THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

T.B. by and through his parents THOMAS BOYCE and MARGARET BOYCE, *et al.*, individually and on behalf of a class,	)	
Plaintiffs,	)	
vs.	)	No. 12 C 5356
JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	Judge Robert W. Gettleman
	)	Magistrate Judge Sidney I. Schenkier
Defendant.	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION.

Plaintiffs are Medicaid-eligible children who participate in the Home and Community-Based Services Medicaid Waiver for Medically Fragile, Technology Dependent children ("MF/TD" or "MF/TD Waiver"). P.A. 97-689, effective June 14, 2012, promulgated the Save Medicaid Access and Resources Together ("SMART") Act *reprinted in* 2012 Ill. Legis. Service, P.A. 97-689 (S.B. 2840) (Westlaw 2012). Among other things, the SMART Act authorized a program, subject to federal approval, to allow Medicaid-eligible children who are disabled and medically fragile and technology dependent to receive medical assistance in the community. P.A. 97-689, Sec. 75, codified at 305 ILCS 5/5-2b (Westlaw 2012). Participation in the program will be limited to children of families with income up to 500% of the federal poverty level. *Id.* Section 5/5-2b also directs Defendant to maximize, to the fullest extent permitted under federal law, federal reimbursement and family cost sharing, including co-pays, premiums or any other family contributions. *Id.* All Plaintiffs seek a declaration that the "planned reduction or

reduction or denying ... existing benefits of the MF/TD waiver and Medicaid" violates the ADA, the Rehabilitation Act ("RA") and certain federal regulations, the Medicaid Act and 42 U.S.C. § 1983. *T.B. v. Hamos*, No. 12 C 5356, U.S. Civil Docket at Doc. No. 1, page 53 (hereafter "*T.B.* Civil Docket at ___"). All Plaintiffs seek permanent injunctive relief requiring Defendant to "restore the level of Medicaid funding to maintain the existing medical services for the Plaintiffs ... in the MF/TD waiver and Medicaid." *T.B.* Civil Docket at 1, page 54.

II. STATEMENT OF FACTS.

All the named Plaintiffs are Medicaid-eligible children alleged to be medically fragile. *T.B.* Civil Docket at 1, ¶¶ 39(a), 45, 46(a), 52, 53(a), 63, 64(a), 74, 75(a), 85, 86(a), 96. All the named Plaintiffs reside in the family home. *Id.* at 1, ¶¶ 39(e), 46(e), 53(g), 64(h), 75(g), 86(g). All the named Plaintiffs receive in-home nursing services, *Id.* at 1, ¶¶ 39(a), 45(a), 53(a), 64(a), 75(a), 86(a), and all the named Plaintiffs participate in the MF/TD Waiver. *Id.* at 1, ¶¶ 40, 47, 54, 65, 76, 87.

Four of the named Plaintiffs, M.K., X.N., S.P. and O.W., alleged that their families' incomes are greater than 500% of the federal poverty level. *Id.* at 1, ¶¶ 53(f), 56, 64(g), 67, 75(f), 78, 86(f), 89. All Plaintiffs alleged that the passage of the SMART Act together with the Defendant's efforts to amend Illinois' Title XIX State Medicaid Plan and renew the MF/TD Waiver would result in reductions of their current level of skilled nursing and Medicaid benefits in violation of the ADA, RA, the "integration" regulations and the Medicaid Act. *Id.* at 1, ¶¶ 43, 50, 61, 72, 83, 94, 173-208. There is no named Plaintiff who received in-home private duty nursing services except in conjunction with his or her participation in MF/TD. *T.B.* Civil Docket at 1.

Plaintiffs seek an order certifying the following class:

> All medically fragile and technology dependent children who are either enrolled or seek enrollment in either the State of Illinois' Medically Fragile, Technology Dependent Medicaid Waiver (MF/TD) or who are either enrolled or seek enrollment under the State of Illinois Medicaid (Private Duty Nursing – "PDN") Services for children, who receive in-home services but do not meet the institutional level of care to qualify for services under the MF/TD Waiver.

T.B. Civil Docket at 4, ¶ 2. Defendant opposes class certification. First, given Illinois' ongoing activities regarding the renewal of the MF/TD Waiver, its application to the federal Department of Health and Human Services to amend its Title XIX State Medicaid Plan, and the fact that a great deal depends upon approvals from individuals who are not parties to this action, it is not "practicable" within Fed. R. Civ. P. 23(c)(1)(A) for the court to take up the Motion for Class Certification at this time. Second, given the claims Plaintiffs assert, class treatment is inappropriate. Third, even if class treatment were appropriate, there are significant problems with the class definition. Finally, Plaintiffs fail to meet the criteria of Fed. R. Civ. P. 23.

III. ARGUMENT.

A. The Court Should Defer The Motion For Class Certification Because To Do So Is Not Prejudicial To The Parties.

Fed. R. Civ. P. 23(c)(1)(A) states:

> At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

Fed. R. Civ. P. 23(c)(1)(A) (Westlaw 2012). Rule 23(c)(1) requires that the decision whether to certify a class be made usually before the merits of the case are decided. *Wiesmueller v. Kosobucki*, 513 F.3d 784, 787 (7th Cir. 2008) (citing *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941-42 (7th Cir. 1995)). "Usually" is not "always" and "practicable" allows for wiggle room. *Weismueller*, 513 F.3d at 787. The court's determination whether to maintain the action as a class action is not practicable when, as here, the existing record is not adequate for resolving

the relevant issues. *Chateau de Ville Productions, Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966 (2nd Cir. 1978) (citations omitted).

In 2003, Rule 23(c)(1)(A) was amended to change the timing for determination of the class issue from "as soon as practicable after commencement of an action" to "an early practicable time." *See* FRCP 23 — 2003 Notes of Advisory Committee *reprinted in* O'Connor's Federal Rules, Civil Trials (2012) at 1154, ¶¶ 1, 2. The "as soon as practicable" exaction neither reflected prevailing practice, nor captured the many valid reasons that may justify deferring the initial certification decision. *Id.* at ¶ 2. The Advisory Committee found that, among other things, it may be necessary to gather information in order to make the certification decision, including information required to identify the nature of the issues that will actually be presented at trial. *Id.* at ¶ 3.

In the Seventh Circuit, the rule is that before deciding whether to allow a case to proceed as a class action, a judge should make whatever factual and legal inquiries are necessary under Rule 23. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). The proposition that a judge must accept all of the complaint's allegations when deciding whether to certify a class, as Plaintiffs erroneously argue, "cannot be found in Rule 23 and has nothing to recommend it." *Szabo*, 249 F.3d at 675. *T.B.* Civil Docket at 5, pages 4-5. A judge would not and could not accept the plaintiff's assertion as conclusive; instead the judge should receive whatever evidence (if only by affidavit) and resolve the disputes before deciding whether to certify the class. *Id.* at 676. Touching aspects of the merits in order to resolve preliminary matters, *e.g.* jurisdiction and venue, is a familiar feature of litigation. *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2552 (2011) (citing *Szabo*, 249 F.3d 672, 676-77).

Defendant is not suggesting that this court should permit discovery to enlighten the analysis of whether Plaintiffs satisfy the requirements of Rule 23. Rather, the court needs information to identify the nature of the issues that will actually be presented on summary judgment or at trial. That information includes, but is not limited to: 1) with what criteria a renewed MF/TD Waiver will operate, 2) in what manner Illinois' XIX State Medicaid Plan will be amended, if at all, 3) whether the program authorized by 305 ILCS 5/5-2b will be implemented, and 4) if that program is implemented, with what criteria it will operate.

The determination whether to certify class should be deferred in order to permit actors who are not parties to this litigation, namely the U.S. Department of Health and Human Services, to make decisions that directly affect the *T.B.* subject matter. By way of example, if the federal government denied an amendment to Illinois' Title XIX State Medicaid Plan seeking to utilize an income cap, the claims of all the *T.B.* Plaintiffs that challenge use of an income cap become moot and must be dismissed. *Wiesmueller*, 513 F.3d at 786. In the example just given, if class were certified, the claims of all the unnamed class members likewise become moot and must be dismissed. *Id.*, at 785-86 (citations omitted).

Finally, no party is prejudiced by deferring the decision whether to grant class certification. There is no evidence that any of the alleged "reductions" have occurred or will imminently affect any one. Moreover, no one has been given any notice that any changes in medical assistance are imminent.

B. Plaintiffs' Claims Are Inappropriate For Class Treatment.

While the Complaint does not specifically pray for individualized relief for each putative class member, the Acts of Congress on which Plaintiffs predicate their claims are not suitable for class action treatment because these statutes, under their plain language, create rights or remedies

for individuals. In *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012), the Seventh Circuit vacated an order certifying a class of plaintiffs comprised of students eligible for special education services who had been denied or delayed entry in the processes established through the Individuals with Disabilities Education Act, hereinafter "IDEA." *Jamie S.*, 668 F.3d at 497-500. *Jamie S.* held that, like the Acts of Congress at issue here, the IDEA is necessarily child-specific. *Id.* at 498. There is no such thing as a systemic failure to refer individual children for specific IDEA services. Resolving any individual class member's claim for relief under the IDEA requires an inherently particularized inquiry into the circumstances of the child's case. *Id.* Accordingly, the claims asserted here are not suitable for class treatment. Before embarking on the rigorous analysis of whether the class definition proffered by Plaintiffs meets Rule 23's requirements, this court must satisfy itself that the claims are suitable for disposition through the class action format by making whatever factual and legal inquiries are necessary under Rule 23. *Spano v. The Boeing Co.*, 633 F.3d 574, 583 (7th Cir. 2011).

1. The Acts Of Congress That Create The EPSDT Program Provide Only For An Individualized Right For A Child To Receive Certain Medical Services, Upon Demonstrated Medical Need.

42 U.S.C. § 1396a(a)(43), in pertinent part, states that the single state Medicaid agency shall:

> (B) provid[e] or arrang[e] for the provision of such screening services in all cases where they are requested,
>
> (C) arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services . . .

42 U.S.C. § 1396a(a)(43)(B), (C) (Westlaw 2012). At 42 U.S.C. § 1396d(r)(5), the Act of Congress defines the term "early and periodic screening, diagnostic, and treatment services" to

include, among other things, "[s]uch other necessary health care ... to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State [Medicaid] Plan." 42 U.S.C. § 1396d(r)(5) (Westlaw 2012). Under EPSDT, an eligible child has a right to be examined periodically to determine the existence of any physical or mental illnesses or conditions. Also under EPSDT, a Medicaid-eligible child has a right to receive treatment allowable in 42 U.S.C. § 1396d(a) to correct or ease the conditions discovered through the periodic screenings, whether the State includes the corrective services in its State Medicaid plan or not. The provisions of Title XIX cited do not impose any liability on Defendant for their breach. The Plaintiffs here do not claim that Defendant has failed to implement the Acts of Congress that require an EPSDT component in Illinois' Medicaid program. Rather, all named Plaintiffs and putative class members, through Count III, seek individualized final relief, specifically, to continue to receive treatment or services medically necessary for their individual circumstances in the community and not in an institution. The claims set forth in Count III of the Complaint are unsuitable for treatment in a Rule 23(b)(2) class.

2. Neither Title II Of The ADA Nor The Rehabilitation Act Recognizes Or Remediates "Systemic" Or "Per Se" Violations Of The Statutes.

As a general rule, Title II of the ADA only protects from discrimination a disabled individual who, with or without reasonable modifications to rules, policies or practices, meets the essential eligibility requirements for the receipt of services or the participation in programs provided by the public entity. 42 U.S.C. §§ 12132; 12131(2). Under the plain language of the Act of Congress, an individual alleging discrimination by a public entity in its administration of federally funded programs has the burden of proving, as part of his or her *prima facie* case, that he or she is a "qualified individual with a disability." The language is written in the singular.

Because Title II of the ADA requires a Plaintiff to prove his or her status as a "*qualified individual*," this court would be called upon to determine, through an individualized hearing, not only whether discrimination occurred, but also whether the alleged discrimination was unlawful. (Emphasis supplied). The virtually identical statutes concerning employment discrimination, Title I of the ADA, 42 U.S.C. §§ 12112; 12111(8), have been so construed. *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 191-92 (3rd Cir. 2009) (concerning employment discrimination under Title I of the ADA, the court must make an inquiry into whether class members are "qualified" within the meaning of the statute which includes whether they can or need to be reasonably accommodated before a classwide determination of unlawful discrimination can be reached; accordingly, class treatment is not appropriate); *Weigel v. Target Stores*, 122 F.3d 461, 465 & n. 3 (7th Cir. 1997) (collecting cases and finding that since the ADA's proscription against employment discrimination protects only "qualified individual[s] with a disability," the elements of a plaintiff's *prima facie* showing must include proof that the plaintiff is a member of the protected class).

In *Hohider*, the lower court certified a nationwide class of employees alleging a pattern or practice of unlawful discrimination under Title I of the ADA. *Hohider v. United Parcel Service, Inc.*, 243 F.R.D. 147, 246 (W.D. Pa. 2007). The Court of Appeals reversed the class certification order. *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 171 (3rd Cir. 2009). The Third Circuit found that the lower court failed to incorporate the ADA's substantive requirements into its analysis at the liability stage and, inappropriately, certified a class that included both "qualified" and "not qualified" individuals. *Id.* at 196-98. Because only a "qualified individual" could establish a systemic or *per se* violation of the ADA, the question of who was "qualified" had to be resolved at the outset. *Id.* at 185-202. The facts that would

resolve the question of who was qualified were too individualized for a class to be certified even though the plaintiffs in *Hohider* did not seek any individualized relief. *Id.* The ADA's "qualified" standard cannot be evaluated on a classwide basis in a manner consistent with Rule 23(a) and (b)(2). *Id.* at 196. Since the statutes construed in *Hohider* are virtually identical to the statutes in Title II of the ADA, this court must reach the same result.

The plain language of the RA demands a similar result. It provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability" be excluded from any federally funded program. 29 U.S.C. § 794(a). While the statute does not define the term "otherwise qualified," the Supreme Court held that an "otherwise qualified" person for the purpose of establishing that prohibited discrimination under the RA has occurred, is one who is able to meet all the program's requirements in spite of his or her disability. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). With respect to the Plaintiffs' RA claims, the court must conduct individualized hearings for the named Plaintiffs and each putative class member to determine who, with or without modifications to federally funded programs, is "otherwise qualified" to participate in Defendant's programs.

Plaintiffs incorrectly argue that class treatment is automatically appropriate whenever a Plaintiff challenges an allegedly discriminatory "policy or practice." *T.B.* Civil Docket at 5, pages 5-7. First, Plaintiffs do not allege what "policy or practice" Defendant maintains in reference to the named Plaintiffs and putative class. There can be no evidence of "policy or practice" until the responsible actors give shape to the programs at issue. Moreover, Plaintiffs presented no evidence of any illegal policy or practice. Second, even if the federal government were to permit all the changes that Illinois seeks, the question, at bottom, will always be whether Defendant should modify a program for an allegedly disabled individual by providing a service,

or waiving cost sharing, *etc.*, as a reasonable accommodation to a disability and whether a refusal to do so is unlawful discrimination. The claims contained in Counts I and II are unsuitable for class treatment.

With regard to the claims set forth in Count IV, *i.e.*, the purported violations of the reasonable promptness provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(8), no Plaintiff alleged any facts to bring him or herself within the ambit of this statute. Defendant relies on the material contained at pages 10-11 of her Response in Opposition to Plaintiffs' Motion for TRO. *T.B.* Civil Docket at 30, pages 10-11. Under the language of that Act of Congress, and the authorities cited, a so-called right to medical assistance in a reasonably prompt fashion is similarly an individualized determination. The claims contained in Count IV are unsuitable for class treatment.

C. The Court Should Not Certify Class Because The Class Definition Proffered Is Vague And Requires Individualized Fact-Finding In Order To Determine Membership In The Class.

The most important part of the class certification order is where it defines the class because both the scope of the litigation and its ultimate *res judicata* effect depend upon the class definition. *Spano v. The Boeing Co.*, 633 F.3d 574, 583-84 (7th Cir. 2011). The class definition "must be definite enough that class can be ascertained." *Wooley v. Jackson Hewitt, Inc.*, 2011 WL 1559330 * 3 (N.D. Ill. April 25, 2011) (citing *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006)). Even if the claims asserted here were suitable for class treatment, the definition fails. First, no named Plaintiff is "either enrolled or seek[s] enrollment under the State of Illinois Medicaid (Private Duty Nursing – PDN") Services for children." Defendant disputes that any such program exists, but no one who claims to be participating in it is now before the court. Second, even if some children receive in-home private duty nursing services without

participating in MF/TD, they are not necessarily receiving those services because they are "medically fragile and technology dependent children." If children are receiving in-home private duty nursing services and not in MF/TD, there is no way to tell if they are also "medically fragile and technology dependent" without an individualized inquiry into their unique circumstances based on expert opinion evidence. Third, there is no time limit on the class. Once children who receive EPSDT Medicaid services, whether they participate in MF/TD or not, reach age twenty-one, they lose eligibility for those services by Act of Congress. 42 U.S.C. § 1396a(a)(43). The MF/TD participants become members of a class certified in *Hampe v. Hamos*, U.S. Dist. Court No. 10, C 3121, Civil Docket at 72, 75. Finally, simply because an individual "seeks enrollment" in any program does not mean that he or she qualifies for it with or without reasonable modification.

D. Plaintiffs Do Not Meet The Legal Standards For Certification Of A Rule 23(b)(2) Class.

A class may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The need for a rigorous analysis is for the defendant's protection because certification of a class can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit. *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) (citations omitted). The named plaintiffs bear the burden of establishing the Rule 23(a) requirements. *Retired Chicago Police Ass'n v. Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). The plaintiffs' failure to meet any one of them precludes certification of a class. *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993) (citations omitted). Additionally, a putative class action plaintiff must also satisfy one of the three provisions of Rule 23(b) before the class action can be certified. *Retired Chicago Police*, 7

F.3d at 596. The Plaintiffs expressly seek certification of a class under Rule 23(b)(2). *T.B.* Civil Docket at 4, ¶ 2. By engaging in the following analysis, Defendant does not concede or waive any of the arguments made in Parts III(A) through (C) of this Response.

1. Numerosity.

Defendant does not dispute that Plaintiffs have satisfied Rule 23(a)(1) as to those persons who are currently enrolled in MF/TD. For all the reasons set forth on pages 10-11 of this Response, Defendant disputes that Plaintiffs satisfied Rule 23(a)(1) as to those children who received in-home private duty nursing services through EPSDT and who do not participate in MF/TD.

2. Plaintiffs Fail To Establish Commonality.

The Plaintiffs' claims are not based on a common nucleus of operative fact. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). The individualized nature of proof of each class member's claim will defeat commonality in cases where a diverse class lacks uniformity. *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2550-57 (2011); *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 497-98 (7th Cir. 2012). Under the ADA and RA, the proof required to establish a status of "qualified individual" is unique to each putative class member, so there are no common questions of law or fact. As previously shown, the Medicaid statutes do no more than confer rights on an individual to obtain certain medical services.

In *Wal-Mart,* the Supreme Court reversed an order that certified a Plaintiff class, pursuant to Fed. R. Civ. P. 23(b)(2), consisting of approximately one and one-half million current and former female employees of Wal-Mart. The class sought declaratory and injunctive relief together with backpay for Wal-Mart's alleged discriminatory conduct in violation of Title VII. The *Wal-Mart* plaintiff class lacked commonality as required by Rule 23(a)(2), because an order

certifying class cannot rest merely on common questions of law or fact contained in the complaint. *Wal-Mart,* 131 S. Ct. at 2551-52.

Rather, commonality requires the plaintiff class representatives to demonstrate that the class members "have suffered the same injury" and not merely suffered a violation of the same provision of law. *Id.* at 2551 (citation omitted). The plaintiffs' claims must depend upon a common contention which "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551. There was no commonality among the *Wal-Mart* class members because each action of each decision-maker toward each plaintiff would have to be separately analyzed. *Id.*, at 2553-55. When the decision-makers acted under a system that conferred discretion upon individual employees, proof of the illegality of one manager's use of discretion does not prove the illegality of another's. *Id.*

Wal-Mart clearly applies to the claims Plaintiffs assert in the Complaint because they depend on individualized proof of discrimination, or individualized medical need for services. First, the Plaintiffs' claims rest merely on allegations that Defendant violated the law and not on allegations that the named Plaintiffs suffered the same injuries. *T.B.* Civil Docket at 5, page 10. All the questions Plaintiffs identified are speculative, bottomed on acts that may allegedly contravene federal law, if they ever come to pass, or depend upon highly individualized fact-finding. *Id.* Second, there are no allegations that Defendant denied medical services and treatment to the named Plaintiffs under any common, standard policy. The named Plaintiffs cannot allege that such a policy even exists under the circumstances regarding the MF/TD Waiver renewal and efforts to implement 305 ILCS 5/5-2b. The facts that prove whether the

Plaintiffs and putative class are entitled to relief under any theory are too individualized to admit of class treatment. Plaintiffs cannot satisfy Rule 23(a)(2).

3. Plaintiffs Failed To Establish Typicality.

Rule 23(a)(3)'s requirement of typicality focuses on how the facts and issues involving the named class representatives relate to the putative class members' claims. The named representatives' claims must have the same essential characteristics of the claims of the class at large. *Retired Chicago Police*, 7 F.3d at 596-97; *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009). Plaintiffs fail to establish typicality because any liability determination that must rest on highly individualized application of the law to the facts can never satisfy typicality. *See Jamie S. v. City of Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012).

4. Adequacy of Representation.

Defendant does not dispute that Plaintiffs have satisfied Rule 23(a)(4).

5. Plaintiffs Fail To Satisfy Rule 23(b)(2).

Rule 23(b)(2) requires a showing that the "party opposing class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief *with respect to the class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added). Class cannot be certified under Rule 23(b)(2) when, as here, Plaintiffs' claims include claims for individualized relief that are not incidental to the claims for classwide relief. *Wal-Mart*, 131 S. Ct. at 2557-60. The Supreme Court stated that, "[t]he key to the (b)(2) class is the 'indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Id.* at 2557 (citation omitted). Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the

class. *Id.* The combination of individualized and classwide relief in a (b)(2) class is inconsistent with the history and structure of the rule, and Rule 23(b)(2). *Id.* at 2557-61.

There is no "indivisible nature" to any final injunctive or declaratory relief that could arguably be awarded here. All named Plaintiffs and putative class members want individual services that their professionals deem medically necessary for them in whatever quantum it takes to keep them in the community, as well as a final injunction to bring an end to allegedly discriminatory or otherwise illegal acts.

IV. CONCLUSION.

WHEREFORE, for the foregoing reason, Defendant, JULIE HAMOS, in her official capacity as Director of the Illinois Department of Healthcare and Family Services, prays that Plaintiffs' Motion for Class Certification be denied.

Respectfully submitted,

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DATED: November 13, 2012

CERTIFICATE OF SERVICE

KAREN KONIECZNY, one of the attorneys of record for Defendant Hamos, hereby certifies that on November 13, 2012, she caused a copy of the foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** to be served by the Court's ECF/electronic mailing system upon ECF filing users, and that I shall comply with LR 5.5 as to any party who is not a filing user or represented by a filing user.

/s/ Karen Konieczny