IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

TIMOTHY B., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
	)	
v.	)	Case No. 1:22-cv-1046
	)	
KODY KINSLEY, in his official capacity as Secretary of the Department of Health and Human Services,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION REQUESTING AN INITIAL PRETRIAL CONFERENCE AND ISSUANCE OF SCHEDULING ORDER

Defendant Kody Kinsley opposes Plaintiffs' motion requesting that the Court schedule a Rule 26(f) conference, which would initiate discovery in this complex action. The Court has pending before it Defendant's motion to dismiss, ECF No. 40, which could result in dismissal or narrowing of Plaintiffs' claims. Jumpstarting discovery now would needlessly consume Defendant's time and resources, whereas a continued delay of discovery while the Court decides the pending motion would work no prejudice on Plaintiffs.

BACKGROUND

In March of this year, Plaintiffs filed an amended class action complaint alleging that DHHS has a "policy or practice" of discriminating against foster children with mental impairments by unnecessarily placing them or putting them at risk of placement in institutional Psychiatric Residential Treatment Facilities ("PRTFs"). *See* ECF No. 35 (alleging violations of the Americans with Disabilities Act ("ADA") and Rehabilitation Act).

Defendant promptly moved to dismiss Plaintiffs' complaint on multiple grounds, including because: (1) Plaintiffs failed to allege that the State's placement decisions deviated from recommendations of the State's qualified treatment professionals; (2) the fact that Named Plaintiff London R. must wait for a community placement is not an ADA violation; (3) the Named Plaintiffs have not alleged that a parent, guardian, or custodian has chosen community-based, as opposed to residential, treatment for them; and (4) any Named Plaintiff for whom a state court has found "clear, cogent, and convincing evidence" that they are in need of 24-hour residential treatment is precluded from

asserting that their placement in a PRTF is "unnecessary" or "unjustified." *See generally* ECF No. 41. Defendant also argued that both the individual and the associational Plaintiffs lack standing and thus that this court lacks jurisdiction. *Id.* at 17-24.

Plaintiffs opposed the motion to dismiss, ECF No. 53, and Defendant replied on April 24, 2023, ECF No. 58. The Court has not issued a decision on the motion, which has been fully briefed for only four months.

Although discovery has not begun, Defendant voluntarily produced to Plaintiffs the full case files of each of the Named Plaintiffs. These case files contain, among other things, information concerning the Named Plaintiffs' mental and behavioral health treatment and foster care placements, including any placements in residential facilities or PRTFs.

Plaintiffs now seek to compel the start of discovery by moving for an order scheduling an initial pretrial conference under Rule 16(b) and directing the parties to initiate the Rules 16 and 26(f) discovery planning conferences and reporting process. ECF No. 64, at 2-3.

Defendant opposes this motion.[1]

ARGUMENT

Every court has authority "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936). Courts have "broad inherent power" to delay or stay discovery "until preliminary issues can be settled which may be dispositive of some important aspect of the case." *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988). Indeed, Federal Rule of Civil Procedure 16(b)(2) explicitly provides that a Court may for "good cause" delay the issuance of a scheduling order, which in turn delays the timing of the Rule 26(f) discovery conference and the start of discovery.

[1] Procedurally, because discovery has not yet started, Defendant is opposing Plaintiffs' motion rather than moving to "stay" discovery or for a protective order. However, the practical effect should be the same. *See Jeremiah M. v. Crum*, No. 3:22-cv-00129-JMK, 2022 WL 17082117, *3-5 (D. Alaska Nov. 17, 2022) (finding "good cause to delay the Rule 26(f) conference and the issuance of a Scheduling Order until after the resolution of Defendants' Motion to Dismiss" even though the court believed it could not "stay" discovery that had not yet commenced).

When a dispositive motion, such as a motion to dismiss, may resolve a case or narrow the issues presented, a court has good cause to postpone discovery to conserve the court's and the parties' resources and time. *See Tilley v. United States*, 270 F. Supp. 2d 731, 734, 734 n.1 (M.D.N.C. 2003); *Maxwell Foods, LLC v. Smithfield Foods, LLC*, No. 5:20-CV-00479-M, 2021 WL 9667341, *1 (E.D.N.C. Feb. 2, 2021) (staying discovery when a partial motion to dismiss might "substantially narrow the scope of discovery").

In deciding whether to postpone discovery until a pending motion is resolved, a court "must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery," which "involves weighing the likely costs and burdens of proceeding with discovery." *Simpson*, 121 F.R.D. at 263. In assessing this balance, courts consider several additional factors, including: "whether the motion, if granted, would dispose of the entire case"; "the strength of the motion's arguments"; and "whether discovery is necessary for the non-moving party to respond to the motion to dismiss." *Marden's Ark Corp. v. Bodenhamer*, No. 5:20-CV-

00611-BO, 2021 WL 3559470, *1 (E.D.N.C. Aug. 10, 2021) (citing *Simpson*, 121 F.R.D. at 263; *Tilley*, 270 F. Supp. 2d at 734-35); *see also Smith v. City of Greensboro*, No. 1:19CV386, 2020 WL 13646253, at *1 (M.D.N.C. July 2, 2020) (noting that courts consider "judicial economy" and prejudice to the parties in determining whether to grant a request to delay discovery).

Here, the balance of factors demonstrates good cause to delay opening discovery.

I. Defendant's Pending Motion to Dismiss May Resolve This Case or Substantially Limit the Scope of Discovery.

There is substantial uncertainty regarding which if any parties and claims will survive this Court's ruling on Defendant's motion to dismiss. For example, this Court may conclude that any of the five Named Plaintiffs has failed to allege that they could be served in a less restrictive setting, *see* ECF No. 41, at 11; that London R.'s wait to find an available community-based placement option does not violate the ADA, *see* ECF No. 41, at 11-12; that the Named Plaintiffs are precluded from arguing that their placement in a PRTF is "unnecessary" or "unjustified" because the issue has already been decided by a state court, *see* ECF No. 41, at

15-17; or that the Plaintiffs lack standing, *see* ECF No. 41, at 17-24.

When "it is an open question whether the court will grant the motion to dismiss," a delay of discovery is warranted if the defendant has "made plausible arguments" in support of the motion to dismiss. *See, e.g.*, *Marden's Ark Corp.*, 2021 WL 3559470, at *1.

Contrary to Plaintiffs' contention, Defendant need not demonstrate an "'immediate and clear'" likelihood that the Court will grant the motion to dismiss. *See* ECF No. 65, at 8-9 (quoting *Simpson*, 121 F.R.D. at 263). In *Simpson*, the court advised that "a preliminary peek at the merits" of a motion to dismiss "may be helpful," 121 F.R.D. at 263, but the *Simpson* court's "peek" revealed that the plaintiff could easily resolve the concerns raised in the motion to dismiss by amending their complaint. *Id.* The same is not true here where the motion to dismiss is grounded in issues related to, among other things, preclusion and standing, which cannot be remedied with mere tweaks to the complaint.

Even if Plaintiffs had made "compelling arguments" in opposition to dismissal, that would not tip the balance in

favor of proceeding to discovery, particularly when the costs of discovery, as here, "could be substantial." *Marden's Ark Corp.*, 2021 WL 3559470, at *1.

II. Opening Discovery Would Significantly Burden Defendant.

Discovery in this matter is likely to be complex and costly. Plaintiffs allege a practice that implicates not only the North Carolina DHHS itself, but, at a minimum, each of North Carolina's 100 county Departments of Social Services (which are by law responsible for the placement and treatment of foster children), and the Local Management Entities/Managed Care Organizations that arrange and pay for mental health and substance use disorder services under contract with the State. Moreover, Plaintiffs seek to certify a class of hundreds if not thousands of foster children with mental impairments "unnecessarily" placed in a PRTF or at serious risk of such placement. ECF No. 35, at 32-33. The factors driving such placements are varied and complex, and Defendant anticipates that Plaintiffs may seek voluminous discovery.

Particularly given this complexity and potential volume, it would be inefficient and unjustified to require Defendant,

at this preliminary stage, to produce reams of documents and data, or to require Defendant's employees to sit for depositions. *Morris v. CrossCountry Mortgage, LLC*, No. 5:22-CV-336-BO, 2023 WL 2541702, *2 (E.D.N.C. Mar. 16, 2023). "[I]f the motion[] to dismiss [is] granted, the time and resources devoted to discovery will have been wasted." *Id.*

Apparently recognizing the significant burden discovery would impose, Plaintiffs suggest that the Court "at minimum" permit initial discovery into: (1) a recent DHHS report regarding treatment and residential settings for youth with behavioral and mental health needs (including depositions of DHHS employees); and (2) the Named Plaintiffs' mental- and behavioral-health treatment, claims, and PRTF records (including depositions of unspecified "PRTF and other placement-related fact witnesses"). ECF No. 65, at 7-8. But the DHHS report goes to the heart of the matters at issue in this case, so Plaintiffs' request for discovery "around the DHHS Report" may effectively collapse into a full-scale opening of discovery. Even if it did not, it would be highly inefficient to require DHHS employees to sit for depositions on a single report when Plaintiffs will presumably seek to

depose some of those same employees once discovery opens in full.

In any event, representatives for the Defendant have already voluntarily met with Plaintiffs' counsel to answer questions regarding the DHHS report. Defendant has also produced, again voluntarily, a large volume of documents regarding the Named Plaintiffs specifically. Plaintiffs have not identified any additional information so urgently needed as to justify opening discovery in this case.

III. Delaying Discovery Will Not Prejudice Plaintiffs.

Plaintiffs purport to identify two ways in which they will be prejudiced if discovery is postponed for a short time while this Court decides Defendant's motion to dismiss. Neither is persuasive.

First, Plaintiffs allege that "with each passing day, more and more putative class members are segregated unnecessarily." ECF No. 65, at 4-5. But there is no reason to believe that opening discovery now will hasten the ultimate resolution of this case. Indeed, the opposite is likely to be true if Defendant must divert resources to piecemeal discovery efforts that must later be redirected or halted

depending on the Court's decision on the motion to dismiss. In any event, given that Plaintiffs anticipate that this case "may take several years to resolve," ECF No. 65, at 6, "any delay in discovery will be brief in the larger context of this litigation," *Jeremiah M.*, 2022 WL 17082117, and discovery completed before the motion to dismiss is decided could become stale. *See also Marden's Ark Corp.*, 2021 WL 3559470, at *1.

Second, Plaintiffs assert that they will be prejudiced if discovery is postponed because "'witnesses relocate, documents are lost, and memories fade.'" ECF No. 65, at 4 (citing *Mike's Train House, Inc. v. Broadway Ltd. Imports, LLC*, No. JKB-09-2657, 2011 WL 836673, at *3 (D. Md. Mar. 3, 2011), and *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993)).

But Defendant has implemented litigation holds directing DHHS staff and the county Departments of Social Services to retain all documents that may be relevant to this case, and these holds will preserve the documents of departing staff as well.

In any event, "memories" are of little import in a case alleging that the State has a "longstanding," "pervasive," and "ongoing" policy or practice. ECF No. 64-1, at 4-5; *see also* ECF No. 35 ¶¶ 1, 20-21, 187, 190-91. Plaintiffs' citations to *Mike's Train* and *Brumbaugh* also miss the mark. In *Mike's Train*, Defendant sought to stay all proceedings for *up to four years* in a case that had been pending for 16 months and in which discovery was "well underway." 2011 WL 836673, at *2-3. *Brumbaugh* did not involve discovery at all, but rather when the limitations period runs from "the discovery" of alleged misrepresentations in a securities fraud suit brought eight years after the relevant purchase. 985 F.2d at 159, 161-62.

It is therefore "unlikely that delaying discovery will prejudice plaintiffs' ability to pursue their claims" if the motion to dismiss is ultimately denied. *Morris*, 2023 WL 2541702, at *2*; see also Wickwire v. Am. Pub. Univ. Syst./Am. Mil. Univ.*, No. 3:21-CV-39, 2021 WL 6882390, (N.D.W. Va. Sept. 7, 2021) (any concern regarding "preservation of witness memory" was "outweighed by other factors such as

efficiency, expense, and hardship on Defendants" (internal citation and footnote omitted)).[2]

CONCLUSION

In sum, the balance of factors favors denying Plaintiffs' request to initiate discovery now. If the pending motion to dismiss is granted, "all the time and resources devoted to discovery will be for naught." *Marden's Ark Corp.*, 2021 WL 3559470, at *1. This, combined with the comparative absence of prejudice to Plaintiffs if discovery is delayed until the motion to dismiss is resolved constitutes "good cause to stay discovery" at this stage. Plaintiffs' Motion Requesting an Initial Pretrial Conference and Issuance of Scheduling Order should be denied.

[2] Plaintiffs do not assert, nor could they given that the motion to dismiss has been fully briefed, that discovery is necessary for Plaintiffs to respond to the motion to dismiss. *See Marden's Ark Corp.*, 2021 WL 3559470, at *1.

Respectfully submitted,

September 1, 2023

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies pursuant to Local Rule 7.3 that the foregoing responsive brief contains less than 6,250 words. Counsel relies upon the word count feature of word processing software in making this certification.

September 1, 2023

/s/ Kendra Doty
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CERTIFICATE OF SERVICE

I, Kendra Doty, hereby certify that I caused a true and correct copy of the foregoing to be filed through the ECF system and served electronically on the registered participants as identified on the Notice of Electronic Filing.

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