IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BILL M., et al.,	)	**Case No. 4:03CV3189**
	)	
Plaintiffs,	)	
	)	**PLAINTIFFS' BRIEF IN RESPONSE**
vs.	)	**TO DEFENDANTS' BRIEF IN**
	)	**OPPOSITION TO CERTIFICATION**
NEBRASKA DEPARTMENT OF	)	**OF CLASS**
HEALTH AND HUMAN SERVICES	)	
FINANCE AND SUPPORT, et al.,	)	
	)	
Defendants.	)	

The Plaintiffs, by and through their attorneys of record, submit this Brief in Response to Defendants' Brief in Opposition to Certification of Class.

INTRODUCTION

On July 1, 2004 Plaintiffs filed a motion for class certification (Filing #58) and a brief in support of the motion (Filing #59). On August 2, 2004, Defendants filed a brief in opposition to the motion for class certification (Filing #65). The present brief is filed in reply to Defendants' opposition brief.

DISCUSSION

The Defendants' Brief in Opposition to Certification of Class ("Filing #65, Defendants' Opposition Brief") asserts three reasons to deny the motion for class certification. However, "each of these reasons rests on the fact that each named Plaintiff, and each putative class member, has individual needs requiring individualized services. These needs can be evaluated, and services to ameliorate them provided, only by factual analysis of each individual's case." (Filing #65, Defendants' Opposition Brief, at 8).

Defendants' opposition brief collapses this case down to the singular dimension of the foregoing theme: one can only determine a person's needs by an individualized inquiry. However, Defendants' collapsed theme altogether ignores that many class members, those who are wait listed, are not receiving any funding for specific types of services for which they have been determined to be eligible and for which they have a need. (Filing #60, Plaintiffs' Exhibit #2, Stortenbecker deposition, 104:4-20.) The only reasons for wait listing these class members is that funding is not presently available for them and that they are not a priority as determined by Defendants. (Filing #69 Plaintiffs' Exhibit #2, Stortenbecker deposition, 106:13 - 108:2.) An individual is a "priority" for coming off the wait list, also referred to by Defendants as the Register of Persons with Unmet Needs, only when that individual requires protection from ongoing or imminent physical harm. 205 NAC 2-011.09. Plaintiffs allege that under the ADA (and *Olmstead*), the Rehabilitation Act, and provisions of applicable Medicaid law Defendants are required to provide funding for these services within a reasonable time frame. Lack of funding is not an acceptable excuse for failing to comply with the State's Medicaid obligations, and the provision of appropriate care under the Medicaid program, consistent with the ADA and *Olmstead*. Furthermore, appropriate funding cannot be made contingent solely on the existence of ongoing or imminent physical harm. Some of the named plaintiffs, like many in the class as a whole, have waited for years to begin receiving funding for necessary home and community-based services for which they are eligible, and this places them at risk of unnecessary institutionalization. The drone of Defendants' singular theme altogether ignores this aspect of the present lawsuit, and therefore Defendants fail to address it.

As noted, Defendants' singular theme focuses on the quantity of services to be provided to an individual relative to that person's individual characteristics. Their position is that an individual's

needs involve an individualized inquiry, and therefore no one person can be representative of the class and thus determination of class membership will be difficult and involve many individualized determinations. This argument might possibly have some merit if this action sought individualized relief, such as determinations of the specific level of funding that must be made available to each plaintiff and class member. However, that is certainly not the type of relief sought by the Complaint. The relief sought in this action is declaratory and injunctive. Such relief would directly impact how long people may be placed on the wait list and how funding determinations are to be made, not individualized determinations of funding for services. While such individual determinations might later be impacted by the relief requested in this action, and certainly that is Plaintiffs' ultimate hope, such individual determinations are not part of the relief requested in the Complaint. Assessing individualized needs will only be relevant in the present case for the purpose of demonstrating the flaws in the Defendants' current policies, procedures or processes. That is, the individual cases of the named Plaintiffs and other, selected class members would be representative evidence of the typical effect of Defendants' policies, procedures or processes which have been applied to all class members in common.

Defendants' concern that each Plaintiff's claim "depends entirely on unique facts," (Filing #65, Defendants' Opposition Brief, at 18) is beside the point. There is no "each claim." The named Plaintiffs do not have separate claims, they seek no monetary damages, and they do not seek individually-driven remedies. Their only claims, common to the entire class, are that Defendants' failure to provide funding for services in a reasonably timely fashion and Defendant's mechanism for determining funding are violative of applicable law. See *Caroline C. by Carter v. Johnson*, 174 FRD 452 464 (D. Neb. 1996), ("Moreover, where, as here, plaintiffs are not seeking individualized

damage awards, 'injunctive actions by their very nature often present common questions satisfying Rule 23(a)(2),' citing *Baby Neal*, 43 F 3d at 57 and Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure, §1763, at 201. The court in *Caroline C.* also found that Defendants' contentions that the harm suffered by each plaintiff was different and therefore typicality was lacking was specious, and that a case where the plaintiffs had only requested injunctive and declaratory relief was easily distinguished from others cited by the Defendant in which compensatory damages had been sought. At 465.)

In sum, the foundation of all three arguments advanced by the Defendants to deny class certification is without support and each of the three arguments fall. These three arguments are further addressed below.

I.
THE PROPOSED CLASS DEFINITION IS ADEQUATE, AND WILL NOT REQUIRE AN INDIVIDUALIZED, FACT INTENSIVE INQUIRY IN ORDER TO DETERMINE ANY PERSON'S MEMBERSHIP IN THE CLASS.

The complaint defined the class to be:

> All present and future individuals with developmental disabilities in Nebraska who are eligible for Medical Assistance Home and Community-Based Services but either are not receiving funding for such services, or are not receiving sufficient funding for such services to reasonably achieve the purpose of the service, assure the class member's health and safety, or ensure progress toward independence, interdependence, productivity and community integration.

Defendants state that this proposed class definition requires a number of "intensive factual inquiries." The first "intensive factual inquiry" apparently is whether an individual is in fact developmentally disabled. However, this is not a difficult issue at all. All persons on the Register of Persons with Unmet Needs must have first been determined to be eligible for home and community-based services for the developmentally disabled prior to being placed on the Register.

(Filing #60, Exhibit #2, Stortenbecker deposition, 104:4-25). Those who are no longer on the Register, because they are receiving requested services, but who complain that their services are inadequately funded (i.e., under funded) due to the state's flawed assessment process, have clearly been determined to be developmentally disabled. They would not be receiving any amount of DD services had the Defendants not determined them to be developmentally disabled.

This suit alleges violations of Federal Medicaid law, and consequently the class is restricted to those class members who qualify for Medical Assistance Home and Community-Based services. This is also known as a "home and community-based waiver program." According to Roger Stortenbecker, the state's head DD administrator until shortly before the Complaint was filed, two-thirds of all persons on the Registry of Persons with Unmet Needs are eligible for the Medicaid Waiver. (Filing #60, Exhibit #2, Stortenbecker Deposition 105:1 - 106:12). This is a determination that is made with respect to every one of the thousands of individuals receiving services, and is not difficult to make. Defendants' expressed concern over this is without support, appears overstated, and is without merit.

The Defendants also assert that "[w]hile it may not be difficult to ascertain that a putative class member had not received any funding, the inquiry as to whether sufficient funding had been received is *infinitely* more complex." (Filing #65, Defendants' Opposition Brief, at 10, internal quote omitted, emphasis added). This is really an issue that goes to the ultimate merits of the case, not class certification. When there is no individualized relief being sought, as is the case here, it is difficult to imagine why a determination of each class member's class membership would ever need to be made. In the event the class prevails in this suit, there will be no request for class members to submit claims, and thus it is not necessary to determine whether each and every putative class

member did in fact receive insufficient services. Rather, declaratory relief will be granted and an injunction will issue. Defendants will be required to cease their violations of applicable laws and to adopt legally valid measures to address the wait list and a legally valid process for assessing need and setting funding for services.

Questions of eligibility and sufficiency of service may involve complex issues, and the Defendants are correct in citing 205 Neb. Admin. Code § 5-001. Services should be "individually tailored, establishing goals and objectives that address the unique preferences and needs of the eligible persons." *Id*. However, the true issue involved here is not the individualized needs that persons with a disability may have, but rather the mechanisms the Defendants have employed in an across-the board manner (with no regard for individualized tailoring) to deny or under fund those required services. The Defendants have identified the needs in many cases, but they are failing to provide the funds for the services.

Community placement has already been found by State treatment professionals to be appropriate for Plaintiffs and putative class members. That expert testimony may or may not be involved, and is largely irrelevant to class certification. Unlike the purposed class of landowners in *Nudell,* (cited by Defendants) there is little need for in an depth analysis of factual questions in identifying class members, and class certification issues do not relate directly to the ultimate issues of liability in this case. *Nudell v. Burlington Northern and Santa Fe Railway Company*, 2002 WL 1543725, 3 (D.N.D. 2002). The court in *Nudell* found that, "it still too closely identifies the class definition with a merits determination, in that class membership depends on resolution of many predicate factual issues related . . . to the ultimate questions in the case. . . . [N]otice to the class members is a virtual impossibility[.]" *Id.* The class definition in this case suffers none of these flaws,

the definition is independent of the merits of the case, membership is not dependent on predicate factual issues, and notice can be readily achieved. (Filing #59, Plaintiffs' Class Certification, Brief at 17). Here, unlike the claims and issues in *Falcon*, relief for the class would be "'peculiarly important'[since] the 'issues involved are common to the class as a whole' and [since] they 'turn on questions of law applicable in the same manner to each member of the class' . . . in such cases 'the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (*quoting Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979). The Defendants have failed to show how the issues are not common to the class, and they have not shown that the questions of law would apply differently to each member of the class. Judicial economy requires that the proposed class definition be accepted.

II.

THE PROPOSED CLASS MEETS THE COMMONALITY REQUIREMENT.

Fed. R. Civ. P. 23(a)(2) requires that in order for a class action to proceed there must be questions of law or fact common to the class. This is certainly the case here.

Specifically, the Defendants cite to *Egge* in their Opposition Brief, at 14, noting that when the resolution of common issues is dependent on factual determinations that are different for each purported class plaintiff, courts have consistently refused to find commonality. (Filing #65). However, *Egge* further states (in fact in the next paragraph of the opinion):

> However, factual variations among class members' grievances do not defeat a class action. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.

> Not every question of law or fact need be common to the class to satisfy the requirements of Rule 23(a)(2). Rather, [it] is *easily met* in most cases because it requires only that the course of conduct giving rise to a cause of action affects all class members, and that at least one of the elements of that cause of action is shared by all class members.

Egge v. Healthspan Services Company, 208 F.R.D. 265, 268 (D.Minn. 2002) (*quoting Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998), *Donaldson v. Pillsbury Co.,* 554 F.2d 825, 831 (8th Cir. 1977) (cert. denied, 434 U.S. 856 (1977)), and *Lockwood Motors, Inc. v. General Motors Corp.,* 162 F.R.D. 569, 575 (D.Minn. 1995) (internal quotes omitted, emphasis added). The claims of the Plaintiffs and the putative class members here arise out of the same legal and remedial theory, and the course of conduct (by the Defendants) affected all of the Plaintiffs and putative class members and gave rise to this cause of action.

The Defendants attempt to draw a parallel between this case and *Reinholdson v. State of Minnesota,* 2002 WL 31026580 (2002). However, any similarity between that case and the present one is purely superficial. In *Reinholdson* there was no uniting factor in the claims of the Plaintiffs, and their claims varied depending on the school's shortcomings with regard to each of their particularized individual situations. Their claims were based on treatment that was special and unique to each separate individual named plaintiff. They sought individualized relief in the form of "compensatory education for any time period when IDEA was found to be violated." At 8. The court in that case commented that "[s]uch relief is not conducive to class treatment because it would of necessity require individualized determinations for each named Plaintiff and each member of the putative class as to whether he or she was denied educational services, the nature of the services, the time period, and the type of educational services necessary to compensate for such denial." *Id.*

In the present case, as set forth in Plaintiff's Class Certification Brief and herein, the claims are common to all the Plaintiffs, showing clear uniting factors. (Filing #59). While each named Plaintiff has his or her own past experience with Defendants, all named Plaintiffs and putative class members assert legally invalid policies with regard to the register of persons with unmet needs and the process for determining funding which are generally applicable to the class. The relief sought in the present action is not individualized and does not require any individualized determinations.

III.
THE PLAINTIFFS' CLAIMS ARE TYPICAL OF CLAIMS HELD BY THE PROPOSED CLASS SINCE THE CLAIMS ARE ALL BASED ON FACTS WHICH ARE SHARED BY EACH MEMBER.

"The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances, maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of class members will be fairly and adequately protected in their absence." *Falcon* at 157, n. 13.

The claims and circumstances asserted in this case by the Plaintiffs and putative class members are clearly interrelated and rise out of the same facts and circumstances. The claims here turn on facts relating to the unlawful methodology and practices of the Defendants, and not the individualized needs of each Plaintiff and putative class member. As a result, typicality and commonality are present. A further analysis of *Reinholdson* is unnecessary here because unlike the claims asserted in the present case, the claims in that case turned on "treatment that [was] special or unique to themselves." *Reinholdson* at *9.

Defendants assert that typicality is limited where the claimed injury is tied to "a complex course of conduct engaged in *by the defendants* over a long period of time, as opposed to a single act to which all class members have been exposed equally," *Clay v. American Tobacco*, 188 F.R.D. 483, 492 (S.D. Ill. 1999) (*quoting Insolia v. Phillip Morris Inc.,* 186 F.R.D. 535, 544 (W.D. Wis. 1998) (*quoting* 1 Newberg and Conte § 3.13) (*emphasis added)*. However, Plaintiff's claims are not so complex, and Defendants do not prove otherwise. Further, the *Clay* court, cited by Defendants, stated:

> A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. . . . The typicality requirement may be satisfied *even if* there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus similar legal theories may control even in the face of different facts. Properly applied, these guidelines should uphold the rationale behind the typicality requirement, namely that a plaintiff with typical claims will pursue his or her own self-interest in the litigation and in so doing will advance the interests of the class members, which are aligned with those of the representative.

Clay at 491-492 (*quoting De La Fuente v. Stokely-Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir. 1983) and *Insolia* at 543-544 (*quoting* Newberg)) (emphasis added). The claims of each class member in the present case arise from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. Consequently, typicality is present.

The Defendants miss the issue by trying to compare tobacco litigation involving monetary relief, together with issues of individual choice and widely differing individual circumstances, with the present case. In addition, Defendants' citation *In re Air Crash Disaster at Gander, Newfoundland, on Dec. 12, 1985,* 633 F.Supp. 50 (J.P.M.L. 1986), is perplexing since that case was

solely about consolidation of nine separate actions pending in six separate jurisdictions and had nothing to do with class certification or class actions.

Defendants mistakenly assert that typicality is lacking because "no two claims are alike." While it may be true that individualized facts may not be identical, there is no requirement that every class member's situation be identical. Instead, courts have held time and time again that typicality is satisfied as long as the claims of the Plaintiffs and the putative class members arise out of the same practices or course of conduct. The court should find typicality in this class on the basis of Fed. R. Civ. P 23(a)(3).

CONCLUSION

The proposed class here is adequately defined, the claims meet the commonality requirements, and the claims made by the Plaintiffs are typical of those held by all of the proposed class members. For these reasons and all of the above arguments, class certification is appropriate and judicially economical.

Dated this 27th day of August, 2004.

BILL M., et al, Plaintiffs,

By: s/Shirley A. Mora James
Bruce G. Mason, NSBA #12626
Shirley A. Mora James - NSBA #19705
Dianne D. Delair - NSBA # 21867
Mitchel L. Greenwall, Certified Senior Law Student
Nebraska Advocacy Services, Inc.
134 South 13th Street, Suite 600
Lincoln, NE 68508
Telephone: (402) 474-3183
Fax: (402) 474-3274
E-Mail: Shirley@nas-pa.org; Dianne@nas-pa.org

By: s/ David W. Rowe
Bradford E. Kistler - 12243
David W. Rowe - 19155
KINSEY RIDENOUR BECKER & KISTLER, LLP
121 South. 13th Street, Suite 601
P. O. Box 85778
Lincoln, NE 68501-5778
(402) 438-1313
(402) 438-1654 (FAX)
E-mail: drowe@krbklaw.com

ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Dianne D. DeLair dianne@nas-pa.org

Douglas D. Dexter dougdexter@notes.state.ne.us, Assistant Attorney General and attorney for Defendants

Bradford E. Kistler bkistler@krbklaw.com

Bruce G. Mason BMasonLaw@aol.com

Shirley A. Mora James shirley@nas-pa.org

David W. Rowe drowe@krbklaw.com

I further certify that I have mailed by United States Postal Service the foregoing document to the following non CM/ECF participants:

None.

s/ Shirley A. Mora James
Shirley A. Mora James, NSBA #19705