

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, by his next friend
and mother, Lillian Minor, *et al.*,

Plaintiffs,

v.

RICK PERRY, Governor, *et al.*,

Defendants.

§
§
§
§
§
§
§
§
§
§
§
§
§
§
§

CIV. NO. 5:10-CV-1025-OG

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Eric Steward, Linda Arizpe, Andrea Padron, Patricia Ferrer, Benny Holmes, and Zackowitz Morgan (collectively, the “Named Plaintiffs”) move this Court to certify this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. In support of their motion,¹ the Named Plaintiffs state that:

1. All of the Named Plaintiffs are Medicaid-eligible individuals with mental retardation or a related condition² (collectively referred to as “developmental disabilities”) who currently are confined in nursing facilities in Texas or at risk of being placed in a nursing facility.³ Each Named Plaintiff is entitled to live in the most integrated setting and prefers to live in the community, with appropriate services and supports. However, each Named Plaintiff (except Mr. Holmes) remains

¹ Concurrently with this motion, the Named Plaintiffs are also filing their Memorandum of Law in Support of the Motion for Class Certification, which is expressly incorporated herein.

² This Motion incorporates the term “mental retardation or a related condition” as defined and used in the federal PASARR regulations. *See* 42 C.F.R. § 483.102(b)(3).

³ Named Plaintiff, Benny Holmes, recently and subsequent to the filing of the Complaint, moved out of the nursing facility where he had been residing into a small group home in the community. Even though he is now in the community, he remains at risk of readmission to a nursing facility and, therefore, continues to be an appropriate class representative.

unnecessarily segregated as a result of the defendants' failure to comply with Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 *et seq.*; 28 C.F.R. § 35.130(d) *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Additionally, each Named Plaintiff has been or is being denied the specialized services in the nursing facility that are necessary to provide them with active treatment, in violation of the Nursing Home Reform Amendments (NHRA) to the Medicaid Act, 42 U.S.C. § 1396r(e)(7) and their implementing regulations, 42 C.F.R. § 483.100 *et seq.*

2. This action seeks class-wide injunctive relief under Rule 23(b)(2) of the Federal Rules of Procedure to end the harm suffered by the Named Plaintiffs and others similarly situated who are inappropriately institutionalized in nursing facilities and denied active treatment. The Named Plaintiffs seek injunctive relief to require Rick Perry, Governor of the State of Texas, Thomas Suehs, Executive Commissioner of the Texas Health and Human Services Commission, and Chris Trayloer, Commissioner of the Texas Department of Aging and Disability Services (the "Defendants") to fulfill their obligations to the proposed class under Title II of the ADA, Section 504 of the Rehabilitation Act, and the NHRA by, among other things: (1) implementing an effective screening and assessment process that will accurately identify individuals with developmental disabilities, including whether they can be appropriately served in the community; (2) providing those so identified with the necessary services and supports to enable them to move to community-based settings; and (3) for those who require nursing facility care, determining their need for specialized services and providing them with those services with sufficient frequency, intensity, and duration to constitute active treatment.

3. The Complaint seeks the same relief from Defendants for approximately 4,500 other similarly-situated individuals with developmental disabilities who are living in nursing facilities,

and thousands more who will or should be screened for admission to nursing facilities in the future. Most of these individuals are unnecessarily segregated in nursing facilities and would prefer to live in an integrated community setting with appropriate services and supports. Additionally, all of the proposed class members currently confined to nursing facilities are denied the specialized services and active treatment that the defendants are obligated to provide.

4. The Complaint requests that the Court certify a plaintiff class comprised of all Medicaid-eligible persons over twenty-one years of age with mental retardation and/or a related condition⁴ in Texas who currently or will in the future reside in nursing facilities, or who are being, will be, or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq.*

5. The proposed class satisfies the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a) of the Federal Rules of Civil Procedure as more fully set forth in the accompanying Memorandum of Law.

6. Because Defendants have acted or refused to act on grounds generally applicable to the entire class, thereby making final injunctive and declaratory relief appropriate for the whole class, the proposed class satisfies the standards of Rule 23(b)(2) of the Federal Rules of Civil Procedure.

7. There are no other pending actions in any court of which Plaintiffs are aware against Defendants alleging the same or similar causes of action.

8. Counsel for the Named Plaintiffs, Advocacy, Inc., the Center for Public Representation, and Weil, Gotshal & Manges LLP (Plaintiffs' Counsel), have discussed and thoroughly explained to the Named Plaintiffs the nature of a class action and the potential

⁴ The class definition utilizes the phrase "mental retardation and/or a related condition," rather than "developmental disabilities" because this is the current terminology in the federal PASARR regulations. 42 CFR § 483.102(b)(3).

advantages and disadvantages to the Named Plaintiffs of proceeding in a class action rather than individually.

9. Prior to filing this action, Plaintiffs' Counsel engaged in extensive settlement negotiations with Defendants over a period of seven months in an attempt to resolve the issues raised in this litigation. The settlement negotiations focused exclusively on a systemic resolution of the issues and did not involve negotiations seeking to obtain individual relief for any of the Named Plaintiffs.

10. Plaintiffs' Counsel are not aware of any person who has relied on the fact that this action was filed as a class action. Plaintiffs' Counsel intend to pursue this litigation on behalf of the class even if the claims of the current Named Plaintiffs are rendered moot by the actions of Defendants or otherwise, either by continuing to pursue the action through the institutional plaintiffs and/or by intervening additional named plaintiffs.

11. Because this a Rule 23 (b)(2) class action, notice to the class is not required. Rule 23(c)(2)(A). *See Newton-Nations v. Rogers*, 316 F.Supp.2d 883, 890 (D.Ariz. 2004); Advisory Committee Note on Rule 23, 215 F.R.D. 158, 218 (2003) ("The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice."). Consequently, the Named Plaintiffs do not believe that there is any need for notice to the class at this point in the litigation.

12. Plaintiffs' Counsel have extensive experience in prosecuting class actions, including numerous class actions on behalf of persons with disabilities. They have the skills and resources to adequately represent the plaintiff class in this case as set forth more fully in the attached Memorandum of Law and seek appointment as co-class counsel in this action.

REQUESTED RELIEF

WHEREFORE, the Named Plaintiffs respectfully request that, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, the Court certify a class consisting of all Medicaid-eligible persons over twenty-one years of age with mental retardation and/or a related condition in Texas who currently or will in the future reside in nursing facilities, or who are being, will be, or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq.* The Named Plaintiffs further request that the Court appoint Advocacy, Inc., Weil, Gotshal & Manges LLP, and the Center for Public Representation as co-class counsel pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ Garth A. Corbett

Garth A. Corbett
State Bar No. 04812300
Sean A. Jackson
State Bar No. 24057550
Advocacy, Incorporated
7800 Shoal Creek Boulevard., Suite. 171-E
Austin, Texas 78757
(512) 454-4816 (Telephone)
(512) 454-3999 (Facsimile)

Yvette Ostolaza
State Bar No. 00784703
Robert Velevis
State Bar No. 24047032
Casey A. Burton
State Bar No. 24058791
Weil, Gotshal & Manges LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201
(214) 746-7700 (Telephone)
(214) 746-7777 (Facsimile)

Steven J. Schwartz
J. Paterson Rae
Center for Public Representation
22 Green Street
Northampton, Massachusetts 01060
(413) 586-6024 (Telephone)
(413) 586-5711 (Facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF CONFERENCE

I, Garth A. Corbett, hereby certify that I have conferred with counsel for Defendants on the relief requested in this Motion for Class Certification, and certify that Defendants are opposed to the relief sought herein.

/s/ Garth A. Corbett
Garth A. Corbett

CERTIFICATE OF SERVICE

I, Garth Corbett, hereby certify that all parties have been served through the Court's ECF system, or if such party does not accept service through the Court's ECF system, then by first class mail.

/s/ Garth A. Corbett
Garth A. Corbett