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MAY 17 1999
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHARON ALLEN, by her next friend and
mother, VIRGINIA ALLEN, et. al.,

Plaintiffs,

v.

WESTERN STATE HOSPITAL, et.al.,

Defendants.

Case No. C99-5018 RJB

ORDER CERTIFYING CLASS
ACTION

This matter comes before the court on Plaintiffs' Motion for Class Certification Fed.R.Civ.P. 23(a) and 23(b)(2) (DKT. #2). The court has considered the pleadings filed in support of and in opposition to the motion, supplemental briefing and the file herein.

FACTS

Plaintiffs are adults with developmental disabilities. They are currently patients at Western State Hospital ("WSH"), or were patients there who have been discharged into other facilities. Plaintiffs bring this suit for declaratory and injunctive relief, asserting that defendants have denied them minimally adequate treatment, habilitation, behavioral support, protection from harm, and other related care and services at WSH and in the community, in violation of their rights under the First and Fourteenth Amendments and certain federal statutes. Plaintiffs wish to bring this action as a

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1 class action. Plaintiffs propose a plaintiff class consisting of individuals with developmental
 2 disabilities who “(1) presently reside at Western State Hospital; 2) may be or are at risk of being
 3 admitted to WSH; or 3) have been discharged from WSH after June 1, 1997 to residential
 4 habilitation centers, or community living arrangements funded, operated or licensed by the
 5 defendants.” (DKT. #2).

6 On April 23, 1999 the court heard oral argument on the issue of class certification. The court
 7 specifically questioned (1) whether the parties could enter into a firm stipulation that would put them
 8 in the same place as a class certification, and (2) whether it was appropriate to have the second part
 9 of the class (those who may be or are at risk of being admitted to WSH).

10 ISSUES

11 1. Whether a firm stipulation is possible, and whether it could put the parties in the same
 12 practical position as class certification.

13 2. Whether class certification is appropriate

14 a. For a class composed of those who are presently at WSH

15 b. For a class composed of those who were recently discharged from WSH.

16 c. For a class composed of those who those who may be or are at risk of being
 17 admitted to WSH.

18 DISCUSSION

19 **1. Whether a firm stipulation is possible, and whether it could put the parties in the same
 20 practical position as class certification.**

21 The decision to certify a class is within the sound discretion of the court. *Montgomery v.*
 22 *Rumsfeld*, 572 F.2d 250, 255 (9th Cir. 1978). Defendants assert that a number of courts have denied
 23 class certification in (b)(2) actions if there would be no benefit to class action and the injunctive relief
 24 would automatically accrue to the benefit of the putative class. Defendants cite *Craft v. Memphis*
 25 *Light, Gas and Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976); *Davis v. Smith*, 607 F.2d 535, 540

1 (2d. Cir. 1978). In *Craft*, the court decided that the determination of the constitutionality of rules
2 and regulations would benefit others even if no class was formed, so certification of a class was not
3 necessary. 534 F.2d at 686.

4 The defendants acknowledge that in order to assert that a class action would result in no
5 greater benefit, it may be necessary for the affected public officials to affirm that they will provide
6 prospective injunctive relief to putative class members if the plaintiffs prevail. Defendants assert that
7 both defendant Timothy Brown, Director of the Division of Developmental Disabilities within the
8 Department of Social and Health Services (“DSHS”), and Jann Hoppler, Director of the Mental
9 Health Division within DSHS, affirm that any relief will benefit all proposed class members.
10 Defendants also state “[s]ince defendants have previously affirmed that any relief granted to plaintiffs
11 will be provided to all those similarly situated, there is no question that future patients will benefit
12 from any changes ordered by the court.” (DKT. #34).

13 Plaintiffs contend that if class certification is denied, discovery, proof at trial, and remedial
14 orders would be limited to the specific conditions affecting the named plaintiffs. Plaintiffs assert that
15 the defendants have not assented to discovery of hospital conditions and community services and
16 programs affecting all members of the putative class, and that this is necessary for complete relief.
17 Plaintiff also are concerned that the court may not be authorized to order system-wide relief on the
18 basis of a few findings of actual injury. *Lewis v. Casey*, 518 U.S. 343, 357-359 (1996). *Lewis* points
19 out that if plaintiffs can only prove, for example, one type of injury, class-wide relief cannot be
20 ordered for injuries that were not proven. 518 U.S. at 359.

21 While a firm stipulation might be able to grant sufficient relief assuming that the named
22 plaintiffs could show injuries sufficient for class-wide relief, it does not appear that defendants’
23 proposed stipulations would be sufficient in that regard. Without the discovery that a certified class
24 would allow, showing sufficient injuries for class-wide relief may be impossible. For this reason, the
25 court will consider what type of class should be certified.

1 **2. Whether class certification is appropriate.**

2 For class certification to be appropriate, plaintiffs must satisfy Fed.R.Civ.P. 23(a) and one of
3 the provisions of Fed.R.Civ.P. 23(b). Fed.R.Civ.P. 23(a), "Prerequisites to a Class Action" states
4 that

5 One or more members of a class may sue or be sued as representative parties on behalf of all
6 only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are
7 questions of law or fact common to the class, (3) the claims or defenses of the representative
8 parties are typical of the claims or defenses of the class, and (4) the representative parties will
9 fairly and adequately protect the interests of the class.

10 Plaintiffs claim that they can show numerosity, commonality of questions of law and fact,
11 typicality of claims or defenses of the entire class, and adequacy of representation for all three
12 proposed groups to make up this class. Defendants contend that a class action is not necessary and
13 that the future group should not be part of any class that is certified.

14 To satisfy Fed.R.Civ.P. 23(b), plaintiff's class must meet one of its provisions. Plaintiffs
15 assert that they satisfy 23(b)(2) which states

16 (2) the party opposing the class has acted or refused to act on grounds generally applicable to
17 the class, thereby making appropriate final injunctive relief or corresponding declaratory relief
18 with respect to the class as a whole

19 **a. For a class composed of those who are presently at WSH**

20 Plaintiffs claim that they satisfy the numerosity requirement which includes the component of
21 the impracticability of joinder. They claim numerosity is satisfied by having at least 61 individuals
22 with developmental disabilities at WSH. Defendants assert that at the time of their response that
23 there are currently 46 patients with developmental disabilities at WSH.

24 Plaintiffs claim that the impracticability of joinder has been easily satisfied in civil rights cases
25 seeking injunctive or other relief, and that a group of institutionalized individuals with developmental
26 disabilities are particularly suited for class certification. They cite *Armstead v. Pingree*, 629 F.Supp.
273, 279 (M.D. Fla. 1986); *Smith v. Heckler*, 595 F.Supp. 1173, 1186 (E.D. Cal. 1984); *National
Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986).

1 Plaintiffs claim that there are common questions of fact and law. They assert that

2 the defendants have denied all of the present . . . members of the class a safe environment,
3 minimally adequate treatment, habilitation, behavioral support, discharge planning, other
4 supports and services at Western State Hospital, an integrated community setting, and equal
5 access to the defendants' community service system.

6 (DKT. #2). They assert that the class members

7 all have the same or similar disabilities, are all segregated in the same facility, are all denied
8 appropriate care for their conditions, and are all subject to the same regime of unnecessary
9 restraint, confinement, abuse, neglect, unsafe conditions, segregation, and denial of
10 appropriate community supports.

11 (DKT. #2).

12 Plaintiffs assert that they satisfy the requirements of typicality. Typicality requires that the
13 plaintiffs' claims and class' claims "are so interrelated that the interest of the class members will be
14 fairly and adequately protected in their absence." *General Telephone Co. of Southwest v. Falcon*,
15 457 U.S. 147, 157-158, fn. 13 (1982). See also *California Rural Legal Assistance v. Legal Services*
16 *Co.*, 917 F.2d 1171, 1175 (9th Cir. 1990) *modified in* 937 F.2d 465 (9th Cir. 1991). The test for
17 typicality encompasses the nature of the claim of the class representative, not the specific facts under
18 which the claim arose. *Jones v. Shalala*, 64 F.3d 510, 514 (9th Cir. 1995).

19 Plaintiffs claim that their claims are typical because, although they all have different treatment
20 and habilitation needs, they have all been denied services that they are entitled to have. Plaintiffs cite
21 *Appleyard v. Wallace*, 754 F.2d 955, 957-958 (11th Cir. 1995) *disapproved on other grounds by*
22 *Green v. Mansour*, 474 U.S. 64 (1985).

23 Defendants also assert that plaintiffs are not typical of the class that they seek to represent.
24 While there are several methods for being admitted to WSH, defendants assert that all of the named
25 individual plaintiffs were admitted to WSH under the judicial civil commitment process of RCW
26 71.05. Defendants assert that plaintiffs are not typical because they have longer periods of residence
at WSH, more hours in restraints, more hours in seclusion, and a higher percentage of them were

1 committed for being a risk to themselves or others, compared with the averages of other identifiable
2 class members.

3 Defendants seem to be asserting that the named plaintiffs should be the “average” of other
4 identifiable class members; there is simply no such requirement. In any lawsuit in which individuals
5 first file suit and then seek to institute a class action, it should be expected that the named individuals
6 believe that they have suffered worse than average treatment, and that is why they chose to
7 participate in a suit while others have not come forward to do so. The same conduct is alleged to
8 have occurred to both the named plaintiffs and the proposed class members. The quantity and
9 quality of alleged mistreatment is largely irrelevant.

10 Plaintiffs claim that they will fairly and adequately represent the interests of the entire class
11 both by having qualified and competent attorneys, and by the class representatives not having
12 antagonistic or conflicting interests with the unnamed members of the class. Plaintiffs claim that
13 counsel is adequate because they are mandated by federal law to advocate on behalf of individuals
14 with developmental disabilities, have extensive experience practicing in this area, their resources are
15 more than adequate, and there are no existing conflicts.

16 Defendants speculate that if the named plaintiffs’ and class members’ interests diverge, that
17 the counsel will be unable to adequately represent the interests of both.

18 Plaintiffs assert that the named plaintiffs are adequate to represent the class because they have
19 the same interests, and will pursue all of their constitutional and statutory rights. Plaintiffs assert that
20 the only differences between the named plaintiffs and the class members go to the issue of remedy
21 and not to the relevant issues of rights and interests.

22 Plaintiffs have met the requirements of numerosity, commonality, typicality, and adequacy for
23 the formation of a class of persons with developmental disabilities that are presently at WSH. The
24 next question is whether plaintiffs have also met the requirements of Fed.R.Civ.P. 23(b).

25 Plaintiffs assert that their action meets the requirements of Fed.R.Civ.P. 23(b)(2) because the
26

1 defendants have

2 refused and/or failed to provide minimally adequate habilitation, treatment, behavioral
3 support, discharge planning, and protection from harm, and adequate supports and services in
4 the most integrated setting to all of the individuals with developmental disabilities at WSH,
including the named plaintiffs, and the rest of the plaintiff class.

5 (DKT. #2). Plaintiffs assert that civil rights cases (especially those seeking hospital or prison reform)
6 for which declaratory and injunctive relief are sought, constitute exactly the type of litigation for
7 which this provision was designed. Plaintiffs cite *Holmes v. Continental Can Co.*, 706 F.2d 1144,
8 1152 (11th Cir. 1983); *Advisory Committee Notes*, 39 F.R.D. 69, 102 (1966); *Coley v. Clinton*, 635
9 F.2d 1364, 1378 (8th Cir. 1980); *Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982).

10 **b. For a class composed of those who were recently discharged from WSH.**

11 This past group consists of patients with developmental disabilities who were discharged
12 from WSH to residential habilitation centers or community living arrangements provided by the
13 defendants. The plaintiffs seek to certify this group to represent problems with their community
14 services after they have been discharged from WSH.¹ Neither party devotes much discussion to
15 whether this group is appropriate for class certification.

16 Plaintiffs claim that numerosity is satisfied for this group by having an unknown number of
17 persons with developmental disabilities who have been discharged. Defendants assert that at the
18 time of their response that there are probably between 78 and 98 patients with developmental

19 ¹It would not be appropriate to certify this group to seek declaratory and injunctive relief for
20 conditions that they experienced at WSH because this type of relief would have no direct impact on
21 this group. For this reason this group has no personal interest in the outcome of this suit as it
22 pertains to conditions at WSH because it will not affect them. Although some discharged patients
may at some time be re-admitted, that would give them an interest based on being members of the
future group, not by virtue of being in the past group.

23 It is not clear why, if there is indeed inappropriate placement for individuals with
24 developmental disabilities in state run facilities besides WSH, this group should be limited to persons
25 who were first patients at WSH. It seems likely that there are other routes which would place
persons with developmental disabilities in these facilities without first going to WSH. If placement is
inappropriate there for the first group, why would not it be inappropriate for the second group as
well?

1 disabilities, plus approximately 15 patients discharged since January 1, 1999, who have been
2 discharged during the relevant period. This group satisfies the numerosity requirement.

3 On the issue of typicality, defendants assert that the claims of discharged patients are
4 significantly different than the claims of hospitalized patients because they are receiving
5 comprehensive and high quality residential services and support in the community. Defendants
6 *appear to be arguing over contested factual issues.*

7 The parties do not discuss the other requirements for a class action specifically in regards to
8 this group. On the basis of the discussion in section 2(a) above, they appear to meet the
9 requirements for class certification.

10 **c. For a class composed of those who those who may be or are at risk of being admitted to**
11 **WSH.**

12 Defendants assert that it is impossible to determine the number of persons with
13 developmental disabilities who are or may be at risk of admittance to WSH. Plaintiffs claim that
14 numerosity is satisfied by having an unknown number of persons with developmental disabilities who
15 are at risk to being admitted to WSH in the future. Plaintiffs claim that "The members of the
16 proposed class are readily definable and identifiable as their names and addresses are ascertainable
17 from records maintained by the defendants." (DKT. #2). From plaintiffs' reply it is clarified that the
18 group of people plaintiffs consider to be the class of potential future admittees is either (1) the
19 Division of Developmental Disabilities' ("DDD") list of 28,000 eligible persons on its caseloads
20 (according to plaintiffs this list was compiled to assess those who may pose a community risk for
21 dangerousness, a basis for involuntary commitment) (DKT. #16, Exhibits 1-4), (2) the 550 clients, as
22 of August 1997, with developmental disabilities who were in need of community protection level
23 service for their risk of dangerousness, or (3) the 237 clients of the 550 clients who have a mental
24 health diagnosis (DKT. #16, Exhibit 5).

1 The difficulty is that none of these groups, though ascertainable, would fully encompass the
2 group of people who may be or are at risk of being admitted to WSH. This is both because the most
3 encompassing list only clarifies potential clients who may pose a danger to the community, this list
4 does not appear to include individuals who may pose a danger to themselves. Inevitably, some of the
5 people who are potentially at risk for admittance to WSH are unascertainable. Particularly troubling
6 is the question of why we need a class of persons who may be at risk of being admitted to WSH but
7 who have no certainty that they will be admitted.

8 A more effective future class would appear to be future patients of WSH who suffer from
9 developmental disabilities. While this group is wholly unascertainable at this time, it is the only
10 group which would mirror the other two class action groups.

11 Plaintiffs claim that future members of the class share common questions of law and fact in
12 that they will be denied

13 a safe environment, minimally adequate treatment, habilitation, behavioral support, discharge
14 planning, other supports and services at Western State Hospital, an integrated community
setting, and equal access to the defendants' community service system.

15 (DKT. #2).

16 Defendants point out that none of the named plaintiffs are future admittees of WSH and on
17 this basis question whether there is typicality between class representatives and future class members
18 can be achieved.

19 The purpose of the typicality requirement is to assure that the interest of the named
20 representative aligns with the interests of the class. Typicality refers to the nature of the
claim or defense of the class representative, and not to the specific facts from which it arose
or the relief sought.

21 *Hanon v. Dataproducts Corp.* 976 F.2d 497, 508 (9th Cir. 1992) (citing *Weinberger v. Thornton*,
22 114 F.R.D. 599, 603 (S.D.Cal.1986)). "The test of typicality 'is whether other members have the
23 same or similar injury, whether the action is based on conduct which is not unique to the named
24 plaintiffs, and whether other class members have been injured by the same course of conduct.'"
25

1 *Hanon*, 976 F.2d at 508 (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)).

2 Although future patients are in a different position from present and discharged patients, the
3 class representatives have suffered the same or similar injuries that plaintiffs assert that the future
4 class members have the potential to suffer once admitted to WSH. Typicality is thus satisfied.

5 As discussed above, the representatives and the attorneys meet the requirements of adequacy.
6 Fed.R.Civ.P. 23(b) is also satisfied as plaintiffs are seeking appropriate declaratory and injunctive
7 relief.

8 For these reasons, future patients of WSH who suffer from developmental disabilities should
9 be certified as part of the class as long as notice requirements can be satisfied by their admittance.

10 Under the Fed.R.Civ.P. 23(c)(2), class actions certified under 23(b)(2) are not specified to
11 require notice to the class members. "By its terms subdivision (c)(2) is inapplicable to class actions
12 for declaratory and injunctive relief maintained under subdivision (b)(2). *Eisen v. Carlise*, 417 U.S.
13 156, 177, fn. 14 (1974). See also *Craford v. Honig*, 37 F.3d 485, 487, fn.2 (9th Cir. 1994)
14 ("Fed.R.Civ.P. 23(b)(2) . . . does not require notice or permit members to opt out, although a court
15 in its discretion may provide for an opt-out or notice.")

16 If this case should be dismissed or settled, notice must be given to all class members under
17 Fed.R.Civ.P. 23(e). Plaintiffs assert that this notice can be achieved through such means as posting
18 notices where institutionalized class members can see them, *Vecchoine v. Wohlgemuth*, 80 F.R.D.
19 32, 41, fn. 9 (E.D. P.A. 1978), *Van Horn v. Trickey*, 840 F.2d 604(8th Cir. 1988), newspaper
20 advertisements, and notice to program administrators, county mental health directors, and
21 community groups, *Vecchoine*, 80 F.R.D. at 41 fn. 9.

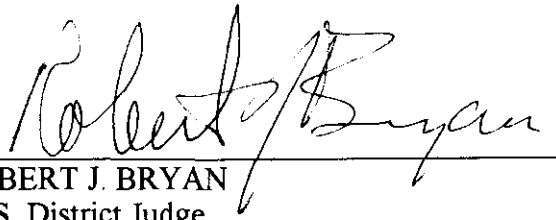
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Therefore, it is hereby

ORDERED that Plaintiffs' Motion for Class Certification Fed.R.Civ.P. 23(a) and 23(b)(2) (DKT. #2) is **GRANTED**. The plaintiff class is **CERTIFIED** to consist of individuals with developmental disabilities 1) who presently reside at Western State Hospital, 2) who have been discharged from Western State Hospital after June 1, 1997 to residential habilitation centers, or community living arrangements funded, operated or licensed by the defendants, and 3) who will be admitted to Western State Hospital in the future.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

DATED this 17 day of May, 1999.



ROBERT J. BRYAN
U. S. District Judge

ec

United States District Court
for the
Western District of Washington
May 18, 1999

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:99-cv-05018

True and correct copies of the attached were mailed by the clerk to the following:

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