No. 06-1454

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK SHOOK and DENNIS JONES, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants,* and JAMES VAUGHAN, SHIRLEN MOSBY, THOMAS REINIG, and LOTTIE ELLIOTT, *Intervenor-Plaintiffs-Appellants,*

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EL PASO, *et al.*
Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado
Civil Action No. 02-CV-0651-RPM-MJW
The Honorable Richard P. Matsch

BRIEF OF *AMICI CURIAE* THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, CENTER FOR CHILDREN'S LAW AND POLICY, COLORADO CENTER ON LAW AND POLICY, COLORADO CROSS-DISABILITY COALITION, COLORADO LAWYERS COMMITTEE FOR CIVIL RIGHTS, THE LEGAL CENTER FOR PEOPLE WITH DISABILITIES AND OLDER PEOPLE, NATIONAL CENTER FOR YOUTH LAW, NATIONAL DISABILITY RIGHTS NETWORK, NATIONAL SENIOR CITIZENS LAW CENTER, PUBLIC JUSTICE, IN SUPPORT OF PLAINTIFFS-APPELLANTS SHOOK, *ET AL*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 29(c) and 26.1(a), counsel for *Amici Curiae* states the following: None of the *amici* has any parent corporation nor issues stock.

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INTEREST OF *AMICI*

Amici are ten national and state organizations (more fully described in Attachment A) with a strong interest in preserving injunctive class actions as a mechanism for securing relief from system-wide civil rights violations. All parties have consented to the filing of this brief.

INTRODUCTION

Amici Curiae are concerned about the implications of this case beyond the narrow issue of whether the district court erred in denying class certification to the plaintiffs. This is because the district court's grounds for denying class certification are based on fundamentally flawed views of the requirements for certification of a class action under Rule 23(b)(2). *Amici* submit this brief to show that, if affirmed, the district court's class certification decision will threaten the ability of not only prisoners with mental illnesses, but more broadly, of other vulnerable groups to pursue class-wide relief for serious, systemic civil rights violations.

Amici will present information demonstrating that: 1) Rule 23(b)(2) class actions are essential vehicles for addressing systemic civil rights violations; indeed, part (b)(2) of the Rule was added with the express purpose of accommodating civil rights and institutional reform actions; 2) the district court's interpretation of mental illness is inaccurate and if adopted by other courts, would preclude virtually

all 23(b)(2) class actions by persons with mental disabilities; and, 3) if other courts had focused on minor differences between putative class members, as the district court did here, significant institutional reforms that have rectified serious civil rights violations could not have been implemented. Indeed, as *amici* demonstrate below, the district court's overly narrow view of Rule 23(b)(2) class actions flies in the face of well-established precedent, and has adverse implications for vulnerable populations extending well beyond prisoners with mental illnesses.

STATEMENT OF FACTS

Amici adopt the statement of facts set forth in the Plaintiffs' brief.

ARGUMENT

I. Rule 23(b)(2) Class Actions Are Essential Vehicles for Enforcing Civil Rights.

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." As the United States Supreme Court has recognized, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of 23(b)(2) class actions. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (internal citations omitted). As both the 1966 Advisory Committee on Civil Rules and the federal courts have observed, Rule 23(b)(2) was "designed for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of

persons." Adv. Comm. Notes, 28 U.S.C. App. p. 697; *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998) (noting that Rule 23(b)(2) is the most frequently used vehicle for civil rights and institutional reform actions); *see also Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("23(b)(2) was adopted in order to permit the prosecution of civil rights actions"); *Colo. Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 361 (D. Colo. 1999) (stating that (b)(2) certification is typical for "actions in the civil rights field where a party is charged with discriminating unlawfully against a class"); 2 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 4:11, p. 62 (4th ed. 2002) (noting that "23(b)(2) class actions were designed specifically for civil rights cases"). Thus, in the context of civil rights cases alleging violation of the rights of numerous similarly situated persons, "the class suit is a uniquely appropriate procedure." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1776 (2d ed. 1986).

The plaintiffs here sought to certify a 23(b)(2) class comprising "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail," or alternatively, "all persons who are now, or in the future will be, confined in the El Paso County Jail." *Shook v. County of El Paso*, 2006 WL 1801379, slip op. at 1 (D. Colo. June 28, 2006) (unpublished). The putative class sought relief because the Defendants, among other things, allegedly

fail to provide sufficient numbers of Jail staff with adequate training to care for inmates with serious mental health needs, fail to provide inmates with necessary inpatient psychiatric care, and fail to take precautions to prevent inmate self-harm and suicide. (Compl. ¶ 17.) Cases such as this one involving allegations of system-wide deficiencies resulting in serious harm are exceptionally well-suited for class treatment because the claims can be proven by showing systemic violations, such as the failure to adopt or follow policies and procedures, a lack of sufficient staff and a lack of adequate training. Accordingly, the Plaintiffs' allegations that Defendants have failed to address their serious mental health needs make class certification proper because the Plaintiffs seek "final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

Additionally, class certification is particularly appropriate where, as here, the fluid nature of the putative class renders individual claims for injunctive relief impracticable. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980) (citing *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (noting that populations such as pretrial detainees in custody awaiting trial are inherently transitory)); *Shook*, 2006 WL 1801379, at 8 (noting that the Jail houses recent arrestees, persons awaiting trial, and persons convicted and sentenced to terms of two years or less). Likewise, when 23(b)(2) classes involve plaintiffs who are residents of juvenile, senior, and

mental health facilities, such populations are constantly changing due to various factors such as releases, transfers or even death. *See, e.g.*, *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 60 (3d Cir. 1994) (nature of foster placement is transitory and, thus, inherently variable); *Christina A. ex rel. Jennifer A. v. Bloomberg*, 197 F.R.D. 664, 671 (D.S.D. 2000) (noting that Department of Children's ability to discharge juveniles at its discretion makes each juvenile's time in the system different and unpredictable); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1386 (D. Nev. 1991) (holding class action appropriate where the "proposed class is very fluid, and many of its members are sick and/or elderly."). Given the inherently transient nature of institutional residency, (b)(2) certification is critical to ensure that a class remains intact regardless of any individual plaintiff's post-certification change in status. *See, e.g.*, *Newberg*, § 25:14, p. 540.

In asserting that the named plaintiffs could bring individual § 1983 actions as an alternative to a class action, the district court not only gave short shrift to the issue of fluidity but also ignored the reality that the vast majority of marginalized people, particularly those in the government's care or custody, inevitably lack the resources necessary to individually seek effective legal redress for civil rights violations. *See U.S. ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976) ("Only a representative proceeding . . . guarantees a hearing for individuals, such as many of the class members here, who by reason of ignorance, poverty, illness or

lack of counsel may not have been in a position to seek one on their own behalf," citing *Adderly v. Wainwright*, 58 F.R.D. 389, 405-07 (M.D. Fla. 1972)). While some plaintiffs may have the ability to litigate their individual claims, there are countless others who are suffering and will continue to suffer the same harms, flowing from the same violations of their rights, because they lack the resources to seek relief.[1]

It is for exactly this reason that in determining whether a class should be certified, courts are called upon to assess the ability of class members to bring individual actions. Such an assessment requires the examination of factors including, but not limited to, "the ability of individual members to institute separate suits, and the nature of the underlying action and the relief sought." *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986) (finding class certification appropriate where claimants with disabilities and their widows may be unable to bring individual suits due to lack of financial resources); *Armstead v. Pingree*, 629 F.Supp. 272, 279 (M.D. Fla. 1986) (institutionalized individuals with developmental disabilities particularly suited for class certification

[1] The District Court seems to imply that rather than seeking class-wide injunctive relief, the named plaintiffs should instead bring individual claims for injunctive relief and/or damages for violations of their Eighth Amendment rights. *Shook*, 2006 WL 1801379, at 4. As a practical matter, however, this alternative would not provide meaningful relief. Individual claims for injunctive relief would likely be mooted by virtue of a plaintiff's departure from the jail, and an award of damages for the serious harms resulting from the jail's failure to provide mental health care—including suicide—is not a substitute for remedying unconstitutional conditions *before* they result in tragedy.

given that plaintiffs' confinement, their economic resources and their mental disabilities make it "highly unlikely" that separate actions would follow if class treatment were denied).[2]

Rule 23(b)(2) class actions are the quintessential vehicle for enforcing civil rights, as this mechanism is the most effective and efficient tool to represent the interests of plaintiffs who share a common state of vulnerability and require systemic reforms to address the constitutional violations they have asserted. *Newberg*, § 4:11, p. 62. This case presents issues of significant importance, not only for the prisoners with serious mental illnesses who are incarcerated at the El Paso County Jail, but for any group seeking to remedy systemic deprivations of civil rights.

II. The District Court's Portrayal of Mental Illness is Inaccurate and Would Preclude 23(b)(2) Class Actions by Persons with Mental Disabilities.

In conducting its analysis of the putative class members' eligibility for certification, the district court employed an inaccurate portrayal of mental illness that, if followed, would make it virtually impossible for any court to certify a class of persons with mental illness or other mental disabilities. Specifically, the court

[2] Moreover, individuals such as the named plaintiffs and the putative class members are unlikely to be able to find counsel to represent them individually given the dearth of private counsel who are experienced and willing to litigate these cases. *See* Michael L. Perlin, *Fatal Assumptions: A Critical Analysis of the Role of Counsel in Mental Disability Cases*, 16 Law & Hum. Behav. 39, 42, 49 (1992).

posited that mental health needs are not readily identifiable and are too nebulous to be categorized for purposes of a class action. *Shook v. Board of Commissioners of County of El Paso*, 2006 WL 1801379, at 6-8. These misapprehensions about mental illness were the foundation upon which the district court based its analysis of the plaintiffs' motion for class certification. As the discussion below demonstrates, the court's reliance on such misapprehensions led it to conclude, incorrectly, that the putative class could not meet the requirements of Rule 23(b)(2).

In determining that class certification was inappropriate, the district court asserted that the proposed class of "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail," was "nebulous" and that the term "serious mental health needs" was "vague." *Shook*, 2006 WL 1801379 at 7. In arriving at this conclusion, the court asserted that "[m]edical needs in the physical sense are more identifiable than those arising from mental or emotional conditions because medical needs in the physical sense are largely identifiable objectively." *Id.* at 6. Specifically, the district court claimed that in contrast to physical disorders, "mental disorders are more difficult to categorize, and the term 'mental disorder' is not subject to precise boundaries." *Id.* Focusing on bipolar disorder as an example, the district court suggested that the

very nature of bipolar disorder's complexity renders the plaintiff class unsuitable for certification in this case. *Id.* [3]

But the distinction between mental and physical illnesses drawn by the district court is a false dichotomy: as the American Psychiatric Association has explained, mental conditions are defined with similar levels of abstraction in psychology as are physical conditions in medicine—for example, psychology also examines conditions based upon structural pathology (also used in examining ulcerative colitis, a form of inflammatory bowel disease), symptom presentation (such as migraine), deviance from physiological norm (e.g. hypertension or high blood pressure in medicine), and etiology, the study of causation (e.g. pneumococcal pneumonia, a common, but serious infection and inflammation of the lungs). American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* xxx (4th ed. text rev. 2000). That bipolar disorder is subject to varying definitions and categorized into subtypes, as are many other mental—and

[3] Despite recognizing that "[w]hen determining whether an action should proceed as a class action, the court should refrain from evaluating the merits of the plaintiffs' claims," (*id*. at *6) the district court employed its inaccurate view of mental illness to do just that, making determinations not only about the merits of plaintiffs' claims, but also about the scope of relief. Such determinations are wholly inappropriate at the class certification stage. *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir.1982), citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Penn v. San Juan Hosp., Inc*., 528 F.2d 1181, 1189 (10th Cir. 1975); *Rich v. Martin Marietta Corp*., 522 F.2d 333, 340 (10th Cir. 1975); *see also Thiessen v. Gen. Elec. Capital Corp*., 267 F.3d 1095, 1107 (10th Cir. 2001) (same).

physical—disorders, should not preclude people with such disorders from bringing class actions.

Courts have recognized that there is no distinction between the right of a prisoner to medical care for physical ills and their psychological or psychiatric counterparts. *See, e.g.*, *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977 (cited with approval in *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996)) (holding that prisoners are entitled to psychological or psychiatric treatment if deemed appropriate by a health care professional and noting that "[m]odern science has rejected the notion that mental or emotional disturbances are the products of afflicted souls, hence beyond the purview of counseling, medication and therapy"); *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1564 (D. Idaho 1984) (analyzing lack of medical and psychiatric care as part of the same failure to provide a constitutionally adequate health care delivery system).

Further, in analyzing whether a prison has been deliberately indifferent to prisoners' serious mental health needs, courts have not undertaken an analysis of whether mental disorders are "readily identifiable" in determining the need for system-wide injunctive relief. For example, in *Balla*, the court found that the prison's lack of psychiatric care represented deliberate indifference to the serious medical needs of the inmates and ruled that the prison staff was responsible for identifying such needs. *Id.* at 1578. Rather than calling into question the nature of

mental disorders, the court ruled that the prison was required to implement "six essential components of a minimally adequate mental health treatment program." *Id.* at 1558. The *Balla* court also recognized attempted suicide as a manifestation of severe mental and emotional problems and easily concluded that such persons are "seriously ill." *Id.* at 1569.

The *Balla* court's ability to analyze and make conclusions about the plaintiffs' Eighth Amendment claims regarding insufficient mental health care demonstrates the faultiness of the district court's assumption that because jail staff might not immediately recognize prisoners' mental illnesses, they could not be deliberately indifferent to the needs of those prisoners. *Shook v. Bd. of Commissioners of El Paso County*, 2006 WL 1801379, at 6. Like prisons, jails frequently house detainees who are in acute phases of mental illness. *CQ Researcher*, Jan. 5, 2007, Vol. 17, No. 1 at 16. The obviousness of mental illness (or lack thereof) alone should not preclude persons with mental illnesses from receiving the attention and care that they require.

This is particularly important given several recent studies showing that a significant number of people incarcerated in penal institutions have mental illnesses. It is estimated that there are between 200,000 and 300,000 persons in U.S. jails and prisons with such serious mental illnesses as schizophrenia, bipolar disorder, and major depression. Jamie Fellner, *A Corrections Quandary: Mental*

Illness and Prison Rules, 41 Harv. C.R.-C.L. L. Rev. 391, 392 (2006). [4] Mentally ill prisoners with schizophrenia or other serious "Axis I" disorders, such as bipolar disorder, may suffer from delusions, hallucinations, chaotic thinking, or serious disruptions of consciousness, memory, and perception of the environment. *Id*. at 395. In 2005, studies showed that over half of all state prison and jail inmates had a mental health problem. *CQ Researcher*, Jan. 5, 2007, Vol. 17, No. 1, at 5. More than half of all jail inmates met the criteria for mania, thirty percent suffered from major depression, and twenty-four percent reported symptoms that met the criteria for a psychotic disorder. *Bureau of Justice Statistics Report*, Sept. 2006, p. 1.

Without treatment, serious mental illness can cause a prisoner excruciating mental agony. *Olmstead v. L.C.*, 527 U.S. 581, 609-10 (1999) (Kennedy, J., concurring in the judgment) ("It must be remembered that for the person with severe mental illness who has no treatment, the most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts out reality and subjects him to the torment of voices and images beyond our powers to describe.").

When prisoners with mental illness allege facts sufficient to show systemic

[4] Although it is difficult to quantify the precise number of prisoners nationwide who have *serious* mental illnesses, the various estimates that exist suggest that the number is significant. *See, e.g.*, The President's New Freedom Commission on Mental Health, *Transforming Mental Health Care in America* 32 (2003) ("about 7% of all incarcerated people have a current serious mental illness"); American Psychiatric Association, *Psychiatric Services in Jails and Prisons*, xix (2d ed. 2000) ("up to 5% are actively psychotic").

deliberate indifference to mental health needs, Rule 23 should not be interpreted to create a barrier between those prisoners and the care they require. The district court's characterization of the putative class as not readily identifiable and "too nebulous" is not only incorrect, but if taken as precedent, would irreparably damage the ability of persons with mental disabilities to bring class actions in a variety of settings. [5]

III. The District Court's Fundamentally Flawed Analysis of Manageability, Commonality and Typicality Ignores Well-Established Precedent and Has Far-Reaching Adverse Implications for Other Vulnerable Populations.

Numerous courts and commentators have recognized the 23(b)(2) class action device as an essential tool in addressing systemic civil rights violations. *See* Part I, *supra*, at 2-3. But had courts in the past misinterpreted the requirements of Rule 23 as the district court did here, many class actions that have benefited persons in society's most disadvantaged classes could not have been brought. Specifically, in its analysis of class boundaries as well as its commonality and typicality inquiries, the district court improperly focused on minor differences between class members while overlooking their shared interests.

[5] The district court's analysis has implications not only for people with mental illnesses, but also for those with developmental disabilities such as attention deficit disorder, dyslexia, Down's Syndrome, and learning disabilities, which, based on the district court's criteria, could be similarly characterized as "nebulous" and "vague".

A. The Effect of Misinterpreting Manageability

The district court incorrectly concluded that the proposed class lacked manageable boundaries. *Shook*, 2006 WL 1801379, at 7. The court disassembled the proposed class—"persons with serious mental health needs"—into a seeming hodgepodge of persons suffering from "many varieties and degrees of mental disorders." *Id.* For example, the district court found that "[m]ost of the named plaintiffs are identified as having some form of Bipolar Disorder." *Id.* at 6. And minor differences exist between them, as bipolar disorder "is subclassified into 4 types of disorders . . . ." *Id.* The district court concluded that these minor differences evidenced "a nebulous class" that could not satisfy Rule 23. *Id.* at 7. However, such intense scrutiny of class members' differences is not warranted, especially when considering a 23(b)(2) class action like this one. *See, e.g.*, *Washington v. Walker*, 75 F.R.D. 650, 652 (S.D. Ill. 1977) (stating that Rule 23(b)(2) does not require "a class whose bounds are precisely drawn") (citation and quotation marks omitted).

If similar scrutiny had been applied to important civil rights class actions for injunctive relief in the past, those classes would not have been certified. In *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), for example, the plaintiff class challenged the practices of Pennhurst State School and Hospital. Residents with mental retardation languished in unsanitary,

overcrowded facilities and were often subjected to physical abuses. *Id*. at 1302-04, 1308-10. The class action eventually compelled Pennhurst to close and the state to provide its former residents with competent care. *See, e.g., Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 90 (3d Cir. 1979) (affirming lower court order in part), *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (ruling on Eleventh Amendment issues); *Pennhurst*, 610 F. Supp. 1221, 1226-28 (D. Pa. 1985) (approving final settlement agreement). In *Pennhurst*, differences existed among class members: the class comprised persons with four different levels of mental retardation, yet the *Pennhurst* court nonetheless granted certification. *See* 446 F.Supp. at 1298, 1300, 1302. Had the *Pennhurst* court applied the same inappropriate degree of scrutiny as the district court did here, though, it would have likely found that—similar to four subclassifications of bipolar disorder—four different levels of mental retardation evidenced a "nebulous class." Thus, class certification would have been denied and Pennhurst's residents would have been left without a remedy, as a lawsuit on behalf of an individual would not have provided the sort of systemic change necessary to benefit them all. *See* Mary A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 Ohio St. L.J. 1, 17 (1984) ("The class suit can secure relief for the client that is not only longer-lasting but also broader-based [than individual lawsuits].").

B. The Effect of Misinterpreting Commonality and Typicality

Rule 23(a)(2) requires that there be questions of law or fact that are common to the class. Unlike the test under Rule 23(b)(3)—not at issue in this case—common issues need not predominate over individual ones. *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). "Commonality requires only a single issue common to the class." *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999) (citations omitted). "The claims of the class members need not be identical for there to be commonality; either common questions of law or fact will suffice." *Schwartz v. Celestial Seasonings, Inc*., 178 F.R.D. 545, 551 (D. Colo. 1998) (citing *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982)). "[T]here may be varying fact situations among individual members of the class . . . as long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory." *Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635, 639-40 (D. Colo. 1986) (citation and quotation marks omitted). If identical claims were required, "it would be rare, if even possible, to obtain class certification." *Cook v. Rockwell Int'l Corp*., 181 F.R.D. 473, 480 (D. Colo. 1998).

Here, the district court's inappropriate focus on class members' differences fatally infected its analysis of commonality and typicality. The district court found that the variety of the defendants' practices—including the abusive use of a taser, a toiletless detention cell, and lack of monitoring of suicidal inmates—evidenced

that the remedies the plaintiffs sought were "based on diverse legal theories"; thus, "commonality is lacking." *Shook*, 2006 WL 1801379, at 9. The court further held that the putative class members' varied circumstances defeated typicality, because they demonstrated that the class members were not challenging a "single course of conduct." *Id.* at 10. But varied circumstances do not, in fact, preclude commonality. True, defendants' lack of policy affected the putative class members differently, but such a lack of policy will, by its very nature, have different consequences and effects for different individuals. For example, the lack of a policy to maintain accessible features in a retail store may mean that an individual who uses a wheelchair is unable to park, or an individual who is deaf or hard of hearing is unable to use a telephone. But other courts have not found that varied effects—resulting from a common failure to enact policies and procedures—are a bar to class certification. *See Grijalva v. Shalala*, No. 93-711, 1995 WL 523609, *2 (D. Ariz. July 18, 1995) (unpublished) (certifying a nationwide class of enrollees in Medicare HMOs who challenged a government agency's failure to institute certain policies; the agency's failure to enforce policies affected the class members in different ways); *see also Baby Neal*, 43 F.3d at 57 ("[Rule 23](b)(2) classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the

claims of all class members, irrespective of their individual circumstances and the disparate effects of the conduct."); 7A Wright et al., *supra*, § 1763.

Nor do varied circumstances defeat typicality. *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001) (discussing typicality in prison conditions case and stating, "We do not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct."). Many courts have held that where named plaintiffs challenge centralized policies—or the lack thereof—class certification is appropriate. *See, e.g., Valdez*, 186 F.3d at1288 (holding that the fact "'that the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2)'") (quoting *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988)); *see also Lightbourn v. County of El Paso, Texas*, 118 F.3d 421, 426 (5th Cir. 1997) (affirming certification of class comprising "all Texas citizens of voting age who are blind or mobility-impaired" challenging barriers to polling places and voting procedures; finding commonality was met because government agency "similarly discriminated against all class members" by failing to enforce the Rehabilitation Act or the Americans with Disabilities Act); *Nat'l Org. on Disability v. Tartaglione*, No. CIV. A. 01-1923, 2001 WL 1258089, *3 (E.D. Pa. Oct. 22, 2001) (unpublished) (involving challenges by classes of

individuals to inaccessible polling places; commonality requirement was met because defendants did not have policies in place "direct[ing] local election officials to comply with [29 U.S.C. 794] and the ADA" by making polling places accessible); *Christina A.*, 197 F.R.D. at 667-68 (certifying class of juveniles in state training school challenging a wide range of practices; holding that a common question existed as to whether the school's policies and procedures resulted in deprivations of plaintiffs' constitutional rights because "[t]he fact that those conditions, policies and procedures affect the plaintiffs differently does not defeat the commonality of their claims") (citing *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982)); *Dajour v. City of N.Y.*, No. 00 CIV. 2044 (JGK), 2001 WL 1173504, *4-*6 (S.D.N.Y. Oct. 3, 2001) (unpublished) (certifying class of homeless children challenging the city's failure to provide them with certain services and holding that commonality was satisfied despite children's divergent circumstances because the plaintiffs' claim turned on the common question whether the defendants were required to provide "the specific screening, diagnosis and treatment services that the plaintiffs claim to be required"); *Risinger v. Concannon*, 201 F.R.D. 16, 19-20 (D. Me. 2001) (certifying class of mentally ill children challenging state agency's denial of services; holding that commonality was satisfied despite the class members' different diagnoses because, among other

things, their injuries were "caused by the same practices and policies of Defendants.").

Had the district court's standards for commonality and typicality been applied to requests for class certification in the past, important civil rights class actions could never have been brought. For example, *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996), *aff'd* 126 F.3d 372, 375 (2d Cir. 1997) was filed after a six-year-old ostensibly protected by New York City's child welfare system was killed by her mother. *Marisol* challenged that system in a class action that eventually compelled the city to overhaul its disastrous child welfare practices. Nina Bernstein, *Effort to Fix Child Welfare Draws Praise*, N.Y. Times, Dec. 8, 2000, at B1. However, had the *Marisol* court analyzed commonality and typicality as the district court did here, it would have denied certification.

The putative class in *Marisol*, like the class here, suffered from injuries that arose from a variety of circumstances including abuse by foster parents, failure to place children with appropriate guardians and failure to locate runaway children. 929 F.Supp. at 669-72. Yet the *Marisol* court found that commonality was satisfied: despite the "unique circumstances of each child" a common question arose because the defendants had allegedly "injured all class members by failing to meet their federal and state law obligations." *Id.* at 690. The class also met the typicality requirement because all of its members sought relief from injuries that

resulted from the same practice. *Id.* at 691; *see also Miller v. Spring Valley Props.*, 202 F.R.D. 244, 249 (C.D. Ill. 2001) ("[W]here plaintiffs allege that the actions were taken as part of an overall discriminatory practice . . . factual differences in how Defendants carried out a discriminatory policy are not sufficient to undermine typicality."). Under the district court's analysis, though, the similarities shared by the class members in *Marisol* would have been overlooked. As in *Marisol*, the defendants here have allegedly failed to meet their constitutional obligations by violating the putative class's Eighth Amendment rights. (Appellant Br. at 37.) Furthermore, these violations resulted from the same practice: defendants' failure to provide sufficient numbers of adequately trained mental health and custody staff. (Supp. Compl. ¶¶ 60, 61; Appellant Br. at 52.) Yet the district court found that neither commonality nor typicality was satisfied. Instead, it inflexibly focused on differences between the putative plaintiffs, employing a standard far beyond that contemplated by Rule 23. *See Shook*, 2006 WL 1801379, at 9. Had the *Marisol* court applied this same incorrect analysis, the children would have been left without a remedy, and their abuse and neglect would have likely continued.

The decisions set forth above demonstrate that the requirements imposed by the district court with respect to commonality, typicality and manageability are inconsistent with the vast majority of other courts analyzing petitions for class certification under Rule 23(b)(2). Where plaintiffs allege that they have suffered

civil rights violations as a result of inadequate policies, procedures and training, it is appropriate, logical, and efficient to remedy that situation at its source through a single action.

IV. Numerous Courts Have Granted Class Certification in Cases Seeking Redress of Systemic Civil Rights Violations.

To fully understand the implications of the district court's decision, *amici* offer the following descriptions of a small fraction of the numerous decisions granting class certification in civil rights actions for injunctive relief. Many such actions have been instrumental in correcting egregious and widespread injustices. Had the courts that certified these cases as class actions employed standards similar to those employed by the district court, most—if not all—of these cases could not have proceeded as class actions, leaving in place systemic civil rights violations:

Neiberger v. Hawkins, 208 F.R.D. 301, 319 (D. Colo. 2002) (certifying the class as "all adult patients who are now or in the future will be involuntarily committed to the Institute of Forensic Psychiatry ("IFP") of the Colorado Mental Health Institute at Pueblo ("CMHIP") due to an adjudication of not guilty by reason of insanity");

Johnson v. Florida, 348 F.3d 1334 (11th Cir. 2003) (affirming district court's refusal to vacate consent decree in action brought by class of "all persons who are now or will in the future be committed" to state-run hospital for persons

with mental illness, and a subclass of present and future patients "who have been determined by their treatment team to be 'discharge ready' for a period of 15 days or longer, but who have not been discharged");

D.W. v. Poundstone, 165 F.R.D. 661, 670 (M.D. Ala. 1996) (certifying class of "all adolescent youth who have been or will be committed to the Alabama Department of Mental Health and Mental Retardation");

Haymons v. Williams, 795 F. Supp 1511, 1519 (M.D. Fla. 1992) (defining and certifying a class as "[a]ll persons whose home health care benefits under the Florida Medicaid program were terminated when Underhill Personnel Services and Conval-Care, Inc., were terminated from participation in the program on May 20, 1991, and who were not given advance notice and the opportunity for a hearing before their benefits were terminated");

Woe v. Mathews, 408 F. Supp. 419, 429 (E.D.N.Y. 1976), remanded in part on other grounds sub nom., *Woe v. Weinberger*, 556 F.2d 563 (2d Cir. 1977) (certifying a class of "all persons between the ages of 21 and 65 who are or will be involuntarily civilly committed to New York State mental institutions");

Lightbourn v. County of El Paso, Tex., 118 F.3d 421, 426 (5th Cir. 1997) (affirming certification of a class of "all Texas citizens of voting age who are blind or severely mobility-impaired");

Lucas v. Kmart Corp., No. 99-cv-1923-JLK, 2005 WL 1648182, at *3 (D. Colo. July 13, 2005) (unpublished) (certifying nationwide class of people who use wheelchairs challenging barriers and policies at 1,500 retail stores);

Access Now, Inc. v. AHM CGH, Inc., No. 98-3004 CIV, 2000 WL 1809979, at *6 (S.D. Fla. Jul. 12, 2000) (unpublished) (certifying a class of individuals with disabilities challenging barriers at a chain of health care facilities);

Colo. Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354, 363 (D. Colo. 1999) (certifying class of "[a]ll Colorado residents with disabilities who use wheelchairs or electric scooters for mobility who, beginning on the date two years prior to the filing of the Class Action Complaint (October 1, 1997) were discriminated against on the basis of disability by Taco Bell's failure to have queue lines that comply with the Americans with Disabilities Act Accessibility Guidelines in Colorado Taco Bell restaurants that Defendant owns, operates, leases to or leases from others");

Civic Ass'n of the Deaf of New York City, Inc. v. Giuliani, 915 F. Supp. 622, 634 (S.D.N.Y. 1996) (certifying class of deaf individuals challenging accessibility of municipal 911 and street alarm box system);

Penn v. San Juan Hosp., Inc., 528 F.2d 1181, 1183, 1188-89 (10th Cir. 1975) (affirming certification of class of "all persons of Navajo Indian descent who live in or near the City of Farmington, New Mexico or frequent that city such as

that might be expected to seek emergency care in San Juan Hospital," suing hospital for denying them emergency care);

Keyes v. Sch. Dist., 576 F. Supp. 1503, 1507-08 (D. Colo. 1983) (certifying class of "all children with limited-English language proficiency who now attend, and who will in the future attend schools operated by the defendant [school] district," challenging school district's denials of educational opportunities);

Rios v. Read, 480 F. Supp. 14 (E.D.N.Y. 1978) (ruling in favor of a class of Puerto Rican and Hispanic children challenging school system's lack of educational opportunities for non-English speakers);

Sherman v. Griepentrog, 775 F. Supp. 1383, 1386-89 (D. Nev. 1991) (certifying class of individuals seeking to enjoin Medicaid policy that counted certain payments made to Department of Veterans Affairs pensioners as income);

Small v. Hudson, 322 F. Supp. 519, 520 (M.D. Fla. 1970) (ruling in favor of class of "needy elderly or infirm Negro persons who reside in, or are otherwise eligible for admission to the county homes for the aged and infirm owned and operated by defendants, but who have been, or are being discriminated against by reason of defendants' practice of maintaining racially segregated county homes for the aged or infirm").

CONCLUSION

As this Court has held, "if there is an error to be made, let it be made in favor and not against the maintenance of the class action." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). The district court's denial of class certification based on its misinterpretation of Rule 23 has grave implications, not only for the proposed class in the instant case, but for the future of civil rights class actions in this Circuit. If the district court's incorrect analysis becomes precedent, those who rely on Rule 23(b)(2) to enforce their rights could be precluded from bringing class actions due to minor differences between putative class members—a result never contemplated by Rule 23 or the overwhelming majority of civil rights cases in which class actions have been certified. Consistent with these cases and the language and purpose of Rule 23(b)(2), *amici* urge this Court to reverse the district court's denial of class certification.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, undersigned counsel certifies that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B), and that this brief, exclusive of the items listed in Rule 32(a)(7)(B)(iii), contains 6,198 words as measured using the Word Count function for Word documents.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Brief of Amici Curiae Judge David L. Bazelon Center for Mental Health Law *et al*. in Support of Plaintiffs, as submitted in Digital Form, is an exact copy of the written document filed with the Clerk.

(1) The digital submission does not involve any required privacy redactions and does not include any attached written documents that were filed with the Clerk.

(2) The digital submission has been scanned for viruses on February 20, 2007, with the Symantec AntiVirus version 10.0.0.359, Scan Engine 103.0.2.7, Virus Definition File Dated: 2/20/07 (rev. 19). According to this program, the document is free of viruses.

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ATTACHMENT A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Judge David L. Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Center has engaged in litigation, policy advocacy, and public education to preserve the civil rights of and promote equal opportunities for individuals with mental disabilities. It has litigated numerous cases concerning the rights of people with mental illness, including rights of individuals in correctional settings.

The Center for Children's Law and Policy (CCLP) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP capitalizes on its Washington, DC location by working on juvenile justice and education reform efforts in DC, Maryland, and Virginia; partnering with other Washington-based system reform and advocacy organizations such as the Justice Policy Institute, National Juvenile Defender Center, and Campaign 4 Youth Justice; engaging in legislative advocacy with Congress; and associating with major Washington law firms, which provide assistance on a pro bono basis. CCLP also works in other states and on national initiatives such as the John D. and Catherine T. MacArthur Foundation's Models for Change initiative, which promotes juvenile justice reforms, and the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative, which aims to reduce the use of locked detention and ensure safe and humane conditions of confinement for children.

The Colorado Center on Law and Policy is a non-profit organization that seeks to secure justice, promote economic security, and increase access to health care for lower income Coloradans, as well as provide the critical advocacy formerly provided by Colorado's federally funded legal services programs. We accomplish our mission, in part, through litigating and assisting pro-bono counsel when significant legal or policy issues are involved (for example, violations of due process). We also engage in legislative and administrative advocacy strategies in order to assist those we serve. As an organization that sometime seeks class action relief for lower income Coloradans when no other viable alternatives exist, we are very concerned about ensuring the viability of injunctive class actions as a mechanism for securing relief for some of our most vulnerable citizens.

The Colorado Cross-Disability Coalition (CCDC) is a statewide disability rights advocacy organization. Its mission and purpose is to eradicate discrimination against people with disabilities in Colorado and beyond. CCDC's members are individuals with all types of disabilities and their allies. CCDC is Colorado's largest organization dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1990, CCDC pursues its mission through education, advocacy and legal efforts, and is recognized statewide for its expertise in the enforcement and interpretation of disability civil rights laws.

This case of particular interest to CCDC because, as the cases involving CCDC in the brief show, CCDC routinely has employed Rule 23(b)(2) class actions to address a myriad of disability discrimination issues that would have been difficult or impossible to address by individual plaintiffs in individual cases. For example, in *Lucas v. Kmart*, a class of individuals with mobility impairments was certified to address a lack of training, access policies, parking barriers, service counter barriers, re-stocking policies, check-out aisle barriers and policies, and more. Also, CCDC represents individuals with all types of disabilities and is concerned the lower court's ruling would prohibit its members with mental disabilities from remedying widespread civil rights violations.

The Colorado Lawyers Committee for Civil Rights is a nonpartisan, nonprofit, public service organization that frequently facilitates legal representation to individuals and organizations for charitable purposes. Lawyers Committee projects often focus on efforts designed to protect individuals in our society who have few resources but are most in need of assistance. The Colorado Lawyers Committee recently created a Mental Health Task Force which includes attorneys and mental health professionals. The Task Force is exploring legal barriers to mental health services for children and underprivileged adults. As part of this effort, the Task Force has focused on the interaction between the Colorado criminal justice system and persons with serious mental health issues.

The Colorado Lawyers Committee, and especially the Mental Health Task Force, finds this lawsuit of particular import because the lower Court's opinion would make it virtually impossible for mental health patients incarcerated in Colorado jails to achieve class action status. Without the class action vehicle, this population would be denied meaningful relief for conditions that may violate its Eighth Amendment rights to stable medical and mental health treatment during incarceration. The District Court's focus on factual differences among individual class members fundamentally misreads the history and precedent behind Fed. R. Civ. P. 23(b)(2) class actions seeking only injunctive and declaratory relief. In

such cases, unlike suits seeking damages under Rule 23(b)(3), it is not necessary that common questions of law and fact "predominate" over individual questions. Here, where the El Paso County Jail has acted on grounds generally applicable to the class -- by failing to provide appropriate services for individuals with mental illness -- a 23(b)(2) class is entirely proper. In addition, the District Court incorrectly portrays "serious mental health needs" as a concept that is too "nebulous" to define a class. This flawed position, if taken as precedent, would irreparably inhibit the ability of persons with mental illnesses to bring class actions in Colorado. The Colorado prisons and jails have been experiencing a large influx of inmates with mental illnesses over the last decade (from 3% of the population in 1991 to over 20% today). This appeal has vital implications for those individuals, many of whom do not have a voice. It is for these reasons that the Colorado Lawyers Committee joins as *amicus* in this appeal.

The Legal Center for People with Disabilities and Older People (The Legal Center) is a Colorado nonprofit corporation established to protect and promote the legal and human rights of persons with disabilities. The Legal Center serves as the federally mandated and state designated Protection and Advocacy System for individuals with mental illness, pursuant to 42 U.S.C. § 10801, et seq., the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI).

It has been The Legal Center's experience that Congressional findings made when the PAIMI Act was enacted are equally applicable today and they include: (1) individuals with mental illness are vulnerable to abuse and serious injury; and (2) individuals with mental illness are subject to neglect including lack of treatment. *See* 42 U.S.C. § 10801(a)(1) & (3). The present appeal involves the District Court's refusal to certify a class of plaintiffs with "serious mental health needs," who allege, among other claims, they were abused at the hands of El Paso County jailers; suffered a constitutional violation of their right to be free from cruel and unusual punishment; and had their serious mental health needs neglected, while confined in the El Paso County jail. The District Court's decision to deny class certification to plaintiffs with "serious mental health needs" will make it more difficult in this case and future cases for individuals with mental illness to receive adequate and humane treatment when confined in Colorado's county jails.

The guiding purpose of the PAIMI Act is to ensure the rights of individuals with mental illness are protected. See 42 U.S.C. § 10801(b)(1). The Legal Center has and is currently investigating inmate complaints of abuse and neglect from various other county jails across Colorado.

Thus, The Legal Center has a compelling interest in this case to ensure the rights of individuals with mental illness are protected when they find themselves confined in facilities such as county jails.

The National Center for Youth Law (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nationwide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance.

NCYL has represented children and youth in federal class action lawsuits that have improved the quality of foster care in numerous states, expanded access to children's health and mental health care, improved conditions in juvenile correctional facilities, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. NCYL has a strong interest in preserving the opportunity for disadvantaged children and youth to pursue class-wide injunctive relief to reform systems that impact their lives.

The National Disability Rights Network (NDRN) is the membership association of protection and advocacy ("P&A") agencies which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2005, P&As served over 73,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

This case is of particular interest to NDRN due to the importance of class actions for protecting the rights of persons with disabilities and safeguarding this vulnerable population from harm.

The National Senior Citizens Law Center (NSCLC) is a non-profit organization that advocates nationwide to promote the independence and well-

being of low-income older persons and people with disabilities. For approximately 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys and paralegals in legal aid programs. NSCLC has participated as counsel on behalf of older persons and people with disabilities in numerous class action lawsuits that have included constitutional due process and equal protection claims. As a result, NSCLC is deeply concerned about the availability of injunctive class action relief to address systemic violations of law.

Public Justice is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable in the courts. We specialize in precedent-setting and socially significant individual and class action litigation. Litigating throughout federal and state courts, Public Justice prosecutes cases designed to advance civil rights and civil liberties, consumer and victims' rights, environmental protection and safety, workers' rights, toxic torts, the preservation of the civil justice system, and the protection of the poor and powerless. We also have special projects that preserve access to justice by fighting federal preemption, unnecessary court secrecy, class action bans and abuses, the misuse of mandatory arbitration, and other efforts to deprive people of their day in court. Public Justice has litigated numerous civil rights class actions seeking injunctive and declaratory relief, including lawsuits filed under 42 U.S.C. § 1983. Based on our experience and expertise in litigating these cases, we believe that the lower court's class certification analysis and decision under Fed. R. Civ. P. 23 are erroneous. If Rule 23(b)(2) class actions are to continue to serve as a tool for vindicating the rights of vulnerable populations – such as children, the elderly, and people with mental and/or physical disabilities – then the lower court's decision must be reversed.

ATTACHMENT B

Briefs and Other Related Documents

Shook v. Board of County Com'rs of County of El PasoD.Colo.,2006.Only the Westlaw citation is currently available.

United States District Court,D. Colorado.

Mark SHOOK and Dennis Jones, on behalf of themselves and all others similarly situated,
Plaintiffs,
andJames Vaughan, Shirlen Mosby, Thomas Reinig, Lottie Elliott, and Victor Siegrist, Intervenor Plaintiffs,
v.
The BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF EL PASO and Terry Maketa, in his official capacity as Sheriff of El Paso County,
Defendants.

Civil Action No. 02-cv-00651-RPM.

June 28, 2006.

David Cyrus Fathi, National Prision Project, Washington, DC, Mark Silverstein, American Civil Liberties Union, Thomas S. Nichols, Davis, Graham & Stubbs LLP, Denver, CO, Plaintiffs and Intervenor Plaintiffs.

Gordon Lamar Vaughan, Sara Ludke Cook, Vaughan & Demuro, Jay Allen Lauer, El Paso County Attorney's Office, Colorado Springs, CO, for Defendants.

ORDER DENYING CLASS CERTIFICATION

RICHARD P. MATSCH, Senior District Judge.

***1** In the five complaints filed in this action, the original plaintiffs and intervening plaintiffs ("plaintiffs") have alleged sufficient facts to support their claims that the protection against cruel and unusual punishment granted to them by the Eighth Amendment to the United States Constitution, made applicable to state and local governments by the Fourteenth Amendment, was violated by acts and omissions of employees and agents of the Sheriff of El Paso County, Colorado while the plaintiffs were inmates housed in the El Paso County Jail. More particularly, the allegations identify each of these plaintiffs as persons with serious mental health needs which were not met, resulting in harm to them.They do not seek damages for such harm; they ask only for declaratory and injunctive relief on behalf of a class, comprising "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail," or alternatively, "all persons who are now, or in the future will be, confined in the El Paso County Jail."

***1** The motion for certification of a class under Fed.R.Civ.P. 23(b)(2), filed June 17, 2005, is opposed by the defendants and the issues have been adequately briefed. The motion is denied because the plaintiffs have not met the requirements of Rule 23(a)(2) and (3). The questions of law or fact are not sufficiently common to either of the classes for which certification is sought and the claims and defenses are not typical of either class as identified. Additionally, the plaintiffs have not shown that the defendants have acted or refused to act on grounds generally applicable to either of the putative classes in a manner that would make appropriate the broad injunctive relief or corresponding declaratory relief requested as necessary to support certification under Rule 23(b)(2).

***1** The Jail houses recent arrestees, persons awaiting trial, and persons convicted and sentenced to terms of two years or less. The Jail comprises two buildings, both located in Colorado Springs-the Criminal Justice Center and the Metro Detention Center. The five complaints [FN1] allege the following facts in support of the plaintiffs' individual claims: Plaintiff Mark Shook asserts that he suffers from a form of autism known as Asperberger's Syndrome, as well as bipolar disorder. He alleges that before his arrival at the Jail in fall 2001, he regularly took two anti-psychotic drugs prescribed by his psychiatrist. He complains that after he arrived at the Jail he had no access to any medications, and when after three weeks he finally did see a doctor, the doctor would not prescribe his regular medications because they were not on the Jail's list of approved medications.

FN1. The five complaints are (1) the class action complaint of plaintiffs Mark Shook and Dennis Jones, filed on April 2, 2002, (2) the complaint in intervention of James Vaughan and Shirlen Mosby; (3) the plaintiffs' supplemental class action complaint; (4) the complaint in intervention of Thomas Reinig and Lottie Elliott, and (5) the complaint in intervention of Victor Siegrist. James Robillard, one of the original plaintiffs, moved to withdraw and was dismissed from this action on December 3, 2002.

***1** Plaintiff Dennis Jones states that he has been diagnosed as bipolar and suffers from depression, anxiety, and suicidal thoughts. He asserts that before he entered the Jail in September 2001, he was prescribed two drugs to control his symptoms. Mr. Jones complains that after he was confined, Jail

officials denied him access to any medications for nearly a month. He alleges that when he finally obtained a prescription, he received only one of the drugs he needed and the dosage was insufficient to provide relief for his symptoms. In addition, he complains that the Jail staff who monitored the levels of his medication took blood samples too soon or too long after he received his medication for the tests to be accurate.

***2** Plaintiff-intervenor Shirlen Mosby states that she is bipolar and has experienced numerous attacks of anxiety, depression, feelings of hopelessness, and suicidal thoughts. She alleges that during her confinement, Jail officials improperly placed her in special detention cells and belittled her condition. She also alleges that she was able to attempt suicide three times because of inadequate supervision at the Jail.

***2** Plaintiff-intervenor James Vaughan asserts that he is bipolar and suffers from nearly continuous conditions of depression, anxiety, and "racing thoughts." He claims that he was deprived of any medication for many days after he arrived at the Jail as a pretrial detainee, and that he had inadequate access to psychiatric care while there. In addition, he complains that he did not receive the blood tests necessary to monitor the anti-depressant medication he required.

***2** Plaintiff-intervenor Thomas Reinig alleges that he has a history of psychiatric hospitalizations and diagnoses dating to the early 1990s, and has been diagnosed with schizoaffective disorder and paranoid schizophrenia. His was incarcerated in the Jail as a pretrial detainee in September 2003, and for a period between March and June 2004 was sent to the state psychiatric hospital in Pueblo, Colorado. At the Jail he was prescribed a variety of psychiatric medications and listed as a potential suicide risk. Mr. Reinig complains of having been confined eight times in a toiletless special detention cell, sometimes while restrained with handcuffs and leg irons. He also complains that several times Jail staff-subjected him to shocks from a taser and threatened him with the use of the taser on additional occasions. In addition, he alleges that Jail authorities have strapped him into the Jail's restraint chair, and on other occasions have threatened the use of the restraint chair.[FN2]

FN2. Mr. Reinig is the prisoner identified as "Prisoner No. 13" in the Supplemental Complaint. (¶ ¶ 37-38).

***2** Plaintiff-intervenor Lottie Elliott states that she arrived at the Jail on November 18, 2004, after having spent three days on the psychiatric ward of St. Francis Hospital after a suicide attempt on November 15, 2004. She alleges that she was released to the Jail with a prescription written by the hospital psychiatrist for the administration of an anti-psychotic medication. She complains that the Jail's medical staff changed her medications without consulting her or warning her of possible side effects of the new drugs. After she complained for several days, Jail staff permitted her family to pick up the previously written prescription form from her property, fill it at a community drugstore, and bring the medications to the Jail. She alleges that ten days passed before she began receiving the medications prescribed by the hospital psychiatrist, and the dosage administered by Jail staff was inadequate. Ms. Elliott alleges that her requests for additional medication were unanswered until she met with the Jail's psychiatrist and by then she had been incarcerated for approximately four weeks and had attempted suicide.[FN3]

FN3. Ms. Elliott is the prisoner identified in the supplemental complaint as "Prisoner No. 7." (¶ ¶ 2223).

***3** Plaintiff-intervenor Victor Siegrist alleges that he suffers from schizoaffective paranoid disorder (bipolar type) and seizures. His complaint states that he has been confined in the Jail since April 27, 2005, except for periods when he was in Memorial Hospital and in the Colorado Mental Health Institute at Pueblo for reasons related to this mental health problems. He alleges that during his confinement at the Jail he was deprived of necessary medications. He also alleges that he was held for periods of time in cells having no sink or toilet. He complains of being forced to attend court appearances in a humiliating suicide gown and of being subjected to shocks from a taser. In addition, he alleges that the defendants failed to protect him adequately from the risk of self-harm. He asserts that at the Mental Health Institute at Pueblo, he received medications that stabilized his condition, but upon his return to the Jail, his medication was changed without his having been examined by a doctor. He maintains that he observed and experienced inadequate mental health staffing at the Jail.

***3** The complaint and supplemental complaint describe various incidents that occurred at the Jail between 1999 and 2005 involving persons identified as "Prisoners 1-14." The plaintiffs allege that those incidents show administrative deficiencies, such as inadequate staffing and training, that increase the risk

of mental and physical harm to mentally ill inmates, including the risk of self-harm.

***3** The plaintiffs seek an order enjoining the defendants to:
***3** • provide sufficient numbers of mental health and custody staff, with adequate training, to provide for the serious mental health needs of class members;
***3** • provide safe and appropriate housing for prisoners with serious mental health needs;
***3** • discontinue use of the "special detention cells" to house prisoners exhibiting signs of mental illness;
***3** • provide inpatient psychiatric care for prisoners whose serious mental health needs require it;
***3** • cease using restraints, pepper spray, and electroshock weapons ("tasers") against prisoners exhibiting signs of mental illness in circumstances that pose a substantial risk of serious harm to such prisoners;
***3** • implement an adequate system to provide appropriate medication to prisoners whose serious mental health needs require it and to monitor the effects of that medication; and
***3** • provide adequate screening and precautions to prevent self-harm and suicide.

***3** (Supplemental Compl. ¶ 68).

***3** The plaintiffs seek to represent the proposed class, and they bear the burden of proving that the requirements of Rule 23 are satisfied. *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir.1988). To determine whether this action should proceed as a class action, the court must first determine whether the four threshold requirements of Rule 23(a) are met. *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir.1998). Rule 23(a) provides:
***4** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

***4** If those requirements are met, "[the court] must then examine whether the action falls within one of the three categories of suits set forth in Rule 23(b)." *Adamson*, 855 F.2d at 675. Plaintiffs seek certification pursuant to Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class as a whole."

***4** There is no need to identify those who are or may become members of a class for certification under Rule 23(b)(2), which does not require notification, but there must be a sufficient definition to develop the contours for identifying the issues sought to be adjudicated and determine whether those issues are within the court's jurisdictional and institutional competence to grant the relief requested.

***4** The plaintiffs' claims are sufficient to state a claim for damages under 42 U.S.C. § 1983 making officials liable for constitutional violations caused by them. They do not request damages. Injunctive relief is a recognized form of equitable relief under that statute. The form of the injunction must comply with the requirements of Rule 65(d), as follows:
***4** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

***4** Fed.R.Civ.P. 65(d). The plaintiffs recognize that limitation and allege that class certification is necessary because the plaintiffs are no longer in the Jail facilities and their individual exposure to the claimed violations is not likely to reoccur. They contend that if future violations are to be prevented, the court must enter its orders under Rule 23(b)(2).

***4** There are three flaws in the class approach to the claims sought to be adjudicated in this civil action. First, the inherent complexities in determining what persons present a need for treatment of mental disorders while confined. Second, the limitations on this court's ability to adjudicate the factual and legal issues in a manageable way. Third, the inability of the court to fashion the remedy requested, given the requirements of Rule 65(d) and the jurisdictional limitations imposed by the Prison Litigation Reform Act ("PLRA") in 18 U.S.C. § 3626.

***5** That statute did not alter or amend Rule 23 but it did restrict the court's ability to provide equitable relief of the kind requested in this case. Accepting that there maybe prospective relief for the benefit of a class of persons beyond the named plaintiffs, the restriction clearly stated is that the order must be narrowly drawn and "extend no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct

the violation of the Federal right."

***5** The plaintiffs candidly state that their purpose in pursuing this class action is to determine the "scope of prisoner's constitutional rights to mental health services" and identify it as the legal question that is common to the entire class of "Jail prisoners with serious mental health needs." That statement misapprehends the established law. Implicit in that statement is the assumption that the Constitution affirmatively creates a right to mental health services or treatment. It does not. The Constitution prohibits denial of treatment for medical needs, including mental health needs, of which jail officials are aware.

***5** The interest protected by the Eighth Amendment is highly individualistic and case specific in character. Broadly stated, the courts have interpreted its prohibition of cruel and inhuman punishment to equate the failure to provide medical treatment for serious medical needs of prisoners with such punishment, if that failure results from a deliberate indifference on the part of the prison officials. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Proof of a violation of this protection requires a showing that the prisoner has some particular need for medical treatment that is "serious" and that the prison officials were deliberately indifferent to it. *Id.; see also Riddle v. Mondragon*, 83 F.3d 1197, 1203 (10th Cir.1996) "A medical need is serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Riddle*, 83 F.3d at 1202 (internal quotations and citations omitted).

***5** Deliberate indifference is more than the failure to provide that attention. There must be a showing that the officials have knowledge that the prisoner has a condition requiring special treatment or care and, with such knowledge, disregard it resulting in excessive risk to the prisoner's health. In an action for damages, the plaintiff must show actual physical injury resulting from-that is caused by-the failure of care. If treatment is provided but it is below the relevant standard of care, there is no constitutional claim. Deliberate indifference is more than negligence. A claim for relief under § 1983 is based on the Constitutional violation, not the law of torts. Under the PLRA, there is no justiciable claim if there is no physical injury. "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).

***6** To proceed with the plaintiff's claims in this case would require an expansion of this well established law to interpret the Eighth Amendment as mandating prison officials to take affirmative action to prevent or protect against the possibility of an occurrence of a violation in the future. When determining whether an action should proceed as a class action, the court should refrain from evaluating the merits of the plaintiffs' claims, *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir.1982), but the court may consider whether the plaintiffs' definition of the class and their statement of the common legal questions differ from established law. Furthermore, the court may consider the nature of the plaintiffs' claims and how the proof or defense of such claims relates to the standards of Rule 23.

***6** Medical needs in the physical sense are more identifiable than those arising from mental or emotional conditions because medical needs in the physical sense are largely identifiable objectively. In contrast, mental disorders are more difficult to categorize, and indeed the term "mental disorder" is not subject to precise boundaries. The Manual of the American Psychiatric Association states, "although this manual provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder.' " American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, xxi (4th ed. 1994) ("DSM-IV"). The American Psychiatric Association recognizes that its descriptions of behaviors and symptoms that categorize various mental disorders classify disorders, not classes of people. The DSM-IV states, "A common misconception is that a classification of mental disorders classifies people, when actually what are being classified are disorders that people have." DSM-IV at xxii. That Manual specifically avoids using classifications of mental disorders to refer to classes of people, emphasizing instead the individual nature of mental disorders. *See id.* That reference work further cautions that its descriptions of behaviors characterizing various mental disorders "may not be wholly relevant to legal judgments...." DSM-IV at xxvii.

***6** The terminology used by the plaintiffs in their pleadings does not match the language of the DSM-IV. Most of the named plaintiffs are identified as having some form of Bipolar Disorder. That is but one of the 16 major diagnostic classes in the Manual and it is subclassified into 4 types of disorders (Bipolar I Disorder, Bipolar II Disorder, Cyclothymia, and Bipolar Disorder Not Otherwise Specified) with separate criteria sets. *See* DSM-IV at

35066. Consider the complexity of this description of the Diagnostic Features of Bipolar I Disorder:

***6** There are six separate criteria sets for Bipolar I Disorder: Single Manic Episode, Most Recent Episode Hypomanic, Most Recent Episode Manic, Most Recent Episode Mixed, Most Recent Episode Depressed, and Most Recent Episode Unspecified. Bipolar Disorder I, Single Manic Episode, is used to describe individuals who are having a first episode of mania. The remaining criteria sets are used to specify the nature of the current (or most recent) episode in individuals who have had recurrent mood episodes.

***7** The essential feature of Bipolar I Disorder is a clinical course that is characterized by the occurrence of one or more Manic Episodes ... or Mixed Episodes.... Often individuals have also had one or more major Depressive Episodes.... Episodes of Substance-Induced Mood Disorder (due to the direct effects of a medication, other somatic treatments for depression, a drug of abuse or toxin exposure) or of Mood Disorder Due to a General Medical Condition do not count toward a diagnosis of Bipolar I Disorder. In addition, the episodes are not better accounted for by a Schizoaffective Disorder and are not superimposed on Schizophrenia, Schizophreniform Disorder, Delusional Disorder, or Psychotic Disorder Not Otherwise Specified. Bipolar I Disorder is subclassifed in the fourth digit of the code according to whether the individual is experiencing the first episode (i.e., Single Manic Episode) or whether the disorder is recurrent. Recurrence is indicated by either a shift in the polarity of the episode or an interval between episodes of at least 2 months without manic symptoms. A shift in the polarity is defined as a clinical course in which a Major Depressive Episode evolves into a Manic Episode or a Mixed Episode or in which a Manic Episode or a Mixed Episode evolves into a Major Depressive Episode. In contrast, a Hypomanic Episode that evolves into a Manic Episode or a Mixed Episode, or a Manic Episode that evolves into a Mixed Episode (or vice versa), is considered to be only a single episode. For recurrent Bipolar I Disorders, the nature of the current (or most recent) episode can be specified (Most Recent Episode Hypomanic, Most Recent Episode Manic, Most Recent Episode Mixed, Most Recent Episode Depressed, Most Recent Episode Unspecified).

***7** DSM-IV at 35051. Manic, mixed, or major depressive episodes may range from mild to severe. *Id.* at 351. According to the DSM-IV, the majority of individuals with Bipolar I Disorder return to a fully functional level between episodes. *Id.* at 352.

***7** Although not specifically mentioned in Rule 23, a prerequisite of a class action is that there must be a class. 7A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure* § 1760 (3d ed.2005). While it is true that notice to members of a Rule 23(b)(2) class is not required, every Rule 23 class must have a defined boundary. Certification of a nebulous class would result in numerous procedural problems. Compliance with class-wide injunctive relief would be impossible to monitor, if it would even be possible to enter an order meeting the requirements of Rule 65(d). In addition, certification of a vaguely defined class would lead to uncertainty about the preclusive effect of the action.

***7** The plaintiffs seek certification of a class comprised of "all persons with *serious mental health needs*, who are now, or in the future will be, confined in the El Paso County Jail," but the term "serious mental health needs" is vague. The plaintiffs have not offered any definition of that term. There are many varieties and degrees of mental disorders, and those who operate Jails are not required to offer treatment or alter their custody procedures for every psychological problem exhibited by prisoners. *See, e.g.*, *Riddle*, 83 F.3d at 1204 (plaintiffs who claimed that prison lacked adequate treatment for prisoners suffering from deviant sexual compulsions failed to satisfy the *Estelle* requirement of showing "serious medical need").

***8** As discussed above, "serious medical need" has been defined as a condition that has been diagnosed by a physician as mandating treatment or one that is so obvious that a lay person would recognize it as needing medical attention, but that standard is of little use in defining the class in this action. The Constitution does not require that each Jail inmate receive an extensive mental health evaluation by a physician or mental health professional at the time of intake. Whether an inmate is obviously suffering from a serious medical condition due to a mental disorder depends on the events and circumstances giving rise to that prisoner's claim of deliberate indifference. "All persons with *serious mental health needs* who are now, or in the future will be, confined in the El Paso County Jail" is a group that is too amorphous to proceed as a class, even one under Rule 23(b)(2).

***8** The plaintiffs have proposed an alternative class defined as "all persons who are now, or in the future will be, confined in the El Paso County Jail." The fact that the plaintiffs have proposed an alternative class definition suggests that they foresee the procedural problems that will inevitably result if the class were to be defined as "all persons with serious

mental health needs, who are now, or in the future will be, confined in the El Paso County Jail." The plaintiffs' alternative class definition, however, is too broad. There are no allegations that the defendants' actions or inactions violate the Eighth Amendment rights of every Jail inmate. The plaintiffs do not claim, for example, that the use of a taser or pepper spray to subdue a prisoner constitutes cruel and unusual punishment in every instance, their complaint is about the use of such devices to restrain prisoners who suffer from severe mental illness. The issue is then whether the proposed class of "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail" meets the requirements of Rule 23.

***8** Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. The plaintiffs allege that the El Paso County Jail regularly houses 1,000 inmates or more, and its population has been as high as 1,312. The plaintiffs cite national statistics showing that approximately 20% of jail prisoners have some kind of mental illness. They assert that this statistic shows that Rule 23(a)(1)'s numerosity requirement is met. Their proposed class, however, is comprised of those with *serious* mental health needs. That group is not defined. The plaintiffs instead emphasize "impracticability," arguing that the fluid nature of a Jail population renders individual claims impracticable. The plaintiffs assert that "unless a class is certified, the conditions under which mentally ill and suicidal prisoners are confined at the El Paso County Jail are effectively immunized from judicial review." The public records of this court contradict that assertion. Conditions at the El Paso County Jail have been and are the subject of individual actions. [FN4] The question is whether the plaintiffs have satisfied all of the requirements of Rule 23.

> FN4. The supplemental complaint includes allegations regarding the suicides of Jail prisoners Brian Bennett and Marca Wilson. Civil Action No. 03-cv-00492-RPM, an action for damages against the Board of County Commissioners of El Paso County and others arising out of the death of Brian Bennett was dismissed based on stipulations submitted on March 17, 2004 and April 27, 2004. Civil Action No. 03-cv-01919-RPM, an action for damages brought by the statutory heir of Marca Wilson against the Board of County Commissioners of El Paso County and others is pending in this court.

***9** Rule 23(a)(2) requires that there be questions of law or fact common to the class. This prerequisite is met if there is single issue of law or fact common to the class. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir.1999). Certification under Rule 23(b)(2) of a claim seeking the application of a common policy is not precluded merely because the claims of individual class members differ factually, but when the claims of the named plaintiffs arise from diverse factual situations and the remedies they seek are based on diverse legal theories, commonality is lacking. *See Hart*, 186 F.3d at 1288-90.

***9** The facts common to the class are that the plaintiffs and putative class members suffer from mental illness and were confined in the El Paso County Jail. Other than those common features, the circumstances giving rise to the class members' claims vary greatly. These differences are significant because the facts relevant to the determination of whether an Eighth Amendment violation occurred varies depending on the type of violation alleged. Plaintiff Reinig, for example, complains of being shocked by a taser. Determination of this complaint would require inquiry into whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously or sadistically to cause harm. *See Hudson v. McMillian*, 503 U.S. 1, 67 (1992); *Mitchell v. Maynard*, 80 F.3d 1433, 1440 (10th Cir.1996). Plaintiff Mosby complains of being held in a toiletless special detention cell. A claim of that type requires evaluation of the duration and severity of the alleged deprivation. *See Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir.1998). Lottie Elliott alleges that she was able to attempt suicide several times. A claim for failure to protect against the risk of self-harm involves factual issues about the prison official's knowledge of the inmate's mental condition and the care and security provided to the inmate. *See Barrie v. Grand County, Utah*, 119 F.3d 862, 864 (10th Cir.1997). Evaluation of the claims asserted on behalf of the class would require examination of the unique circumstances surrounding each incident alleged to constitute a constitutional deprivation.

***9** The proposed class suffers from the same deficiency as the proposed class in *Hart*. In that case, the United States Court of Appeals for the Tenth Circuit Court of Appeals stated, "Other than all being disabled in some way and having had some sort of contact with New Mexico's child welfare system, no common factual link joins these plaintiffs." 186 F.3d at 1289. Similarly, in this action, there is no single question of fact common to the class.

***9** Rule 23(a)(2)'s commonality requirement may

also be met by showing a common question of law, but commonality requires more than that the claims of class members be bound by a broad legal theme. Rule 23(a)(2) is not satisfied by generalized allegations of policy failures or systemic deficiencies. *See Hart*, 186 F.3d at 1289. The plaintiffs have not identified any common legal question applicable to the class, rather they assert an assortment of alleged constitutional violations. No single policy, custom, procedure or alleged administrative deficiency unites the claims of the plaintiffs or the putative class members. An inmate's suicide or suicide attempt does not by itself show deliberate indifference on the part of the Jail's staff and administrators, nor does the use of pepper spray or tasers necessarily show an Eighth Amendment violation. Trial of the claims asserted on behalf of the class would require separate evaluation of all of the circumstances surrounding each incident, including the behavior exhibited by the prisoner, the knowledge of prison staff regarding the prisoner's condition, and the response of the Jail staff.No single claim or legal issue could be resolved on a class basis.

***10** The plaintiffs contend that "scope of prisoners' constitutional rights to mental health services is a legal question common to the entire class of Jail prisoners with serious mental health needs." (Pls.' mot. for class certification at 7). The plaintiffs' objective is to have this court prescribe Jail practices for the humane treatment of mentally ill prisoners, but that broad objective does not satisfy the commonality requirement. The plaintiffs' request for class-wide remedies does not mean there are legal questions common to the entire class. The plaintiffs are seeking relief far wider than that necessary to redress the constitutional torts alleged.

***10** Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims of the class." The claims may arise from differing fact situations, but must be "based on the same legal or remedial theory." *Adamson*, 855 F.2d at 676. This standard "is closely related to the test for the common-question prerequisite in subdivision (a)(2)." 7A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure* § 1764.

***10** The plaintiffs fail to satisfy the typicality prerequisite for the same reasons that they fail to satisfy the commonality prerequisite. The plaintiffs' claims and the claims of the putative class members arise under the Eighth Amendment, but their claims are not based on any single course of conduct, and there is no legal issue which, if resolved, would control the claims of the class. The plaintiffs request seven categories of injunctive relief on behalf of the class, but such relief is requested on the basis of an assortment of claims.

***10** Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." To satisfy this prerequisite, the plaintiffs must show that their interests are aligned with those of the persons they seek to represent and that they will vigorously prosecute the class through qualified counsel. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir.2002). The plaintiffs are represented by qualified counsel associated with the American Civil Liberties Union of Colorado and the ACLU National Prison Project. Plaintiffs and their counsel have vigorously pursued this case since it was commenced in 2002, and no conflicts between plaintiffs or their counsel and other class members have been identified. In this regard the plaintiffs have shown that they would be adequate class representatives, but they have failed to satisfy Rule 23(a)'s commonality and typicality requirements, and they have not adequately defined the class.

***10** The plaintiffs have not met the threshold requirements of Rule 23(a). For many of the same reasons, the plaintiffs fail to satisfy the requirement that "the party opposing the 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). Significantly, for a class to be certified pursuant to Rule 23(b)(2), the opposing party's actions or inactions must be "generally applicable" to the class.

***11** As discussed above, the plaintiffs do not complain of a written policy or standard procedure or practice to which all class members are subject. The plaintiffs do not complain of lack of conduct that is premised on grounds applicable to the entire class. Instead they contend that a number of separate incidents collectively show administrative deficiencies amounting to deliberate indifference. The problem is that there are unique factual circumstances relevant to each incident alleged by the plaintiffs, and determination of whether the alleged incidents show a policy or custom of deliberate indifference would require separate assessment of each incident alleged by the plaintiffs as an example of such indifference. Notably, the allegations with respect to the persons identified as Prisoners 1-14 arise from distinct acts. The defendants' responses to those claims draw from each prisoner's Jail history

and medical files. The individual nature of the asserted claims and the individual nature of the defenses to those claims renders this action unmanageable as a class action. "The vehicle of class litigation must ultimately satisfy practical as well as purely legal considerations." *Shook v. El Paso County*, 386 F.3d 963, 973 (10th Cir.2004).

***11** The facts alleged in the complaints could support individual claims for relief, but those allegations do not show that final injunctive relief or declaratory relief with respect to the class as a whole is appropriate. The plaintiffs request this court to enter an order addressing matters such as the propriety of using tasers and pepper spray to subdue mentally ill prisoners, the propriety of temporarily holding mentally ill prisoners in special detention cells, when and by whom mental health evaluations and treatment should be provided, the types of psychiatric medication that should be made available to prisoners, how such medication should be prescribed and administered, the numbers of mental health and custody staff that should be employed at the Jail, and the type of training that should provided to Jail employees. Some of these matters, such as the use of pepper spray and tasers, cannot be addressed prospectively on a class-wide basis. Whether the use of such devices with particular prisoners comports with the Eighth Amendment must be evaluated on the basis of individual circumstances, and if a violation occurred, a remedy to address the harm suffered by the affected prisoner or prisoners can be fashioned. The broad relief sought by the plaintiffs shows that they are not simply seeking to redress past constitutional torts and prevent there recurrence, rather they want this court to set standards for Jail practices with respect to mentally ill prisoners. This court is not the appropriate decision maker to determine what constitutes "adequate" training for Jail staff, or what medications should be on the Jail's list of approved medications, or how many employees are needed for "sufficient" Jail staffing. This court must respect its constitutional boundaries and refrain from usurping the role of prison administrators.

***12** The plaintiffs argue that the Tenth Circuit's opinion in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir.1980) shows that a Rule 23(b)(2) class action is an appropriate method for litigating disputes about the constitutionality of prison conditions. *Ramos v. Lamm* must be read within the context of its facts and subsequent developments in the law. *Ramos* depended upon a factual showing that the State of Colorado was operating a prison facility that was so outdated and poorly managed that all aspects of confinement there warranted condemnation as cruel and inhuman punishment, requiring an order that it be closed unless remedial measures were taken to bring it into conformity with court directed standards. Those standards were altered on appeal. There can be no doubt that the orders entered in that case are well beyond the limitations of the PLRA and no equivalent remedy could now be provided. Additionally, both the Tenth Circuit and the Supreme Court have subsequently more clearly identified what can be characterized as the deliberate indifference that gives rise to a claim of violation of the Eighth Amendment.

***12** The PLRA did not add new elements to the class certification process, and the PLRA's limitations on broad prospective relief are not determinative of the class certification issue, but neither can those limitations be ignored. If this court does not have the authority to grant the injunctive relief requested, the purpose of proceeding as a class action is defeated. Rule 23(b)(2) necessarily presumes that the court has the power to grant "appropriate final injunctive relief or corresponding declaratory relief appropriate to the class as a whole." Thus, the definition of the class is the critical element in determining what relief is appropriate.

***12** When subdivision (b)(2) was added to Rule 23, one of its purposes was to facilitate class action suits seeking the enforcement of civil rights, but that historical fact does not mean that every purported class action alleging constitutional violations is suitable for class adjudication. Here the proposed class is vague, the claims of deliberate indifference arise from a variety of factual circumstances and legal theories, the plaintiffs' claims are based on conduct not generally applicable to the class, and class-wide injunctive relief is not appropriate.

***12** Based on the foregoing, it is

***12** ORDERED that the plaintiffs' motion for class certification is denied.

D.Colo.,2006.
Shook v. Board of County Com'rs of County of El Paso
Slip Copy, 2006 WL 1801379 (D.Colo.)

Briefs and Other Related Documents (Back to top)

• 2005 WL 2836740 (Trial Motion, Memorandum and Affidavit) Plaintiffs' and Intervenor Plaintiffs' Reply Memorandum IN Support of Motion for Class Certification (Aug. 19, 2005) Original Image of this

Document (PDF)

• 2005 WL 2836730 (Trial Motion, Memorandum and Affidavit) Response in Opposition to Motion for Class Certification (Jul. 25, 2005) Original Image of this Document (PDF)

END OF DOCUMENT

Briefs and Other Related Documents

National Organization of Disability v. TartaglioneE.D.Pa.,2001.Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.

NATIONAL ORGANIZATION ON DISABILITY, et al.,

v.

Margaret M. TARTAGLIONE, et al.

No. CIV. A. 01-1923.

Oct. 22, 2001.

PADOVA, JUDGE.

MEMORANDUM

***1** Plaintiffs, organizations who advocate for the disabled, membership organizations of persons with disabilities, and disabled individuals, filed this action on April 19, 2001. The Amended Complaint alleges that the Commissioners of the City of Philadelphia in charge of elections and the purchase of voting machines, the City of Philadelphia, the Philadelphia Board of Election, and the Secretary of the Commonwealth of Pennsylvania have violated Plaintiffs' civil rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 (1994), and Section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"), 29 U.S.C. § 794(a) (1994), by denying them equal and integrated access to polling places and accessible voting machines.[FN1] Before the Court is Plaintiffs' Motion for Class Certification. For the reasons which follow, the Motion will be granted.

FN1. Plaintiffs' initial Complaint alleged claims only against the City Commissioners. On October 10, 2001, the Court dismissed the claims brought by the visually impaired Plaintiffs, without prejudice, for failure to join an indispensable party pursuant to Fed.R.Civ.P. 12(b)(7). Plaintiffs filed an Amended Complaint on October 15, 2001, naming, as additional parties, the City of Philadelphia, the Philadelphia Board of Election and the Secretary of the Commonwealth of Pennsylvania.

***1** I. BACKGROUND

***1** There are nine individual Plaintiffs who have either visual or mobility impairments who seek to represent a class of similarly situated disabled voters. The visually impaired Plaintiffs, Denice Brown, Patrick Comorato, Suzanne Waters, Suzanne Erb, and Fran Fulton, are all legally blind. The mobility impaired Plaintiffs, Jesse Jane Lewis, Theresa Yates, Julia Campolongo, and Karin DiNardi, use wheelchairs to ambulate. There are also four organizational Plaintiffs, National Organization on Disability, Liberty Resources, Inc., Pennsylvania Council of the Blind, and the National Federation of the Blind of Pennsylvania.

***1** Plaintiffs allege that Defendants have discriminated against them in the voting process in violation of the ADA and the Rehabilitation Act by purchasing new electronic voting machines which are not accessible or independently usable by visually disabled voters. Plaintiffs further allege that Defendants have discriminated against them by failing to select accessible polling places or modify polling places to make them accessible to persons with mobility impairments. Plaintiffs seek injunctive relief on behalf of themselves and a class of similarly situated voters.

***1** Plaintiffs seek certification of a class made up of the following subclasses: (1) registered voters of Philadelphia County who have mobility impairments which prevent them from voting in inaccessible neighborhood polling places; and (2) blind or visually impaired voters who are unable to read or use election ballots which have not been adapted for persons with visual impairments. (Am.Compl.¶ 25.) The proposed Class comprises approximately 184,000 individuals, slightly more than one-half of whom are visually impaired. (Am.Compl.¶ 26.)

II. LEGAL STANDARD

***1** To obtain class certification, Plaintiffs must meet all four requirements of Federal Rule of Civil Procedure 23(a) and at least one part of Federal Rule of Civil Procedure 23(b). *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir.1994) (citing *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir.1975)). When doubt exists concerning certification of the class, the court should err in favor of allowing the case to proceed as a class action. *Gaskin v. Commonwealth of Pa.*, No. 94-CV-4048 (E.D.Pa., July 24, 1995), 23 IDELR 61 (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir.1985). The four requirements of Rule 23(a) are satisfied only if:

***1** 1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the

representative parties will fairly and adequately protect the interests of the class.

***2** Fed.R.Civ.P. 23(a).

***2** Plaintiffs allege that the proposed class is maintainable pursuant to Federal Rule of Civil Procedure 23(b)(2) which requires that: "the party opposing the 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). Defendants argue that class certification should be denied because Plaintiffs do not satisfy the third and fourth requirements of Rule 23(a) relating to the adequacy of the class representatives and the typicality of their claims.

***2** In determining whether the class should be certified, the Court examines only the requirements of Rule 23 and does not look at whether the Plaintiffs will prevail on the merits. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 157, 177-78 (1973) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.") (citations omitted). However, the Court must also "carefully examine the factual and legal allegations" made in the Complaint. *Barnes v. American Tobacco Co.*, 161 F.3d 127, 140 (3d Cir.1998).

***2** Rule 23(c)(4)(B) provides "that a class may be divided into subclasses and each subclass treated as a class." In this case, the Plaintiffs seek to divide the class into two subclasses because of the differences in the facts and circumstances of the visually and mobility impaired Plaintiffs and the relief they seek.

III. DISCUSSION

A. *RULE 23(a)*

1. *Numerosity*

***2** The Amended Complaint alleges that the class numbers approximately 184,500 persons with visual and mobility impairments. (Am.Compl.¶ 26.) There is no minimum number necessary to satisfy the numerosity requirement. *See* *Moskokwitz v. Lopp*, 128 F.R.D. 624, 628 (E.D.Pa.1989). The statute does not require "any particular number or require that joinder of all members be impossible, so long as a good faith estimate of the number of class members is provided." *Stewart v. Associates Consumer Discount Co.*, 183 F.R.D. 189, 194 (E.D.Pa.1998). The Court may use common sense assumptions to support a finding of numerosity. *Id.* Common sense dictates that where the class numbers in the thousands that "joinder of all would be impracticable and that the numerosity requirement has been satisfied." *Id.* The size of the proposed class makes joinder impracticable and, consequently, the numerosity requirement is met in this case.

2. *Commonality*

***3** "The commonality requirement is satisfied if the named plaintiff shares at least one question of fact or law with grievances of the prospective class. Classes seeking injunctive relief 'by their very nature often present common questions satisfying Rule 23(a)(2).' " *Duffy v. Massinari*, No.Civ.A. 99-3154, 202 F.R.D. 437, 2001 WL 683802, at *4 (E.D.Pa. June 15, 2001) (citing *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir.1994). Plaintiffs assert that the named Plaintiffs and the proposed subclass members have the following questions of law or fact in common: "whether Defendants violated the Americans with Disabilities Act ... and Section 504 of the Rehabilitation Act ... by failing to ensure that voters with mobility or visual impairments have access to neighborhood polling places and voting machines that are independently usable by blind or visually impaired persons." (Pls.' Mem. at 6.) The alleged discriminatory acts of Defendants are the same with respect to the named Plaintiffs and the subclasses they seek to represent. As Plaintiffs seek injunctive relief against Defendants, who are allegedly engaged in a common course of conduct on a classwide, or subclass wide, basis, the commonality requirement is met in this case. *T.B. v. School Dist. of Philadelphia*, No.Civ.A. 97-5453, 1997 WL 786448, at *4, (E.D.Pa., Dec.1, 1997).

***3** 3. *Typicality*

***3** "A plaintiff's claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." *T.B. v. School Dist. of Philadelphia*, 1997 WL 786448, at *4 (citing *Pascal v. Heckler*, 99 F.R.D. 80, 83 (E.D.Pa.1983)). A plaintiff's claim can be typical even if the named plaintiff's individual circumstances are "markedly different" from that of the class. *Duffy*, 202 F.R.D.

437, 2001 WL 683802, at *5. The named Plaintiff's claims need only be sufficiently similar to those of the class to allow the court to conclude that "(1) the representative will protect the interests of the class and (2) there are no antagonistic interests between the representative and the proposed class." *Id.*

***3** Plaintiffs assert that the claims of the named Plaintiffs are typical of those of the subclasses because they are adversely affected by the unlawful conduct of the Defendants in the same way. (Pls.' Mem. at 9.) The claims of the proposed subclass of visually impaired voters and the claims of the visually impaired Plaintiffs arise from the same facts-the failure of Defendants to purchase electronic voting machines with audio output technology-and are based on the same legal theory-that Defendants' conduct violates the ADA and the Rehabilitation Act. The claims of the proposed subclass of mobility impaired voters and the claims of the mobility impaired Plaintiffs also arise from the same facts-the failure of Defendants to select neighborhood polling places which are accessible to voters who use wheelchairs-and are based on the same legal theory-that Defendants' conduct violates the ADA and the Rehabilitation Act.

***3** Defendants argue that the Motion for Class Certification should be denied because the claims of the named Plaintiffs are not typical of the claims of the subclasses they represent. Defendants argue, without citing any supporting evidence, that some visually impaired voters who can read large type may be able to use the electronic voting machines recently purchased by the City, because those machines can enlarge the typeface. Defendant also argue, again without citing any supporting evidence, that not all mobility impaired voters are assigned to inaccessible polling places, and therefore, the claims of the named Plaintiffs would not be typical of the claims of those voters. Defendants further argue that the named Plaintiffs are not typical because they are subject to unique defenses because some of them have voted and two of them, Lewis and Erb, are members of the Mayor's Commission on People with Disabilities. However, "[R]ule 23(a)(3) requires typicality of the named plaintiffs' claims, not defenses that may be raised." *Fitch v. Radnor Industries, Ltd.*, No.Civ.A. 90-2084, 1990 U.S. Dist. LEXIS 13568, at *11 (citing *In re Mellon Bank Shareholders Litigation*, 120 F.R.D. at 37-38.

***4** The claims of the individual Plaintiffs and the members of the proposed subclasses are typical in that they challenge the same course of conduct by Defendants: the failure to purchase accessible voting machines and the failure to select accessible polling places or modify polling places to make them accessible. The potential factual differences mentioned by Defendants are too slight to warrant a finding that the proposed subclasses of visually and mobility impaired voters do not satisfy the typicality requirement and, therefore, the typicality requirement is satisfied in this case. *T.B. v. School Dist. of Philadelphia*, 1997 WL 786448, at *5.

4. *Adequacy of representation*

***4** "To establish adequate representation, (a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *T.B. v. School Dist. of Philadelphia*, 1997 WL 786448, at *5. Plaintiffs assert that their counsel, Tom Earle and Steve Gold, have ten and thirty years of experience, respectively, in federal court class actions and disability rights. They have also litigated numerous class actions to enforce the ADA and the Rehabilitation Act. Plaintiffs also assert that the named Plaintiffs will fairly and adequately protect the interests of the class and have no interests which conflict with other class members.

***4** Defendants argue that the Motion for Class Certification should be denied because the interests of the named Plaintiffs conflict with the interests of the members of the subclasses. Defendants claim that the interests of visually disabled Plaintiffs who seek to prevent the City from using the electronic voting machines it has already purchased conflict with the interests of the class of mobility impaired voters because the new voting machines are accessible to the disabled. They also argue that the interests of the mobility impaired Plaintiffs in moving polling places to accessible locations conflict with the interests of the class of the visually impaired who might have to travel greater distances to vote. Defendants also argue that, because of these purported conflicts, the same attorneys would not be able to conduct the proposed litigation on behalf of both subclasses.

***4** The Court finds that Plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation. The Court further determines that the potential conflicts between the interests of the proposed subclasses are insubstantial and do not constitute interests which are antagonistic and which would prevent the named Plaintiffs from adequately representing the subclasses they seek to represent. Therefore, the adequacy of representation

requirement of Rule 23(a) is met in this case.

B. *Rule 23(b)(2)*

***5** As the Plaintiffs have met the requirements for certification of the proposed class pursuant to Rule 23(a), the Court must examine whether certification is appropriate under at least one part of Rule 23(b). Plaintiffs seek to have this class certified pursuant to Rule 23(b)(2) because Defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief ... with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). Section (b)(2) was "designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." *T.B. v. School Dist. of Philadelphia*, 1997 WL 786448, at *6. The Amended Complaint seeks class wide injunctive relief to remedy Defendants' alleged discrimination against the subclasses of visually and mobility impaired voters. The Court finds, therefore, that certification of the proposed subclasses pursuant to Rule 23(b)(2) is appropriate.

IV. CONCLUSION

***5** For the reasons stated above, the Court concludes that Plaintiffs have met the requirements for certification of the class pursuant to Federal Rule of Civil Procedure 23. Accordingly, the Court certifies the proposed Plaintiff class for the purpose of seeking injunctive relief pursuant to Rule 23(b)(2). An appropriate Order follows.

ORDER

***5** AND NOW, this day of October, 2001, in consideration of Plaintiffs' Motion for Class Certification (Docket No. 15), Defendants' response thereto and Plaintiffs' reply memorandum of law, IT IS HEREBY ORDERED that the Motion for Class Certification is GRANTED and the class shall comprise the following two subclasses:

***5** (1) all mobility impaired individuals, including those that use a wheelchair to ambulate, and who are registered to vote in the City of Philadelphia; and

***5** (2) all blind or visually impaired individuals who are registered to vote in the City of Philadelphia.

E.D.Pa.,2001.

Briefs and Other Related Documents (Back to top)

• 2:01cv01923 (Docket) (Apr. 19, 2001)

END OF DOCUMENT

Grijalva v. ShalalaD.Ariz.,1995.
United States District Court, D. Arizona.
GRIJALVA, et al.
v.
SHALALA.
Civ. No. 93-711 TUC ACM.

July 18, 1995.

MARQUEZ, Senior U.S. District Judge:
***1** Plaintiffs seek class certification in this action against the Defendant Secretary of Health and Human Services (HHS), Health Care Financing Administration (HCFA). Plaintiffs allege that risk-based [FN1] HMOs deny medical services to elderly Medicare beneficiaries.[FN2] Plaintiffs allege that the Secretary has failed to monitor and sanction these HMOs and failed to implement effective notice, appeals,[FN3] and contemporaneous-termination hearing procedures [FN4] for HMO service denials.[FN5] Thereby, the Secretary has shirked her duty and responsibility to administer the Medicare program and ensure that beneficiaries receive the services to which they are entitled.

***1** Plaintiffs seek certification of a nationwide class, described as follows:
***1** Persons who were enrolled in Medicare risk-based health maintenance organizations or competitive medical plans [FN6] during the six years prior to the filing of this lawsuit or who will enroll in such organizations in the future, including two sub-classes: 1) class members denied health care services covered by the Medicare program; and 2) class members not given adequate notices or appeal rights.

***1** Plaintiffs are all Arizona residents and enrollees of the same HMO, FHP. Additionally, ten other Medicare beneficiaries seek to intervene as party representatives in this action. The Intervenor Plaintiffs hold diverse state residencies and HMO memberships.[FN7]

***1** Plaintiffs seek injunctive and declaratory relief. As this Court previously held, this is not an action for benefits. (Order: Defendant's Motion to Dismiss, filed December 15, 1994). Monetary relief, if any, might result eventually if Plaintiffs prevail. *Id.* at 5-6. Subsequent to a finding by this Court that the Secretary allowed HMOs to improperly deny benefits, readjudication might provide benefits to some and for others it will make no difference. *Id.*

***1** Certification as a class depends on whether the requirements of Fed.R.Civ.P. 23 can be met. First, the following four prerequisites must all be satisfied:
***1** (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

***1** Fed.R.Civ.P. 23(a). Second, a class action must fit one of three categories set forth in Fed.R.Civ.P. 23(b); here, the relevant category is whether "the party opposing the 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).

1. Numerosity: Impracticality of Joinder

***1** Here, the numbers alone support proceeding with this matter as a class action. Nearly one-hundred HMOs are spread throughout the country providing care to over one-million Medicare beneficiaries. Longwill, "Structure and Performance of Health Maintenance Organizations, 12 HCFA Review N. 1, 74 (1990). Plaintiffs charge that HMOs perpetrated the challenged conduct across the nation. Plaintiffs seek redress for HHS/HCFA's failure to take remedial measures to correct the nationwide HMO health care delivery system, including instituting a meaningful appeal process. Joinder on such a scale is clearly impractical.

2. Questions of Law or Fact Common to the Class; Named Plaintiffs' Claims are Typical of the Claims of the Class; Class Representatives Will Fairly and Adequately Protect the Interests of the Class

***2** Combined,[FN8] the three remaining factors produce a shorthand analysis of whether a class action would serve as an efficient method of litigating the issues in the case. *Duggan v. Bowen*, 691 F.Supp. 1487, 1502 (D.D.C.1988) (citing *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410-11 (D.C.Cir.1984) & *General Telephone Co. of the Southwest v. Falcon*, 547 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2371 n. 13 (1982)).

***2** Although Defendant argues that a class action is not appropriate because each individual Plaintiff brings a separate and unique set of facts to the case, the procedural and substantive questions raised by Plaintiffs are common to all claimants in this action. Telling different stories, each Plaintiff complains that

he or she was improperly denied medical benefits, most claim that the HMO failed to provide timely notice of the denial or that when notice was given it inadequately stated the reasons for denial. Plaintiffs complain that they received insufficient notice of appeal rights, and were ultimately subjected to an ineffective appeals process. The complaints of each representative party are typical of the claims of the class. Especially with the addition of the Plaintiffs Intervenors, the named Plaintiff parties will fairly and adequately represent the interests of the class.[FN9]

***2** Again, this is not an action to determine individual entitlement; this is not an action requiring the development of administrative records related to claim determinations. Contrary to Defendant's contention that the differences between Plaintiffs dissuade class certification, the diversity provides evidence of the widespread effect of the challenged procedures. Each individual Plaintiff's case if proven represents substantiating evidence of the alleged unlawful pattern or practice by HHS/HCFA of ignoring abuses by HMOs and HHS/HCFA's abdication of its administrative role.

***2** Plaintiffs are elderly, typically infirm or disabled and in need of medical care. They are typically isolated and without access to legal assistance. Without certification as a class, only a few cases will find their way through the administrative system into the courts and even if plaintiffs prevail on the merits, the majority of Medicare beneficiaries enrolled in HMOs will continue to be subjected to the procedures challenged here. For example, Defendant argues that she is entitled to litigate these issues in each circuit across the country until the Supreme Court takes up the dispute and resolves any differences between the circuits. Although in some instances such legal debate might serve to fully develop the law, the burden that would be placed on elderly medicare recipients outweighs the value of such a lengthy process.

3. Defendant has Acted on Grounds Generally Applicable to the Class

***2** If Plaintiffs' allegations are correct, the failure by HHS/HCFA's to monitor HMO services and to implement an effective appeals system, has affected the entire class leading to the conclusion that HHS/HCFA has acted or refused to act on grounds generally applicable to the class, which would make final injunctive relief or declaratory relief appropriate with respect to the class as a whole. Fed.R.Civ.P. 23(b)(2).

4. Plaintiffs Intervenors

***3** Defendant does not oppose intervention by Plaintiffs Intervenors if this matter is certified as a class action. The Court finds that such certification is proper and therefore Plaintiffs Intervenors shall be added as named party representatives in this action.

5. Class Description

***3** All that remains is the proper definition of the class. Plaintiffs propose to include in the class all "persons who were enrolled in Medicare risk-based health maintenance organizations or competitive medical plans during the six years prior to the filing of this lawsuit or who will enroll in such organizations in the future." Plaintiffs include two sub-class descriptions: "members denied health care services covered by the Medicare program"; and "members not given adequate notices or appeal rights."

***3** When defining the class, this Court takes care not to exceed its jurisdictional limitations. Here, Plaintiffs are entitled to judicial review as provided for in 42 U.S.C. § 405(g) only "if the controversy exceeds $1000 and upon the Secretary's final decision. 42 U.S.C. § 1395mm(c)(5)(B). "A final judgment in the context of § 405(g) [FN10] and § 1395mm(c)(5)(B) [FN11] consists of two elements: (1) the presentment of a claim to the Secretary; and (2) the exhaustion of administrative remedies." (Order: Defendant's Motion to Dismiss, filed December 15, 1994, at 4.) This Court denied Defendant's motion to dismiss after waiving the jurisdictional exhaustion requirements, *Id.* at 4-5, and assumed, because it was not contested, that presentment was satisfied. However, for purposes of defining the Plaintiff class this element must be assessed more closely by the Court.

***3** Although "presentment of a claim" must be strictly adhered to, it is liberally construed. *Linquist v. Bowen*, 813 F.2d 884, 887 (8th Cir.1987). Presentment can best be described as the means for obtaining a "decision of the Secretary," *Heckler v. Ringer*, 466 U.S. 602, 639 n. 27, 104 S.Ct. 2013, 2034 n. 27 (1984) (Stevens dissenting).

***3** Most commonly, a decision is elicited by filing a claim or application for benefits. *Linquist*, 813 F.2d at 887. For example, "class members whose applications for benefits were denied clearly satisfy

the presentment requirement," *New York v. Heckler*, 742 F.2d 729, 734 (2nd Cir.1984) [FN12] (citations omitted), because these people have obviously presented their claims to the Secretary, *Ringer*, 466 U.S. at 617, 104 S.Ct. at 2023 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S.Ct. 893, 899 (1976)).

***3** The presentment requirement is satisfied when an individual makes a claim for benefits, and the Secretary determines that the claimant meets the eligibility requirements for those benefits. When benefits are suspended, ..., because of a requirement collateral to the Secretary's eligibility criteria [6] the claimant's dispute with the Secretary is not, strictly speaking, a "claim for benefits" in the sense in which the phrase was used by the Supreme Court in *Mathews* and *City of New York* [*Bowen v. New York*]. Accordingly, having presented their claims for benefits to the Secretary once already, there was no requirement ... that the class members "represent" their claims to the Secretary in order to obtain review of the collateral issue." (footnote in original).

> FN6. The Secretary concedes that the decision to require a representative payee is wholly collateral to the question of a claimant's entitlement to benefits. (citation omitted).

***4** *Briggs v. Sullivan*, 886 F.2d 1132, 1139 (9th Cir.1989). Presentment is also satisfied by contesting agency determinations, such as agency-wide terminations or reductions in benefits which do not involve direct denials of claims, *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir.), *cert. granted and judgment vacated on other grounds*, 469 U.S. 1082, 105 S.Ct. 583 (1984), or provider sanctions, *Cassim v. Bowen*, 824 F.2d 791 (9th Cir.1987).

***4** Plaintiffs need not submit a formal claim. Any protestation suffices: a letter or other form of complaint, or a questionnaire, even when completed in advance of the termination, where the beneficiary claimed he was still disabled and asked that his benefits not be cut off. *Mathews*, 424 U.S. at 328, 96 S.Ct. at 899.

***4** Conversely, no jurisdiction exists where there has been no claim submittal, such as in declaratory actions. *Farkas v. Blue Cross & Blue Shield*, 24 F.3d 853, 857 (6th Cir.1994) (citing *Ringer*, 466 U.S. at 621, 104 S.Ct. at 2025). This would circumvent the exhaustion requirement of § 405(g). *Ringer*, 466 U.S. at 621, 104 S.Ct. at 2025. Not even the Secretary can provide declaratory opinions. Congress foreclosed such possibilities by prohibiting claims from being filed with the Secretary for her scrutiny until after the contested medical service has been furnished. 42 U.S.C. § § 1395d(a), 1395f(a); 42 C.F.R. § § 405.1662-495.1667 (1983)). *See e.g.*, *Ringer*, (no jurisdiction where medicare recipient challenged whether medicare covered surgical procedure but recipient had not had surgery).

***4** The threshold question is whether a Plaintiff filed a "claim for benefits" with the Secretary. If yes, Plaintiffs satisfy the non-waivable requirement and this Court's jurisdiction is invoked. Here, all Plaintiffs filed claims for medicare benefits and were determined eligible. Thereafter, Plaintiffs allege that they sought and were denied services by their HMOs. Pursuant to 42 C.F.R. § 417.606(a), the HMO makes the initial coverage determination as to whether the enrollee is entitled under the Medicare statutes to receive the requested service. If services are denied, the HMO must so notify the applicant within 60 days of the request. 42 C.F.R. § 417.608(a). Failure by an HMO to timely notify the applicant is deemed an adverse determination and may be appealed. 42 C.F.R. § 417.608(c).

***4** Any applicant dissatisfied with the initial determination by the HMO may seek reconsideration within 60 days of the denial notice. 42 C.F.R. § § 417.614, 616(b).[FN13] In response to a request for reconsideration, the HMO may reverse its denial and provide the requested service. 42 C.F.R. § 417.620(a), (b)(1). Any adverse decision, in whole or in part, results in an automatic transfer of the matter to HHS/HCFA, the agency charged by statute to determine eligibility and establish the rights of beneficiaries, including reconsideration determinations. 42 U.S.C. § § 1395mm(c)(5)(B), § 405(b); 42 C.F.R. § 417.620(b)(2).[FN14]

***5** An applicant who is dissatisfied with the reconsideration determination of HHS/HCFA is entitled to a hearing before the Secretary, 42 U.S.C. § § 1395(c)(5)(B), 405(b); 42 C.F.R. 417.630, which is held by an Administrative Law Judge (ALJ), 42 C.F.R. § § 417.628, 417.632(b); 20 C.F.R. § 404.929. In turn, the ALJ's decision is reviewable by the Appeals council at HHS, 42 C.F.R. § 417.634; 20 C.F.R. § 404.968(a)(1), and thereafter, judicial review may be sought, 42 U.S.C. § § 1395, (c)(5)(b), 405(g); 42 C.F.R. § 417.636(a), (b).[FN15]

***5** Here, it is the request for reconsideration filed after the HMO's initial denial of services which triggers the administrative review process.[FN16] This

is the means by which an applicant obtains a decision of the Secretary and by which an applicant "presents" his or her claim to the Secretary. Without this step, there can be no decision, final or otherwise, made by the agency to deny or grant a Plaintiff's request for benefits. Plaintiff's argument that *Briggs, supra,* applies ignores this critical distinction as well as the statutory and regulatory scheme described above.

***5** Here, Plaintiffs challenge the Secretary's oversight of HMO service providers because she allows HMOs to improperly deny their members Medicare covered services, and she has failed to establish adequate denial and appeal procedures for HMOs. The Court has found these issues to be collateral to the Plaintiffs' individual claims for purposes of waiving the exhaustion requirement. Plaintiffs argue that under *Briggs* because the issue is collateral to the determination of eligibility, the non-waivable presentment requirement is satisfied by the filing of benefit claims with the Secretary. However, Plaintiffs analysis merges the two distinct jurisdictional analysis into one: assuming every denial of a benefit must occur subsequent to some eligibility application, any collateral challenges warranting waiver of administrative exhaustion requirements automatically pass the non-waivable presentment test.

***5** Here, Plaintiffs' claims for Medicare benefits do not suffice to invoke jurisdiction under 42 U.S.C. § 405(g). Jurisdiction is invoked when a Plaintiff files a claim with the Secretary for the *contested* benefit, ie: a Request for Reconsideration of the HMO's denial. It is this process which provides the mechanism which enables the Secretary to monitor the HMO and to correct improper denials. So it follows, that the class shall be limited to those members who filed requests for reconsideration with the HMOs, failed to thereby obtain relief, and had their claims transmitted for adjudication to Network Design Group, HHS/HCFA.[FN17]

***5** At first blush this might appear a harsh imposition on Plaintiffs who allege that the HMO failed to provide notice of their appeal rights at the time it denied services. However, the statutory and regulatory scheme provides sufficient safeguards to balance individual rights against interests in having an effective administrative process. In addition to the regulatory notice requirement that the HMO provide appeal information at the time it issues a denial, 42 C.F.R. § 417.608, the statute requires that each enrollee be given information, in writing, explaining their rights, including appeal rights, at the time of enrollment and thereafter the HMO must reissue the notices at least once a year, 42 U.S.C. § 1395mm(c)(3)(E).[FN18] Plaintiffs allege that the HMOs failed to provide the former, but do not address the latter. For purposes of class certification this Court will assume the statutory required notice was given to Plaintiffs. Further, Plaintiffs are charged with knowledge [FN19] where as here the administrative scheme, including the appeal process, is clearly articulated and well publicized by statute, 42 U.S.C. 1395mm, and the Federal Register, 42 C.F.R. 417.600 *et. seq.*[FN20]

***6** Under the regulatory scheme the failure by an HMO to timely notify an enrollee of an adverse service determination constitutes an initial adverse determination and may be appealed. 42 C.F.R. § 417.608(c). Such enrollees, like many of the Plaintiffs here, do not receive notice of their rights yet are entitled to the same administrative adjudication process and correspondingly are subject to the same exhaustion requirements. This Court will not have jurisdiction over these Plaintiffs' claims unless they filed some form of a claim for benefits with the Secretary. *McDonald v. Heckler*, 612 F.Supp. 293, 299 (Mass.1985). *Accord*, *Ringer*, 466 U.S. at 620, 104 S.Ct. at 2024; *Farkas*, 24 F.3d at 857. Many of the Plaintiffs here have done just that and are properly members of the class.

***6** So too, other individuals who have not filed claims for benefits with the Secretary, such as future claimants of Medicare benefits, cannot satisfy the non-waivable presentment requirement of § 405(g). *Ringer*, 466 U.S. at 620, 104 S.Ct. at 2024; *accord* *McDonald*, 612 F.Supp. at 299 (Mass.1985), *Farkas*, 24 F.3d at 857. This Court will not have jurisdiction over their claims until they have filed some form of a claim for contested Medicare services. *McDonald*, 612 F.Supp. at 299.

***6** In addition to jurisdictional limits, the Court finds that the class should be limited to Medicare beneficiaries enrolled in risk-based health maintenance organization or competitive medical plans during the three years prior to filing of this law suit. The representative Plaintiffs allege incidents occurring from 1992 through 1993. Three years appear to provide a sufficient time frame for discovery without being overly burdensome on Defendant. The Court recognizes its discretion to amend the class description if during the course of this litigation modification is warranted. *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir.1968), *cert. denied*, 394 U.S. 928, 89 S.Ct. 1194 (1969); *Central Weleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir.1993).

***6** The Court requested supplemental memorandum from the parties on Plaintiffs' proposal that the class be limited to Medicare recipients enrolled in HMOs 6 years prior to the filing of this law suit. For the first time, Defendant raised the issue of a 60 day statute of limitations period under § 405(g) of the Medicare statute. *See, Johnson v. Shalala*, 2 F.3d 918 (9th Cir.1993) (claimants with lapsed claims for failure to timely seek administrative or judicial review are barred from class by 60 day statute of limitations); *accord, Medellin v. Shalala*, 23 F.3d 199 (8th Cir.1994). Defendant argues that class membership should be limited to those Plaintiffs who had administrative or judicial actions filed or pending within 60 days of the date Plaintiffs' filed this action.

***6** Like the exhaustion requirement of § 405(g), the 60 day statute of limitations may be waived or equitably tolled by the Secretary or the Court under certain limited circumstances. *Johnson*, 2 F.3d at 932. The Federal Rules of Civil Procedure apply to actions under § 405(g), *Johnson v. Sullivan*, 922 F.2d 346, 355 (7th cir.1990) (citation omitted), "[t]hus the Secretary must raise this 60-day statute of limitations in a responsive pleading as an affirmative defense or it will be considered waived." *Id.* (citing Fed.R.Civ.P. 8(c), 12(h)(1)). Defendant not only omitted the argument from her responsive memorandum here, she failed to raise the limitation issue in her Motion to Dismiss, ruled on by this Court December 15, 1994. Defendant has not filed her Answer. The Court finds that Defendant is untimely in raising this defense.

***7** Accordingly,

***7** IT IS ORDERED that Plaintiffs-Interveners' Motion to Intervene is GRANTED; Plaintiffs-Interveners shall be added as named party representatives in this action.

***7** IT IS FURTHER ORDERED that Plaintiffs' Motion to Certify a [Nationwide] Class is GRANTED.

***7** IT IS FURTHER ORDERED that the class shall be defined as all persons, nationwide, who were enrolled in Medicare risk-based health maintenance organizations or competitive medical plans during the three years prior to the filing of this lawsuit. This class consists of two sub-classes: first, the class includes those persons denied services by an HMO, with or without notice, who presented a claim to the Secretary by seeking reconsideration of the HMO denial or by filing some other form of appeal or objection with the HMO, HHS/HCFA, or SSA office and whose claims were not administratively resolved; second, the class includes persons who were not given adequate notice or appeal rights, including those persons whose claims were favorably adjudicated by HHS/HCFA.

***7** IT IS FURTHER ORDERED that a status/scheduling conference shall be held August 14, 1995 at 9:30 A.M.; parties may appear telephonically. On week prior to the hearing, counsel shall provide chambers with telephone numbers so that the Court can initiate the telephone calls for the hearing.

FN1. HHS/HCFA pays an HMO a flat monthly capitation payment. The more health care an HMO provides the less it profits.

FN2. Count 1.

FN3. Count 2.

FN4. Count 3.

FN5. Plaintiffs also complain in Count 4 that Defendant has misallocated the burden of proof for appeals by placing it on the Medicare applicant rather than on the HMO.

FN6. The parties do not define competitive medical plans (CPMs) but there does not appear to be any significant distinction between CPMs and HMOs for purposes of this motion.

FN7. Plaintiffs Intervenors reside in California and Oregon. Plaintiffs Intervenors were or are enrolled in Qual-Med Senior Security, Partners Senior Choice, Inter Valley Health Plan, and Secure Horizons.

FN8. The typicality requirement is designed to assure that the named representative's interests are aligned with those of the class. Where there is such an alignment of interests, a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class. In this respect, the typicality requirement is closely related to both the 23(a)(2) requirement that there be common

questions of law or fact and 23(a)(4) requirement that the named plaintiff adequately protect the interests of the class. *Jordon v. Los Angeles County*, 669 F.2d 1311, 1321 (9th Cir.), *cert. granted and vacated on other grounds*, 459 U.S. 810, 103 S.Ct. 35 (1982).

FN9. There is no question regarding Plaintiffs' counsels' qualifications to proceed with this class action. Plaintiffs' attorneys are seasoned medicare advocates. There is no antagonism between the named Plaintiffs; the representative and absent parties share the same interests in resolving the case. Clearly, the suit is not collusive.

FN10. Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow....
42 U.S.C. § 405(g).

FN11. A member enrolled with an eligible organization under this section who is dissatisfied by reason of his failure to receive any health service to which he believes he is entitled and at no greater charge than he believes he is required to pay is entitled, if the amount in controversy is $100 or more, to a hearing before the Secretary to the same extent as is provided in section 405(b) of this title, and in any such hearing the Secretary shall make the eligible organization a party. If the amount in controversy is $1,000 or more, the individual or eligible organization shall, upon notifying the other party, be entitled to judicial review of the Secretary's final decision as provided in section 405(g) of this title, and both the individual and the eligible organization shall be entitled to be parties to that judicial review.
42 U.S.C. § 1395mm(c)(5)(B).

FN12. *Cert. denied*, *Heckler v. New York*, 474 U.S. 815, 106 S.Ct. 57 (1985), *judgment affirmed*, *Bowen v. New York*, 476 U.S. 467, 106 S.Ct. 2022 (1986).

FN13. The request for reconsideration may be filed with the HMO or any Social Security Administration (SSA) office. 42 C.F.R. 417.616(a)(2).

FN14. Very often HHS/HCFA contracts with a fiscal intermediary, here Network Design Group, to perform these administrative tasks involving determination and payment of qualified claims.

FN15. Plaintiffs do not allege improper claim adjudication by HHS/HCFA, but instead complain that the administrative appeal process is inadequate because it is too lengthy. Plaintiffs seek a shorter interim period between the HMO's denial and HHS/HCFA's determination of entitlement so that recipients need not go without services for an extensive period of time. Accordingly, Plaintiffs whose claims have been favorably adjudicated by HHS/HCFA are members of only the sub-class of Plaintiffs challenging the appeals process; Plaintiffs whose claims were administratively denied are excluded entirely.

FN16. *See e.g.*, *Roen v. Sullivan*, 764 F.Supp. 555, 561 (Minn.1991) (dismissed action seeking declaratory judgment that chiropractic medical care, denied by HMO, is covered by Medicare. Court lacked jurisdiction where plaintiffs did not appeal HMO's denial of services. Court held the plaintiffs failed to take the first step towards seeking administrative review.)

FN17. Plaintiffs report that virtually all of the named Plaintiffs and Intervenors objected when their HMOs denied them service. This Court shall liberally construe any objection, there is no requisite magic format, ie: objection need not have been entitled Request for Reconsideration.

FN18. The materials designed to disseminate this information must be submitted to HCFA/HHS for review and approval, prior to its distribution by the HMO. 42 U.S.C. § 1395mm(c)(3)(C), and (G).

FN19. It is a legal fiction which imposes upon everyone the charge that they are knowledgeable of that which is published in the Federal Register. *Cervantez v. Sullivan*,

719 F.Supp. 899, 909 (Cal.1989). Illiteracy or poverty is no excuse. *Id.*

FN20. The Court does not intend that this finding be construed in any way to suggest that this Court has considered the substantive issue raised by Plaintiffs in this action challenging the adequacy of the notice provisions and appeal procedures established by Defendant.

D.Ariz.,1995.
Grijalva v. Shalala
Not Reported in F.Supp., 1995 WL 523609 (D.Ariz.), Med & Med GD (CCH) P 43,523

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Access Now, Inc. v. AHM CGH, Inc.S.D.Fla.,2000.
United States District Court, S.D. Florida.
ACCESS NOW, INC., a not-for-profit Florida corporation, et al., Plaintiffs,
v.
AHM CGH, INC., etc., et al., Defendants.
No. 983004CIVGOLDSIMONTO.

July 12, 2000.

Miguel Manuel De La O, & David Marko, Miami, FL, for Access Now, Inc.
Carmen Cartaya, Miami, FL, for Palm Beach Gardens Community Hospital, Inc..
David A. Cathcart, Los Angeles, CA, for Defendants.
James Sawran, Ft. Lauderdale, FL, for Tenet Healthsystem Hospitals, Inc.
David E. Marko, De la O & Marko, P.A., for Plaintiffs.
Carmen Y. Cartaya, James C. Sawran, McIntosh, Sawran, Peltz & Cartaya, P.A., for Defendants.
David A. Cathcart, Gibson, Dunn & Crutcher, LLP, for Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

GOLD, J.

***1** This cause having come before the Court on the Plaintiffs' Amended Motion for Class Certification [DE 51] and the Court having heard argument of counsel and considered the parties' written submissions, and being otherwise fully advised in the premises, finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

***1** Plaintiffs herein have brought suit against Defendants in a one-count Complaint for alleged violations of Title III of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). Defendants did not concede any of the facts alleged in the Third Amended Complaint regarding discriminatory practices and maintain that they have not violated the ADA. Plaintiffs seek certification of a class comprised as follows:

***1** All people in the United States with disabilities as that term has been defined by 42 U.S.C. § 12102(2), including those persons who have an impairment that substantially limits a major life function, including but not limited to mobility, hearing, and sight, who have been and who were, prior to the filing of the Class Action Complaint through the pendency of this action, entitled [to] the full and equal enjoyment of the goods, services, programs, facilities, privileges, advantages, or accommodations of any of the Defendants' Facilities, because of their respective disabilities (the "Class").

***1** Amended Motion for Class Certification at 3-4. Plaintiffs have moved for class certification for a claim seeking exclusively injunctive relief pursuant to Fed.R.Civ.P. 23(a), 23(b)(2), and the ADA. The common goal of the proposed Class is to provide access for the disabled (as defined by the ADA) to the goods, services, programs, facilities, privileges, advantages, and accommodations of Defendants' medical facilities throughout the United States.

***1** Defendants consist of affiliated acute care hospitals, ambulatory surgical centers, specialty clinics, and medical office buildings located throughout the United States operated by entities in which Tenet Healthcare Corporation has a majority ownership interest. The gravamen of Plaintiffs' Third Amended Complaint is that Defendants' medical facilities are not in compliance with the accessibility requirements of the ADA.

***1** This Court is aware of numerous cases wherein classes have been certified in actions seeking injunctive relief for compliance with the provisions of the ADA. This Court determines, as set forth below, that the criteria for certification of a class have been met, as the proposed Class fulfills the requirements of Fed.R.Civ.P. 23(a) and 23(b)(2). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

A. Identification of the Class

***1** In *Colorado Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354 (D.Colo.1999), the district court recognized the importance of "the existence of an identifiable class" as a prerequisite to class certification in a case alleging violations of the ADA. As explained in *Davoll v. Webb*, 160 F.R.D. 142, 143 (D.Colo.1995), a class is sufficiently identifiable if it is "administratively feasible for the court to determine whether a particular individual is a class member." Since the putative class extends to all individuals with disabilities, as defined by the ADA, this Court finds that it is administratively feasible to determine whether an individual is a member of the Plaintiff Class. This Court accepts the Class as identifiable for purposes of satisfying this preliminary requirement to class certification.

B. Satisfaction of Rule 23(a)

***2** The party moving for class certification bears the burden of showing that the requirements of Rule 23(a) are met. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). In order to satisfy Rule 23(a), Plaintiffs must demonstrate that:
***2** (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

***2** Fed.R.Civ.P. 23(a). This Court is compelled to examine whether the Plaintiff Class is appropriately certified.

(1) Numerosity

***2** The first prong of Rule 23(a) requires this Court to determine whether the proposed class is too numerous for joinder. Although this Court need not make specific finding as to the number of persons in the purported class, this Court "may examine statistical data and then draw reasonable inferences from the facts in determining whether the numerosity requirement has been met." *Pottinger v. City of Miami*, 720 F.Supp. 955 (S.D.Fla.1989). *See also Vergara v. Hampton*, 581 F.2d 1281 (7th Cir.1978); *Anderson v. Dep't of Pub. Welfare*, 1 F.Supp.2d 456 (E.D.Pa.1998). Plaintiffs have provided the Court with statistical data to enable the Court to determine that the numerosity requirement has been met. *See, e.g., Padron v. Feaver*, 180 F.R.D. 448, 639 (S.D.Fla.1998) (certifying class of persons denied supplementary security income benefits, and extrapolating from national statistics regarding the number of persons similarly denied benefits). The fact that the purported Class comprises all disabled individuals in the United States further supports a finding that the numerosity test has been met. *Kilgo v. Bowman Transp. Inc.*, 789 F.2d 859 (11th Cir.1986) (district court did not abuse its discretion in finding the numerosity requirement of Rule 23(a) had been met with class members located in Jacksonville, Atlanta, and Birmingham).

***2** The text of the ADA sets forth that "individuals with disabilities are a discrete and insular minority." 42 U.S.C. § 12101(a)(7). Therefore, the instant class action would serve the express purpose of the ADA, which includes the provision of "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

***2** The vast number of members in the proposed Plaintiff Class demonstrates that joinder of the class members is impracticable. *See Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D.Cal.), *modified*, 158 F.R.D. 439 (1994); *see also Davoll v. Webb*, 160 F.R.D. 142 (D.Colo.1995). From the statistical data supplied by Plaintiffs and the express provisions of the ADA, this Court concludes that the numerosity requirement of Fed.R.Civ.P. 23(a)(1) has been met by the representation of all disabled individuals in the United States, as defined by the ADA.

(2) Commonality and (3) Typicality

***3** "The commonality and typicality requirements of Rule 23(a) tend to merge." *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir.1985) (citing *General Tel. Co. of Southwest v. Falcon*, *supra*). At issue are Federal Rules of Civil Procedure 23(a)(2), which requires this Court to determine whether "there are questions of law or fact common to the class," and 23(a)(3), which requires that "the claims or defenses of the representative parties are typical of the claims or defense of the class."

***3** In the Third Amended Complaint, the putative Class seeks solely injunctive relief for compliance by Defendants' medical facilities with the requirements of the ADA. The requirement that there be questions of law or fact common to the class is satisfied in the context of settlement class certification, given the alleged existence of common discriminatory practices on the part of Defendants (i.e., Defendants' alleged noncompliance with the ADA). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). *See also, e.g., Baby Neal v. Casey*, 43 F.3d 48 (3d Cir.1994) (class members can assert a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D.Cal.) (accommodation of disabled at theaters and adequacy of those accommodations are issues of law and fact common to all affected disabled persons). Application of the alleged exclusionary policy and structural barriers comprises a common nucleus of operative facts that supports class certification. *Cf. Lieken v. Squaw Valley Ski Corp.*, 3 A.D. Cases 945,

949 (E.D.Cal.1994).

***3** The ADA acknowledges that "individuals who have experienced discrimination on the basis of disability have often no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4). The named Plaintiffs seek class certification to enforce the ADA for all disabled individuals in the United States. Although the claims of the absent class members may include minute factual distinctions from those of the named class representatives, the claims have the same legal predicate. Each individual class member would raise the same claims against these same Defendants, and seek the same remedy: injunctive relief for compliance with the ADA, including the removal of structural and communication barriers to access.

***3** Plaintiffs have identified several areas of inquiry that illustrate questions of law and fact common to the proposed class members, including the following:
***3** Whether the Defendant facilities are "public accommodations" subject to the provisions of the ADA;
***3** Whether the Defendant facilities comply with the ADA by making available the full and equal enjoyment of, and access to, the goods, services, programs, facilities, privileges, advantages, or accommodations of their facilities to individuals with disabilities;
***3** Whether the Defendant facilities have made reasonable modifications in their policies, practices, and procedures in order to furnish their goods, services, programs, facilities, privileges, advantages or accommodations to individuals with disabilities;
***4** Whether the Defendant facilities have taken steps to furnish their goods, services, facilities, privileges, advantages and accommodations to individuals with disabilities in an integrated setting;
***4** Whether the Defendant facilities have removed architectural and communication barriers that may exist in their facilities where such removal is readily achievable or technically feasible, or otherwise made their goods, services, programs, facilities, privileges, advantages, or accommodations available through alternative methods if barrier removal is not readily achievable or technically feasible;
***4** Whether the Defendant facilities have taken steps to prevent individuals with disabilities from being excluded, denied services, segregated, or otherwise treated differently than other individuals, because of the absence of auxiliary aids and services;
***4** Whether the Defendant facilities have provided auxiliary aids and services that comply with the ADA and its interpretive materials; and
***4** What measures are legally required to bring the Defendant facilities into compliance with the ADA should they be in violation of the ADA.

***4** *See* 42 U.S.C. § 12182. Under these circumstances, commonality and typicality are sufficiently established for certification of this class.

(4) Adequate Representation

***4** "The fourth requirement of Rule 23(a) ensures that the representative parties will fairly and adequately protect the interests of the class." *Pottinger*, 720 F.Supp. at 959. This Court must, therefore, evaluate the interests of the class representatives and the adequacy of class counsel. *See Singer v. AT & T Corp.*, 185 F.R.D. 681 (S.D.Fla.1998). This Court recognizes that, in the context of this case, an inquiry into the adequacy of representation serves to protect the legal rights of absent class members, since they will be bound by the *res judicata* effect of any judgment entered. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir.1987).

***4** Adequacy of representation is usually presumed in the absence of evidence to the contrary. *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378 (D.Colo.1993). Here, the claims of the class representatives are virtually identical to those of the absent class members, since each class representative seeks compliance with the ADA by Defendants' medical facilities.
***4** Indeed, in a public accommodation suit ... where disabled persons challenging the legal permissibility of architectural design features, the interests, injuries, and claims of the class members are, in truth, identical such that any class member could satisfy the typicality requirement for class representation.

***4** *Arnold*, 158 F.R.D. at 450. *Accord Leiken*, 3 A.D. Cases at 949; *Civic Ass'n of the Deaf*, 915 F.Supp. at 633. Although adequate class representation generally does not require that the named plaintiffs demonstrate to any particular degree that individually they will pursue with vigor the legal claims of the class, this Court has considered the appearance of Edward Resnick, President of Plaintiff Access Now, Inc., a national advocacy group for the disabled, at the June 2, 2000 status conference. *Kirkpatrick*, 827 F.2d at 726. Mr. Resnick's appearance in Court is demonstrative of his interest in vigorously prosecuting this action on behalf of Plaintiff Access Now, Inc. and the disabled community. Under his leadership, Access Now, Inc. has brought many actions under the ADA on behalf of the community

of disabled persons. Having no reason to doubt the competence of the class representatives, this Court finds that the class representatives will fairly and adequately protect the interests of the absent class members.

***5** Class counsel has also demonstrated the competence and resources necessary to prosecute class actions. The Court notes that the competence of counsel representing this class has been scrutinized in a similar class action seeking ADA compliance, and they have been found to be competent class counsel. *See Access Now., Inc. v. Ambulatory Surgery Center*, Case No. 99-109 CIV-SEITZ/GARBER (So.D.Fla. May 15, 2000) (Order Granting Plaintiffs' Motion for Class Certification), 13 Fla. L. Weekly Fed. D276 (May 18, 2000).

***5** Having found that Plaintiffs have met their burden and have established that the requirements of Rule 23(a) are met, this Court will now analyze whether the Plaintiff Class has fulfilled the requirements of Rule 23(b)(2) for certification of a class seeking only injunctive relief.

C. Satisfaction of Rule 23(b)(2)

***5** There are two basic requirements to maintain a class action under Rule 23(b)(2): (1) the party opposing the class must have acted or refused to act or failed to perform a legal duty on grounds generally applicable to all class members; and (2) the class must seek final injunctive or declaratory relief with respect to the class as a whole.

***5** The Advisory Committee Notes to the 1966 amendments to Rule 23 demonstrate the propriety of certifying a 23(b)(2) class in this case. "Illustrative [of 23(b)(2) classes] are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." *See also Colorado Cross-Disability Coalition*, 184 F.R.D. at 361 (citing to the Advisory Committee Notes).

***5** Generally, Rule 23(b)(2) is invoked in cases where injunctive or declaratory relief is the primary or exclusive relief sought. *Buycks-Robertson v. Citibank Fed. Sav. Bank*, 162.F.R.D. 322 (N.D.Ill.1995). Injunctive or declaratory relief must be the predominant remedy requested for class members. *Cwiak v. Flint Ink Corp.*, 186 F.R.D. 494 (N.D.Ill.1999); *Doe v. Guardian Life Ins. Co. of America*, 145 F.R.D. 466 (N.D.Ill.1992).

***5** Here, the putative class seeks exclusively injunctive relief, alleging class-based discrimination for noncompliance with federal statutory provisions (the ADA). This case fits squarely within the ambit of cases for which Rule 23(b)(2) was created. Inasmuch as the Plaintiffs allege unlawful class-wide discrimination for non-compliance with the ADA, this Court finds that class certification pursuant to Rule 23(b)(2) is appropriate.

CONCLUSION

***5** Plaintiffs have brought a single claim against Defendants, which have been identified as affiliated acute care hospitals, surgical centers, specialty clinics, and medical office buildings, for alleged noncompliance with Title III of the ADA. Each of these facilities is alleged to either provide or house medical services and to qualify as a "public accommodation" as defined in Title III of the ADA. Plaintiffs purport to represent a large but identifiable class, consisting of all persons in the United States with disabilities as defined by the ADA. Plaintiffs have alleged that, as a nationwide class of individuals with disabilities, they have been denied full and equal access to the goods, services, programs, facilities, privileges, advantages, or accommodations of Defendants' facilities. The Plaintiff Class seeks injunctive relief only. The injunctive relief sought would be the same, whether brought by the Class or one of its members.

***6** Plaintiffs have properly alleged, and provided substantial authority to support, each requirement for certification of a class seeking injunctive relief against the named Defendant medical facilities under Rule 23(b)(2).

***6** Accordingly, it is hereby ORDERED AND ADJUDGED:

***6** 1. Plaintiffs' Amended Motion for Class Certification is GRANTED.

***6** 2. The Class, as identified by Plaintiffs, is hereby accepted and CERTIFIED as compliant with Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

***6** 3. The class action will proceed through the named class representatives as represented by De la O and Marko, P.A.

S.D.Fla.,2000.

Access Now, Inc. v. AHM CGH, Inc.
Not Reported in F.Supp.2d, 2000 WL 1809979 (S.D.Fla.), 20 NDLR P 51, 13 Fla. L. Weekly Fed. D 325

END OF DOCUMENT

Briefs and Other Related Documents

Dajour B. ex rel. L.S. v. City of New YorkS.D.N.Y.,2001.Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Dajour B., by his parent and next friend, L.S.; Darren O, by his parent and next friend, A.R.; Christina F., by her parent and next friend, S.F.; Tiffany C., by her parent and next friend Y.C.; Chris G., by his parent and next friend, C.F.; and Devante H., by his parent and next friend, S.H., on behalf of themselves and others similarly situated, Plaintiffs,

v.

THE CITY OF NEW YORK and Antonia C. Novello, as Commissioner of the New York State Department of Health, Defendants.

No. 00 CIV.2044(JGK).

Oct. 3, 2001.

OPINION AND ORDER

KOELTL, District J.

***1** The plaintiffs, Dajour B., by his parent and next friend L.S., Darren O., by his parent and next friend, A.R., Christina F., by her parent and next friend S.F., Tiffany C., by her parent and next friend Y.C., Chris G., by his parent and next friend C.F., and Devante H., by his parent and next friend S.H., bring this action for declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983, against the defendants, the City of New York (the "City") [FN1] and Antonia C. Novello, as Commissioner of the State of New York Department of Health ("DOH"). The plaintiffs allege that they are homeless children with asthma who either reside or have applied to reside in New York City's homeless shelter program, and that the defendants have, through certain policies and practices, violated their rights under 42 U.S.C. § 1983 and Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (the "Medicaid Act"), by failing to provide them with adequate diagnosis, screening and treatment services for asthma and information about these services. [FN2] This claim has survived a motion to dismiss and a motion for summary judgment, *see* *Dajour B. v. City of New York*, No. 00 Civ.2044, 2001 WL 830674 (S.D.N.Y. July 23, 2001),[FN3] and the plaintiffs now seek to certify a class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

FN1. The plaintiffs originally named a number of New York City agencies and commissioners as defendants in their complaint, but later agreed to dismiss those claims and proceed only against the City. *See* *Dajour B. v. City of New York*, No. 00 Civ.2044, 2001 WL 830674, at *1 (S.D.N.Y. July 23, 2001).

FN2. The plaintiffs originally raised a number of claims directly under the Medicaid Act as well. After the parties had fully briefed motions to dismiss the complaint, the plaintiffs agreed to withdraw these claims and rely solely on the fourth count in the complaint. This count is brought pursuant to 42 U.S.C. § 1983 and incorporates the allegations made in the withdrawn claims concerning violations of the Medicaid Act.

FN3. The Court did, however, limit the precise provisions of the Medicaid Act and its implementing regulations under which these claims could be raised. *See id.* at *11-12. The provisions still at issue, which generate enforceable rights, are identified in more detail below.

I

***1** The facts and allegations in this case, along with the relevant statutory framework, have been set forth in some detail this Court's prior decision *Dajour B. v. City of New York*, 2001 WL 830674. Familiarity with that decision is presumed, and only the background necessary to resolve class certification is repeated here.

***1** The named plaintiffs allege that they are homeless children ranging in age from sixteen months to fourteen years who suffer from asthma or symptoms of asthma, a chronic inflammatory disease of the pulmonary system. (*See* Compl. [FN4] ¶ ¶ 57, 68, 80, 90, 100, 109). All plaintiffs claim to reside or to have applied to reside in New York City's homeless shelter system, and all claim that they have been deprived of medical services that they were eligible for under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (the "Medicaid Act").

FN4. All references to "Compl." are to the plaintiffs' First Amended Complaint.

***1** The Medicaid Act establishes a joint federal and state program to provide medical assistance to needy individuals in participating states. *See* 42 U. S.C. § 1396; *Cantanzano v. Wing*, 103 F.3d 223, 224 (2d

Cir.1996). Participating states receive federal subsidies, but must provide and administer a range of medical services to individuals eligible for Medicaid in accordance with an approved plan for service. *See* 42 U.S.C. § 1396 *et seq.* Among the mandatory medical services required by the Medicaid Act are "early and periodic screening, diagnosis and treatment" services, or "EPSDT," for eligible individuals under the age of twenty-one. *See* 42 U.S.C. § § 1396a(a)(43), 1396d(a)(4)(B).

***1** Section 1396d(r) defines the minimal level of EPSDT services that must be provided to these individuals. These services include "screening services", which, at minimum, extend to comprehensive health and developmental histories, comprehensive unclothed physical exams, appropriate immunizations, laboratory tests and health education. 42 U.S.C. § 1396d(r)(1)(A)(B). Although § 1396d(r) does not explicitly mention services for asthma, it does state that screening services must be provided "at intervals which meet *reasonable standards of medical ... practice*," and "at such other intervals, indicated as medically necessary, *to determine the existence of certain physical or mental illnesses or conditions.*" 42 U.S.C. § 1396d(r)(1)(A)(i) & (ii) (emphases added). The section also defines the required EPSDT services as including:
***2** such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section [defining "medical assistance" under the Act] 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 plan.

***2** 42 U.S.C. § 1396d(r)(5).

***2** Another provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(43), requires that a state Medicaid plan include provisions to: (1) inform all eligible individuals under the age of twenty-one of the availability of the EPSDT services described in § 1396d(r); (2) provide or arrange for the provision of such screening services in all cases where they are requested; and (3) arrange for corrective treatment of all conditions detected by the screenings. *See id.* The implementing regulations specify that a participating state's Medicaid program must "[p]rovide for a combination of written and oral methods designed to inform effectively all EPSDT eligible individuals (or their families) about the EPSDT program." *See* 42. C.F.R. § 441.56. The information must be provided in "clear and nontechnical language" and tell eligible individuals or their families about the benefits of preventative health care, the nature of the EPSDT program (including the fact that it is cost-free in most cases), and where and how to obtain the services (including that necessary transportation services are available). *Id.* The regulations also contain provisions concerning timing and annual reminders, in some cases. In particular, the administering agency must have procedures to provide the relevant information "generally, within 60 days of the individual's initial Medicaid eligibility determination and in the case of families which have not utilized EPSDT services, annually thereafter." *Id.*

***2** At all times relevant to this action, New York State has participated in the Medicaid program pursuant to a State plan that is administered and supervised by the New York State Department of Health ("DOH"). *See* 42. U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10; N.Y. Soc. Serv. L. § 363-a(1). This plan establishes a program called the "Child/Teen Health Plan" ("C/THP") to provide eligible children with the required EPSDT services. *See* N.Y. Soc. Serv. Law § 365-a(3)(a); N.Y. Comp.Codes. R. & Regs. tit. 18, § § 508.1(a) & 508.8. New York state has delegated the responsibility to establish and administer an operating C/THP program to a number of local districts in the State; the City of New York is one such district. *See* N.Y. Soc. Serv. Law § § 62(1) & 365.

***2** The gravamen of the plaintiffs' complaint is that the City and DOH have, because of inadequacies in their current policies and procedures, failed to meet their EPSDT obligations under the Medicaid Act, 42 U.S.C. § § 1396a(a)(10), 1396a(a)(43)(A), (B) and (C), 1396d(a)(4)(B), and 1396d(r) (the "EPSDT provisions"), and their implementing regulations, 42 C.F.R. § § 441.56(a) and (b), 441.60(a), 441.61 and 441.62.[FN5] Specifically, the plaintiffs allege that the City, in accordance with its current C/THP program and practices, fails effectively to (1) inform homeless children and their families that EPSDT services are available; (2) screen homeless children for asthma; (3) provide homeless children with diagnosis and necessary medical treatment services for asthma; (4) provide these children and their families with the required support services, including assistance for transportation to and scheduling of medical appointments; and (5) coordinate with other agencies and programs to ensure that homeless children receive all of the above services. (*See* Compl. ¶ 53.) The plaintiffs allege that DOH, through its own policies and practices, is similarly failing to meet its supervisory obligations to ensure that the City provides adequate EPSDT services to homeless

children with asthma. (*See* Compl. ¶ 55.) The plaintiffs now seek to certify this action as a class action representing "all children who are now, or will in the future be, under the age of twenty-one; who are seeking or receiving emergency shelter in the City of New York; and who are eligible to receive Medicaid benefits." (Compl. ¶ 120; Pl.'s Br. at 3.)

FN5. The plaintiffs also originally sought to enforce rights under 42 U.S.C. § 1396a(a)(5) and its implementing regulations, 42 C.F.R. § § 431.10 and 435.903. In *Dajour B. v. City of New York*, 2001 WL 830674, this Court held that these statutory provisions and regulations do not create enforceable rights, *see id.* at *11-12.

II

***3** Before certifying a class, the Court must determine that the party seeking certification has satisfied the four prerequisites of Rule 23(a); numerosity, commonality, typicality, and adequacy of representation. *See, e.g., Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir.1997); *Comer v. Cisneros*, 37 F.3d 775, 796 (2d Cir.1994). More specifically, the Court must find that:
***3** (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

***3** Fed.R.Civ.P. 23(a). The Court must also find that the party qualifies under one of the three sets of criteria set forth in Rule 23(b)(1), (2), or (3). *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Comer*, 37 F.3d at 796. The plaintiffs here seek certification under Rule 23(b)(2), which provides for a class to be maintained where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole ...." If the Court finds both that the requirements of 23(a) have been met, and that the claims fall within the scope of Rule 23(b)(2), the Court may, in its discretion, certify the class. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290 (2d Cir.1992); *Krueger v.. New York Telephone Co.*, 163 F.R.D. 433, 438 (S.D.N.Y 1995).

***3** A motion for class certification should not, however, be a mini-trial on the merits. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *Krueger*, 164 F.R.D. at 438. The dispositive question is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 have been met. *See Eisen*, 417 U.S. at 178 (citing *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir.1971) (Wisdom, J.)). The Supreme Court has instructed that it would be both unwise and unfair to reach the merits of a dispute in this context. *See Id* at 177-78. As the Court has explained, resolution of merits issues at this stage might allow some parties seeking certification to secure the benefits of the class action mechanism without first having met its requirements, and might subject some parties to adverse merits rulings without the benefit of the rules and procedural safeguards that traditionally apply in civil trials. *See Eisen*, 417 U.S. at 177-78. This Court should thus refrain from deciding any material factual disputes between the parties concerning the merits of the claims, *see, e.g., Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 570-72 (2d Cir.1982); *Meyer v. Macmillan Publishing Co.*, 95 F.R.D. 411, 414 (S.D.N.Y.1982), and should accept the underlying allegations from the complaint as true. *See Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n. 15 (2d Cir.1978).

***4** The Court must nevertheless conduct a "rigorous analysis" to determine whether the relevant requirements of Rule 23 have been met. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The burden of persuasion lies with the party seeking certification, in this case the plaintiffs. *See, e.g., Bishop v. New York City Dep't of Hous. Preservation and Dev.*, 141 F.R.D. 229, 234 (S.D.N.Y.1992). In deciding whether the requirements of Rule 23 have been met, the Court may, and may be required to, examine not only the pleadings but also the evidentiary record, including any affidavits and results of discovery. *See, e.g., Sirota*, 673 F.2d at 571; *Chateau de Ville Productions v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966 (2d Cir.1978) .[FN6]

FN6. Defendant Novello argues that this motion should have been brought before the expiration of the deadline in the Scheduling Order for making "procedural motions." There was a good reason to delay the making of this motion to allow development of the record. In any event, this Court repeatedly adjourned the defendants' response to this motion without any

suggestion by the defendants that the motion should be rejected as untimely. There is no basis in the papers to conclude that the defendants have been prejudiced in any way by the timing of the motion, and the plaintiffs would be prejudiced if unable to maintain the action as a class action. Therefore, to the extent that this motion should have been brought earlier, the defendants have waived that objection, and the Court extends the deadline nunc pro tunc.

***4** The issue on this motion is thus whether the plaintiffs have met their burden of establishing, on the basis of the pleadings, affidavits, and the results of discovery, that the four prerequisites of Rule 23(a) have been met, and that the proposed class can be maintained under Rule 23(b)(2).[FN7] *See Krueger*, 163 F.R.D. at 438.

FN7. The City argues that this Court lacks jurisdiction to decide this class certification motion because, as was more fully briefed in its Memorandum of Law in Support of the City's Motion to Dismiss the First Amended Complaint, the Court allegedly lacks federal jurisdiction in this action, and the Federal Rules of Civil Procedure do not extend or limit the jurisdiction of the courts. *See* Fed.R.Civ.P. 82. Between the time when the City presented this argument and the disposition of this class certification motion, the Court rejected the City's claim that the Court lacks federal subject matter jurisdiction over this action. The jurisdiction in this case thus derives squarely from 28 U.S.C. § 1331, rather than from the Federal Rules of Civil Procedure alone.

III

***4** It is necessary in the first instance to define the class sought to be certified. The plaintiffs sought to certify a class consisting of "all children who are now, or will in the future be, under the age of twenty-one; who are seeking or receiving emergency shelter in the City of New York; and who are eligible to receive Medicaid benefits." (Compl. ¶ 120; Br. at 3). The defendants presented a number of arguments suggesting that this definition is overbroad because it is not limited to children who have or may potentially have asthma. This definition may thus include some individuals who either lack an interest in the relief requested or, in the defendants' view, have adverse interests.

***4** It is unnecessary to decide whether these arguments are meritorious because the plaintiffs do not object to limiting the proposed class to those members who also "have or may potentially have asthma." (Pl.'s Rep. at 8.) [FN8] This limitation fully addresses all of the overbreadth concerns raised by the defendants. Therefore, the Court will assess whether this class meets the substantive criteria set forth in Rules 23(a) and 23(b)(2). *See generally Lundquist v. Security Pac. Automotive Financial Serv. Corp .*, 993 F.2d 11, 14 (2d Cir.1993) (a district court "is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly").

FN8. The proposed class would then consist of "all children who are now, or will in the future be, under the age of twenty-one; who are seeking or receiving emergency shelter in the City of New York; who are eligible to receive Medicaid benefits; *and who have or may potentially have asthma.*" (*Id.* (emphasis added).)

IV

A.

***4** The defendants do not contest numerosity, and this requirement is easily met. There is undisputed evidence in the record suggesting that the homeless shelters in New York City currently house approximately 8,000 to 10,000 children under the age of twenty-one at any given time. Other evidence suggests that almost 40% of these children-or somewhere in excess of 3,000-suffer from asthma at any given time. (*See* Declaration of David S. Frankel, dated Jan. 17, 2001 ("Frankel Decl."), at ¶ 4.)

***5** The number of plaintiffs in the proposed class is thus very likely on the order of thousands, and, certainly, far greater than forty-the number at which numerosity is generally presumed in this Circuit. *See Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.2001); *see also Robidoux v. Celani*, 987 F .2d 931, 936 (2d Cir.1993). To the extent that there are common issues in question, allowing all these potential plaintiffs to pursue individual actions would be enormously burdensome on the parties and on the courts, and joinder would clearly be impracticable. In light of these facts, and

the defendants' lack of objection, the plaintiffs have satisfied the numerosity requirement.

B.

***5** The commonality requirement is met if the plaintiffs' grievances share a common question of law or fact. *See* *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir.1994). "Commonality does not mandate that all class members make identical claims and arguments," *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y.1992), and can be met if the gravamen of the complaint is that defendants violated the rights of the class members in the same general fashion, *see* *Open Hous. Ctr., Inc. v. Samson Mgmt. Corp.*, 152 F.R.D. 472, 476 (S.D.N.Y.1993). The mere presence of some asserted factual differences among class members is therefore not a bar to commonality. *See, e.g.*, *Kreuger v. New York Telephone Co.*, 163 F .R.D. 433, 439 (S.D.N.Y.1995); *Open Hous. Ctr.*, 152 F.R.D. at 476.

***5** As the plaintiffs correctly note, this entire controversy turns on a common question of law: namely, whether the defendants are required under the Medicaid Act to provide or supervise the provision of the specific screening, diagnosis and treatment services that the plaintiffs claim to be required. *See* *Baby Neal*, 43 F.3d at 56 ("Because the requirement may be satisfied by a single common issue, it is easily met ...."). The defendants' liability in this § 1983 action also turns on a common question of fact: whether the kinds of injuries allegedly faced by the members of the class derive from policies or practices on the part of the defendants that systematically deprive members of these services. Commonalities like these are generally sufficient to meet the requirements of Rule 23(b)(2) in actions seeking injunctive relief to reform a child welfare system. *See, e.g.*, *Marisol A. v. Giuliani*, 126 F.3d 372, 376-77 (2d Cir.1997); *Baby Neal*, 43 F .3d at 57 (citing cases); *Nichols v. Williams*, 00-CV-2229, 2001 WL 951716, at *6 (E.D.N.Y. Aug. 16, 2001).

***5** The decision of the Second Circuit Court of Appeals in *Marisol A.* strongly supports the conclusion that these commonalities are in fact sufficient to meet the requirements of Rule 23(a)(2) in this case. In *Marisol A.*, the district court had granted the plaintiffs class certification to pursue a myriad of constitutional, regulatory, and statutory challenges to New York City's child welfare system, where the common question of law was "whether each child has a legal entitlement to the services of which that child is being deprived," and the common issue of fact was "whether defendants systematically have failed to provide these legally mandated services." *Marisol A.*, 126 F.3d at 376. These questions are virtually identical in form to the ones identified as common in the present case.

***6** The Court of Appeals affirmed the class certification decision, even though it noted that no single plaintiff (named or otherwise) was affected by every legal violation alleged, and even though no single specific legal claim affected every member of the class. *See* *id.* at 377. The diversity of legal claims warranted further refinement of the class into subclasses based on the more precise legal bases for claims; but did not undermine the commonality necessary for class certification. *See* *id.* at 376-77, 378-79. There was commonality because the plaintiffs' alleged injuries derived "from a unitary source of conduct by a single system ...." *Id.* at 377.

***6** The commonalities in the present case are even greater than those in *Marisol A.* The plaintiffs allege injuries arising not just from any "unitary source of conduct," but from a particularized course of conduct. In addition, the plaintiffs bring not multiple claims but rather a single claim, which alleges violations of the EPSDT provisions of the Medicaid Act and their implementing regulations. These highly interrelated provisions deal with a specific subclass of medical services that are to be provided to eligible individuals under the age of twenty-one.

***6** Given these allegations of fact and law, the plaintiffs have easily met the commonality requirement of Rule 23(a)(2).

C.

***6** Rule 23(a)(3) requires that the claims of those seeking to represent a class be typical of those of the class as a whole, and "is satisfied when each member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *In re Drexel*, 960 F.2d at 291 (citing *Eisen*, 391 F.2d at 562)). Like Rule 23(a)(2), Rule 23(a)(3) "does not require that the factual background of the named plaintiff's case be identical with that of the other members of the class ...." *Bishop*, 141 F.R.D. at 238 (quoting *Burka v. New York City Transit Auth.*, 110 F.R.D. 595, 604-05 (S.D.N.Y.1986)). The Rule does, however, ask courts to examine whether "the disputed issue[s] occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Id.* (quoting

Burka, 110 F.R.D. at 604-05).

***6** This requirement is logically distinct from the requirement that the grievances of the class members share a common question of law or of fact, but the commonality and typicality requirements tend to merge in practice because similar considerations animate them. *See Marisol A.*, 126 F.3d at 376; *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 597 (2d Cir.1986). The crux of both requirements is to ensure that "maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n. 13.

***7** The typicality of the plaintiffs' claims is indicated by the fact that the common issues of law and fact in this case are not peripheral to the individual grievances raised by the named plaintiffs or the class members they seek to represent. To the contrary, these questions are central to the grievances of all of the class members because no one could succeed in an individual § 1983 claim without establishing both that the Medicaid Act gives homeless children under the age of twenty-one the right to the particular EPSDT services they seek and that the City and/or DOH has a policy or custom that provides these services inadequately. *See generally Monell v. Department of Social Serv.*, 436 U.S. 658, 691 (1978); *see also Kentucky v. Graham*, 473 U.S. 159, 166 (1985). As in *In re Drexel*, each named plaintiff's claim thus arises from the same challenged policies or practices and each plaintiff would have to make the same or similar legal arguments to establish the defendants' liability. *See In re Drexel*, 960 F.2d at 291.

***7** The City argues that the plaintiffs' claims are nevertheless atypical because whether an individual has been denied EPSDT services will depend on the unique circumstances of each individual's case. A virtually identical argument was explicitly rejected by the Court of Appeals in *Marisol A.*, 126 F.3d at 376-77, and by the Supreme Court in *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). There is a common question of law applicable to all plaintiffs, namely whether the plaintiffs have a right under the Medicaid Act to the EPSDT services they seek. This issue can be resolved irrespective of the kinds of differences that the City alleges between the class members and the named plaintiffs.

***7** To the extent that the City relies on differences between the types of injuries allegedly suffered by different class members, the argument is similarly without merit. There still remains a critical and common issue of fact as to whether the various alleged injuries were in fact caused by a policy or practice, rather than a series of unconnected acts. *See, e.g., Robidaux v. Celani*, 987 F.2d 931, 936-37 (2d Cir.1993). Moreover, the named plaintiffs seek only declaratory and injunctive relief to reform a continuing policy or practice. Because compensatory damages need not be assessed, the precise ways that various members of the class may have been injured is less relevant than the fact that a continuing policy or practice may be causing harm to many of the class members. *See Baby Neal*, 43 F.3d at 58. In these circumstances, differences in the kinds of injuries allegedly caused by a policy or practice are no bar to the typicality of a named plaintiff's claim. *See, e.g., Falcon*, 457 U.S. at 157-59; *Marisol A.*, 126 F.3d at 377; *Baby Neal*, 43 F .3d at 58.

***7** Novello raises a variant of the argument that facts about the injuries sustained by the named plaintiffs render their claims atypical. Novello argues that the named plaintiffs have suffered no personal injury at all, and that their claims are thus not typical of the claims of a class that allegedly faces actual injury. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) ("[A] class member must be part of the class and possess the same interest and suffer the same injury as the class members in order to represent the class" (quotation marks omitted); *East Tex. Motor Freight System, Inc. v. Rodriquez*, 431 U.S. 395, 404-05 (1977).[FN9]

FN9. Novello joins the argument that the claims of the named plaintiffs are not typical of the claims of the class with an argument that the named plaintiffs lack standing to bring this action because they have suffered no injury in fact. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 357-58 (1996); *Senior v. Eastern Ky. Welfare Rights Org.*, 426 u.S. 26, 40 n. 20 (1976). The current motion is not, however, a motion to dismiss for lack of standing, and the issues of class certification are distinct from the issue of standing. *See Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 831 (1999) (class certification issues are "logically antecedent" to Article III concerns, and pertain to "statutory standing," which may properly be treated before Article III standing); *Amchem*, 521 U.S. at 612 (same). In any event, as explained below, as well as in the decision denying the motion for summary judgment,

the plaintiffs have presented sufficient evidence that they have been injured in fact by a policy and practice of the defendants such that they have standing to bring this suit.

***8** In support of this argument, Novello points to evidence in the record, which, in her view, establishes that most of the named plaintiffs or their families (i) "are quite aware of their children's asthma" (DOH's Opp. at 8); (ii) have "either received information about the C/THP ... or else regarded that information as irrelevant" (DOH's Opp. at 7); and (iii) "have obtained adequate Medicaid-reimbursed medical care for their children's asthma," which they find effective (DOH's Opp. at 8). The plaintiffs respond with evidence that indicates that they have received information about the C/THP program only in an untimely and uneven manner, if at all, and that they have received at best episodic and ineffective care, highlighted by emergency department visits for severe asthma attacks, and containing little or no education in asthma management.

***8** Whatever the ultimate factual resolutions of the plaintiffs' claims, Novello's arguments do not undermine the typicality of the plaintiffs' claimed damages for several reasons. First, the fact the plaintiffs may know about their asthma by now, and may have known for some time (*see* Compl. ¶ ¶ 57, 68, 80, 101, 109), does not undermine the plaintiffs' allegation that they have been injured because they have been unable to obtain the kinds of formal screenings and diagnoses needed to obtain medical services through the C/THP program, to alert C/THP officials that further treatment is required, or, in some cases, to obtain help in managing the illness. (*See, e.g.*, Compl. ¶ ¶ 61, 64, 78, 85, 90, 106-07, 118-19.) Second, while most of the plaintiffs may have learned about the C/THP program by now, this evidence is tangential to whether the plaintiffs were injured by failures to provide this information within the time frames and in the manners required by the Medicaid Act. Finally, most of the evidence suggesting that some of the plaintiffs may currently be receiving satisfying Medicaid-reimbursed treatment for asthma relates to services obtained after this action was commenced, and after many of the alleged injuries allegedly occurred.

***8** There is also ample evidence in the record, which, if believed, would indicate that the named plaintiffs have suffered actual injuries resulting from the City's and DOH's policies or practices. The claims raised by the named plaintiffs are typical of the class they seek to represent.

D.

***8** Much like the typicality requirement, the requirement that the named plaintiffs adequately represent the class is motivated by concerns similar to those driving the commonality requirement, namely, the efficiency and fairness of the class certification. *See* *Falcon*, 457 U.S. at 157 n. 13; *Marisol A.*, 126 F.3d at 378. To achieve these ends, Rule 23(a)(4) requires the party seeking certification to demonstrate that (i) class counsel is qualified, experienced, and generally able to conduct the litigation, and (ii) there is no conflict of interest between the named plaintiffs and other members of the plaintiff class. *See* *In re Drexel*, 960 F.2d at 291.

***9** With regard to the first criterion, the plaintiffs are jointly represented in this action by The Legal Aid Society; a number of attorneys affiliated with the Association to Benefit Children, which is a homeless rights advocacy organization; a number of attorneys from the law firm Kramer Levin Naftalis & Frankel LLP; and the Natural Resources Defense Council. The plaintiffs' counsel have extensive experience litigating class action lawsuits in general and welfare cases in particular, and the defendants have not contested the adequacy of counsel. The plaintiffs' counsel have also pursued this case vigorously from its inception. Based on these facts, the plaintiffs have established the adequacy of class counsel.

***9** There are also no conflicts of interest among the plaintiffs. The plaintiffs do not seek damages but rather broad-based injunctive relief, which would require improvements in the quality of EPSDT services offered to all members of the proposed class. The interests of all the class members are thus aligned. *See*, *e.g.*, *Marisol A.*, 126 F.3d at 378.; *Baby Neal*, 43 F.3d at 63.

***9** The defendants attempt to undermine this conclusion by arguing that some of the plaintiffs no longer have a continuing interest in receiving EPSDT services or information about the C/THP program because they have found alternative means to obtain Medicaid-reimbursed services for asthma. Evidence of lack of interest is, however, not evidence of a conflict in interest, and "[g]enerally, adequacy of representation entails inquiry into ... whether plaintiffs interests are antagonistic to the interest of other members of the class ...." *See* *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*, 222 F.3d 52, 60 (2d Cir.2000). None of the defendants' evidence indicates that the interests of any of the

named plaintiffs is antagonistic to those of any members of the class.

***9** To the extent that the defendants have attempted to argue that the claims of the named plaintiffs are moot, the argument is without merit. There is ample evidence in the record which, if believed, indicates that most if not all of the named plaintiffs could still benefit from improved treatment services through the C/THP program. Moreover, there is sufficient evidence that the plaintiffs may benefit from future periodic screening, diagnoses, and information, in case their illnesses or circumstances change. All that is required to represent a class adequately is that a plaintiff raise a claim that is not yet moot when the class is certified. *See* *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) ("Our cases leave no doubt ... that by obtaining class certification, plaintiffs preserved the merits of the controversy for our review" and that "the termination of a class representative's claim does not moot the claims of the unnamed members of the class" (citations omitted).).

***9** Moreover, there is ample evidence in the record that the alternative medical services in question were obtained with the aid of the attorneys in this case rather than through New York State's EPSDT program. Even if these services were to have mooted the named plaintiffs' claims, the plaintiffs have alleged the constant existence of a class of persons suffering from the same kind of deprivations they allege. (*See* Compl. ¶ 1.) Because the named plaintiffs were in need of some EPSDT services at the time the lawsuit was brought-whether screening, diagnosis, treatment, informational services, or all of these services-the subsequent provision of some of these services to the named plaintiffs would not moot the claims of unnamed class members. *See County of Riverside*, 100 U.S. at 52; *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975).

***10** In sum, the named plaintiffs, with the aid of their present counsel, will adequately represent the interests of the proposed class.

IV.

***10** Rule 23(b)(2) allows for parties who otherwise meet the prerequisites of Rule 23(a) to maintain a class action in circumstances where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole ...." In *Marisol A .*, the Court of Appeals found that this criterion was met where, as here, the plaintiffs had alleged that the violations arose from "central and systemic failures" in a child welfare system and sought only declaratory and injunctive relief, which would resolve the alleged problem with respect to the entire class. *Marisol A.*, 126 F.3d at 378. The defendants have not distinguished *Marisol A.* from the present case in any way, and there is no distinction relevant to the Rule 23(b)(2) analysis.[FN10]

FN10. Indeed, Rule 23(b)(2) was formulated precisely to allow for class actions where, as here, parties seek broad injunctive relief to vindicate the civil rights of a large class of individuals. *See, e.g.*, *Marcera v. Chinlund*, 595 F.2d 1231, 1237 (2d Cir.1979) ("It is well established that civil rights actions are the paradigmatic 23(b)(2) class suits, for they seek classwide structural relief that would clearly redound equally to the benefit of each class member."), *vacated on other grounds*, *Lombard v. Marcera*, 442 U.S. 915 (1979); *Alliance to End Repression v. Rockford*, 565 F.2d 975, 979 n. 9 (7th Cir.1977); Fed.R.Civ.P. 23(b)(2) advisory committee's note (1966).

***10** Rather than addressing these issues squarely, the defendants cite a number of cases in which Rule 23(b)(2) motions were allegedly denied where "injunctive and declaratory relief is sought against a governmental entity." (City's Opp. at 10.) But, as the Court of Appeals's opinion in *Marisol A.* makes clear, there is no general rule that class actions cannot be maintained for declaratory and injunctive relief against government entities.

***10** Some of the cases cited by the City do support the proposition, sometimes referred to as the "*Galvan* rule", that class certification should be denied when pursuit of the claim in a class action form would be "largely a formality" or "superfluous." *See, e.g.*, *Berger v. Heckler*, 771 F.2d 1556, 1566 (2d Cir.1985); *Galvan v. Levine*, 490 F.2d 1255, 1261-62 (2d Cir.1973); and *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, 399 (2d Cir.1973). The defendants argue that class certification would be a formality in this case because the members of the proposed class would arguably profit equally from an injunction obtained by the six named plaintiffs in a non-class action as from one obtained in a certified class action.

***10** This case is very different from *Galvan.* The

defendant in *Galvan* had already explicitly conceded that it had a policy or practice that similarly affected all of the members of the proposed class and had indicated to the Court that it understood an individual judgment to bind it with respect to the other members of the class. *See* Galvan, 490 F.2d at 1261. The defendant in *Galvan* had also already taken positive steps to withdraw the policy even before the entry of an adverse judgment and stated that it did not intend to reinstate the policy. *See id.*

***10** In the present case, by contrast, the City and DOH do not concede that their policies have resulted in similar widespread effects with regard to the class members, and instead vigorously argue that each of the individuals' claims arise from circumstances unique to their cases. The defendants have not asserted that they have taken any steps to remedy what the plaintiffs allege are widespread practices in violation of federal law. There is thus far less of a guarantee that a successful non-class action would result in adequate relief for the whole class. Numerous district courts in this Circuit have found *Galvan* to be inapplicable under similar circumstances. *See, e.g.*, *Karen L. v. Physicians Health Services, Inc.*, 202 F.R .D. 94, 103-04 (D.Conn.2001); *Boyland v. Wing*, 2001 WL 761180, at *12-13 (E.D.N.Y. Apr. 06, 2001); *Ashe v. Board of Elections*, 124 F.R.D. 45, 51 (E.D.N.Y.1989); *Koster v. Perales*, 108 F.R.D. 46, 54 (E.D.N.Y.1985); *Bacon v. Toia*, 437 F.Supp. 1371, 1383 n. 11 (S.D.N.Y.1997).

***11** The defendants also vigorously argue that the named plaintiffs' claims are now moot. Courts have found exceptions to the *Galvan* rule when problems of mootness on the part of the named plaintiffs might otherwise prevent a class of injured persons from obtaining injunctive relief to reform a continuing policy or practice. *See, e.g.*, *Monaco v. Stone*, 187 F.R.D. 50, 63 (E.D.N.Y.1999); *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y.1986); *Jane B. v. New York City Dep't of Soc. Servs.*, 117 F.R.D. 64, 72 (E.D.N.Y.1999); *Ashe*, 124 F.R.D. at 51.

***11** Given these facts, and the plaintiffs' continued interest in class certification, the class may be maintained under Rule 23(b)(2).

CONCLUSION

***11** For the foregoing reasons, the Court grants the plaintiffs' motion under Rule 23(b)(2) and certifies a class comprising of all children who are now, or will in the future be, under the age of twenty-one; who are seeking or receiving emergency shelter in the City of New York; who are eligible to receive Medicaid benefits; and who have or may potentially have asthma.

***11** SO ORDERED.

S.D.N.Y.,2001.
Dajour B. ex rel. L.S. v. City of New York
Not Reported in F.Supp.2d, 2001 WL 1173504 (S.D.N.Y.)

Briefs and Other Related Documents (Back to top)

• 1:00cv02044 (Docket) (Mar. 16, 2000)

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Lucas v. Kmart Corp.D.Colo.,2005.Only the Westlaw citation is currently available.

United States District Court,D. Colorado.

Carrie Ann LUCAS, Debbie Lane, and Julie Reiskin, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

KMART CORPORATION, Defendant.

No. 99-CV-01923-JLK.

July 13, 2005.

Amy Farr Robertson, Fox & Robertson, P.C., Denver, CO, Brian D. East, Advocacy, Inc., Austin, TX, Denette Vaughn, James Earl Teague, Advocacy, Inc., Lubbock, TX, Earl R. Mettler, Mettler & LeCuyer, PC, Albuquerque, NM, Kevin William Williams, Denver, CO, L. Javier Cavazos, Atty at Law, Harlington, TX, Michael Wayne Breeskin, Arc of Denver, Inc., Denver, CO, Stephen T. LeCuyer, Mettler & LeCuyer, PC, Albuquerque, NM, Steven R. Greenberger, Chicago, IL, Timothy Patrick Fox, Fox & Robertson, P.C., Denver, CO, for Plaintiffs.

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ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

KANE, Senior J.

***1** This wheelchair access disability discrimination case is before me on Plaintiffs' Motion for Class Certification. Plaintiffs' seek to certify a nationwide class of wheelchair users based on allegations of a pattern of discrimination against them in Kmart stores across the country. Defendant Kmart Corporation ("Kmart") objects to certification, principally on grounds that each one Kmart's 1500 stores is physically unique, differing in terms of size, layout, configuration, building structure and merchandise selection as would preclude a finding of commonality necessary for certification. I am unpersuaded, and grant Plaintiffs' Motion.

Facts and Procedural History.

***1** Plaintiffs Carrie Ann Lucas, Debbie Lane and Julie Reiskin are individuals who depend on wheelchairs for their mobility. They filed this action against Kmart in 1999, asserting claims for violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § § 12101 *et seq.* and the Colorado Anti-Discrimination Act ("CADA"), Colo.Rev.Stat. § § 24-34-601 *et seq.*, based on policies and practices they claimed Kmart maintained at their stores that discriminated against them and the entire class of shoppers who depend on wheelchairs or scooters for their mobility. Plaintiffs sought injunctive relief to correct these centralized policies and practices that created architectural and related barriers and impeded the ability of wheelchair-bound shoppers from using or enjoying access to Kmart, and moved for class certification.

***1** During the pendency of the class certification motion, Kmart filed for protection under Chapter 11 of the Bankruptcy Code and proceedings ground to a halt as a result of the automatic stay triggered by such a filing. Kmart emerged from bankruptcy in May 2003 with a reorganization plan that called for significant changes in Kmart's business practices. The automatic stay dissolved, and the question quickly arose as to whether this action could, and should, proceed.

***1** Over Kmart's objection that doing so would violate the fresh start and related provisions of the Bankruptcy Code, I granted Plaintiffs' Motion to Reopen. The parties filed a series of supplemental briefs and related materials updating the case and the discovery plan, and renewed the Motion for Class Certification. As part of their negotiations, Plaintiffs conceded their CADA claims were discharged upon confirmation of Kmart's reorganization plan. The sole remaining claim, then, is Plaintiffs' request for injunctive relief under the ADA.

Discussion.

***1** After the reorganization, Kmart continues to operate approximately 1,500 stores nationwide. Plaintiffs contend they and others with disabilities have experienced numerous instances of discriminatory practices, policies, and barriers to access at Kmart both before and after reorganization, including narrow and obstructed aisles as well as inaccessible checkout aisles, counters, fitting rooms, and parking facilities. In addition to their own testimony, they offer the testimony of others in the putative class describing instances of similar

problems at Kmart stores in other states. (Fuller Dep. at 51:5-55:25 (June 5, 2001); Mason Dep. at 26:10-27:13 (June 4, 2001); Mauro Dep. at 30:11-31:13; Pls.' Resp. to Def.'s June 6, 2003 Letter at App. 5, 6 (June 16, 2003).)

Legal Standards for Class Certification.

***2** In order to obtain certification as a class action under Fed.R.Civ.P. Rule 23, class plaintiffs must first demonstrate the prerequisites for class action status-numerosity, commonality, typicality, and adequacy of representation-exist under subparagraph (a), and then demonstrate the action is properly maintainable as a class action for any of the reasons identified in paragraph (b). *See generally* C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 3d § 1785 (West 2005). Here, Plaintiffs contend the prerequisites for class designation are met, and seek to certify a nationwide class of wheelchair users under 23(b)(2).

***2** Because of the flexible nature of class certification, courts are to favor the procedure. *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir.1968). As long as the proper standards for class certification under Rule 23 are applied, the decision of whether to certify the class rests soundly in my discretion. *Shook v. El Paso County*, 386 F.3d 963, 967-68 (10th Cir.2004).

***2** In ruling on the Motion for Class Certification, I do not evaluate the underlying merits of the claim. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)(rejecting cases requiring evaluation of likelihood of success on merits and instead accept the substantive allegations of the complaint as true.) While I need not blindly rely on conclusory allegations parroting Rule 23, I accept the substantive allegations of the complaint as true. *Shook* at 968 (citing *J.B v. Valdez*, 186 F.3d 1280, 1290 & n. 7 (10th Cir.1999)). "In determining the propriety of a class action, the question is not whether the ... plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.* (quoting *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir.1982)); *see generally* Wright, Miller & Kane, *supra*, § 1785.

Certification of Nationwide Class is Appropriate Under these Standards.

***2** This case provides a paradigm for class certification under Rule 23(b)(2), where the party opposing the class is alleged to have acted or refused to act on grounds generally applicable to the class, and the relief sought seeks to compel compliance with civil rights laws in a manner that will inure to the benefit of all members of the putative class. *See* Wright, Miller & Kane, *supra*, § § 1775, 1776. Indeed, the Advisory Committee Notes to the 1966 amendment adding subparagraph (b)(2) to Rule 23 explain that (b)(2) was intended to reach precisely the type of class proposed in this case: "Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." *Applied in Colorado Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 361 (D.Colo.1999)(Babcock, C.J.).

***2** Kmart's objection that the 23(a) prerequisites of commonality and typicality cannot be met entwines the standards for class certification with the merits of the case and is rejected. Specifically, Kmart argues that because there is no centralized control over design, access or configuration of Kmart's 1500 nationwide stores, common legal and factual questions exist only as to those class members who patronize the same individual store. The claims of the proposed class representative, under this theory, are typical only of those class members who patronized the same stores as they did. I reject both contentions. The question of whether Kmart Corporation is liable for alleged ADA violations by its member stores is an open question that must be litigated on its merits. The fact Kmart denies it has ADA obligations for individual member stores will not preclude class certification in a case where that denial is in dispute.

***3** The focus of concern in 23(b)(2) certification is whether final injunctive relief against defendant can and will benefit the class as a whole. Assuming discovery and litigation of Plaintiffs' claims can lead to a determination that Kmart Corporation is liable for discriminatory practices of its member stores, the prerequisites of commonality and typicality are met. Numerosity of the putative class is not reasonably in dispute, and the question whether the proposed representative plaintiffs can fairly and adequately represent a nationwide class of wheelchair users must be answered in the affirmative. *See Colorado Cross-Disability Coalition* at 361 (where Plaintiffs Julie Reiskin and Debbie Lane were deemed adequate to represent a similar class of wheelchair bound patrons of Taco Bell restaurants nationwide). With respect to 23(b)(2), the fact there is a dispute over the requirement that Kmart acted on grounds generally applicable to the class, or that Kmart is legally able to

bind its stores with respect to injunctive relief, does not bar certification. *See* Wright, Miller & Kane at § 1775, n. 12 (citing *Dickerson v. U.S. Steel Corp.*, 64 F.R.D. 351, 358 (E.D.¶ .1974).

***3** Defendants' objection regarding representative Plaintiffs' standing to assert claims on behalf of individuals who patronized other Kmart stores is subsumed by my determination that the Rule 23(a) prerquisites have been met. Defendants' objection regarding the "mootness" of claims by class members who patronized stores now closed is irrelevant given the nature of the claims and the relief sought. Stores no longer in existence will obviously not be bound by an order for injunctive relief, and the fact of their closure in no way affects the justiciability of claims seeking injunctive relief to remedy discrimination in stores that are open.

***3** Based on the foregoing, Defendants' various objections to certification are DENIED and Plaintiffs' Motion for Class Certification is GRANTED. Plaintiffs Carrie Ann Lucas, Debbie Lane and Julie Reiskin are appointed representatives of the nationwide class of individuals who shop at Kmart and rely on wheelchairs or motorized scooters for their mobility in doing so.

D.Colo.,2005.
Lucas v. Kmart Corp.
Not Reported in F.Supp.2d, 2005 WL 1648182 (D.Colo.)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE* THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH, *ET AL.*, IN SUPPORT OF PLAINTIFFS SHOOK *ET AL.*,** was served via electronic mail on the 20th day of February, 2007, and via first-class mail on February 21, 2007, addressed to the following:

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