UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

JODIE SMOOK, by VICKY and RANDY SMOOK, her parents, individually and on behalf of all persons similarly situated, Plaintiff, -vs- MINNEHAHA COUNTY, SOUTH DAKOTA; JIM BANBURY, individually and as director of Minnehaha County Juvenile Detention Center; and John and Jane Doe DETENTION CENTER OFFICERS, Defendants.	CIV 00-4202 MEMORANDUM OPINION AND ORDER

Plaintiff, Jodie Smook, filed a Motion for Class Certification, Doc. 25, which alleges that the defendants violated the constitutional rights of juvenile pre-trial detainees. Following a discovery dispute, the Court granted plaintiff's motion to compel regarding other minors who were processed at the Minnehaha County Juvenile Detention Center ("JDC") and subjected to a strip search and/or questioning regarding their religious beliefs and practices. (See Doc. 36.) Following the receipt of the pertinent lists, plaintiff filed a Supplement in Support of Motion for Class Certification ("Supplement") (Doc. 39) and attached as Exhibits to the Supplement three lists of minors processed at the JDC. For the reasons stated below, the Motion for Class Certification will be granted.

BACKGROUND

Plaintiff alleges that her civil rights were violated at the JDC. According to the Complaint, plaintiff and three of her friends were arrested by Sioux Falls policemen for curfew violations on August 8, 1999. The four teenagers were taken to the JDC where, allegedly, they were questioned

about their religious beliefs and practices, individually ordered into a bathroom, and strip searched. According to the Complaint, the JDC had a policy of conducting strip searches of minors, even without probable cause to believe that the minors had weapons or contraband, as well as a policy of questioning juvenile detainees about the religious beliefs and practices. Plaintiff alleges that more than 100 minors were subjected to each of the JDC's policies, and seeks to certify a class consisting of "all minors who were charged with minor offenses and were, pursuant to JDC policy, strip searched and/or subjected to questioning about their religious beliefs at the Minnehaha County Juvenile Detention Center between November 1, 1997 and November 1, 2000."

In the Supplement plaintiff proposes to certify two separate classes based on the defendants' assertion that the two policies at issue in this case had different life-spans. The first proposed class would be defined as: "all minors who were charged with minor offenses and were, pursuant to JDC policy, strip searched at the Minnehaha County Juvenile Detention Center between November 1, 1997 and November 1, 2000." The second proposed class would be defined as: "all minors who were charged with minor offenses and were, pursuant to JDC policy, subjected to questioning about private matters, including but not limited to questions about their religious beliefs and practices, at the Minnehaha County Juvenile Detention Center between November 1, 1997 and November 1, 2000." The phrase "minor offenses" proposed by plaintiff would include petty theft, liquor violations, being a runaway and curfew violations.

According to the defendants' Answers to Interrogatories, the policy under which plaintiff was searched had been in effect since approximately June 1999. Plaintiff appears to concede that the policy began sometime in June 1999[1] and ended on September 14, 1999. In an article dated September 5, 1999, the Argus Leader reported that 234 juveniles were taken to the JDC for curfew violations in 1998, and 210 were taken there from January through July of 1999. Despite publicity in the local newspaper and on local television news, only two other parents have contacted plaintiff's

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[1] Plaintiff's Reply brief says that the policy was in effect "[d]uring the summer of 1999." (Reply at 1.) Her own experience – being stopped in June 1999 but not being taken to the JDC – corroborates the defendant's assertion that the policy started sometime in June 1999.

mother, Vickie Smook, about joining this lawsuit. Some parents, the number of which is not specified, have contacted plaintiff's counsel about joining the suit.

DISCUSSION

When properly maintained, a class action promotes judicial efficiency and, in addition, may provide a remedy to persons for whom it would not be economically feasible to obtain relief individually. See Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980). To bring a class action under the Federal Rules of Civil Procedure, a plaintiff must meet both the general prerequisites for class actions in Rule 23(a) as well as the requirements for at least one of the particular kinds of transactions listed in Rule 23(b). Fed. R. Civ. P. 23. Plaintiff seeks certification under both Rule 23(b)(2) and Rule 23(b)(3). "Certification is not irreversible and may be altered or amended as the case progresses towards resolution on the merits." Cook v. Rockwell Int'l Corp., 151 F.R.D. 378 (D. Colo. 1993).

A. Prerequisites

Rule 23(a) lists four prerequisites for the maintenance of a class action. In particular, the Rule provides:

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

Fed. R. Civ. P. 23(a). These prerequisites are usually referred to as numerosity, commonality, typicality, and adequacy of representation.

1. Numerosity

Plaintiff has shown that the proposed class is sufficiently numerous to warrant class certification. Although a lesser number can satisfy numerosity, a rule of thumb is that a class of forty members satisfies the numerosity requirement. See Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (citing 1 Newberg on Class Actions 2d § 3.05 (1985)). Prior to the

Court's Order dated July 31, 2001 granting plaintiff's motion to compel, the plaintiff relied on news reports to satisfy the numerosity requirement. Pursuant to the Court's Order dated July 31, 2001, however, defendants disclosed a list of minors that plaintiff contends shows there were approximately 300 curfew arrests processed at the JDC between June 1, 1999 and September 15, 1999. The Court reviewed the list attached as Exhibit A to plaintiff's Supplement. Plaintiff represents that Exhibit A is a list of minors arrested for curfew violations. The list does not state that the minors listed therein were arrested for curfew violations. But defendants have not objected to plaintiff's characterization of the list and the Court will accept, for purposes of deciding the pending motion, plaintiff's representation that Exhibit A represents minors arrested for curfew violations and processed at the JDC. Having reviewed Exhibit A for the time period between June 1, 1999 and September 15, 1999, the Court finds well over 200 minors were arrested for curfew violations. This number of potential class members is sufficient to satisfy numerosity. Moreover, plaintiff represents, without challenge by the defendants, that two additional lists attached to plaintiff's Supplement as Exhibits C and D show that approximately 265 minors were processed during the pertinent time period for "curfew and other violations" and approximately 250 minors were processed during the pertinent time period for "offenses other than drug offenses, violent offenses or weapon offenses."

2. Commonality

Although Rule 23(a) requires questions of law or fact common to the class, those questions do not have to be identical as applied to each member of the class. See Paxton v. Union National Bank, 688 F.2d 552, 561 (8th Cir. 1982) (stating that "the rule does not require that every question of law or fact be common to every member of the class). Defendants suggest that plaintiff's treatment was an isolated incident, because she has not produced testimony from additional persons claiming to have been subjected to or similarly affected by the challenged policy. The plaintiff has, however, produced a blank admission form apparently used by the JDC that includes spaces to write down the detainee's "religious preference" and "attendance," as well as spaces to inventory pants, shirts, socks, and "briefs/panties." The admission form supports plaintiff's assertion that the JDC had a policy of engaging in conduct that she claims is unconstitutional. Whether the conduct which

resulted from the policy was in fact constitutional is a legal question that class members will have in common.

3. Typicality

At this stage of the proceedings, plaintiff has also established typicality. "Typicality under Rule 23(a)(3) means that there are other members of the class who have the same or similar grievances as the plaintiff." Alpern v. Utilicorp United, Inc., 84 F.3d 1525, 1540 (8th Cir. 1996) (quotation marks and citation omitted). Variations in the facts underlying the claims of the plaintiff and the potential class members will not preclude class certification if the plaintiff's claims arise from the same event or course of conduct as the class claims, and give rise to the same legal or remedial theories. See id. In this case, all of the members of the putative class, including the named plaintiff, were allegedly subject to the same policy administered by the JDC. There is nothing atypical about plaintiff's claim that would prevent class certification.

4. Adequacy of Representation

The plaintiff is also an adequate representative for the class. "The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." Paxton, 688 F.2d at 562-63. Defendants do not argue that plaintiff cannot adequately represent the class. There is no indication that plaintiff's interests are antagonistic to the interests of other class members, or that she will not vigorously promote the interests of the class.

B. Certification under Rule 23(b)(2)

This case meets the requirements for certification under Rule 23(b)(2). As a general rule, "[c]ertification is appropriate under subsection (b)(2) if classwide injunctive relief is sought when the defendant 'has acted or refused to act on grounds generally applicable to the class.'" DeBoer v. Mellon Mort. Co., 64 F.3d 1171, 1175 (8th Cir. 1995) (quoting Rule 23(b)(2)). Defendants oppose certification under Rule 23(b)(2) on the grounds that they stopped implementing the challenged policy in September 1999, before this lawsuit was ever filed. On this argument, however, defendants

"bear the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 190 (2000). Although the defendants may eventually be able to meet this burden, the facts are not sufficiently developed to make a final decision on injunctive relief. At this point, defendants' voluntary decision to stop implementing the policy does not prevent the certification of a class under Rule 23(b)(2).

C. Certification Under Rule 23(b)(3)

A class may also be certified under Rule 23(b)(3). This provision permits certification if "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Defendants do not contest that common questions of fact – what the JDC's policy was – and common questions of law – whether the policy was constitutional – predominate in this case. They suggest that a class action is not a superior vehicle for the litigation, because no additional plaintiffs or potential plaintiffs have come forward to litigate these issues. The absence of additional plaintiffs suggests that the individual stakes are too low for many plaintiffs to come forward on their own, and thus that there is a strong interest in having the common issues determined in a class action. See Charles A. Wright, Arthur R. Miller, Mary K. Kane, Federal Civil Practice & Procedure, § 1780 at 536-65 (2d ed. 1986). A class will also be certified under Rule 23(b)(3).

D. Problems of Certification Under Both Rule 23(b)(2) and Rule 23(b)(3)

When a class is certified under both Rule 23(b)(2) and Rule 23(b)(3), there is a danger that class members who opt out of the class will bring separate actions seeking injunctive relief that is different than the injunctive relief awarded in the class action. See DeBoer, 64 F.3d at 1775. To prevent this problem, the Eighth Circuit has previously upheld a district court's decision not to certify a class under Rule 23(b)(3), which permits class members to opt out, when a class could be certified under Rule 23(b)(2), which does not permit opting out. Id. That approach, however, is also problematic, because it may prevent class members who are entitled to seek money damages from

receiving personal notice and an opportunity to opt out. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 845-46 (1999) (emphasizing the importance of these rights).

A better solution to the problem is divided certification. Under this approach, the district court certifies the injunctive aspects of a suit under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3). See Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 898 (7th Cir. 1999) (suggesting this method to the district court on remand); Lemon v. International Union of Operating Engineers, 216 F.3d 577 (7th Cir. 2000) (suggesting three options for class certification where both injunctive and monetary relief is sought by plaintiff). The injunctive relief, if any, that is awarded, binds all members of the class, while individual members who opt out are free to pursue their own claims for damages. Because the money damages sought in this case are not merely incidental, see Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411-16 (5th Cir. 1998), and because this method of bifurcation furthers the purposes of both Rule 23(b)(2) and Rule 23(b)(3), the Court will certify a separate class for injunctive relief and a separate class for money damages. Of course, the membership in these classes will, at the outset, be identical. It will change if individual class members exercise their rights to opt out.

E. Scope of the Classes

The information presented so far does not support as broad a class as plaintiff seeks to have certified. The class proposed by plaintiff would include minors taken into the custody of the JDC between November 1, 1997 and November 1, 2000. The information presented in connection with the Motion for Class Certification only supports classes of persons who, as minors, were taken into the custody of the JDC from June 1, 1999 through September 14, 1999. Although it appears that the JDC policy regarding religious beliefs' questioning may have been in existence for a longer period of time than the strip searching policy, the record at this point does not support the lengthy time frame suggested by plaintiff. But subsequent discovery may establish a basis for expanding the class period.

CONCLUSION

The evidence before the Court supports the certification of two classes of plaintiffs. At the outset, both classes will be comprised of:

> all persons who, when they under the age of eighteen years old, were charged with minor offenses and were, pursuant to JDC policy, strip searched and/or subjected to questioning about their religious beliefs at the Minnehaha County Juvenile Detention Center from June 1, 1999 through September 14, 1999.

The first class will be comprised of all such persons seeking injunctive relief. The second class will be comprised of all such persons seeking compensatory and/or punitive damages. The term "minor offenses" is defined as petty theft, liquor violations, being a runaway and curfew violations. The plaintiff shall prepare a form of notice to members of the second class that complies with the requirements of Rule 23(c)(2) of the Federal Rules of Civil Procedure, and file the proposed notice with the Court in accordance with the Order below. Accordingly,

IT IS ORDERED:

(1) that the Motion for Class Certification, Doc. 25, is granted.

(2) that, pursuant to Federal Rule of Civil Procedure 23(b)(2), a class is certified of all persons seeking injunctive relief in this action who, when they under the age of eighteen years old, were charged with minor offenses and were, pursuant to JDC policy, strip searched and/or subjected to questioning about their religious beliefs at the Minnehaha County Juvenile Detention Center from June 1, 1999 through September 14, 1999.

(3) that, pursuant to Federal Rule of Civil Procedure 23(b)(3), a separate class is certified of all persons seeking compensatory and/or punitive damages in this action who, when they under the age of eighteen years old, were charged with minor offenses and were, pursuant to JDC policy, strip searched and/or subjected to questioning about their religious beliefs at the Minnehaha County Juvenile Detention Center from June 1, 1999 through September 14, 1999.

(4) that plaintiff shall file a proposed form of notice to class members, for the class certified pursuant to Rule 23(b)(3), with the Court within 10 days from the date of service of this Order.

Dated this 20th day of March, 2002.

BY THE COURT:

Lawrence L. Piersol
Chief Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Tamela D. Gillespie
(SEAL) DEPUTY