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United States District Court,
N.D. California.

Roxanne LOPEZ, et al., Plaintiffs,
v.
The SAN FRANCISCO UNIFIED SCHOOL
DISTRICT, et al., Defendants.

No. C 99-3260 SI. | Sept. 8, 2003.

ORDER DENYING DEFENDANTS' MOTION TO DECERTIFY THE CLASS

SUSAN ILLSTON, District Judge.

*1 Now before the Court is defendants' motion for class decertification. Having carefully considered the arguments of the parties and the papers submitted, the Court DENIES the motion for class decertification.

BACKGROUND

This action was first filed on July 6, 1999, more than four years ago. Plaintiffs' second amended complaint was filed on December 22, 1999. Plaintiffs' second amended complaint seeks "declaratory and injunctive relief ... against the defendants for severely limiting Plaintiffs' access to programs, facilities, services, activities and educational opportunities by knowingly refusing to eliminate architectural and programmatic barriers, resulting in emotional and physical distress to Plaintiffs and violating Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and its accompanying regulations; and 42 U.S.C. § 1983." Second amended complaint at 3:19-25.

On May 2, 2001 the Court certified two plaintiff classes pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, based on a stipulation by the parties. Those classes were defined as follows:

(1) Current and former school district students with mobility or visual impairments who have been denied access to school district "programs and serves activities

and or facilities as a result of structural barriers."

(2) Persons other than students or school district employees with mobility impairments who have been denied access to school district programs and services as a result of the barriers.

Plaintiffs have submitted declaration testimony from 22 students and adults alleging systemic access barriers. Two class representatives were appointed by the Court for the student class: L.L. and K.K. For the other class one non-student representative was appointed: Teresa Gallegos. Both LL and KK are special education students who have attended several schools in the District and who are subject to the Individuals with Disabilities in Education Act. The plaintiffs allege that these individuals have encountered structural or physical barriers to access as well as policy barriers to access, including policies about evacuation, transportation, adaptive physical education and field trips. Both students have Individualized Educational Program plans (IEPs) as required by 34 C.F.R. Section 300.305-300.307.

Plaintiffs also allege that the District has never adopted or implemented a transition plan explaining the steps it will take to comply with the ADA and Section 504, as required by these statutes. Opp. at 14:1-5. According to plaintiffs' allegations, the District has been in dereliction of its responsibilities to remove barriers as required under the ADA and section 504, and by its own projection does not intend to remove those barriers completely until 2012. Opp. at 14:22-23. The schools that the class representatives have attended were built prior to the effective dates of the Rehabilitation Act or the ADA.

*2 This case is currently set for trial on January 5, 2004.

LEGAL STANDARD

A party seeking to decertify a class must show that the requirements of Rule 23 have not been met. *Slaven v. BP America, Inc.*, 190 F.R.D. 649, 651 (C.D.Cal.2000). Throughout the litigation the Court may revisit the question of class certification. The Court has broad discretion to decide whether to certify a class. *Armstrong et al. v. Gray Davis, California Board of Prison Terms, et al.*, 275 F.3d 849, 872 n. 28 (9th Cir.2001). Further, the Court has a duty throughout the litigation to stringently examine the adequacy of class representatives. *In re: General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1124 (7th Cir.1979).

Federal Rule of Civil Procedure 23(a) states that “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.” In addition, to prosecute a class action, the plaintiffs must show 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 ... with respect to the class as a whole.” Fed.R.Civ.P. 23(b). The commonality requirement is said to be met if plaintiffs’ grievances share a common question of law or fact. “Typicality, by contrast is said to require that the claims of the class representatives be typical of those of the class”, and to be met when the claims arise from the same course of alleged events. *Armstrong et al. v. Gray Davis, California Board of Prison Terms, et al.*, 275 F.3d 849, 868 (9th Cir.2001).

Under the ADA, a class representative is a typical class member if the representative’s claims are typical of the claims of the class as a whole to such a degree that “the bulk of the elements of the class members’ claims are established by the proof offered in support of the named plaintiffs’ claim.” *Sokol v. New United Manufacturing, Inc.*, 1999 WL 1136683 (N.D.Cal.1999). “[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977).

DISCUSSION

Defendants make several arguments to support class decertification. Plaintiffs opposed them all, and each will be discussed below.¹

¹ Plaintiffs also argue that the nature and timing of the motion, in light of defendants’ prior stipulation to class certification, suggest bad faith; and that because defendants previously stipulated that class representatives satisfied the typicality and adequacy requirements for class certification, this motion should be summarily denied. That Order granting class certification was issued by this Court on May 2, 2001. However, in that Stipulation and Order, it was noted

that the class certification order would be subject to review based on new, different or additional evidence. Accordingly, this Court is now obliged, in light of defendants’ motion, to renew the class certification inquiry

1. Individualized treatment is not required in a systemic denial of access action

Defendants argue that the plaintiffs’ claims require individualized determinations which are fact-specific and therefore not easily susceptible to class treatment. They contend that this case is not about access to facilities, but rather about access to programs, a fact-specific inquiry.

*3 Defendants’ argument that all requests for reasonable modification under Title II under the ADA require individualized treatment is incorrect. The cases that defendants cite in support of this contention are Title II discrimination actions brought by individual plaintiffs, not class actions. They are generally not cases about programmatic or architectural barriers to access. For example, the defendants cite *Wong v. Regents of the University of California*, 192 F.3d 807, 818 (9th Cir.1999) for the proposition that an “individualized analysis of the disabled individual’s circumstances” is required. *Wong* was a third-year medical student who brought an ADA claim against his medical school alleging that the school failed to modify its class requirements to accommodate his learning disability, in particular, by refusing to give him more time to complete his third-year course requirements. *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir.2002), also cited by defendants, is also an action brought by an individual and alleges discrimination due to his vocational school’s alleged failure to make reasonable modifications to its program to accommodate his learning disability. *Zukle v. Regents of University of California*, 166 F.3d 1041, 1048 (9th Cir.1999), cited by defendants, presents facts very similar to *Wong*. In *Zukle*, the plaintiff brought an individual action against his medical school when it refused to decelerate his program which he alleged was a reasonable modification for his learning disability.

Significantly, none of these cases cited by defendants for the proposition that an individualized inquiry is required, concerns allegations of systemic denials of access in which a class of plaintiffs sought certification on the grounds that architectural and policy barriers precluded their access. In such cases, in this circuit as well as other circuits, courts have routinely held that class certification of classes composed of people with disabilities affected

by the, systemic access barriers is appropriate. The body of case law supporting class certification in these circumstances is addressed below.

2. Different disabilities do not preclude class treatment where class members experience common injury of systemic denial of access

Defendants argue that each individual student who is faced with alterations must be evaluated to determine whether those alterations affect usability, and that determination is also a fact-specific inquiry. According to defendants, “One class representative’s experience at a school cannot be typical of another class member’s experience at another school that may have undergone different alterations.” Mot. At 20:15–17. The Court is unpersuaded that these arguments defeat class decertification in this ADA and section 504 access case.

In cases brought under the ADA and section 504 where the allegations in the complaint stem from allegedly exclusionary policies and barriers, these barriers provide a common nucleus of operative fact from which to seek injunctive relief. *Access Now, Inc. v. AHM CGH, Inc.*, 2000 U.S. Dist. Lexis 14788 (S.D. Fla. 2000). For example in *Access Now*, plaintiffs were all disabled persons in the United States who were denied access to acute care medical facilities due to structural and programmatic barriers. The Court certified a class on the grounds that “[e]ach individual 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.” *Id.* at *10. The Court stated that “minute factual distinctions” between class representatives and absent class members should not prevent class certification. Arguably, in that action involving all disabled people in the United States, the factual distinctions were much greater than those among the class members in this action, students or users of the San Francisco Unified School District facilities. Most importantly, all of the plaintiffs here, like those plaintiffs in *Access Now*, seek systemic policy and architectural changes. As the Court held in *Access Now*, “Under these circumstances, commonality and typicality are sufficiently established for certification of this class.” *Id.* at *12.

*4 Although class members may be injured by the alleged structural and programmatic barriers differently, e.g., visually impaired class members will suffer injuries that may be different in kind than mobility-impaired class members, such differences are inadequate to defeat class representation. See e.g., *Baby Neal for and by Kanter 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); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (accommodation of people with disabilities at theaters and adequacy of those accommodations are issues of law and fact common to all affected people with disabilities). Courts addressing the issue of adequacy of representation in access suits, have found overwhelmingly that disabled plaintiffs satisfy typicality requirements. “Indeed in a public accommodations suit ... where disabled persons challenge 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 requirements for class representation.” *Arnold*, 158 F.R.D. at 450 (emphasis in original).

Armstrong, decided by the Ninth Circuit in 2001, presents similar factual questions to those posed in the current motion. In that action the Court stated that “the differences that exist here do not justify requiring groups of persons with different disabilities, all of whom suffer similar harm from the Board’s failure to accommodate their disabilities, to prosecute separate actions.” *Armstrong*, 275 F.3d 849, 868 (9th Cir. 2001). Similarly, defendants have alleged that differences in plaintiffs’ disabilities justify decertification of the class. But where as here, and as in *Armstrong*, the entire class challenges the procedures and policies of defendant which make the defendants’ program or facility inaccessible, alleged differences in disability will not work to defeat class certification.

3. Administrative exhaustion under the IDEA is not required in an action based on systemic denial of access

Defendants have argued that class representative L.L. jeopardizes the claims of the class and is therefore an inadequate representative, because he has failed to exhaust his administrative remedies under the IDEA. Having failed to pursue administrative relief, defendants argue that class representatives render the entire class vulnerable to dismissal due to the IDEA’S alleged exhaustion requirement. Defendants argue that the rights and remedies under the IDEA are coextensive with those available under the ADA and section 504, and thus that all claims must be pursued under the IDEA’S administrative relief mechanisms before being pursued in this Court.

The Court is unconvinced. First, the IDEA clearly provides rights and remedies far more limited in scope

than those available under the nondiscrimination statutes that plaintiffs invoke here. The IDEA'S more limited purpose is to provide the right to "a free appropriate public education that emphasizes special education and related services."20 U.S.C. § 1400(d)(1)(A). The IDEA's explicit focus is on individualized instruction plans, as opposed to the general removal of barriers. Barrier removal may only be accomplished incident to an individual instruction plan. In contrast, the ADA and section 504 are far broader, requiring that all facilities and programs be readily accessible to and usable by people with disabilities. The Court is convinced by plaintiffs' arguments that the rules and regulations of the these statutes are, in fact, not coextensive.

*5 Congress addressed the question of the relationship between the IDEA and the Rehabilitation Act in 1986 (prior to enactment of the ADA) stating, "Nothing in this chapter [of the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under ... Title V of the Rehabilitation Act of 1973."20 U.S.C. § 1415(1). This amendment was in response to a Supreme Court decision interpreting the IDEA as the only available remedy for a discrimination action in education. *See Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).

Further, the cases cited by plaintiffs support their argument that in this instance exhaustion is not required. *See e.g., Zimmerman v. State of Oregon Depart. of Justice*, 183 F.3d 1161, 1166 (9th Cir.1999) ("administrative exhaustion is required under Title I, but not be under Title II"). The IDEA clearly requires, in all but a handful of circumstances, exhaustion of administrative remedies available under that statute for individuals challenging their individual education plans. However, the present challenge is not to an individual education plan, but to policies which are allegedly contrary to law and work to deny access to a broad class of persons in a discriminatory manner. The purpose of IDEA's exhaustion requirement, to permit agencies to correct their errors and apply their expertise, prior to judicial review, does not apply here. *See Urban v. Jefferson County School District*, 89 F.3d 720, 724 (10th Cir.1996).

Where a systemic policy is challenged, IDEA exhaustion is generally not required. *See Hoeft v. Tucson United School Dist.*, 967 F.2d 1298, 1303-1304 (9th Cir.1992); *Urban*, 89 F.3d at 724 (IDEA'S exhaustion requirement does not apply when exhaustion would be futile or administrative remedies inadequate, and where the challenge is to a systemic policy which is alleged to be contrary to law). Accordingly, the Court rejects

defendants arguments that class certification is defeated by plaintiffs' failure to exhaust administrative remedies.

4. Adequacy of class counsel

Defendants' motion challenges the adequacy and competence of class counsel to represent the interests of the class, citing class counsel's failure to file documents under seal to protect the privacy of class representatives and failing to generate expert reports regarding access at several of the schools that class members represented. The Court finds these are insufficient reasons to require a determination that class counsel inadequately represent the interests of the class.

5. Defendants' objections based on plaintiffs' pursuit of damages

Defendants Have objected to plaintiffs' adequacy as class representatives on the grounds that their pursuit of damages is in violation of Fed.R.Civ.P. 23(b)(2). In plaintiffs' opposition, plaintiffs state that they no longer seek damages in this action. Opp. at 27:6. While plaintiffs' decision not to seek damages diffuses defendants' argument, the Court notes that pursuit of damages does not preclude class treatment under certain circumstances.

*6 Classes seeking damages may be certified as long as the damages claim is "incidental to the primary claim for monetary or injunctive relief."Fed.R.Civ.P. 23(b)(2). Ideally, incidental damages do not require separate hearings to determine the merits or scope of each individual's case and injury. This action concerns systemic policy and practice changes that plaintiffs seek in the school district. As such, it is primarily an action for injunctive relief. Any damages sought are incidental and ancillary to plaintiffs' underlying claim for changes in policies and practices. Accordingly, seeking damages would be unlikely to jeopardize class certification.

6. Defendants' objections to K.K. as an adequate class representative

In response to defendants' argument that K.K. failed to participate in discovery and thus is not an adequate class representative, plaintiffs refer to declarations from K.K.'s guardians ad litem which have been filed with this Court and which document in detail K.K.'s alleged lack of access to programs and facilities within the school district. Accordingly, the Court rejects defendants' argument that K.K. is not an adequate class representative

due to her failure to provide information about the discrimination she has suffered.

Thus, the Court DENIES the motion for decertification. The class will proceed through the named representatives as certified by this Court in its May 2, 2001 Order. Plaintiffs may continue to be represented by present class counsel. [Docket # 272]

CONCLUSION

The Court finds that plaintiffs satisfy the Rule 23 requirements of commonality, typicality and adequacy.

IT IS SO ORDERED.