IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ETHEL WILLIAMS, JAN WRIGHTSELL, DONELL HALL and EDWARD BRANDON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	**Civil Action No. 05 C 4673**
v.	)	
ROD BLAGOJEVICH, in his official capacity as Governor of the State of Illinois, CAROL L. ADAMS, in her official capacity as Secretary of the Illinois Department of Human Services, LORRIE STONE, in her official capacity as Director of the Division of Mental Health of the Illinois Department of Human Services, ERIC E. WHITAKER, in his official capacity as Director of the Illinois Department of Public Health, and BARRY S. MARAM, in his official capacity as Director of the Illinois Department of Healthcare and Family Services,	)	**Judge Hart** **Magistrate Judge Denlow**
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S RESPONSE TO MOTION FOR CERTIFICATION OF CLASS

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs filed their First Amended Complaint and Motion for Certification of Class on April 26, 2006. Defendants filed their Answer to the Plaintiffs' First Amended Complaint on June 7, 2006. All discovery on the Motion for Certification of Class was concluded on July 14, 2006.

The four named Plaintiffs have been diagnosed with mental illness and live in private intermediate care nursing homes, referred to as Institutions for Mental Disease ("IMDs"). Plaintiffs move to certify a class consisting of "all persons who: (1) have a mental illness; (2) with appropriate supports and services, could live in the community; and (3) are institutionalized in privately-owned IMDs."

Plaintiffs allege that Defendants have allowed them to be "needlessly segregated" in IMDs[1] and failed to provide them with services in the most integrated setting appropriate to their needs. Plaintiffs' claims are based on the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), interpreting Title II of the American with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131, 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

LEGAL STANDARDS FOR CLASS CERTIFICATION

"[A] district court has broad discretion to determine whether certification of a class is appropriate." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir.1993). Nonetheless, a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of" the rule governing class actions, Federal Rule of Civil Procedure 23, have been satisfied. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). "[T]he party seeking class certification assumes the burden of demonstrating that certification is appropriate." *Retired Chicago Police Ass'n*, 7 F.3d at 596.

Under Rule 23, an action may be maintained as a class action if all of the prerequisites of Rule 23(a) and at least one of the three elements of Rule 23(b) are satisfied. *See* Fed.R.Civ.P. 23. Rule 23(a) contains four express mandatory requirements. *Id.* First, the class must be so numerous that joinder of all members is impracticable ("numerosity"). Second, there must be questions of law or fact common to the class ("commonality"). Third, the claims or defenses of the representative parties must be typical of the claims or defenses of the class ("typicality"). Fourth, the Court must be satisfied that the representative parties and their counsel will fairly and adequately protect the interests of the class ("adequacy"). *Id.* In this case, the Plaintiffs allege that this action qualifies under Rule 23(b)(2) - that "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." Fed. R. Civ. P. 23(b)(2).

---

[1] The facilities in which Plaintiffs reside are long-term care facilities, that by virtue of their population mix, are known by the funding term IMD. As stated in Defendant's Answer to Plaintiffs' First Amended Complaint, paragraph 3, "IMDs are nursing homes with a certain statistical percentage of residents with mental illness, and that percentage determines whether there is a federal match for Medicaid eligible residents."

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (internal quotation omitted). However, "*Eisen* has not been interpreted so broadly...as to foreclose inquiry into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 as distinguished from an inquiry into the merits of plaintiff's particular individual claim." *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981). The court is not required to accept allegations in the complaint as true, but rather should make whatever factual and legal inquiries are necessary under Rule 23. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-676 (7th Cir. 2001) ("nothing in the 1966 amendments to Rule 23, or the opinion in *Eisen*, prevents a district court from looking beneath the surface of a complaint to conduct inquiries identified in the rule and exercise the discretion it confers"). Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification. *Id.* at 677.

ARGUMENT: CLASS CERTIFICATION MUST BE DENIED

I. THE COURT SHOULD DENY PLAINTIFFS' MOTION BECAUSE PLAINTIFFS FAIL TO SHOW THAT THE DEFENDANT HAS ACTED OR REFUSED TO ACT ON GROUNDS GENERALLY APPLICABLE TO THE CLASS

While Rule 23 analysis frequently starts with the Rule 23(a) requirements, in this case it makes sense to start with the Rule 23(b)(2) requirements because the Plaintiffs are unable to satisfy them and the analysis will provide this Honorable Court with the background of the Plaintiffs. Rule 23(b)(2) requires that "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." Fed. R. Civ. P. 23(b)(2). Plaintiffs assert that they have satisfied Rule 23(b)(2), because the Defendant 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." Pl. Memo in Support of Mot. for Cert. of Class at 12. A court may make whatever factual and legal inquiries are necessary in determining whether the requirements of 23(b)(2) are met. *See Szabo*, 249 F.3d at 675-676. Simply put, the facts

do not support such a conclusion.

Contrary to the bleak picture painted by the Plaintiffs, the practices and policies of the Defendant have not "effectively den[ied] the Plaintiffs and class members the opportunity to move from IMDs to more integrated settings in the community." Pl. Memo in Support of Mot. for Cert. of Class at 13. Instead, a closer scrutiny of the records[2] of the named Plaintiffs supports the opposite conclusion. In actuality, Plaintiffs are regularly assessed, informed of their rights to community services, evaluated for their readiness for community placement and are provided with the most integrated setting appropriate to their needs and desires.

For example, Plaintiff A,[3] living in an IMD[4] has received regular, ongoing, and individualized assessments of his/her physical and mental health needs to provide the optimum level of care best suited to Plaintiff A's condition. Plaintiff A's treatment team is made up of the following professionals: a psychiatrist, a physician, a licensed nurse, a psychiatric rehabilitation service provider (hereinafter referred to as "PRSC"), as well as treatment professionals at a day program.

Plaintiff A has been consistently found by treatment professionals to be in need of the level of care provided in an IMD. (*See for example* 3909-3924). Plaintiff A's medical and psychiatric needs are assessed monthly by Plaintiff A's psychiatrist, physician, PRSC, and the IMD's nursing staff (*See for example* 0329-0946; 3348-53; 3947-3952).

As recently as June 2006, Plaintiff A's physician reviewed and approved Plaintiff A's care

---

[2] The term "records" refers to the documents obtained from Monroe Pavilion, Wilson Care, and Greenwood Care, bates stamped MP 00001- 04095, WC 0001 - 0785, GC 00001 - 01726, and WW 0001 - 1003, which detail the named Plaintiffs' medical history and treatment.

[3] Pursuant to Agreed Protective Order entered on January 30, 2006, and in an effort to protect Plaintiffs' privacy, Plaintiffs are referred to as Plaintiff A, Plaintiff B, Plaintiff C, and Plaintiff D, the order of which does not correspond to the order that Plaintiffs are listed on Plaintiffs' First Amended Complaint.

[4] In a further effort to adhere to the Agreed Protective Order entered on January 30, 2006 and to protect the Plaintiffs' privacy, Defendant has omitted such other information that could be used to identify the Plaintiffs. For e.g., the Defendant omits the names of the IMDs in which the Plaintiff reside as well as that portion of the bates stamp which identifies the IMD that produced the records. Defendant will provide the full bates stamp numbers for each citation upon direction from the Court or request from the other parties.

plan and certified that Plaintiff A continued to need the level of care currently being provided. (3909) In fact, a physician reviews Plaintiff A's care plan and physicians orders on a monthly basis. (*See for example* 3909-3924). Additionally, in February 2006, several additional assessments were completed by the PRSC working with Plaintiff A. (4025-4037). Plaintiff A's most recent assessment states that Plaintiff A should continue living in an IMD because of his/her need for medication management to reduce internal stimuli, social skills, and other independent living skills. (*See* 4025; 4027; 4030; 4031; 4032). A review of Plaintiff' A's February 2006 individualized comprehensive treatment plan shows that Plaintiff A's personal goal of discharge is included in the plan, but the plan goes on to say that the goal is not realistic because of Plaintiff A's continued severe psychiatric symptoms. (3826).

Contrary to the Plaintiffs' assertions in their First Amended Complaint, the records clearly indicate that Plaintiff A is provided with more than formulaic assessments that "lack any individual plan or review," and that the records do in fact reflect Plaintiff A's desire to live independently. *See* Pl. Amend. Compl. at 61, 68 and 79.

Plaintiff B lives in an IMD and has received regular, ongoing, and individualized assessments of his/her physical and mental health needs. Plaintiff B's medical and psychiatric needs are assessed monthly by his/her physician, psychiatrist, PRSC, and the IMD's nursing staff. (*See for example* 222-225, 227-228, 255-264; 286-309; 265-269). Plaintiff B is also monitored by a podiatrist and ophthalmologist to monitor Plaintiff B's cataracts and potential vision deterioration. (*See for example* 211-213).

As recently as June 2006, Plaintiff B's physician reviewed Plaintiff B's care plan and certified that Plaintiff B was in need of the intermediate level of care. (0200). A physician reviews Plaintiff B's care plan and physicians orders on a monthly basis. (*See for example* 200-207, 232-239). Additionally, in November of 2005, comprehensive assessments of Plaintiff B were completed by the PRSC wherein Plaintiff B's current level of functioning, rehabilitation potential, and discharge potential, including resident expectations, were assessed. (*See* 314-325). The PRSC recommended that Plaintiff B remain in the IMD to continue treatment and skills training. (318). Plaintiff B's stated goal was to keep attending his/her day program until he/she graduates and to improve his/her people skills. (324). Plaintiff B's previous desire to move to a less structured setting is reflected in his/her treatment plans as well as the approach staff would use to assist Plaintiff B.

(2696). However, recent care plans do not reflect that Plaintiff B has a goal to be discharged. (0111-0127). Contrary to the Plaintiffs' assertions in their First Amended Complaint, the records clearly indicate that Plaintiff B receives more than formulaic assessments that "lack any individual plan or review," and that the records do in fact reflect Plaintiff B's desire to live independently. *See* Pl. Amend. Compl. at 61, 68 and 79.

Plaintiff C lives in an IMD and has received regular, ongoing, and individualized assessments of his/her physical and mental health needs. Plaintiff C's treatment professionals have consistently found he/she to be in need of the level of care provided in an IMD. (*See for example*, 0204-0216). Plaintiff C has his/her medical and psychiatric needs assessed monthly by his/her psychiatrist, physician, PRSC, and the IMD's nursing staff. (*See for example* 0226-0235; 0244-45, 0259-0287; 0240-0242) Additionally, in November of 2005, Plaintiff C's PRSC performed comprehensive assessments on his/her current level of functioning and rehabilitation potential. (0254). The records indicate that Plaintiff C may require intermediate care placement indefinitely. (0254) Plaintiff C's goal at this time was to publish a comic strip. (0248). However, a monthly progress note from April 2006, written by Plaintiff C's PRSC, indicates Plaintiff C is interested in being assessed for placement in a group home. (0244).

In addition to assessments made by the IMD's treatment professionals, Plaintiff C's records from his/her day treatment program indicate that, as of November 2005, Plaintiff C was not ready for placement in a less restrictive environment. (0180). Plaintiff C's goals in his/her day treatment service plan include increasing personal hygiene skills, gaining insight into his/her mental illness, and working on creating a support system of peers. (*See* 0187-0195) It is evident that Plaintiffs' assertions that Plaintiffs do not receive "meaningful, adequate, and periodic assessments" is not reflected in Plaintiff C's records. *See* Pl. Amend. Compl. at 61, 68 and 79.

Plaintiff D lives in an IMD and has received regular, ongoing, and individualized assessments of his/her physical and mental health needs. As recently as June of 2006, Plaintiff D's physician has found that Plaintiff D requires the level of care provided in an IMD. (1217). Plaintiff D's records indicate that his/her PRSC and day treatment staff believe that he/she could eventually live in a less structured residential setting. Plaintiff D has expressed a desire to live in a less restrictive residential placement. Plaintiff D's individual treatment plans, which include quarterly and yearly assessments, reflect Plaintiff D's goal. However, when day treatment and IMD staff

attempt to assist him/her with this goal, Plaintiff D expresses the desire to stay at the IMD where he/she presently resides. (*See for example* 0222; 0183; 0226; 0930). Plaintiff D's records indicate that when Plaintiff D is faced with following through with his/her goal to live more independently, he/she becomes ambivalent about pursuing the goals and/or refuses to work on them. (*See for example* 0222; 0183; 0226; 0930).

Moreover, the discharge policies and Resident's Handbooks received from several of the IMDs address community discharge. (GC 115, 134; W C 54-50; GC 27, 28-0031, W C 20) The discharge planning policies state that residents are to be assessed for the potential to live in a less restrictive environment upon admission, and quarterly thereafter through the comprehensive assessment process. (WC 54, GC 27). Should the resident indicate an interest in discharge, a strength needs chart is completed noting the areas thatneed to be addressed in order for the resident to live in the community, including contact with the resident's family and/or significant others regarding resident's interest in discharge. (*Id.*) If the resident's psychiatrist, and family/significant others feel active discharge in appropriate, the resident is placed in Level III programming, which indicates that the resident may be ready for discharge in six months. (*Id*.). Level III programming includes referral to the IMD's Discharge Planning Group to address issues related to preparation for successful discharge to the community, and the requirement that the resident pass a competency test for self-medication. (*Id*.). Additionally, one-on-one staff support and assistance with finding a placement are also provided. (*Id*.).

Based on the comprehensive individualized assessment processes involved in the named Plaintiffs' records, as well as the IMDs' policies and procedures, it is clear that the Defendant has not denied Plaintiffs the opportunity to move from IMDs to more integrated community settings. Thus, it cannot be inferred that Defendants have not acted or refused to act on grounds generally applicable to the class in violation of *Olmstead.* The records demonstrate a thorough and comprehensive level of treatment planning to ensure that Plaintiffs are in the most integrated environment suitable to their needs and capabilities,requiring no need for injunctive or declaratory relief with respect to the class. Therefore, this Honorable Court should deny Plaintiffs' Motion for Certification of the Class.

II. THE COURT SHOULD DENY THE PLAINTIFFS' MOTION BECAUSE THEY DO NOT MEET THE REQUIREMENTS OF RULE 23(A)

Even assuming Plaintiffs could satisfy the requirements of Rule 23(b)(2), they do not satisfy all of the requirements set forth in Rule 23(a). Two prerequisites to class certification include (1) that the named Plaintiffs are representative of the class and suffer the same injury as the class member, *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982), and (2) that the class must be sufficiently defined so that the class members may be determined by an objective criteria. *Wallace v. Chicago Housing Authority*, 224 F.R.D. 420, 425 (N.D. Ill. 2004).

In deciding whether to grant class action certification, the court must make "whatever and legal inquiries are necessary" to determine whether the requirements of Rule 23 are met. *Szabo,* 249 F.3d at 675-676. Courts are not prohibited from making inquiries at certification that overlap merit issues when the purpose of the preliminary inquiry is to evaluate compliance with Rule 23. *See id.* Indeed, these types of preliminary merits inquiry are often necessary to determine "whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 179, *quoting Miller v. Mackey International*, 452 F.2d 424 (5th Cir. 1971).

A. PLAINTIFFS CANNOT SHOW THAT THEY ARE MEMBERS OF THE PROPOSED CLASS

Plaintiffs cannot show that they are members of the proposed class because they do not meet the second prong of that class: "with appropriate supports and services, [Plaintiffs] could live in the community."

In *Lewis v. Casey*, 518 U.S. 343 (1996), the Court had to determine whether certain inmates could maintain a claim on behalf of all other inmates against the Arizona Department of Corrections, alleging that they were deprived of access to the courts because they were furnished with inadequate legal research facilities. The Court held that the representative plaintiffs did not have standing to represent the class because they had failed to identify anything more than isolated instances of injury in fact. *Id.* In its opinion the Court stated "that a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and purport to represent." *Id.* at 357.

Similar to the inmate plaintiffs in *Lewis*, the named Plaintiffs in the instant case allege a

systemwide violation and seek systemwide relief. However, like the inmates in *Lewis*, Plaintiffs fail to identify any injury to themselves attributable to the alleged systemwide violation. Plaintiffs have been evaluated by physicians[5] and found to be unsuitable for placement in a more integrated setting. Because the Plaintiffs' alleged injuries do not amount to violations of *Olmstead,* Plaintiffs would inadequately represent a class for systemwide relief. *See id.* at 359.

In *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1981), Mexican-American city truck drivers brought a class action suit alleging employment discrimination. The truck drivers claimed that their employer's seniority policy and "no-transfer" policy prohibiting drivers from transferring between terminals or from city to line-driver jobs effectively denied them equal employment opportunities within the company because of their race or national origin. *Id.* at 399. Relying on the finding of the District Court that the named plaintiffs lacked the necessary qualifications to be line drivers, the Court held that the plaintiffs subsequently could not have suffered an injury as a result of the alleged discriminatory practices, and therefore they were not eligible to represent a class of persons who did allegedly suffer an injury. *Id.* at 403-404.

Here, like the truck drivers in *East Texas Motor Freight*, the named Plaintiffs have not suffered the injury they allege the class has suffered. Plaintiffs have been assessed by treatment professionals and found in need of the level of care offered in IMDs or they have indicated a preference to stay in an IMD. Like the truck drivers who did not have the necessary qualifications for the line-driver jobs, the Plaintiffs have been found by treatment professionals to need the level of care they are currently receiving in their respective IMDs. Therefore, under *Olmstead*, Plaintiffs do not qualify for placement in a more integrated setting. Thus, Plaintiffs are not members of the class that they are claiming to purportedly represent.

Just because Plaintiffs assert in their Motion that they are members of the class does not make it so. Indeed, the Plaintiffs' own records indicate otherwise. Defendants do not question that

---

[5] The physicians and other health care professionals referred to throughout this brief are employed or contracted by the IMD's and other service providers. The IMD's have contracts with the state for the provisions detailed herein.

the Plaintiffs have a mental illness and live in IMDs. However, because Plaintiffs have failed to show that with appropriate supports and services they could live in the community, they do not belong in the proposed defined class.

In *Olmstead*, the Court held that disabled individuals should be placed in community settings rather than institutions when a state's treatment professionals have determined that community placement is appropriate, the transfer is not opposed by the individual, and the placement can be reasonably accommodated, taking into account state resources and the needs of others with disabilities. 527 U.S. at 597.

The crux of the Plaintiffs' argument is that they are ready to live in a less structured setting, but have been denied by Defendant the opportunity to do so, in violation of *Olmstead*. However, all of the named Plaintiffs have been recently found by treatment professionals to be in need of the level of care provided in their current IMD settings and/or have expressed a desire to remain at the IMD.

For example, Plaintiff A was assessed in June by his/her treating physician. (3909). After reviewing Plaintiff A's care plan and physicians orders, the physician certified that Plaintiff A continued to require the intermediate level of care provided to Plaintiff A at the IMD. (*Id.*) Plaintiff A's current medical records, as well as Plaintiff A's records starting at admission to the IMD, indicate continued problems with verbal abuse of staff and peers, threatening behavior towards staff and peers, agitation requiring nursing staff to administer Haldol to help Plaintiff A calm down, and violations of the IMD's smoking policy (e.g. smoking in his/her room or in the bathroom). (*See* 3950-59). Plaintiff A has a goal to live in a less restrictive environment or with his/her family. (3826). Currently, however, treatment professionals have determined that Plaintiff A is not ready for a lower level of care. (*See* 3909-24)

Plaintiffs allege systemwide violations and seek systemwide relief for violations of Title II of the ADA and Section 504 of the Rehabilitation Act. Pl. Amend. Compl. ¶ 7. Under *Olmstead*, the state would arguably have to place persons that fall within the proposed class into a more integrated setting if they have been determined appropriate for community placement. However, because the treatment professionals have determined that Plaintiff A is not suitable for a more integrated setting, he/she is not representative of the proposed class. Plaintiff A is not entitled to the relief which he/she seeks on behalf of the proposed class because he/she has not suffered the same

alleged injury as the members of the proposed class.

Plaintiff B was also assessed by his/her treating physician in June of 2006. (200) After reviewing Plaintiff B's care plan and physicians orders, the physician certified that Plaintiff B needed the level of care provided to Plaintiff B at the IMD where Plaintiff B currently resides. (200) Plaintiff B's records indicate that he/she *previously* expressed a desire to live in a less restrictive setting and in fact was discharged to live with his/her family before returning to the facility following a psychiatric hospitalization. (*See* 2696; 2179, 2183, 679) Plaintiff B did not express a desire for discharge when Plaintiff spoke with his/her PRSC during a discharge assessment in November 2005. (314-325) Additionally, Plaintiff B's individual care plan dated May 2006 does not reflect his/her goal relating to discharge. (111-127). Plaintiff B's 2004 records are the last to reflect his/her desire to live in an apartment or less structure living arrangement. (*See* 2696). Nevertheless, like Plaintiff A, the treatment professionals have found that Plaintiff B is not ready for discharge to a less restrictive environment. Plaintiff B is not entitled to the relief which he/she seeks on behalf of the proposed class because he/she has not suffered the same alleged injury as the members of the proposed class.

Plaintiff C was also assessed in June of 2006 by his/her treating physician. (0204) After reviewing Plaintiff C's care plan and physicians orders, the physician certified that Plaintiff C needed the level of care provided to Plaintiff C at the IMD where Plaintiff C currently resides. (*Id.*). Plaintiff C has a goal to live in a less structured living arrangement, but the PRSC working with him/her at the IMD indicated as recently as November 2005 that he/she will probably require ICF placement indefinitely. (0185; 0254). Moreover, the professionals working with Plaintiff C at his/her day treatment program documented in November 2005 that Plaintiff C was not suitable for a less restrictive residential environment. (0180). Plaintiff C's individualized service plan did not include a goal related to independent living. (*See* 0187-0195). The goals Plaintiff C is working on in day treatment relate to increasing daily living skills such as personal hygiene, decreasing isolative behaviors and developing a support system of peers, as well as increasing Plaintiff C's limited insight into his/her mental illness. (*Id.*) Plaintiff C's day treatment team has stated in its notes that he/she has made "limited progress" with these goals and continues to struggle with the very basic goal of appropriate hygiene. (0180). Again, as with Plaintiffs A and B, Plaintiff C has not been found to be ready for discharge to a less restrictive environment. Plaintiff C is not entitled to the

relief which he/she seeks on behalf of the proposed class because he/she has not suffered the same alleged injury as the members of the proposed class.

Plaintiff D's physician certified as recently as May of 2006 that he/she was in need of the intermediate level of care currently provided to Plaintiff D at the IMD. (1217) Plaintiff D's records reflect that he/she has had an ongoing personal goal of being discharged to the community. (*See for example* 796) However, when staff attempt to address this goal with Plaintiff D, he/she expresses ambivalence, concern about living in the community, and a desire to stay at the IMD. (*See for example* 222, 0183, 0226, 0930). Other professionals working with Plaintiff D, including his/her PRSC and staff at his/her day treatment program, have indicated that Plaintiff is capable of eventually living in a less restrictive environment. (*See for example* 222, 1873, 226, 930) However, Plaintiff D has indicated time and time again that he/she is not ready to move back to the community and that he/she wants to stay in the IMD where Plaintiff D currently resides. (*Id.*). Thus, while Plaintiff D's treatment plans reflect Plaintiff D's continued expression of the personal goal of eventual discharge to a less restrictive setting, there has been no preparation for discharge to a more integrated setting in the community at this time because Plaintiff D indicated that he does not want to move. (*See for example* 775-777). Plaintiff D is not entitled to the relief which he/she seeks on behalf of the proposed class because he/she has not suffered the same alleged injury as the members of the proposed class. Because Plaintiff D has not consented to being placed into a more integrated setting, he/she is not representative of the proposed class.

Three of the named Plaintiffs' records show that they have been assessed for their readiness to live in a less structured environment but have been found by the treatment professionals to be in need of support at the intermediate level. Treatment professionals have found the fourth Plaintiff to have the skills necessary to live in a less structured environment, but Plaintiff D's records reflect a desire to remain at the IMD. The proposed defined class includes IMD residents who are ready to live in a less structured setting but have been denied the opportunity to do so in violation of *Olmstead*. However, all of the named Plaintiffs have recently been found by treatment professionals to be in need of the level of care provided in their current IMD settings and/or have expressed a desire to remain at an IMD. Thus, this Honorable Court should find that the named Plaintiffs are not representative of the class.

B. PLAINTIFFS' PROPOSED CLASS IS VAGUE AND OVER BROAD

Under Rule 23, an action may be maintained as a class action if all of the prerequisites of Rule 23(a) and at least one of the three elements of Rule 23(b) are satisfied. *See* Fed.R.Civ.P. 23. Rule 23(a) contains four express mandatory requirements. *Id.* In addition, "there is a 'definiteness' requirement implied in Rule 23(a)" which dictates that "the description of a class [be] sufficiently definite to permit ascertainment of the class members." *Alliance to End Repression v.. Rochford*, 565 F.2d 975, 977 (7th Cir.1977). "Compliance with the rule might prevent [a court] from lumping people with divergent interests into a single class, but the rule is *meant* to do just that." [Emphasis in original.] *In re Asbestos Litigation*, 90 F.3d 963, 1008 (5th Cir. 1996).

A class can be properly identified so long as it is defined by objective criteria, such that it is administratively feasible for the court to determine whether a particular individual is a class member. *Ludwig v. Pilkington North America, Inc*, 2003 WL 22478842, *1 (N.D.Ill. Nov.4, 2003); *e.g., LeClerq v. The Lockformer Co*, 2001 WL 199840, *6 (N.D.Ill. Feb.28, 2001) ("An identifiable and definite class exists if 'its members can be ascertained by reference to objective criteria.'") (quoting *National Organization for Women v. Scheidler*, 172 F.R.D. 351, 357 (N.D.Ill.1997)). "Whether the description of a class is sufficiently definite to permit ascertainment of the class members must, of necessity, be determined on a case-by-case basis." *Alliance to End Repression v. Rochford*, 565 F.2d 975, 978 (7th Cir.1977).

As set forth previously, the proposed class is defined as "all persons who have a mental illness; with appropriate supports and services, could live in the community; and are institutionalized in privately-owned Institutions for Mental Diseases (IMDs)." Pl. Mot. for Cert. of Class at 1.

First, the proposed class is vague in that its definition does not sufficiently identify and define the class. Thus, the Court cannot readily ascertain its members by reference to some objective criteria. Mentally disabled persons residing at Illinois IMDs suffer from a wide array of ailments. Treatment of each disabled person depends on the diverse factual circumstances that surround each individualized IMD resident. The supports and services that would be appropriate to place one IMD resident in the community may not be appropriate to place another. Thus, "appropriate supports and services" does not speak to the degree of mental illness from which the IMD residents suffer.

The records show that quarterly and annual assessments of IMD residents are performed. The records also show that the named Plaintiffs were found ineligible for placement into a more integrated setting on their last assessment. Plaintiffs have offered nothing beyond conclusory statements to support their assertions that they, or any person in the proposed class, are ready for placement.

Further, it is unclear what medical and mental threshold the IMD residents must meet to be deemed able to live in the community with "appropriate supports and services." Based on the Plaintiffs' assertion that "thousands of these individuals could live in a more integrated setting with appropriate supports and services" (See Pl. Mot. for Cert. of Class at 2), it can only be assumed that the Plaintiffs have not set the bar very high.

Second, the proposed class is over broad. *Olmstead* states that non-consenting patients do not have to be moved. 527 U.S. at 602. Plaintiffs' proposed class would seek to include all IMD residents able to live in the community, including non-consenting IMD residents. The proposed class does not account for the IMD residents' choices with respect to placement.

The requested relief which Plaintiffs seek includes having Defendants provide them with services in the most integrated setting appropriate to their needs and provide those services with reasonable promptness. Pl. Mot. for Cert. of Class at 2. Plaintiffs contend that their interests are entirely coextensive with those of the proposed class. Pl. Memo in Support of Mot. for Cert. of Class at 9. However, interests of the members of the proposed class diverge on the issue of consent to placement. The proposed class would bind those individuals who are opposed to placement though they may be able to be placed in the community "with appropriate supports and services."

The proposed class is both vague and over broad and fails to meet the requirements of Rule 23. The stringent prerequisites of Rule 23(a) prevent lumping people with divergent interests into a single class. Therefore this Honorable Court should deny the Plaintiffs' Motion for Certification of Class.

CONCLUSION

For the reasons stated above, Defendants respectfully request this Honorable Court deny Plaintiffs' Motion for Certification of Class.

Respectfully submitted,

ROD BLAGOJEVICH

s/ Ray J. Koenig III
Special Assistant Attorney General
Counsel for Defendant Governor Rod Blagojevich

Kerry R. Peck / Ray J. Koenig III
Peck, Bloom, Austriaco & Mitchell, LLC
Special Assistant Attorneys General
105 W. Adams, 31st Floor
Chicago, IL 60603
(312) 201-0900