to enroll. Thus, the current waitlist (as updated throughout the litigation) is the clearest expression for class purposes. All individuals in this class definition have standing due to the harm of being placed on a waitlist rather than providing them with needed Waiver services. *See Dykes,* 2011 WL 4904407, at *2.

Individual Differences Do Not Bar Certification

Defendant's mischaracterization that Plaintiffs seek "individualized mini-trials" (ECF 41, at 33) permeates its argument opposing class certification (*see, e.g., id*. at 9, 22, 26, 31). Plaintiffs do not seek individual relief or damages. They primarily seek a common injunction ordering access to long-term care services outside of an institution, and the development of a valid and reliable assessment tool for risk of entry into a nursing facility.

Varying physical characteristics or healthcare needs among plaintiffs are not a bar to class certification in ADA cases "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." *Postawko v. Missouri Dep't of Corr*., 910 F.3d 1030, 1039 (8th Cir. 2018). The Eighth Circuit rejected the State's argument that the unique condition of each member of the class meant that the claims required a "highly individualized" inquiry, undermining

commonality. *Id.* at 1038. The court found that the State misunderstood the nature of the class claim – that the State's failure to properly screen and treat HCV exposed all inmates to the same unconstitutional injury. *Id.* The court reasoned that, while a class seeking damages would struggle to meet commonality, a class seeking only injunctive relief could meet Rule 23(b)(2). *Id.* The court further concluded that typicality was met as "factual variations in the individual claims will not normally preclude class certification." *Id.* at 1039.

This Court has made a similar conclusion in a case seeking waiver services in the community. *Long v. Benson*, No. 4:08-cv-00026-RH-WCS, 2008 WL 4571904, *1-2 (N.D. Fla. Oct. 14, 2008) (Rule 23(a)(2) requires common issues, not that there be no individual issues). *Accord Van Meter v. Harvey,* 272 F.R.D. 274, 282, 282 (D. Me. 2011) (finding commonality and typicality despite differences in individual plaintiff characteristics based on common questions regarding the Medicaid agency's course of conduct); *Lane v. Kitzhaber*, 283 F.R.D. 587, 595 (D. Ore. 2012) (class of individuals with disabilities seeking reasonable accommodation may be certified without need for individualized assessment of disability or accommodation needed).

Class Definition is Appropriate

The case that Defendants cite for the proposition that "fail-safe" classes are prohibited (ECF 41, at 15) actually rejected the fail-safe class prohibition. *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012). In a bankruptcy case, the court found that "because the class is...linked by a common complaint, the fact that the class is defined with reference to an ultimate issue of causation does not prevent certification." *Id*. Further, while some may fail to prevail on individual claims, that will not defeat class membership. *Id.* The Eleventh Circuit has not ruled on "fail-safe" classes. *See Alhassid v. Bank of Am., N.A.*, 307 F.R.D. 684, 693 (S.D. Fla. 2015). However, the concept is whether class membership can only be ascertained after a ruling on the merits. *See id.*

In this case, the class is ascertainable now as all people who are currently on the Waiver waitlist or who will be placed on it during the pendency of this litigation are easily identified. People on the waitlist seek a common remedy of an adequate process that allows them the opportunity to show they qualify for services and to be offered services within a reasonable time. The waitlist is ascertainable, is not "fail-safe", does not require individualized determinations, and is not ambiguous. *See Neumont v. Monroe Cnty.*, 198 F.R.D. 554, 558 (S.D. Fla. 2000) ("[C]lass description

need only be definite enough for the court to feasibly ascertain member status.").

Defendants argue that because individuals on the waitlist must undergo an individualized assessment to determine final eligibility for Waiver services that a class cannot be certified. Yet it is Defendants' own process that prevents class members from showing they meet eligibility. Defendants systemically refuse to provide a full assessment unless individuals are first released from the waitlist. (ECF 41-6 ¶11; ECF 41-9 ¶5.) Defendants use their refusal as a shield against liability, claiming that Plaintiffs have not shown they will ultimately qualify for Waiver services. However, class membership is not necessarily identical to who ultimately qualifies and receives services. *Cf. Steimel v. Wernert*, 823 F.3d 902, 916 (7th Cir. 2016) (if state's own criteria could prevent enforcement of integration mandate, the mandate would be meaningless). It is clear that all individuals on the waitlist desire to be assessed and provided services, thus the class definition is appropriate.

No Intra-Class Conflicts

In determining whether certification is appropriate, courts consider potential conflicts among the class. *See Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir.1998). To defeat certification, a conflict must

be "fundamental"; i.e., it must go to the heart of the specific issues in controversy. *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181 (11th Cir. 2003) (existence of minor conflicts alone will not defeat certification). A fundamental conflict does not exist just because class members have "differently weighted interests." *See Deepwater Horizon*, 739 F.3d at 813-14.

Where, as here, Plaintiffs seek injunctive relief for violations of the ADA, courts in this circuit have found it less likely that class members will have interests antagonistic to each other "because there are no individual monetary damages sought." *See, e.g., Dunn v. Dunn*, 318 F.R.D. 652, 666 (M.D. Ala. 2016); *Ass'n for Disabled Am., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002); *Access Now, Inc. v. Ambulatory Surgery Center Group, LTD.*, 197 F.R.D. 522, 528 (S.D. Fla. 2000). That some class members may not ultimately qualify for services does not create a fundamental conflict. *See Braggs v. Dunn*, 321 F.R.D. 653, 665 (M.D. Ala. 2017).

The cases cited by Defendants (ECF 41, at 28-31) involve certifications under Rule 23(b)(3), in which proposed classes included members who had received a monetary benefit from the challenged actions of defendants. *See Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350

F.3d at 1190 (pharmaceutical companies within proposed class experienced net gain); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000) (proposed class included cattle producers claiming to be harmed by contracts and marketing agreements that some members had benefitted from); *Auto Ventures, Inc. v. Moran*, No. 92-426-CIV, 1997 WL 306895, at *5 (S.D. Fla. Apr. 3, 1997) (defendant auto importer allegedly created a coercive system where some proposed class member dealerships were rewarded and benefited while others were penalized). These cases have limited applicability here.

No Named Plaintiff or putative class member has or will receive monetary benefit from Defendant's failure to provide services or adequately assess their risk. Instead, all remain on a waitlist and share the same objective—to access the services they need to remain in the community. While not every plaintiff will immediately receive services if injunctive relief is granted, every plaintiff will benefit from a waitlist that moves at a reasonable pace. Further, it is to everyone's benefit for Defendants to develop and administer a valid and reliable risk assessment tool that no longer underestimates peoples' risk of nursing facility entry. That some with a more accurate risk assessment may move up or down the waitlist might be a "differently weighted interest," *Deepwater Horizon*, 739 F.3d at 813-

14, but is not a fundamental conflict. *See Dunn,* 318 F.R.D. at 666 ("No member of the class will be harmed when another prisoner's disability is accommodated pursuant to the relief they have all sought and together obtained."); *Ass'n for Disabled Am.*, 211 F.R.D. at 464 ("requested injunctive relief will provide substantially equal benefits and relief to all members of the class through increased accessibility and the coordinated removal of physical and communication barriers").

Certificate of Word Count. Pursuant to this Court's order and N.D. Loc. R. 7.1(F), this supplemental memorandum contains 3,199 words.

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Respectfully submitted,

/s/ Jodi Siegel

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 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 plaintiff's and defendant's counsel of record registered with the Court for that purpose.

/s/ Jodi Siegel

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