

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ENZO COSTA, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Case No. 1:19-cv-3185 (RDM)

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs hereby move, pursuant to Fed. R. Civ. P. 23 for entry of an order determining that this action may be maintained as a class action on behalf of “all current and future Saint Elizabeths Hospital patients.” The grounds for this motion are set forth below. Plaintiffs also respectfully request that the Court appoint their undersigned counsel as Class Counsel pursuant to Fed. R. Civ. P. 23(g).

INTRODUCTION

For the second time in three years, Saint Elizabeths Hospital (“Saint Elizabeths” or the “Hospital”) was without safe, running water from September 26, 2019 through at least October 23, 2019, exposing patients at the facility to harmful physical, emotional, and mental health consequences. Each of the individual plaintiffs (Enzo Acosta, Vinita Smith, Stefon Kirkpatrick, William Dunbar (collectively, the “Plaintiffs”)) and many of the other patients at the Hospital experienced unhygienic conditions and an interruption of their medical and mental health care. While this matter has not yet proceeded to discovery, it is clear even at this early juncture that this matter should proceed as a class action on behalf of the Saint Elizabeths’ patient population.

Pursuant to Local Rule 23.1(b) and Federal Rule of Civil Procedure 23(b), Plaintiffs hereby move for certification of a Rule 23(b)(2) class, and request appointment of Plaintiffs' Counsel as Class Counsel pursuant to Rule 23(g).

The putative class consists of Saint Elizabeths' current and future patient population. All of the members of that population are persons with mental health disabilities who are, or who will be in the future, committed to the Defendants' care. ECF 21-2 (Decl. of K. Singh Taneja, ¶ 1). All members were injured and likely to be injured by recurrent inhumane, unsafe, and medically dangerous conditions at Saint Elizabeths and the lack of appropriate hospital administration that led to those conditions in violation of Fifth Amendment's Due Process Clause, and the ADA, 42 U.S.C. § 12131.

This action can fairly and efficiently be adjudicated as a class action and should proceed as a class for several reasons. *First*, Plaintiffs' claims that Defendants' actions and/or inactions have deprived class members of humane conditions and subjected them to harm in violation of the Fifth Amendment's Due Process Clause and the ADA raises common, class-wide questions, the answer to which can be resolved through common evidence: why did the water outage occur, why do water outages keep occurring, why do the outages have such a negative impact on hygienic conditions at the facility, why has patient care been so severely impacted, why are Defendants' policies for handling water emergencies so deficient, and why shouldn't Defendants be held responsible?

Second, Plaintiffs, on behalf of themselves and each putative class member, seek a declaration that Defendants violated Plaintiffs' rights under the Fifth Amendment to the U.S.

Constitution and the ADA and an injunction requiring Defendants' agents, employees, and all persons acting in concert with or on behalf of Defendants to cease their unconstitutional and unlawful practices, as detailed at paragraph 113 of Plaintiffs' Complaint. In particular, it is clear from the outcome of the last two water outages that there are significant deficiencies in Defendants' policies, including its "water emergency protocol" that can only be effectively addressed through injunctive relief. That requested relief is exactly the kind of class-wide relief contemplated by Rule 23(b)(2). *See Wal-Mart v. Dukes*, 564 U.S. 338, 361 (2011) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture.") (citation and internal punctuation omitted).

Plaintiffs note that, per the requirement of Local Rule 23.1(b), this motion is being filed within 90 days of filing the Complaint.¹ On January 17, 2020, Plaintiffs' counsel met and conferred with Defendants' counsel regarding this motion. Defendants' counsel stated that they opposed the motion to certify the class.

For the reasons set forth below, the Court should grant Plaintiffs' Motion for Class Certification.

STATEMENT OF FACTS²

I. PLAINTIFFS AND THE PROPOSED CLASS

Saint Elizabeths is the District's only public psychiatric facility for individuals with serious and persistent mental illness who need intensive inpatient care to support their recovery.

¹ This motion is being filed prior to any discovery.

² To the extent necessary, Plaintiffs can submit declarations from each of the proposed class representatives attesting to the facts discussed in this section.

Compl. ¶ 15. The patient population of Saint Elizabeths are all individuals who are indefinitely, involuntarily committed to the District's care, and each patient at Saint Elizabeths will likely be committed at Saint Elizabeths for all or most of their lives. Compl. ¶ 37.

The individual Plaintiffs, like the class they seek to represent, are persons with a disability or perceived to have a disability, as that term is defined in the ADA, are entitled to the protections of the ADA. 42 U.S.C. §12102(2)(A), and are indefinitely, involuntarily committed to the District's care. Compl. ¶ 37.

Enzo Costa is thirty-eight years old and is a patient at Saint Elizabeths Hospital in Unit 1C. Compl. ¶ 9. He is diagnosed with schizophrenia, dystonia, schizo-affective disorder, and anti-social personality disorder. *Id.* He is indefinitely, involuntarily civilly committed to the District's care. Compl. ¶ 37. He was a patient at Saint Elizabeths when it was without safe, running water and was exposed to conditions with severe physical, emotional, and mental health consequences. Compl. ¶¶ 40, 42, 47-49, 56-58, 64-66, 73, 81.

Vinita Smith is fifty-six years old and is a patient at Saint Elizabeths Hospital in Unit 1F. Compl. ¶ 10. She is diagnosed with schizo-affective disorder that requires medication and therapy. *Id.* She is indefinitely, involuntarily civilly committed to the District's care. Compl. ¶ 37. She was a patient at Saint Elizabeths when it was without safe, running water and was exposed to conditions with severe physical, emotional, and mental health consequences. Compl. ¶¶ 40, 42, 44, 55, 62-63, 69-70, 72, 81.

Stefon Kirkpatrick is thirty years old and is a patient at Saint Elizabeths Hospital in Unit 2C. Compl. ¶ 11. He is diagnosed with psychosis disorder. *Id.* He is indefinitely,

involuntarily civilly committed to the District's care. Compl. ¶ 37. He was a patient at Saint Elizabeths when it was without safe, running water and was exposed to conditions with severe physical, emotional, and mental health consequences. Compl. ¶¶ 40, 42, 50-51, 58-59, 67, 74, 81.

William Dunbar is thirty years old and is a patient at Saint Elizabeths Hospital in Unit 2A. Compl. ¶ 12. He is diagnosed with paranoia schizophrenia. *Id.* He is indefinitely, involuntarily civilly committed to the District's care. Compl. ¶ 37. He was a patient at Saint Elizabeths when it was without safe, running water and was exposed to irreparable harmful physical, emotional, and mental health consequences. Compl. ¶¶ 40, 42, 51-52, 60, 68, 75-76, 81.

II. THE WATER OUTAGES AND IMPACT ON PATIENT CARE

For the second time in three years, Saint Elizabeths had an extended water outage from September 26 through at least October 23, 2019. Compl. ¶ 22. During that period, Saint Elizabeths did not have safe, running water, and the water supply at Saint Elizabeths was either completely turned off or was limited for sewage use only. Compl. ¶ 22.

On September 26, 2019, the D.C. Department of Behavioral Health ("DBH") received preliminary lab results of a water quality test of Saint Elizabeths showing evidence of pseudomonas and legionella bacteria in the facility's water supply. Compl. ¶ 26. Legionella bacteria is known for causing Legionnaires' disease, which can lead to severe infections in people with weakened immune systems. Compl. ¶ 27.

In response to the bacteria found in the water supply, DBH reportedly implemented its "water emergency protocol" and turned the water off completely. Compl. ¶ 30. The extended

water outage and its effects presented a clear risk to the health and safety of Saint Elizabeths' patients, including Plaintiffs and class members. The extended water outage and its effects traumatized patients and exacerbated symptoms of mental illness. Compl. ¶ 24.

Plaintiffs and class members were denied appropriate medical care. During the 2019 crisis:

- The Water Outage caused a tense and stressful environment among patients and staff. Compl. ¶ 77.
- Because of the extended Water Outage, Defendants closed the Treatment Mall, patients remained in their locked wards and were not receiving appropriate group therapy, art therapy, or exercise. Compl. ¶ 40.
- Staff, including psychologists and psychiatrists, were not regularly attending work because of the water crisis, forcing cancelations of patient team meetings and other appointments. Compl. ¶¶ 39-41, 47-52, 77.
- Defendants severely curtailed or suspended the psychiatric care on which patients depend. Patients at Saint Elizabeths, including Plaintiffs, received fewer services. The minimal services they received were not appropriate or tailored to their needs. Compl. ¶ 42.
- Patients had difficulty receiving medications (particularly those that need to be suspended in water) and addressing side effects (particularly dry mouth and dehydration). Compl. ¶¶ 43, 47.
- Patients were confined to their units during the day instead of receiving therapy and recreation. Compl. ¶¶ 77, 81.

- There was an increase in fights and physical aggression between patients following the water outage. Compl. ¶ 82.
- There has been an increase in the use of seclusion and restraint of the patients following the water outage. Compl. ¶ 83.
- Saint Elizabeths staff did not perform routine checks of new patients for lice, bacteria, and other infections. Compl. ¶ 43.
- Patients had no access to dentistry and podiatry care that is typically available at Saint Elizabeths. Compl. ¶ 45.

Plaintiffs and class members were denied basic hygienic conditions. During the water crisis, patients and staff were not able to flush the toilets regularly, wash their hands, shower, wash clothing, or drink from the water fountains. Compl. ¶¶ 53, 72-75. Patients at Saint Elizabeths used bottled water, hand sanitizers, and personal care body wipes to care for their basic hygiene. Compl. ¶ 53. Patients were permitted limited use of temporary portable showers and toilets. Compl. ¶¶ 53-71. Clothes and linens were only washed periodically and were sent outside of the facility to be cleaned. Compl. ¶ 73.

Both the interruption in health care and the unhygienic conditions negatively impacted the patients of Saint Elizabeths as a class. Moreover, because this is the second time in three years that Saint Elizabeths had an extended water outage and there are no apparent procedures in place to ensure that plaintiffs receive adequate health care and safe conditions, this harm is likely to reoccur. A restrictive psychiatric hospital setting like Saint Elizabeths must always be safe, calm, predictable in its routine, and responsive to each individual's needs for treatment in order to achieve its goals of preventing and ameliorating harm. Compl. ¶ 78. An environment that is

chaotic, unpredictable, and unsafe, in which patients are not receiving individualized, continuous, intensive treatment risks traumatizing people further and exacerbating the psychiatric needs that were the basis for their admission. Compl. ¶ 79.

ARGUMENT

I. PLAINTIFFS SATISFY THE REQUIREMENTS OF RULE 23(A)

As demonstrated below, the proposed class satisfies each of the four requirements in Rule 23(a): numerosity, commonality, typicality, and adequacy. *See* Fed. R. Civ. P. 23(a).

A. The Proposed Class Satisfies Numerosity

To satisfy Rule 23(a)(1), a class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “Numerosity is satisfied” with credible evidence that “a proposed class has at least forty members.” *See Richardson v. L’Oreal USA, Inc.*, 991 F. Supp. 2d 181, 196 (D.D.C. 2013); *see also Frazier v. Consol. Rail Corp.*, 851 F.2d 1447, 1456 n.10 (D.C. Cir. 1988) (discussing appellate courts’ acceptance of the 40-member threshold). The proposed class meets this standard.

The named Plaintiffs bring this suit on their own behalf and on behalf of all current Saint Elizabeths Hospital patients and all patients who will be admitted in the future. This class is so numerous that joinder of all members is impractical. Saint Elizabeths Hospital has approximately 270 patients. Compl. ¶ 92. Because the population changes on a daily basis, it is inherently fluid and the class also includes future members whose names are not known at this time. Fed. R. Civ. P. 23(a)(1).

The number of individuals in Plaintiffs’ proposed class therefore significantly exceeds the presumptive forty-person standard. *See Richardson*, 991 F. Supp. 2d at 196. Numerosity is plainly satisfied.

B. The Proposed Class Satisfies Commonality

Rule 23(a)(2) requires the existence of “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “Commonality . . . requires the court to determine whether there is at least one question of law or fact common to the class.” *Moore v. Napolitano*, 926 F. Supp. 2d 8, 29 (D.D.C. 2013) (emphasis added). “Factual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members.” *Id.* As the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, “for purposes of Rule 23(a)(2)[,] even a single common question will do.” 564 U.S. 338, 359 (2011) (internal quotation marks and citations omitted).

Commonality is satisfied for a due process claim where all members of the class would be affected by resolution of the constitutionality of the policy as it was applied during the class period. *See Daskalea v. Wash. Humane Soc.*, 275 F.R.D. 346, 374 (D.D.C.2011). Commonality is satisfied for a disability discrimination claim under the ADA where a plaintiff alleging discrimination against a class shows discrimination against a particular group of which the plaintiff is member, plus some additional factor that permits a court to infer that members of the class suffered from a common policy of discrimination. *See Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 26 (D.D.C.2006) (internal quotation marks and citations omitted) .

A common question is one that “is such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 564 U.S. at 350. What matters to class certification is “the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Dukes*, 564 U.S. at 350. Where plaintiffs allege wrongdoing by the defendant, commonality is established where plaintiffs “provide significant proof that there exists a common policy or practice that is the alleged source of the harm to class members.” *Thorpe v. District of Columbia*, 303 F.R.D. 120, 145 (D.D.C. 2014) (internal quotations and citations omitted).

All members of the class were subjected to the inhumane conditions during the Water Outage as a result of Defendants’ deficient water emergency protocols and policies. Plaintiffs had limited opportunities to shower, were provided only with unsanitary toilets that did not flush, were confined to their rooms and units where normal standards of cleanliness were not maintained, and had their psychiatric and medical care severely limited.

The Defendants’ water emergency protocols and policies (or lack thereof) injured or will injure each and every class member by virtue of their failure to implement an effective system of maintaining a safe water supply, remediating problems in the water supply, and maintaining safe and sanitary conditions at the Hospital during a water outage. Thus, Plaintiffs’ claims raise the following common questions: (1) why did the water outage occur? (2) why do water outages keep occurring? (3) why do the outages have such a negative impact on hygienic conditions at the facility? (4) why has patient care been so severely impacted? (5) why are Defendants’ policies for handling water emergencies so deficient? and (6) why shouldn’t Defendants be held

responsible? True or false, as held by this Court in *Thorpe*, “resolution of these common contentions will generate common answers for the entire class and resolve issues that are central (and potentially dispositive) to the validity of each plaintiff’s claim and the claims of the class as a whole.” *Thorpe*, 303 F.R.D. at 146. Commonality is plainly satisfied.

C. The Proposed Class Representatives Have Claims Typical of the Class

Rule 23(a)(3) “requires that the claims . . . of the representative parties be typical of the claims . . . of the class.” Fed. R. Civ. P. 23(a)(3). “A plaintiff’s claims can be typical of those of the class even if there is some factual variation between them.” *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 8 (D.D.C. 2010). “Rule 23 does not require that the representative plaintiffs endured precisely the same injuries that may have been sustained by other class members, only that the harm complained of be common to the class, and that the named plaintiffs demonstrate a personal interest or threat of injury that is real and immediate, not conjectural or hypothetical.” *Johnson v. District of Columbia*, 248 F.R.D. 46, 53 (D.D.C. 2008).

Typicality is therefore satisfied if (1) “each class member’s claim arises from the same course of events that led to the claims of the representative parties;” and (2) “each class member makes similar legal arguments to prove the defendant’s liability.” *Greenberg v. Colvin*, 63 F. Supp. 3d 37, 44 (D.D.C. 2014). The Plaintiffs’ claims meet this standard.

First, the Plaintiffs and each member of the proposed class were subjected to Defendants’ same actions and inactions. All class members were, and are likely in the future, deprived of the basic medical care and safe and sanitary conditions at Saint Elizabeths because of extended water

outages. Accordingly, the “representatives have suffered injuries in the same general fashion as absent class members.” *Hardy v. District of Columbia*, 283 F.R.D. 20, 24-25 (D.D.C. 2012).

Second, the Plaintiffs’ claims are shared by all the members. Each class member brings the exact same claims under the Fifth Amendment’s Due Process Clause and the ADA. Every putative class member relies upon the same basic theory of liability—that the water conditions at Saint Elizabeths and Defendants’ deficient response to those conditions have affected and exposed patients to irreparable, harmful physical, emotional, and mental health consequences. *See* Compl. ¶¶ 19-83. Every putative class member seeks the same injunctive relief to order Defendants to cease their unconstitutional and unlawful practices. *See id.* This satisfies Rule 23(a)(3)’s typicality requirement.

D. The Proposed Class Representatives and Class Counsel Are Adequate

Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This requirement contains two criteria: “(1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel.” *Moore*, 926 F. Supp. 2d at 31 (quoting *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575-76 (D.C. Cir. 1997)).

The named Plaintiffs will fairly and adequately represent the interests of the class. They possess a strong personal interest in the subject matter of the lawsuit and are represented by experienced counsel with expertise in class action litigation in federal court. Moreover, the claims of these individuals mirror the claims of the class. Therefore, the proposed class

representatives' interests are not antagonistic to the interests of absent class members. *See Thorpe v. District of Columbia*, 303 F.R.D. 120, 150 (D.D.C. 2014) (finding "no real conflict of interest, since the scope of the current litigation is limited to a systemic challenge").

In addition, Plaintiffs' proposed class counsel—the American Civil Liberties Union Foundation of the District of Columbia ("ACLU"), Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLC"), and Arnold & Porter LLP—can fairly and adequately represent the class. Each of the three organizations have been appointed as class counsel in numerous matters. Moreover, ACLU, WLC and Arnold & Porter LLP have committed and will continue to commit substantial resources to prosecuting this case. Accordingly, Rule 23(a)(4)'s adequacy requirement in the instant action is satisfied.

II. THE CLASS SATISFIES THE REQUIREMENTS OF RULE 23(B)(2)

To certify a class, a plaintiff must also satisfy at least one of the three types of classes described in Rule 23(b). Plaintiffs seek certification under Rule 23(b)(2).

Certification under Rule 23(b)(2) is appropriate where "(1) the defendant's action or refusal to act [is] generally applicable to the class; and (2) plaintiffs . . . seek final injunctive relief or corresponding declaratory relief on behalf of the class." *Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 33, 47 (D.D.C. 2007). *See also DL v. D.C.*, 860 F.3d 713, 723 (D.C. Cir. 2017) (same). That is the case here, and Plaintiffs' requests for declaratory and injunctive relief easily satisfy both of those requirements.

First, the water outage affected patient care and hygienic conditions throughout the facility, and affected all of Saint Elizabeths' patients. All patients were exposed to conditions that deprived them of, among other things, proper medical care, hygiene, and psychiatric care.

These injuries stemmed from Defendants' adherence to a set of policies, procedures, and protocols (including the water emergency protocol). Thus, Defendants' actions or inactions were generally applicable to the class for purposes of Rule 23(b)(2).

Second, the Supreme Court has stated "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted." *Dukes*, 564 U.S. at 360 (internal quotations and citations omitted). Rule 23(b)(2) certification is allowed when "a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* The declaratory and injunctive relief sought here is class-wide in nature, and would provide relief to each class member.

Plaintiffs seek a declaration that Defendants violated Plaintiffs' rights under the Fifth Amendment to the U.S. Constitution and the ADA and an injunction requiring Defendants' agents, employees, and all persons acting in concert with or on behalf of Defendants to cease their unconstitutional and unlawful practices.

Plaintiffs' requested injunctive relief consists entirely of orders that would apply to the whole facility and therefore to the entire class—including a restriction on admissions during water outages (which affects the entire population's access to services when those services are limited), water testing, maintenance of therapeutic services and sanitary conditions, and development of an emergency protocol. See Compl. ¶ 113. Although phrased in terms of individuals, the request for individualized assessments, *id.* at § 113(b), likewise constitutes classwide relief, in that this relief would require Defendants to conduct an assessment for each member of the class -- i.e., the entire patient population. That the results of individual reviews

may vary does not dilute the across-the-board nature of the mandate to assess *all* patients.

Plaintiffs are asking here for a classwide review, not for the Court to order Defendants to dictate a uniform outcome for each review. Thus, this remedy, like the others requested, would provide relief to the entire class.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to certify the proposed class under Rule 23(b)(2) and appoint Plaintiffs' Counsel as Class Counsel pursuant to Rule 23(g).

Dated: January 21, 2020

Respectfully submitted,

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