IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PHYLLIS BALL, *et al.*,	:	**Case No.: 2:16-cv-282**
Plaintiffs,	:	**Chief Judge Sargus**
v.	:	**Magistrate Judge Deavers**
JOHN KASICH, *et al.*,	:	
Defendants.	:	
and	:	
GUARDIANS OF HENRY LAHRMANN, *et al.*; OHIO ASSOCIATION OF COUNTY BOARDS,	: :	
Defendant-Intervenors.	:	

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

On January 9, 2018, this Court indicated that, in lieu of oral argument on the pending motion for class certification, it would accept an additional reply brief from the Plaintiffs. Our prior briefs have demonstrated, at length, why class certification is appropriate. *See generally*, Docs. 42, 283. Rather than repeat those arguments, this brief will highlight the essential flaws in Defendants' position.

Defendants' arguments have two consistent themes, each of which contradicts the controlling legal standard. First, Defendants insist that, largely due to the State's recent actions to expand waiver services, members of the proposed class have no claim. But the Sixth Circuit has repeatedly held—both before and after the Supreme Court's *Wal-Mart* decision—that "whether the class members will ultimately be successful in their claims is not a proper basis for reviewing a certification of a class action." *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th

Cir. 2006). Second, Defendants demand that all of the members of the proposed class be essentially identically situated to one another. But the Sixth Circuit and other courts have consistently held that class treatment is appropriate where the class members' claims arise from the same practice and are based on the same legal theory, notwithstanding that different class members face "different factual circumstances." *Id.* at 553. Following this principle, courts have repeatedly certified classes in statewide *Olmstead* cases like this one, both before and after *Wal-Mart*. *See*, Doc. 283 at 35, 43; Doc. 42 at 35-41 (collecting cases). By asserting that *Olmstead* claims are inherently individualized and inappropriate for class treatment, the arguments of Defendants and their *amici* would cast aside this deeply rooted precedent.

This case challenges several discrete and systemic statewide practices that affect all members of the proposed class and can be resolved with a single, statewide injunction. As we have shown, see Doc. 283 at 38-41, nothing in our proposed definition will require the Court to make individualized determinations of class membership or liability. The proposed class satisfies the standards established by the controlling cases.

I. THE STATE'S RECENT EFFORTS TO IMPROVE COMMUNITY SERVICES, AND OTHER MERITS ISSUES, ARE IRRELEVANT TO THIS MOTION

At this stage of the litigation, the relevant question is whether class certification is appropriate, not whether Plaintiffs can prove their case on the merits. *See*, Doc. 283 at 31-35. Defendants persistently disregard that distinction. They spend the first 18 substantive pages of their brief arguing that the State provides appropriate integrated services and has expanded the community-based services it provides. Doc. 291 at 10-28. Then, in discussing cohesiveness, Defendants contend: that many class members will not choose community services (*id.* at 34-36); that 8-bed ICFs are not segregated settings (*id.* at 37-38); that the requested relief would constitute a fundamental alteration in violation of *Olmstead v. L.C. ex rel. Zimring*, 527 U.S.

581, 603-04 (1999) (Doc. 291 at 40-43); and that, as a result, the State will never be required to provide enough slots to serve everyone in the class (*id.* at 37). And in discussing the class definition, Defendants argue that the "at-risk" portion of the class includes people who are not at risk of unnecessary institutionalization. *Id.* at 61-62.

These are merits questions, not questions about whether class certification is appropriate. *See*, *e.g.*, *Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 268–69 (D.N.H. 2013) (whether plaintiffs' requested relief would work a fundamental alteration under *Olmstead* is a merits question not to be addressed at class certification). As we have shown, class certification is appropriate here because Defendants have adopted systemic statewide practices that affect the members of the proposed class generally. These practices include:

(1) providing fewer community service slots than are necessary to meet the demonstrated need;

(2) maintaining a fiscal structure that encourages unnecessary institutionalization (by giving county developmental disability boards the power to decide whether to fund community services or refer individuals to ICFs, but forcing the county boards to pay only if they choose to fund community services);

(3) providing insufficient diversionary services, including providing them too late to prevent unnecessary institutionalization; and

(4) failing to provide meaningful individualized information and counseling about community-based alternatives to institutionalization.

These discrete and systemic policies raise questions that are common to the class. This Court can resolve them by a statewide injunction that requires Defendants to: increase the number of community-services slots the State creates and funds; change their fiscal structure to eliminate

the disincentive to institutionalization (by, for example, requiring cost sharing between the county boards and the state for both institutional and community services); provide diversionary services earlier; and expand the information and counseling provided about alternatives to institutionalization.

Plaintiffs' class certification papers did not identify these systemic failures in an effort to prove that the failures exist; that is not the proper inquiry at this stage. Plaintiffs' burden is to show that there are common "*questions*," not that the questions will ultimately be "answered in their favor." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 468 (2013) (emphasis in original). Yet Defendants' responses focus on the merits. Thus, they argue that the State has allocated and funded a sufficient number of waivers. Doc. 291 at 48-49. They contend that the State has recently acted to address the incentive problem caused by its funding structure and that doing more would constitute a fundamental alteration under *Olmstead*. *Id.* at 49-50. And they assert that the State has recently improved its counseling services and that the law requires it to do no more. *Id.* at 51-52.

These are all merits arguments. Plaintiffs will refute them at trial, because they are based on inaccurate and incomplete characterizations of the facts and the governing law. *See generally*, Doc. 283 at 9-31. But this motion is not the place for those arguments. "'[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision.'" *Amgen*, 568 U.S. at 466 (quoting Advisory Committee's 2003 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 23). The Sixth Circuit has repeatedly instructed that "district courts may not turn the class certification proceedings into a dress rehearsal for the trial on the merits." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 851–52 (6th Cir. 2013) (internal quotation marks omitted). Defendants' arguments point to an alleged "'failure of proof

as to an element of the plaintiffs' cause of action'"—one that is "'properly addressed at trial or in a ruling on a summary-judgment motion. The allegation should not be resolved in deciding whether to certify a proposed class.'" *Id.* at 859 (quoting *Amgen*, 568 U.S. at 470). See, *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012) (*Olmstead* plaintiffs do not have to prove, at the class certification stage, that they "are unnecessarily segregated," because "[t]hat is, in effect, the answer to the common question").

Defendants argue that "class certification often requires courts to consider issues related to the merits and relief." Doc. 291 at 29. That is true but irrelevant. A court must understand, at least in general terms, what claims a plaintiff is making and what sorts of relief the plaintiff is seeking in order to determine whether there are common questions. And a court cannot understand those matters without some reference to what the arguments on the merits will be. That is why the Supreme Court has said that the class certification analysis can "entail *some overlap* with the merits," will "*involve[] considerations* that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," and may "*touch[] aspects* of the merits." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (internal quotation marks and citations omitted; emphasis added). But that is a far cry from Defendants' arguments. Defendants do not merely touch on the merits in the course of challenging whether there are common questions. Rather, Defendants' arguments rest on a particular view of how the common questions should be resolved. That is precisely the sort of "dress rehearsal for the trial on the merits" the Sixth Circuit has rejected. *Whirlpool*, 722 F.3d at 851-52 (internal quotation marks and citation omitted).

Even if the State's recent efforts were relevant at this stage, they would not undermine Plaintiffs' case—much less render it "moot." Doc. 291 at 51. As we have shown, it is only

when litigation has been threatened or pending that the State has made any meaningful progress in promoting integrated services. Doc. 34 at 24-26, 28-30; Doc. 283 at 6-7. And, indeed, the State itself has admitted, in a document obtained in discovery, that its efforts here were designed at least in part to "position the state for [this] litigation." Doc. 283 at 13. If the pressure of this case were lifted, Defendants would be "free to return to [their] old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks and citation omitted). Their recent efforts under the threat of a judgment against them provide no basis for resolving the case in their favor.

Defendants also improperly inject merits considerations when they argue that Plaintiffs' motion fails to properly specify the injunctive relief requested. Doc. 291 at 39-40. The outlines of the classwide injunction that would redress the harms we allege are straightforward enough. Such an injunction would require the State to: increase the number of community-services slots it authorizes and funds; change its financial structure for developmental disability services to eliminate the current skewed incentive for institutionalization over community placement; and create a diversion-counseling, informed-choice, and transition-services process that makes the choice of integrated services meaningful.

Defendants claim that Plaintiffs have not specified a proposed injunction at the level of detail that would be required in a final order of this Court. For example, they note that we have not identified precisely how many more community-services slots we seek, where the money will come from, or how to change the financial structure that incentivizes institutionalization. *Id.* at 39. But that is entirely appropriate. A motion for class certification is not a post-trial brief or motion for permanent injunction—much less is it a settlement demand. *Cf. id.* (decrying Plaintiffs' failure to describe what "would satisfy this class").

The purpose of the motion before the Court is to determine whether there are sufficiently common questions—questions that can drive resolution of the case for the entire group of proposed plaintiffs—for this litigation to proceed on a class basis. The Court can decide whether class certification is appropriate without knowing whether, if Plaintiffs ultimately prevail, it should order the creation of 500, 1,000, 10,000, or some other number of new community-services slots. And the Court can decide whether class certification is appropriate without first deciding whether to rectify the current skewed financial incentives by requiring full state-level funding of Ohio's share of all institutional and waiver services, by requiring full county-level funding of Ohio's share, or by changing the financial structure in some other way. The key point—for the motion that is actually before the Court—is that Plaintiffs are challenging discrete statewide policies that have an effect across the class and can be resolved by a classwide injunction. There is no need for the Plaintiffs or the Court to actually craft the injunction at this stage. *See*, *Vallario v. Vandehey*, 554 F.3d 1259, 1270–71 (10th Cir. 2009) (Kelly, J., concurring in the result) (noting that Rule 23 "merely requires pleading facts that would reflect 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole,'" and that "[i]t is up to the district court to construct an appropriate order after hearing the evidence") (quoting Fed. R. Civ. P. 23(b)(2)). Indeed, it would be premature to do so, because the scope and terms of any injunction will necessarily depend on what Plaintiffs ultimately prove on the merits. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy.").

II. MEMBERS OF THE PROPOSED CLASS HAVE SUFFICIENTLY ALIGNED AND COHESIVE INTERESTS

Under the various headings of cohesiveness, commonality, typicality, adequacy of

representation, and the propriety of the class definition, Defendants make essentially the same argument. They contend that the members of the proposed class are not identically situated to one another—and may not all have a claim for relief. But the Sixth Circuit has specifically rejected any requirement that the members of the class be identically situated or that all must have a claim for relief. "'All of the class members need not be aggrieved by . . . [the] defendant's conduct in order for some of them to seek relief under Rule 23(b)(2).'" *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012) (quoting 7A Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 1775). Rather, "'[w]hat matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Id.* at 427 (quoting *Wal-Mart*, 564 U.S. at 350) (alterations in *Gooch*). *See also*, *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015) ("The Supreme Court in *Dukes* did not hold that named class plaintiffs must prove at the class-certification stage that all or most class members were in fact injured to meet [the commonality] requirement.").

Rather, the Sixth Circuit has held that the relevant question for class certification is whether the plaintiffs challenge "a pattern or practice that is generally applicable to the class as a whole"—one that can be enjoined at once for the entire class. *Gooch,* 672 F.3d at 428 (internal quotation marks omitted). Each of the systemic statewide practices that we challenge can be enjoined for the class as a whole. For example, if this Court orders the State to increase the number of community-based services slots it funds, to change its financing structure to eliminate the incentive to unnecessarily institutionalize, or to provide a certain set of diversionary and counseling services at an earlier time than is the present practice, that order will apply to the entire class. Even if not all of the class members can ultimately show that the challenged

practices violated their rights—the question on the merits—these statewide practices can be challenged in a class proceeding. *See*, *id.* (class certification appropriate "[e]ven if some class members have not been injured by the challenged practice") (internal quotation marks and citation omitted).

Thus, contrary to Defendants' suggestion (Doc. 291 at 46), this case is in exactly the same position as was *Gooch*. Here, as in *Gooch*, we seek an order that would resolve key issues classwide: there, an order directing a particular interpretation of an insurance contract that applied to the plaintiff class; here, an order barring or requiring specific statewide policies that apply to the plaintiff class. Even if, as Defendants argue, some members of the proposed class here will not be able to prove that they were injured by the statewide policies we target, the same was true in *Gooch*. *See*, Doc. 291 at 46 (acknowledging that "[n]ot all class members were injured by the provision at stake").

Considered against the proper legal standard, none of Defendants' suggested differences within the class is sufficient to deny class certification. Defendants argue that the class definition improperly includes both those who affirmatively want community services and those who are merely open to them but may not ultimately choose them. *See*, *id.* at 34-36, 62-65. Defendants argue that "[m]aybe and yes are different." *Id.* at 34. But the difference is not relevant to Plaintiffs' underlying legal claims. The *Olmstead* right to community services extends to those who "do not oppose such treatment"—not simply to those who have affirmatively asked for it. *Olmstead*, 527 U.S. at 607. And the right to be informed of and choose among alternatives to institutional care under the Social Security Act would be meaningless if it extended only to those who already knew about and had chosen those alternatives. *See*, Doc. 90 at 31-33. Including in the class those who have expressed interest in community services, even if they have not yet

made any ultimate choice, appropriately reflects the legal claims here. Once this Court issues a class wide order removing the barriers that the State currently maintains to receiving integrated services, the placement decision for each class member can be made through the State's individualized person-centered planning process. *See*, Doc. 283 at 43.

All of those in the proposed class, both those who have already chosen community services and those who would like to explore them further, would benefit from an order ensuring that integrated community services are available and individuals are informed of, and counseled about, them in a sufficient time and manner to make their choice meaningful. That is why other courts addressing *Olmstead* cases have held that differences in preferences do not defeat class certification. *See*, *e.g.*, *Kenneth R.*, 293 F.R.D. 254, 269 (holding that "the existence of preference differences among class members" does not defeat class certification in challenge to statewide policies, and that "because preferences can change, class members who today might prefer institutionalization, can reasonably be thought to also have an interest in the availability of community-based treatment options should their preferences change tomorrow").

Moreover, the revised definition takes pains to limit the class even further than is necessary to match the underlying legal requirements. Rather than including all those who have not objected to community services, it includes only those individuals who have affirmatively indicated their interest in community services. If currently institutionalized, those individuals will have done so by stating that they are or may be interested in community options; if at risk of institutionalization, they will have done so by staying in the community and placing themselves on a waiting list for community-based services. Individuals who have made such affirmative expressions of interest are entitled to a state system that gives them a meaningful choice—which is precisely the class wide relief we seek.

Defendants argue that individuals who currently reside in 8-bed ICFs should not be included in the class because the State has so far chosen to "focus[] its resources" on providing options counseling to those in ICFs "with *nine* or more beds." Doc. 291 at 37. But, as Defendants acknowledge, residents of 8-bed ICFs "who have APSI as a guardian" are in fact receiving options counseling. *Id.* Defendants are thus wrong to say that residents of those ICFs "are technically outside the proposed class." *Id.* at 54. The class definition applies in precisely the same way to residents of 8-bed ICFs as it does to residents of ICFs with 9 or more beds: Those residents who express interest in community services after options counseling—whether under the State's current practices, or under the practices it implements in the future—are eligible to be members of the class; those who do not are not. *See*, Doc. 283 at 7 (currently institutionalized individuals are class members only if they express interest in community services "after receiving options counseling"). That does not defeat cohesiveness, commonality, or anything else. To the contrary, it ensures that everyone in the class has an interest in the common questions in this litigation, and that those interests are capable of being served through a single injunctive order.

Finally, Defendants suggest that Plaintiffs are really seeking relief on behalf of at least eight distinct groups. Doc. 291 at 53-54. But Defendants make this argument only by artificially separating state actions that are in fact interconnected. They treat the State's failure to provide and fill a sufficient number of community-services slots (*id.* at 53 (first bullet)), as a separate matter from the State's failure to provide sufficient services for waiver recipients to achieve integration (*id.* (second through fourth bullets)). They treat each of the different sorts of services that the state fails to provide in its waiver programs (housing and supports, employment, and day programs), as separate from each other. *Id.* (second through fourth bullets). They treat the

State's maintenance of a financing scheme that incentivizes unnecessary institutionalization as entirely separate from those failures. *Id.* (fifth bullet). They then treat all of these systemic state acts as separate from the State's failure to provide meaningful informed-choice services, at an appropriate time, to members of the class—and they treat the latter failure as implicating three distinct groups depending on where the affected individuals currently live. *Id.* at 54 (sixth through eighth bullets). Defendants might as well say that the proposed class implicates 299 distinct groups, because that is the number of ICFs in the state with 8 or more beds. Doc. 283 at 11.

It is true that any injunction that resolves this case might include separate provisions that address each of these failures. But there is no principle of class-action law that says that an injunction in a Rule 23(b)(2) case must be limited to a single provision addressing a single failure by the defendant. To the contrary, final injunctions with multiple, distinct provisions are commonplace in class action litigation. As the Sixth Circuit has made clear, the issue is whether the case is amenable to resolution by a "single *injunction*," which addresses questions on a class wide basis, or whether the claims are seeking "*individualized* relief" tailored to particular plaintiffs. *Davis v. Cintas Corp.*, 717 F.3d 476, 490 (6th Cir. 2013) (internal quotation marks omitted; first emphasis added). Here, Plaintiffs seek only a class wide injunction. And although that injunction will contain multiple distinct provisions (if the Court ultimately agrees with our merits arguments), that does not undermine the cohesiveness or commonality of the class, nor does it undermine any of the other class action prerequisites. Regardless of any fine analytical distinctions one might draw among the State's failures, they work together to deny integrated services to members of the proposed class generally. Informed-choice services (Defendants' sixth through eighth bullet points) cannot give members of the class any real choice between

institutional and community services unless the State makes community services available in a sufficient *quantity* (Defendants' first bullet) and with sufficient *quality* (Defendants' second through fourth bullet points) to meet the need—and unless the officials making placement decisions can do so without a financial incentive to promote unnecessary institutionalization (Defendants' fifth bullet point). Any given member of the class is likely to confront more than one of these failures, and unless an injunction addresses them all it will not adequately remedy the legal violations.

Even if not every class member is affected by these state failures in the same way, class certification is appropriate. As we have shown, the Sixth Circuit has repeatedly rejected any requirement that all class members have been injured in the same way—or even injured at all. What matters is that the plaintiffs challenge practices that are "generally applicable to the class as a whole" and subject to a classwide injunction. *Gooch,* 672 F.3d at 428 (internal quotation marks omitted). That is precisely what we challenge here.

III. CONCLUSION

The motion for class certification should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs' Reply Brief in Support of Motion for Class Certification was filed electronically on January 23, 2018. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

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