UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEFINA S., DEAJA D., CYNTHIA Q., SHANTELL S., and BIANCA M., on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	1:17-CV-7661 (AJN)
-against-	:	
THE CITY OF NEW YORK,	:	
Defendant.	:	

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. PRELIMINARY STATEMENT

Named Plaintiffs are five parents with real or perceived intellectual disabilities whose children are or have been under the supervision of Defendant New York City's Administration for Children's Services ("ACS"), seeking to represent a class of all parents with real or perceived intellectual disabilities who have been or will be investigated for child abuse or neglect by ACS. All Named Plaintiffs, and members of the class they seek to represent, have been discriminated against by ACS in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101(b) *et seq.* (hereinafter "ADA"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (hereinafter "Section 504"). They have suffered the common harms of (i) denial of reasonable accommodations and (ii) higher incidents of court involvement and subsequent removal of their children from their care. ACS caused these harms through its failure to establish and enforce an adequate accommodation policy for itself and its contract agencies, failure to train ACS and contract agency workers who have client-facing responsibilities in the processes and procedures that meet the requirements of the ADA and Section 504, and failure to ensure that reasonable accommodations and tailored services, as required by the ADA and Section 504, are provided.

As Defendant acknowledges in its own papers, ACS is the city agency "responsible for the administration of the child welfare system in New York City." (Opp. at 3). ACS purports to fulfill this responsibility by performing home visits and risk assessments, creating and supervising case management plans, initiating and advocating in court proceedings, and by entering into contracts with other entities to administer foster care placements and to provide preventive and other services to parents.

ACS recognizes that in the performance of all its responsibilities, both directly and indirectly, it must adhere to the requirements of the ADA. Indeed, ACS's current ADA policy specifically states that "reasonable accommodations must be made to all eligible clients with physical or mental disabilities in all [ACS] and provider agency programs," and that the policy "applies to all ACS and provider agency staff that provide preventive and foster care services." (Ex. A, ACS "The Americans with Disabilities Act (ADA) Procedure" at 1).

Despite this clear acknowledgement of both its responsibilities under the ADA and the application of those responsibilities to its contract agencies, ACS seeks to prevent certification of the proposed class on the theory that it is not responsible for the actions of the entities to which it delegates many of its responsibilities, and therefore there are no common questions of law and fact in this case. That argument fails.

Plaintiffs contend that ACS's ADA policy is inadequate, and that even the inadequate policy generally is not followed. Those contentions concern the merits of this case. But on this Motion for Class Certification, where Defendant concedes the proposed class meets numerosity and adequate representation under Fed. R. Civ. P. 23(a), and the only disputes concern commonality and typicality, there can be no question that ACS's ADA obligations apply to all its contract agencies as well as to ACS itself. In addition, the facts show ACS itself is directly involved in all cases to a significantly greater degree than it tries to present in its opposition.

Named Plaintiffs' claims are also typical of those of the class as a whole. By failing to assess adequately parents who may have intellectual disabilities, and then by failing to provide tailored services and basic accommodations to parents with real or

perceived intellectual disabilities, ACS denies all members of the putative class access to the benefits that its services are supposed to provide. Here, the five Named Plaintiffs have all suffered from a lack of proper parenting assessments, a lack of services tailored to their needs, and a lack of basic accommodations.

II. ARGUMENT

The Class Satisfies the Requirements of Rule 23 and Rule 23(a)

A party moving for class certification must establish that the class meets the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and that the action can be maintained under at least one of the subsections of Rule 23(b). *See* Fed. R. Civ. P. 23; *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 440 (S.D.N.Y. 2006). Here, Plaintiffs move for certification under Rule 23(b)(2), asserting Defendant's conduct applies to all putative class members, "so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Defendant argues commonality is not met because Defendant has chosen to contract with other agencies to perform some of its duties and because the individual details of each Family Court case differ. Defendant argues typicality is not met because Named Plaintiffs live in only three boroughs and have contacts with only some of the City's contract agencies. These arguments all fail.

A. Plaintiffs have satisfied the commonality requirement because Defendant has demonstrated a common course of action through its ADA policy, lack of available services, and failure to train and supervise employees of ACS and its contract agencies.

Defendant argues Plaintiffs' harms stem from the actions of dozens of different foster care and preventive service agencies. This is both factually and legally incorrect.

Plaintiffs share a common injury from a common cause: ACS's systemic violations of the ADA. Defendant does not dispute its obligation to comply with the ADA, Section 504, or its duties arising from state law. Nor does Defendant dispute that it is required to prevent removals of children from their families where possible and create and supervise a safety plan or reunification plan, which includes referring parents to the appropriate support services or programming. N.Y. Soc. Serv. Law § 409-a(1), (4); N.Y. City Charter § 617; N.Y. Soc. Serv. Law § 409-e(2)(c); N.Y. Comp. Codes R. & Regs. tit. 18, § 428.6; 42 U.S.C. § 671 (2018); N.Y. Fam. Ct. Act §§ 1027, 1028. Defendant's decision to turn some of its functions over to contract agencies has no bearing on its obligations. ACS cannot escape its responsibility by referring a child or parent to a third party. *See Tylena M. v. Heartshare Children's Servs.*, 390 F. Supp. 2d 296, 305 (S.D.N.Y. 2005) ("While the City . . . delegates responsibility for the provision of direct foster care services to private entities, this delegation does not absolve the City of its ultimate responsibility to ensure that children in its custody receive adequate care and protection from harm.").

Defendant itself acknowledges in its ADA policy that its obligations under the ADA extend to its contract agencies. The policy states that "reasonable accommodations must be made to all eligible clients with physical or mental disabilities in all [ACS] *and provider agency programs*," and that the policy "*applies to all ACS and provider agency staff that provide preventive and foster care services* . . . ." (Ex. A at 1)(emphasis added). In addition, the Foster Care Quality Assurance Standards state ACS "will supervise, monitor, audit and review the activities of the Provider in providing the family foster care services in accordance with their Foster Care Contract Agreement." (Ex. B, Foster Care

Quality Assurance Standards at 121). Moreover, Defendant minimizes the role of its own staff in the life of an Article 10 case. In fact, every child in New York City who is placed in foster care is legally in the care and custody of the Commissioner of ACS. N.Y. City Charter § 617. Because of its ongoing responsibility to children in foster care and their parents, ACS must supervise its contract agencies. As it admits in the very premise of its opposition, Defendant fails to do so.

Defendant also fails to ensure reasonable accommodations are provided to parents with intellectual disabilities, whether those parents interact directly with ACS employees or with contract agencies. Named Plaintiffs and members of the putative class are denied the tailored services they require because (i) those services are not offered at all, (ii) programs offering such services do not have sufficient capacity, or (iii) case workers are not trained to recognize when parents need tailored services. (Ex. C, Jackson Dep. at 24:19-22, 25:2-6; Ex. D, Ovadek Dep. at 192:14-18, 202:3-20; Ex. E, McLeod Dep. at 110:24-111:7; Ex. F, Louallen Dep. 35:20-23, 63:15-65:11, 67:20-68:20, 73:8-74:12, 75:12-80:17).

ACS fails to train and supervise its employees and contract agencies to provide tailored services and other reasonable accommodations. Because of the simultaneous legal obligations to prevent removals of children into foster care, create and supervise reunification plans, and to do all of these things in compliance with the ADA, ACS must notify, train, and, if necessary, supervise the contract agencies to ensure parents are receiving tailored services in compliance with the ADA. As discussed at length in Plaintiffs' opening brief, ACS has failed to do so. ACS fails to train its case workers on how to identify individuals with intellectual disabilities, to assess accurately individuals

suspected of having intellectual disabilities, or to accommodate individuals with disabilities. (Ex. E at 30:24-31:10; Ex. F at 35:20-23, 38:4-13). Defendant does not mandate any training in this area; and what nonmandatory trainings are available are limited in scope and only offered sporadically. (Ex. D at 90:12-93:15). Defendant clearly understands its obligation to train the staff of contract agencies as well as its own staff: trainings are offered to ACS staff at the contract agencies. (Ex. D at 32:20-25). Named Plaintiffs and members of the putative class seek relief from this Court because Defendant has simply failed to train its own staff or the staff of the contract agencies on the issues necessary to comply with the ADA.

Defendant's reliance on *Elisa W.* is entirely misplaced. In *Elisa W.*, the court denied class certification for a class of children in foster care, asserting constitutional claims under the First, Ninth, and Fourteenth Amendments as well as federal and state laws, because plaintiffs alleged only overbroad "structural defects" without specific, corroborating evidence, or client interviews; while defendants proffered evidence that "call[ed] into question the veracity" of plaintiffs' factual assertions, and of plaintiffs' claim that the events giving rise to the claims were "attributable to [ACS's] faulty management and oversight." *Elisa W. v. City of New York*, No. 15 CV 5273, 2018 WL 1413254, at *2 (S.D.N.Y. Sept. 27, 2016) (order denying class certification). Here, in contrast, declarations from institutional and legal services providers show ACS's specific and repeated failure to train staff and, as a result, employees at ACS and contract agencies are unaware of the accommodations necessary for parents with real or perceived intellectual disabilities. (Ex. G, Shapiro (Brooklyn Defender Services) Decl. ¶¶ 25-30; Ex. H, Ketteringham (Bronx Defenders) Decl. ¶¶ 20-25; Ex. I, Burrell (Neighborhood

Defender Service of Harlem) Decl. ¶¶ 15-18; Ex. J, Cortese (Center for Family Representation) Decl. ¶¶ 13-23; Ex. K, Lash (Sinergia) Decl. ¶ 31). The declarations also establish the lack of access to appropriate agencies to assess parents with disabilities and to provide services tailored to their needs. (Ex. G at ¶¶ 31-53, 63-69; Ex., H at ¶¶ 31-36; Ex. I at ¶¶ 28-41; Ex. J at ¶¶ 22-33). The legal services providers' declarations establish ACS's systemic violations of the ADA. (Ex. G at ¶¶ 17-69; Ex. H at ¶¶ 14, 20-37; Ex. I at ¶¶ 9-41; Ex. J at ¶¶ 13-34; Ex. K at ¶ 31). Defendant cannot assert otherwise.

Defendant highlights specific factors in the Named Plaintiffs' cases—homelessness, domestic violence, drug use—and argues these factors defeat commonality. (Opp. at 16-21). They do not. ACS routinely provides services to parents without disabilities who are experiencing these same challenges. Plaintiffs merely ask that ACS do what the ADA requires—provide these services without discriminating against Plaintiffs and members of the class on the basis of their disabilities. Indeed, some of the examples Defendant raises to try to undermine the Named Plaintiffs show how ACS failed to provide them accommodations. For example, while Defendant argues that Shantell S.'s homelessness was an impediment to her parenting, this illustrates exactly the kind of accommodation ACS must provide under the ADA: assistance filling out paperwork necessary for admission to a homeless shelter. ACS did not give Shantell S. that assistance. (Ex. L, Shantell S. Decl. ¶¶ 18-19).

Defendant's reliance on *Taylor v. Zucker*, No. 14-CV-05317, 2015 WL 4560739 (S.D.N.Y. July 27, 2015), is also unavailing. In *Taylor*, recipients of Medicaid-funded homecare services filed suit against the New York State Department of Health, alleging their managed care plans had unlawfully reduced their care without timely and adequate

notice. *Id.* at *1. The court found plaintiffs failed "to provide 'glue' connecting the *reason* for each enrollee's reduction or termination of care together." *Id.* at *9. Here, ACS has provided the so-called "glue" in its own ADA policy, because the policy "*applies to all ACS and provider agency staff that provide preventive and foster care services.*" (Ex. A at 1) (emphasis added).

ACS acknowledges it is responsible for ensuring its contract agencies comply with the ADA. That Named Plaintiffs have suffered some discrimination directly by ACS employees and some discrimination from ACS's contract agencies does not exonerate ACS where ACS bears responsibility for the ADA compliance of both itself and its contract agencies. Because of ACS's continued responsibility, the case at bar is distinguishable from *Wal-Mart*, in which the defendant corporation explicitly gave local supervisors discretion over the employment decisions giving rise to the suit. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011). Indeed, this case is similar to *Davis v. City of New York*, in which the court found commonality for a class of NYCHA residents and their family members and authorized guests or visitors asserting illegal stop and frisks where "[u]nlike the delegation of discretion in *Wal–Mart*, [the City's] policies and practices are promulgated by senior officials and determine the specific ways in which officers perform NYCHA trespass enforcement." 296 F.R.D. 158, 166 (S.D.N.Y. 2013).

Lastly, the proper implementation of an adequate ADA policy, with the attendant trainings and supervision required, would ameliorate, if not end, the discriminatory violations of the ADA and Section 504 common to all Plaintiffs. All Plaintiffs have children who are or have been subject to ACS supervision. All Plaintiffs are participating in or have participated in child safety plans. All Plaintiffs could be subject to another

ACS case. The wrongs Plaintiffs have suffered would be remedied by ACS actions that would impact every single class member: proper policy, proper assessment, proper training, adequate access to tailored services, and proper accommodations. *See M.G. v. New York City Dep't of Educ.*, 162 F. Supp. 3d 216 (S.D.N.Y. 2016) (granting class certification to class of students seeking injunctive relief to gain access to special education services).

B. The named plaintiffs are typical of the class.

Defendant argues the Named Plaintiffs are not typical of the putative class because they received services from only some of New York City's preventive service and foster care agencies. This argument fails because, as ACS has acknowledged in its ADA policy, it is responsible for ensuring ADA compliance by both its own employees and all of its contract agencies.

Defendant's argument that Plaintiffs are not geographically representative of the class is a red herring and must fail. Defendant relies on *Wal-Mart* to suggest typicality is not met, but its citations are dicta. *See Wal-Mart*, 564 U.S. at 349 n.5 ("In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality . . . requirement[] of Rule 23(a)."). Thus, contrary to ACS's suggestion, *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997), remains good law. *See Mazzei v. Money Store*, 829 F.3d 260, 272 (2d Cir. 2016) (citing *Marisol* for typicality standard). Plaintiffs meet the *Marisol* test, which finds typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol*, 126 F.3d at 376. Moreover, "small variances" between the Named Plaintiffs

"do not defeat typicality." *See Zivkovic v. Laura Christy LLC*, 329 F.R.D. 61, 71 (S.D.N.Y. 2018). Named Plaintiffs all reside in New York City. Named Plaintiffs, who reside in Brooklyn, Manhattan, and the Bronx, have all described harms stemming from the faulty and inadequate citywide ACS policy, its failure to train, its failure to conduct proper assessments, and its failure to provide reasonable accommodation and tailored services. (Ex. L at ¶¶ 14-16, 36, 38; Ex. M, Josefina S. Decl. ¶¶ 45-63; Ex. N, Deaja D. Decl. ¶¶ 22-24, 39-43; Ex. O, Cynthia Q. Decl. ¶¶ 36-42; Ex. P, Bianca M. Decl. ¶¶ 23, 39-43, 60). The legal service providers from across the city have described harms arising from the same citywide deficiencies. (Ex. G at ¶¶ 17-53, 63-68; Ex. H at ¶¶ 15-36; Ex. I at ¶¶ 13-41; Ex. J at ¶¶ 13-34; Ex. K at ¶¶ 22-23, 31.) ACS is a centralized New York City agency with the same policies, procedures, and systemic deficits across all boroughs. (Ex. C at 53:24-55:21; Ex. E at 32:19-33:13). Plaintiffs' claims arise from the same ACS systemic failure. Defendant has articulated no reason to distinguish a putative class member living in Staten Island or Queens from those living in the other three boroughs.

Similarly, the Named Plaintiffs' harms are typical because ACS maintains oversight responsibility over contract agencies. It is of no consequence that Defendant characterizes these contract agencies as "independent service providers" (Opp. at 24) or that the Named Plaintiffs have had contact with fewer than all contract agencies. ACS must ensure all contract agencies comply with the ADA; therefore the Named Plaintiffs' interactions with any contract agencies make them typical of the class.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in the opening brief, the Court should grant the motion to certify the class.

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New York, New York

Respectfully submitted,

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