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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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CLERK OF DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

ROGER G. CANUPP, JACOB MYERS,
LAWRENCE MCGEE, HUBERT DAVIDSON,
TYWAUN JACKSON, and CHARLES DURDEN,

Plaintiffs,

vs.

Case No. 2:04-cv-260-FtM-33DNF

LIBERTY BEHAVIORAL HEALTHCARE
CORP., LUCY HADI, Secretary of the
Department of Children and Families,

Defendants.

ORDER

This matter comes before the Court upon Plaintiffs' Motion for Class Certification (Doc. #27) filed August 4, 2004 ("Plaintiffs' Motion"). Defendant Reiger filed a Response to Plaintiffs' Motion and Accompanying Affidavits (Doc. #45) on November 5, 2004. Defendant Liberty Behavioral Health Corporation filed a Notice of Adoption joining in Defendant Reiger's Response (Doc. #47) on November 10, 2004. On February 4, 2005, the Plaintiffs (Doc. #57) notified the Court that Plaintiffs' Motion is now ripe for adjudication.

I.

The facts, as set forth in the Complaint (Doc. #1), are as follows. Plaintiffs Roger G. Canupp, Jacob Myers, Lawrence Mcgee, Hubert Davidson, Tywaun Jackson, and Charles Durden are currently in the custody of the Florida Department of Children and Families

("DCF") and, are involuntarily civilly confined at the Florida Civil Commitment Center ("FCCC") located in Arcadia, Florida, pursuant to The Sexually Violent Predator Act, Section 394.910-394.931, Fla. Stat. (2003) (the "Act")¹. Specifically, the following is a brief factual synopsis of each Plaintiff²:

1. **Plaintiff Roger Canupp** is civilly **committed** pursuant the Act and **has not consented** to the treatment program offered at the FCCC. Mr. Canupp has been diagnosed with BiPolar Disorder, Personality Disorder and Paranoid Schizophrenia. Mr. Canupp has been confined at the FCCC since February 2000.

2. **Plaintiff Jacob Myers** is civilly **detained** pursuant the Act and **has not consented** to the treatment program offered at the FCCC. Mr. Myers has been diagnosed with Borderline Personality Disorder and Schizophrenia. Mr. Myers has been confined at the FCCC since April 2001.

3. **Plaintiff Lawrence McGee** is civilly **detained** pursuant the Act and **has consented** to the treatment program offered at the FCCC. Mr. McGee has a mild to moderate mental retardation and has been diagnosed with Reading Disorder, Disorder of Written Expression, Schizophrenia and Dementia. Mr. McGee has been confined at the FCCC since June 2001.

4. **Plaintiff Hubert Davidson** is civilly **detained** pursuant the Act and **has consented** to the treatment program offered at the FCCC. Mr. Davidson has been diagnosed with Borderline Intellectual Functioning and Learning Disorder, Not Otherwise Specified. Mr. Davidson has been confined at the FCCC since November 2000.

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Upon Plaintiffs' Motion, the Court ordered the dismissal of two named Plaintiffs who were released from the FCCC: Daniel Fabian and Bruce Kramer. See Order of Court dated March 14, 2005 (Doc. #62).

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The factual synopsis of each Plaintiff is based upon the allegations in Plaintiffs' Complaint and the Affidavits of Rick Harry and Adam Deming attached to Defendants Response (Doc. #45).

5. **Plaintiff Tywaun Jackson** is civilly **committed** pursuant the Act and **has consented** to the treatment program offered at the FCCC. Mr. Jackson has been confined at the FCCC since January 1999.

6. **Plaintiff Charles Durden** is civilly **committed** pursuant the Act and **has consented** to the treatment program offered at the FCCC. Mr. Durden has been confined at the FCCC since January 1999.

The Defendant Jerry Reiger is the Secretary of DCF and is being sued in his official capacity. The Defendant Liberty Behavioral Health Corporation ("Liberty") is a Pennsylvania for profit corporation who contracted with DCF to provide, "*inter alia*, sex offender treatment, mental health services, and on-site medical services" to individuals confined at the FCCC. Complaint ¶17.

Plaintiffs move to certify a class of persons who allegedly have been "victims of constitutionally and statutorily inadequate treatment conditions" at the FCCC. Complaint ¶1. Specifically, Plaintiffs contend that Defendants violated Plaintiffs' constitutional and federally protected rights by: (1) failing to provide Plaintiffs with an effective sex offender treatment program to meet the statutory requirement for release from confinement in violation of the Fourteenth Amendment to the United States Constitution ("Fourteenth Amendment"); (2) failing to provide Plaintiffs with appropriate mental health services and care so they can participate in an effective treatment program to meet the

statutory requirement for release from confinement in violation of the Fourteenth Amendment; and (3) failing to accommodate Plaintiffs with qualified disabilities so as to permit them to participate in the FCCC's sex offender treatment programs and activities, or obtain certain services in violation of the American with Disabilities Act, 42 U.S.C. §12131 et seq. ("ADA").³

II.

Whether to certify a class is a matter within the discretion of the Court. Cooper v. Southern Co. 390 F.3d 695 (11th Cir. 2004); Moore v. American Fed'n of Television & Radio Artists, 216 F.3d 1236, 1241 (11th Cir. 2000), cert. denied, 533 U.S. 950 (2001). "The initial burden of proof to establish the propriety of class certification rests with the advocate of the class." Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000), cert. denied, 532 U.S. 919 (2001). As an initial matter, a prerequisite to class certification is that "it must be established that the proposed class representatives have standing to pursue the claims as to which class-wide relief is sought." Wooden v. Board of Regents of Univ. Sys. of Ga., 247 F.3d 1262, 1287 (11th Cir. 2001); Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000) (noting that at least one named class representative must have standing).

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Count IV of Plaintiff's Complaint alleging procedural due process violations has been dismissed by the Court on March 14, 2005 (Doc. #62).

In addition to standing, Plaintiffs must satisfy all four of the threshold requirements set forth in Rule 23(a), Federal Rules of Civil Procedure, and then show that the action is maintainable under at least one of the three provisions of Rule 23(b). Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-14 (1997); Turner v. Beneficial Corp., 242 F.3d 1023, 1025 (11th Cir. 2001) (en banc), cert. denied, 534 U.S. 820; Strube v. American Equity Investment life Ins. Co., ___ F.R.D. ___, 2005 WL 546685 (M.D. Fla. 2005). The four threshold requirements are (1) numerosity: the class is so numerous that joinder of all members is impractical; (2) commonality: questions of law or fact are common to the class; (3) typicality: the representatives of the class present claims or defenses that are typical of the class; (4) adequacy: the representatives of the class will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a); Turner, 242 F.3d at 1025 n.3; Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1279 (11th Cir. 2000).

Rule 23(b) then requires Plaintiffs to show that either (1) prosecution by separate actions would create a risk of inconsistent results; or (2) Defendants have acted in ways generally applicable to the class, making declaratory or injunctive relief appropriate; or (3) common questions of law or fact predominate over individual issues. Moore, 216 F.3d at 1241.

At this stage of the proceedings, the Court is not permitted to undertake a merit review of Plaintiffs' claims for purposes of determining the propriety of certifying a proposed class. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Brown v. Williams Tobacco Corp., 959 F.2d 1566, 1569 n.11 (11th Cir. 1992) citing Nelson v. United Steel Corp., 709 F.2d 675, 679-80 (11th Cir. 1983). Nonetheless, before determining the efficacy of class certification, the Court, if necessary, may consider the sufficiency of Plaintiffs' evidence. Cooper v. Southern Company, 390 F.3d at 712.

III.

Plaintiffs contend that the requirements of Rule 23(a), and that Defendants have acted in ways generally applicable to the class, making declaratory or injunctive relief appropriate, Fed. R. Civ. P. 23(b)(2), are satisfied. At the outset, any analysis of class certification must first address whether the proposed class members have standing before the Court may consider whether the class members fulfill the Rule 23 prerequisites. Prado-Steiman ex. Rel. Prado-Bush, 221 F.3d 1266, 1280. In other words, "just as a plaintiff cannot pursue an individual claim unless he proves standing, a plaintiff cannot represent a class unless he has standing to raise the claims of the class he seeks to represent." Murray v. U.S. Bank Trust Nat. Ass'n, 365 F.3d 1284 (11th Cir,

2004) (citing Prado-Steiman, 221 F.3d at 1280). Plaintiffs seek certification of a class defined as:

all persons who are currently or will be confined involuntarily to the care and custody of the Florida Department of Children and Families pursuant to Fla. Stat.

Doc. #14, p. 2. Although not specifically addressed by Plaintiffs, the proposed class representatives appear to have standing if the Court adopts Plaintiffs' proposed class definition.

Defendants object to Plaintiffs' proposed class definition as being over-broad, vague and not definite. In particular, Defendants object that the proposed class "is not circumscribed by the claims, embraces people who are not affected by those claims, and is composed of too many subgroups with disparate claims." (Doc. #45, page 4). Alternatively, Defendants propose two separate subclasses:

(1) Residents of the FCCC who have been committed to custody pursuant to §394.917, Fla. Stat., that they are sexually violent predators, who have consented to sex offender treatment, who are qualified to participate in sex offender treatment, and who are not receiving adequate sex offender treatment; and

(2) Residents of the FCCC who are either committed to the facility pursuant to §394.917, Fla. Stat., or detained in the facility pursuant to §394.915, Fla. Stat., and who have been diagnosed by a treating professional with a severe mental illness as defined by DSM-IV, and who are not receiving adequate treatment for their severe mental illness.

Doc. #45, page 14.

The Court agrees that the type of conduct challenged and type of injuries alleged by Plaintiffs are different to warrant two separate subclasses. With respect to the first subclass, Defendants suggest that the class be limited to FCCC residents who: (1) are "judicially committed" pursuant to §394.917, as opposed to those residents who are detained pursuant to §394.915; (2) have consented to treatment; and (3) are "qualified" to treatment. Defendants first argue that only residents who are committed have a "right" to treatment and standing to challenge the adequacy of sex offender treatment program. (Doc. #45, pages 6-7). Defendants claim that residents who are detained "have no expectation they will receive sex offender treatment until they are committed under §39[4].917." (Id.).

Whether a resident has a "right" or "expectation" to treatment is immaterial because Defendants have offered every resident, irrespective of their status, an opportunity to consent or decline treatment. Significantly, Defendants admit that the FCCC "offers a three-stage treatment program to residents, who consent to participate in sex offender specific treatment, **whether they are committed or detained** as sexually violent predators." (emphasis added) (Doc. #45, Exhibit 2, Affidavit of Adam Deming, ¶3). Additionally, the Court cannot fail to notice that Plaintiffs Myers, McGee and Davidson, who are in "detainee" status, have been

in this status for not an insignificant amount of time.⁴ Consequently, the Court does not accept Defendants proposed definition to the extent that it is restricted to only those residents who are "committed" at the FCCC. The Court, however, does find compelling the second requirement proposed by Defendant that a resident must consent to treatment in order to challenge the treatment. The Court finds Defendants' third criteria that a resident be "qualified" or "cooperate" in treatment amorphous and inconsistent. The Court finds that this requirement would result in a revolving class door. Thus the Court adopts the following class definition as to the first subgroup:

(1) Residents of the FCCC who (a) have been civilly **committed** to custody pursuant to §394.917, Fla. Stat. that they are sexually violent predators; **or** (b) have been **detained** to custody pursuant to §394.915 as probable cause sexually violent predators; **and** (c) who have **consented** to sex offender treatment, and are not receiving adequate sex offender treatment.

With respect to the second subclass, the Court agrees that a definitive diagnosis of a disability must be demonstrated by a resident in order to challenge the adequacy of the FCCC's mental health services. Accordingly, the Court adopts Defendants' proposed definition for a second subclass as follows:

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The Court is mindful that after a probable cause determination a detainee is entitled to a commitment trial within thirty (30) days under Section 394.916, Fla. Stat. Admittedly, the Court does not know the reason why the Plaintiff-Detainees have not yet had their commitment trials. The Court does not suggest that these delays, albeit approximately four years, are not without good cause.

(2) Residents of the FCCC who (a) have been civilly **committed** to custody pursuant to §394.917, Fla. Stat. that they are sexually violent predators; **or** (b) have been **detained** to custody pursuant to §394.915 as probable cause sexually violent predators; **and** (c) who have been diagnosed by a treating professional with a mental illness as defined by DSM-IV, and who are not receiving adequate treatment for their mental illness.

IV.

A. Rule 23(a) Requirements

(1) Numerosity:

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impractical. Practicability of joinder depends on many factors, including the size of the class, ease of identifying its numbers and determining their addresses, the facility of making service on them if joined, and their geographic dispersion. Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986). There is no specific number of class members necessary to show the impracticability of joinder, and it is not necessary that the precise number of class members be known; Plaintiffs, however, must show some evidence or reasonable estimate of the number of class members. Id. More than forty (40) class members is considered sufficient to satisfy the numerosity requirement. Cox v. American Cast Iron Pipe Co., 784 F.2d 546, 553 (11th Cir. 1986); see also Strube v. Amercian Equity Investment life Ins. Co., 2005 WL 546685 (M.D. Fla. 2005).

Plaintiffs contend that the numerosity requirement is met. Under Plaintiffs' proposed class definition, the size of the class

would exceed 400 individuals. Additionally, the Court finds persuasive Plaintiffs' contention that all the class members reside at the FCCC in an institutional setting, similar to a prison population, making class certification especially suited to their claims. (Doc. #27, page 6). Defendants do not dispute that the numerosity requirement could be satisfied under their more restrictive class definition (Doc. #45, pages 13-14). Defendants acknowledge that at least 70 of the committed residents have consented to treatment. (Doc. #45, Exhibit 1, Affidavit of Adam Deming, ¶4). The Court concludes that the numerosity requirement under Rule 23(a) is satisfied.

(2) Typicality:

"Typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large. Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class." Hines v. Widnall, 334 F.3d 1253, 1256 (11th Cir. 003) (citation omitted). Typicality⁵ is satisfied

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While separate elements, "[i]n many ways, the commonality and typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of the individual class members to warrant class certification." Prado-Steiman v. Bush, 221 F.3d 1266, 1278-79 (11th Cir. 2000) (citations omitted). "Traditionally, commonality refers to the group characteristics of the class as a whole and typicality refers to the individual characteristics of the named plaintiff in relation to the class." Id. at 1279. Neither typicality nor commonality require that all putative class members share identical claims, and both may be satisfied even if some factual differences exist between the claims of the named representatives and the claims of the class at large. Id. at 1279 n.14.

where the named plaintiffs' claims "arise from the same event or pattern or practice and are based on the same legal theory" as the claims of the class. Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984), cert. denied, 470 U.S. 1004 (1985). "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3). The typicality requirement may be satisfied despite substantial factual differences, however, when there is a strong similarity of legal theories." Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001) (citation and quotation omitted).

Plaintiffs contend that the typicality requirement is met because Plaintiffs' claims "arise from the same pattern or practice and [are] based on the same legal theory." (Doc. #27, page 7). Essentially Plaintiff argue that the treatment and mental health programs at the FCCC are not "constitutionally and statutorily adequate." Id. Because Defendants propose alternative class definitions, they dispute that certain of the named class representatives satisfy the typicality requirement. (Doc. #45, page 10). The Court concludes that, under the two subclasses earlier defined by the Court, the Plaintiffs have satisfied the typicality requirement under Rule 23(a).

(3) Commonality:

"Under the Rule 23(a)(2) commonality requirement, a class action must involve issues that are susceptible to class-wide

proof." Murray, 244 F.3d at 811. Plaintiffs contend that common questions of law and fact govern their claims. Specifically, Plaintiffs identifies the common factual and legal question to include, inter alia:

(1) Whether the sex offender treatment program provided by the Defendants at the FCCC due to its lack of individualized treatment, failure to accommodate individuals with disabilities, failure to use pharmaceuticals, and inadequate staff, is constitutionally and statutorily adequate; and

b. Whether the mental health services and care provided by the Defendants at the FCCC due to the lack of staff, infrequency of sessions, and failure to provide pharmaceuticals, is constitutionally and statutorily adequate.

Based upon the applicable standard and Plaintiffs' contentions, the Court concludes that Plaintiffs have satisfied the commonality requirement under Rule 23(a).

(4) Adequacy of Representation:

Rule 23(a)(4) requires that the parties representing a class fairly and adequately protect the interests of the class. The purpose of the adequacy requirement is to protect the legal rights of the unnamed class members. Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir. 1987), cert. denied, 485 U.S. 959 (1988). Because all potential members of a class will be bound by the effect of a judgment, the Court must inquire into whether the Plaintiffs' counsel is qualified to carry out the litigation, "whether plaintiffs have interests antagonistic to those of the

rest of the class," and whether the plaintiffs possess the "personal characteristics and integrity necessary to fulfill the fiduciary role of class representative." Kirkpatrick, 827 F.2d at 726, quoting Griffin v. Carlin, 755 F.2d 1516, 1532 (11th Cir. 1985). However, "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." Kirkpatrick, 827 F.2d at 727. Furthermore, a party's claim of representative status is defeated only if there exists a fundamental conflict between the representative and the class, going into the specific issues in controversy. Pickett, 209 F.3d at 1280.

Plaintiffs contend that this requirement is met because "counsel of record are personally experienced in class action and impact litigation related to the institutional setting." (Doc. 27, page 10). Plaintiffs point out that their counsel have litigated numerous class, and, have both the financial and personnel resources to pursue this litigation. (Id.) Further, the named Plaintiffs "have no interests antagonistic to or in conflict with the class members." (Id.) In addition, Plaintiffs assert that both the named Plaintiffs and all of the class members will benefit from the "declaratory and injunctive relief" sought. Defendants do not dispute that the adequacy of representation requirement is satisfied. (Id.) The Court concludes that certain of the

Plaintiffs have satisfied the adequacy of representation requirement under Rule 23(a).

B. Rule 23(b) Requirements

In the present case, Plaintiffs assert that their claims are maintainable as a class under Rule 23(b)(2).⁶ This subdivision is generally applicable to civil rights actions. Notably, Plaintiffs seek only injunctive and declaratory relief, not monetary damages. Consequently, the Court finds Plaintiffs have satisfied Rule 23(b).

ACCORDINGLY, it is now **ORDERED, ADJUDGED and DECREED:**

Plaintiffs' Motion For Class Action (Doc. #27) is **GRANTED to the extent** that the Court will certify two separate subclasses as defined as:

(1) Residents of the FCCC who (a) have been civilly **committed** to custody pursuant to §394.917, Fla. Stat. that they are sexually violent predators; **or** (b) have been **detained** to custody pursuant to §394.915 as probable cause sexually violent predators; **and** (c) who have **consented** to sex offender treatment, and are not receiving adequate sex offender treatment.

(2) Residents of the FCCC who (a) have been civilly **committed** to custody pursuant to §394.917, Fla. Stat. that they are sexually violent predators; **or** (b) have been **detained** to custody pursuant to §394.915 as probable cause sexually violent predators; **and** (c) who have been diagnosed by a treating professional with a mental

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Fed. R. Civ. P. 23(b)(2) provides the following:

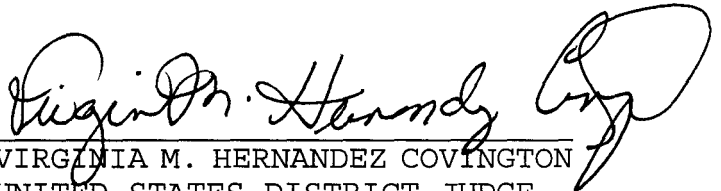
(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) 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.

illness as defined by DSM-IV, and who are not receiving adequate treatment for their mental illness.

DONE AND ORDERED in Chambers in Fort Myers, Florida, on this

29th day of March, 2005.


VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

SA: hmk
Copies: All Parties of Record