

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JIMMY (BILLY) MCCLENDON, et al.,

Plaintiffs,

vs.

No. CV 95-24 JAP/KBM

CITY OF ALBUQUERQUE, et al.,

Defendants

vs.

E.M., R.L., W.A., D.J., P.S., and N.W., on behalf of
themselves and all others similarly situated,

Plaintiff Intervenors.

JOINT STATUS REPORT AND PROVISIONAL DISCOVERY PLAN

Pursuant to FED. R. CIV. P. 26(f), a telephone conference was held on November 17, 2016. The conference was attended by: Peter Cubra, Nancy Simmons and Kelly Waterfall for Plaintiff Intervenors; and by Jenica Jacobi and Debra Moulton for the City of Albuquerque Defendants.

NATURE OF THE CASE

Plaintiffs and Plaintiff-Intervenors

This is a class action brought on January 10, 1995 against the County of Bernalillo, the City of Albuquerque and officials of both entities seeking injunctive and declaratory relief to address violations of the United States Constitution, the Rehabilitation Act and the Americans with Disabilities Act (ADA). All persons presently confined in the Bernalillo County jail system, or who may/will be so confined in the future, are members of the plaintiff class. On September 6, 1995 a complaint in intervention was filed on behalf of all persons who have mental and/or developmental disabilities who are now, or in the future may be, detained in the Bernalillo County jail system. Members of the Plaintiff class who have mental and/or developmental disabilities are members of the Plaintiff Intervenor sub class.

The district court entered its first injunction on August 23, 1995 and the Plaintiffs and Defendants stipulated on September 7, 1995 to convert that order into a permanent injunction. Since that time, the parties agreed to, and the Court approved and entered as orders of the court, several other stipulated orders regarding conditions of confinement, overcrowding issues and other matters. The most recent such orders were entered in 2016.

A joint motion alleging violations of the Court's orders, and also alleging violations of the ADA and Rehabilitation Act, (Doc. 1233) the *Amended Motion For An Order To Show Cause And For Further Remedial Relief Regarding City Defendants*, is before the Court. On November 9, 2016, the Court granted the motion, in part, and ordered:

IT IS ORDERED that, after the all of the authorized discovery is completed, the Court will schedule a hearing at which the City Defendants may appear and show cause whether they are in compliance with the following:

1. The provision in the 2001 Supplemental Order requiring the City Defendants to “[p]rovide direction to law enforcement officials under the control of the City . . . to issue citations where appropriate and to use the ‘walk through procedures,’ rather than incarcerating individuals, where appropriate.”
2. The provision in the 2001 Supplemental Order requiring the City Defendants to “schedule a meeting or meetings concerning the provision of mental health services in Bernalillo County. . . . to plan how to implement an effective jail diversion program for persons with psychiatric or developmental disabilities.”
3. The ADA and the RA with regard to detaining and arresting individuals with mental illnesses or developmental disabilities to sweep them from the streets.

Doc, 1245, page 33.

The Court has scheduled two evidentiary hearings to resolve those issues. The first hearing will address topic 1, and the second hearing will address topics 2 and 3. The purpose of this Joint Status Report is to establish a schedule for conducting those two hearings and a discovery plan.

Defendants

An evidentiary hearing has been scheduled for June 26, 2017, for the purpose of addressing the issue of the provision in the 2001 Supplemental Order requiring the City Defendants to “[p]rovide direction to

law enforcement officials under the control of the City . . . to issue citations where appropriate and to use the ‘walk through procedures,’ rather than incarcerating individuals, where appropriate.

Another evidentiary hearing has been set for September 11, 2017 for the purpose of addressing jail diversion by the City Defendants and whether City Defendants are detaining and arresting individuals with mental illnesses or developmental disabilities to “sweep them from the streets.”

STIPULATIONS

The parties hereto stipulate and agree that venue is properly laid in this District; and that the United States District Court for the District of New Mexico has jurisdiction over the parties and the subject matter.

The parties are willing to further stipulate to the following facts:

When this case was filed, the City of Albuquerque administered the local jail.

In 2003, the Defendants moved class members into the Bernalillo County Metropolitan Detention Center.

Defendant County of Bernalillo directly operates the Metropolitan Detention Center (MDC).

The City Defendants, the City of Albuquerque and the Mayor of the City of Albuquerque, operate a police department which arrests and incarcerates at the MDC.

The City of Albuquerque spends tax dollars annually to pay for certain behavioral health services, including case management, Assertive Community Treatment, substance abuse assessment and treatment and supportive housing.

The parties further stipulate and agree that the law governing this case is: The United States Constitution; and The Civil Rights Act (42 U. S. C. §§ 1983 et seq.), the Americans with Disabilities Act (ADA) and the Rehabilitation Act (Rehab Act) govern this case.

PLAINTIFFS’ CONTENTIONS:

1. The Plaintiff Intervenors’ Complaint in Intervention (“CI”) in this matter alleges, *inter alia*, that the sub class is being denied adequate medical, psychiatric, psychological, and other therapeutic services and programs (CI p. 7); that it is in the interest of the entire class if Plaintiff Intervenors can succeed in reducing the number of plaintiffs with disabilities housed in the jail (CI p. 8); that subclass members have been unnecessarily confined in segregation units and strip cells . . . or housed in living

units that do not provide reasonably safe conditions or requisite treatment and services (CI p. 15); that women with mental and/or developmental disabilities are required to live in a housing unit which is so overcrowded that different segments of the women's population take turns getting out of their overcrowded cells to have access to the dayroom for a maximum of two hours at a time (CI p. 16); that people with disabilities are held at the jail far longer than people without disabilities charged with the same offenses and some are held even beyond the terms of their sentences, due to defendants' failure to arrange an appropriate alternative placement (CI p. 17); Many subclass members have been unnecessarily segregated from the community and incarcerated in the jail because of the unavailability of services for people who (a) need residential mental health care or other supervised living arrangements, (b) have both a psychiatric and a developmental disability, or (c) have organic or other neurological disorders (CI p. 17); that Defendants discriminate against some subclass members on the basis of their disability by: (a) booking them into BCDC even when it is apparent they need hospitalization, and (b) then denying them pre-trial release because they have a mental disability. (CI p.17); that Defendants established a custom and practice of failing or refusing to provide sufficient training to staff regarding the use of force, including failing to adequately instruct them to not use unnecessary force against residents with mental and/or developmental disabilities (CI p. 20); and that the Albuquerque Police Department and Bernalillo County Sheriffs' Office discriminate against members of the subclass in violation of the ADA and the Rehabilitation Act (CI p. 22)

2. All persons presently confined in the Bernalillo County jail system or who may/will be so confined in the future, including but not limited to those detained at the Regional Correctional Center ("RCC") and the Metropolitan Detention Center ("MDC") are members of the plaintiff class.
3. All persons who have mental and/or developmental disabilities who are now, or in the future may be, detained in the Bernalillo County jail system, including but not limited to those confined detained at the RCC and the MDC, are members of the Plaintiff Intervenor sub class.
4. City police continue to inappropriately arrest plaintiff intervenors for "citable" offenses.
5. The City of Albuquerque employs mental health professionals and specially trained police officers who are dispatched by the City Defendants to the scene of behavioral health crises and who also track and initiate encounters with people with mental or developmental disabilities who have a history of encounters with law enforcement.
6. The Defendants have not created a plan to implement an effective jail diversion program for persons with psychiatric or developmental disabilities.
7. The City Defendants continue to discriminate against sub class members by reason of their disabilities, violating The Rehabilitation Act and the ADA.

DEFENDANTS' CONTENTIONS

1. City Defendants are not responsible for providing adequate medical, psychiatric, psychological, and other therapeutic services and programs at the Metropolitan Detention Center and further deny that Plaintiff or Plaintiff Intervenor are being denied adequate medical, psychiatric, psychological and other therapeutic services and programs at the Metropolitan Detention Center.
2. City Defendants are not responsible for insuring that subclass members have not been unnecessarily confined in segregation units and strip cells . . . or housed in living units that do not provide reasonably safe conditions or requisite treatment and services and further deny that subclass members have been unnecessarily confined in segregation units and strip cells . . . or housed in living units that do not provide reasonably safe conditions or requisite treatment and services.

3. City Defendants are not responsible for insuring that women with mental and/or developmental disabilities are not required to live in a housing unit which is so overcrowded that different segments of the women's population take turns getting out of their overcrowded cells to have access to the dayroom for a maximum of two hours at a time and further deny that women with mental and/or developmental disabilities are required to live in a housing unit which is so overcrowded that different segments of the women's population take turns getting out of their overcrowded cells to have access to the dayroom for a maximum of two hours at a time.
4. City Defendants are not responsible for holding people with disabilities at the jail far longer than people without disabilities charged with the same offenses or holding them beyond the terms of their sentences, nor are City Defendants responsible to provide appropriate alternative placement and further deny that people with disabilities at the jail are held longer than people without disabilities charged with the same offences or holding them beyond the terms of their sentences.
5. City Defendants have not unnecessarily segregated from the community and incarcerated them in the Metropolitan Detention Center either because of the unavailability of services for people who (a) need residential mental health care or other supervised living arrangements, (b) have both a psychiatric and a developmental disability, or (c) have organic or other neurological disorders or for any other reason.
6. City Defendants deny that they discriminate against some subclass members on the basis of their disability by: (a) booking them into either BCDC or the Metropolitan Detention Center even when it is apparent they need hospitalization, and (b) then denying them pre-trial release because they have a mental disability and further state City Defendants are not responsible for granting or denying pre-trial releases.
7. City Defendants deny that they have established a custom and/or practice of failing or refusing to provide sufficient training to staff regarding the use of force, including failing to adequately instruct them to not use unnecessary force against residents with mental and/or developmental disabilities.
8. City Defendants deny that the Albuquerque Police Department discriminate against members of the subclass in violation of the ADA and the Rehabilitation Act.
9. The 2001 Supplemental Order required City Defendants to use additional alternatives to incarceration, such as the use of citations and walk through procedures rather than incarcerating people, "where appropriate;" City Defendants have used additional alternatives to incarceration, including the use of citations and other procedures, where appropriate.
10. City Defendants are not targeting individuals who are mentally ill or disabled without reasonable suspicion of criminal activity in an effort to sweep them from the streets.
11. City Defendants deny their policies have a negative impact on mentally ill or disabled individuals.

PROVISIONAL DISCOVERY PLAN

The parties jointly propose to the Court the following discovery plan: *(Use separate paragraphs or subparagraphs as necessary if parties disagree.)*

Witnesses for Plaintiffs and Plaintiff Intervenors include:

1. Albuquerque Police Chief Gordon Eden
2. Albuquerque Mayor Richard Berry
3. Albuquerque Police Department employee Dr. Nils Rosenbaum
4. Albuquerque Police Lieutenant Glenn St. Onge

5. Albuquerque Police CIT Sergeant John Gonzales
6. Retired Memphis Police Department Major Sam Cochran
7. Albuquerque Assistant Police Chief Eric Garcia
8. County employee Elizabeth Simpson
9. Former Albuquerque employee Mike Robertson
10. UNM Professor Paul Guerin
11. County employee Gabe Nims
12. Plaintiffs' expert witnesses
13. other witnesses identified through discovery
14. Any and all witnesses identified by defendants.

Witnesses for City Defendants include:

1. Police Chief Gordon Eden
2. Elizabeth Simpson
3. Dr. Nils Rosenbaum
4. Major Tim Gonterman
5. Major Jessica Tyler
6. UNM Professor Paul Guerin
7. Robert Padilla, CEO Metro Court
8. Sgt. John Gonzales
9. Deputy Chief Eric Garcia
10. Doug Chaplain, Director, Family and Community Services
11. Defendants' expert witnesses
12. Any witnesses identified by Plaintiffs or Plaintiffs Intervenors
13. Any other witnesses identified through discovery

Discovery will be needed on the following subjects: (*Brief description of subjects on which discovery will be needed.*)

The level of compliance with the court's extant orders.

Whether the Defendants have developed an effective plan for diverting from incarceration people with mental disabilities or developmental disabilities.

Whether the City Defendants have been, and are, sweeping the streets of people with disabilities, arresting them and booking them into MDC

Whether the City Defendants are violating the rights of sub class members under the ADA and the Rehabilitation Act.

Discovery Limits and Schedule

Plaintiffs request a Maximum of 50 requests for production of documents by each party to any other party. Defendants request a Maximum of 25 requests for production of documents by each party to any other party. (Responses due 30 days after service).

Plaintiffs request a Maximum of 100 requests for admission by each party to any other party. Defendants request a Maximum of 25 requests for admission by each party to any other party. (Response due 30 days after service).

Plaintiffs request a Maximum of 25 depositions by each party. Defendants request a Maximum of 15 depositions by each party;

Each deposition (other than of experts and parties) limited to maximum of four hours unless extended by agreement of parties.

Reports from retained experts under Rule 26(a)(2) due:

from Plaintiff(s) by 60 days before hearing

from Defendant(s) by 30 days before hearing

Supplementation under Rule 26(e) due every 90 days.

All discovery regarding the first hearing commenced in time to be complete by April 3, 2017 and all discovery for the second hearing due by June 12, 2017.

PRETRIAL MOTIONS

Plaintiffs intend to file:

Plaintiff Intervenors intend to file:

Defendants intend to file:

ESTIMATED TRIAL TIME

This is a non-jury case.

This is a jury case.

The parties request a pretrial conference in _____.

SETTLEMENT

The possibility of settlement in this case cannot be evaluated prior to a meeting between counsel and representatives of the City. The possibility of settlement may be enhanced by use of the following alternative dispute resolution procedure: Designation of a mediator. Judge Torgerson may choose to continue to facilitate any settlement discussion.

The will jointly request a settlement conference at a mutually agreeable date if they think such a conference might be productive.

EXCEPTIONS

(Where counsel cannot agree to any recitation herein, exceptions shall be listed.)

APPROVED WITH/WITHOUT EXCEPTIONS (note exceptions above)

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