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United States District Court, S.D. New York.

RIGHTS, EQUALITY ALWAYS AT
LETCHWORTH, INC., et al., Plaintiffs,

v.

Mario M. CUOMO, as Governor of the State of
New York, et al., Defendants.

No. 84 Civ. 4163 (CES). | Sept. 3, 1985.

Attorneys and Law Firms

Murray B. Schneps, New York City, for

Arnold D. Fleischer, Asst. Atty. Gen., New York City, for

Amy Rothstein, Asst. U.S. Atty., New York City, for

Opinion

REPORT AND RECOMMENDATION

CHARLES E. STEWART, District Judge. This action was referred to the undersigned by Your Honor For, *inter alia*, a Report and Recommendation on plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. Z3(a) and Z3(b)(1) and (2).

*1 Eleven plaintiffs have been named in the Complaint: ten residents of Letchworth Village Development Center and Rights, Equality Always at Letchworth, Inc. ("REAL"), a parents/representatives organization purportedly serving as spokesperson for said residents. Plaintiffs' proposed class includes all persons residing or carried on the rolls of Letchworth Village on June 13, 1984, the date of the action's commencement, or at any time in the future.

It is the considered opinion of the undersigned, upon careful review of the record as a whole, that plaintiffs' motion for class certification be granted as proposed with the exception that REAL be dismissed as a plaintiff for lack of standing. It is further recommended that Your Honor appoint REAL as a *guardian ad litem* pursuant to Fed. R. Civ. P. 17(c) to assist the remaining named plaintiffs in representing the claims of the absent class members.

BACKGROUND

Letchworth Village Developmental Center, located in Thiells, New York, is the largest New York State-operated residential institution providing services to the mentally retarded. Presently there are between 1,400 and 1,700 mentally retarded persons residing at Letchworth Village. The named plaintiffs contend that an additional unknown number of mentally retarded persons, while not presently residing at Letchworth Village, are on the institution's rolls and may return there at any time (Complaint, paragraph Z9).

Levels of mental retardation among the residents vary. Many residents are also physically handicapped. According to Albert P. Robidoux, the Director of Letchworth Village, "to receive services from Letchworth Village a person must be developmentally disabled with additional deficits in adaptive behavior which prevent full participation in the mainstream of society." (Robidoux Affidavit, paragraph 3).

On June 13, 1984 the named plaintiffs filed a class action complaint against State and Federal officials alleging that the defendants "have failed to provide plaintiffs and others similarly situated with constitutionally and statutorily mandated levels of care, habilitation, training, education and treatment, and have maintained them in a setting where such services cannot properly be provided" in violation of the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiffs further allege statutory violations under the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. section 6000, *et seq.*) ; the Rehabilitation Act (29 U.S.C. section 701, *et seq.*) ; and pursuant to the Medicaid program, 42 U.S.C. section 1396.

The complaint names eleven (11) plaintiffs, ten of whom are residents of Letchworth Village.¹ The eleventh named plaintiff is Rights, Equality Always at Letchworth, Inc. ("REAL") which, according to the complaint, is "an organization of parents and representatives of the residents of [Letchworth] functioning as a spokesman and advocate for all such residents, many of whom are incapable of speaking for themselves" (Complaint, pg. 3). The defendants, however, have questioned the propriety of REAL's existence, proclaiming it to be a 'splinter' group organized solely for the purpose of bringing the present action (Memorandum in Opposition, pg. 10).

*2 After arguing that the requirements of Fed. R. Civ. P. Rule 23(a) have been satisfied, plaintiffs request certification pursuant to Rule 23(b)(1) and/or (b)(2). Thus, in addition to showing sufficient numerosity,

commonality, typicality and the adequacy of representation by both the named plaintiffs and counsel thereto, to achieve certification, plaintiffs must show 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 with respect to the class as a whole.”²

DISCUSSION

Before addressing the specific requirements of Rule 23(a) and (b)(2), a discussion as to the effect of the Supreme Court’s holding in *Youngberg v. Romeo*, 457 U.S. 307 (1982) is warranted. In *Youngberg* the Supreme Court defined the substantive rights of the involuntarily mentally retarded under the United States Constitution. Simply put, however, the defendants’ reliance on *Youngberg* as an argument to deny class certification is misplaced.

Youngberg held that the involuntarily committed are protected by the Fourteenth Amendment; that such persons have liberty interests in safe conditions and freedom from bodily restraint; that such persons are entitled to training sufficient to ensure that this interest in safe conditions and freedom from bodily restraint will not be infringed; and that the aforementioned liberty interests must be balanced against relevant state interests.

Youngberg was concerned with the substantive rights of the involuntarily committed. In light of the need for balancing as to these substantive rights, the Court raised the issue of deference to professional judgment. Thus, where concerned with the substantive liberty interests of the involuntarily committed, the Court stated that:

“The decision, if made by a professional is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

“Such a presumption is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function.” [457 U.S. at 323, 324]

This deference to professional judgment and presumption of validity does not, however, affect the issue of class certification. The Court was addressing the issue of liability on an individual claim for damages; not the issue of whether to certify a class requesting declaratory and injunctive relief. The Supreme Court’s requirements of

balancing of interests in *Youngberg*, an individual damage action, cannot be interpreted as a call for the abolition of the class action as an effective procedural tool for addressing “a broad challenge to the constitutional adequacy of treatment” by those civilly committed.³

Again, *Youngberg* involved substantive rights, and in determining class certification a court should avoid addressing “substantive questions of fact going to the merits.” *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982); see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

*3 Turning to the requirements of Rule 23(a), the numerosity requirement of subdivision (a)(1) has not been challenged. With reference to the remaining subdivisions of Rule 23(a), as the Supreme Court stated in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), “The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining ... whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel” 417 U.S. at 157 n.13. See *Dura-bilt Corp. v. Chase Manhattan Bank Corp.*, 89 F.R.D. 87 (S.D.N.Y. 1981).

As to (a)(2)’s requirement of commonality, the courts in this circuit have held that it is not necessary that every issue of law or fact be common to each and every member of the proposed class. *Durabilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87 (S.D.N. Y. 1981); *Vulcan Society v. Fire Dep’t of City of White Plains*, 82 F.R.D. 379 (S.D.N.Y. 1979).

Plaintiffs have alleged numerous common legal and factual issues. According to the complaint, all plaintiffs suffer from the isolation and inaccessibility of Letchworth Village, from the “barren, noisy and prison-like wards,” and from the “inadequate, malodorous, and unsanitary” bathroom conditions. Furthermore, it is alleged that plaintiffs suffer from “lack of sufficient direct care staff and the virtual absence of adequate behavior management programs” resulting “in stagnation or regression in the residents’ physical and mental development” The veracity of the aforementioned allegations are not for this Court to determine. Suffice it to say that commonalities abound.

The most basic point of commonality is the allegations “that the defendants have acted or failed to act towards them on the basis of policies and practices generally applicable to the class as a whole.” (Memorandum in Support, pg. 8). The fact that plaintiffs acknowledge a need for “properly developed, maintained, and utilized

individual habilitation plans” (Complaint, pg. 31) does not make certification any less appropriate. Plaintiffs have alleged “an institution-wide failure to develop and implement individualized plans and programs” (Complaint, paragraph 14). They are not requesting the Court to set down specifics as to some 1,400-plus habilitation plans; rather their claim concerns the alleged general failure to develop and implement procedures and policies regarding habilitation. The commonality then is this general failure, *i.e.*, that the residents are allegedly entitled to something they are not receiving. See *Andre H. by Lula H. v. Ambash*, 104 F.R.D. 606 (S.D.N.Y.1985).⁴

As to the typicality requirement of Subdivision (a)(3), some commentators have found it meaningless noting that “all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23.” 3B *Moore’s Federal Practice* paragraph 23.06–2 at 23–185 (1978). Where subdivision (a)(3) has been given a life of its own, courts have required the named plaintiff to establish that the class needing representation is more than a hypothetical situation, *i.e.*, that “other members of the class who have similar grievances” exist. *Wright v. Stone Container Corp.*, 524 F.2d 1058 (8th Cir.1975).

*4 Defendant\$ submitted a December 7, 1984 affidavit of AUSA Arnold D. Fleischer containing the results of a survey conducted by the Welfare League of its membership.⁵ The Welfare League consists of approximately 1500 members. Of the distributed surveys only 361 were completed and returned, however. This return rate of less than 25% casts severe doubt on the survey’s credibility.

Furthermore, even if the survey received a 100% return rate, a substantial portion of those answering either questioned the adequacy of their resident’s treatment at Letchworth Village or stated that they were ignorant as to the adequacy of the condition questioned.⁶

It was the results of the aforementioned survey which prompted this court to allow further discovery as to defendants’ claim of lack of typicality. But, as acknowledged by the defendants, “a sample universe of 361 out of some 1450 people is not, in itself, enough to defeat class certification.” (Fleischer Affidavit, paragraph 7). Such is still the case.

New evidence is before the Court in support of plaintiffs’ position on the issue of typicality, however. Pursuant to a Federal Survey completed March 1, 1985, Letchworth Village received a letter dated May 21st decertifying it and cancelling approval of its participation in the Medicaid program (42 U.S.C. section 1396). Defendants, while acknowledging “that plaintiffs will make much of the recent decision by the federal government to decertify Letchworth Village,” state “that the non-final decision, on

which the State has never yet had the opportunity to be heard, should not be a factor in the determination of the present motion.” (Supp. Memorandum in Opposition, pg. 6).

As stated earlier, on a motion for class certification a court is not supposed to rule on the merits. Thus it is not the concern of this Court what effect the Federal survey will have on the action’s ultimate disposition, nor the fact that the defendants have stated their intention to seek an administrative hearing with respect to the decertification decision.

What is before the Court is a 79–page document showing the existence of inadequacies on a classwide basis; the relevance of the document to the motion before the Court is obvious. The survey stands as sufficient evidence of typicality so as to warrant certification.

Pursuant to Rule 23(a)(4)’s adequacy-of-representation requirement, plaintiffs must show both the absence of potential conflict between named plaintiffs and absent class members, and the adequacy of counsel. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), *vacated & remanded on other grounds*, 417 U.S. 156 (1974).⁷

The adequacy of counsel cannot be questioned. Both Mr. Schneps and Mr. Lottman have worked extensively in litigation involving the legal rights of the mentally disabled.⁸

As to the adequacy-of-representation by the named plaintiffs of the rights of the absent class member, there is no doubting the fact that a representative’s interest may not be antagonistic to the class he purports to represent. And antagonism may be implied where absent class members’ actions appear inconsistent with their purported representative’s position. See *Crawford v. T exaco Inc.*, 40 F.R.D. 381 (S.D.N.Y. 1966). Furthermore, the Supreme Court has made clear that adequate representation is required by due process. *Hansberry v. Lee*, 311 U.S. 32 (1940).

*5 In arguing that neither the ten (10) individual named plaintiffs nor REAL “can rightly claim to speak for the 1400 residents of Letchworth Village,” defendants assert that a majority of residents have spoken “through their chosen representative, the Welfare League,” and that the Welfare League had determined that participation in the present action would not be in the residents’ best interest.

Initially it is noted that reliance on quantitative elements to determine adequacy of representation is unwarranted as there is no reason that a small number of named plaintiffs cannot adequately represent an entire class. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), *vacated & remanded*, 417 U.S. 156 (1974).

The Welfare League, in a resolution reached following an April 11, 1983 meeting, stated that it did not plan to “participate in class action at this time.” This decision was based ‘ ‘on investigation and results of questionnaire sent to members.” (Fleischer Affidavit, Ex. 1).

The Court already has questioned the credibility of the survey’s results based on the low response rate. Nowhere in the papers submitted to the Court is the Welfare League’s “investigation” explained. Furthermore, the Court is unsure how a simple statement indicating an intention not to participate “at this time” is transformed by the defendants into “the firm position taken by [the residents’] chosen representative against litigation.” (Supplemental Memorandum in Opposition, pg. 22).

Any antagonism existing between named plaintiffs and absent class members is speculative at best. The mere possibility of antagonism existing within a class, however, is outweighed by the important function served by class litigation in facilitating the assertion of claims. See *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th 1982), *cert. denied*, 103 S.Ct. 3536 (1982). The ten named plaintiffs are adequate representatives of the proposed class.

This brings us to the adequacy of corporate plaintiff REAL’s representation. Defendants at various times have alleged that the Welfare League is the “official parent group” and the residents’ “chosen representation,” picturing REAL as a “splinter” group established solely for the purpose of bringing the present action and not being authorized to act on anyone’s behalf. But the question of class certification does not depend on the comparable worth of and/or ideological differences between the Welfare League and REAL.⁹ While the presence of a corporate plaintiff may add credibility and support to a class action, such presence is unnecessary as the sole issue is whether the named individual plaintiffs satisfy the requirements of Rule 23.

The adequacy of REAL’s representation is mooted, however, by the Court’s finding that it should be dismissed as a plaintiff for lack of standing. As the Supreme Court stated in *Warth v. Seldin*, 422 U.S. 490 (1971), for an association to have standing in the absence of injury to itself it “must allege that its members, or any one of them, are suffering immediate harm or threatened injury as a result of the challenge action....” Thus, “to justify any relief the association must show that it has suffered harm, or that one or more of its members are injured.” *Id.* at 511, 515.

*6 REAL has failed to show injury to either itself or its members,¹⁰ nor has the complaint alleged such injury. Absent allegations of a “demonstrable, particularized injury” to either REAL or its members, REAL cannot

continue as a plaintiff in the present action. See *Huebner v. O chberg*, 87 F.R.D. 449 (E.D. Mich. 1980).

But dismissal of REAL as a plaintiff forces the Court to reexamine the adequacy of named individual plaintiffs to represent absent class members. Though there has been no showing of antagonism, the Court is concerned about the competency of the named individual plaintiffs “to comprehend the proceedings and to consult intelligently with counsel.” *Huebner* at 456–57. See *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa.1976); Newberg, *Class Actions*, Vol. 4, section 7942b.

Pursuant to Rule 17(c) the Court can appoint a *guardian ad li tem* to assist the named individual plaintiffs in presenting the interests of the absent class members. REAL, if dismissed for lack of standing, could serve in such capacity.

Having determined that all of the named plaintiffs, with the exception of REAL, satisfy the requirements of Rule 23(a) and have sufficient standing, we turn our attention to subdivision (b)(2) requiring 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 with respect to the class as a whole.”

Initially it is noted that the fact that some absent class members may wish to leave violation of their rights unremedied, or have expressed satisfaction with the existing situation, does not adversely affect certification under subdivision (b)(2). *Norwalk CDRE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir.1968), *Leisner v. New York Telephone Co.*, 358 F. Supp. 359, 372 (S.D.N.Y. 1973).

On May 21, 1985, the State defendants were notified that Letchworth Village was being decertified as an intermediate care facility under the Medicaid program. Decertification was based on a Federal Survey completed on March 1, 1985 detailing 79 pages worth of deficiencies. In the May 21st letter the Associate Regional Administrator of the Division of Health Standards and Quality (Dep’t of Health and Human Services), stated:

“We have corresponded and discussed with you the deficiencies that were found in Letchworth during the March 1984 Federal Survey. We informed you of the seriousness of the deficiencies, and that if the deficiencies were not corrected, your participation in the

Medicaid program would be jeopardized. However, the deficiencies still remain....”

690 F.2d 470 (5th Cir. 1982), *cert. denied* 103 U.S. 3536 (1983).

The March 1984 Federal survey documented 59 pages of violations. Both the 1984 and 1985 surveys documented deficiencies on a classwide basis. Even though forewarned of the seriousness of the violations and of the ramifications resulting from failure to correct the existing situation, inaction on the part of the State defendants resulted in decertification one year later.¹¹ Such inaction evidences a “refus[al] to act on grounds generally applicable to the class,” making certification under subdivision (b)(2) appropriate.¹²

*7 A district court has broad discretion on ruling on a motion for class certification. *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1243 (2d Cir. 1984). Furthermore, a district court should view a class action liberally in the early stages of litigation as it can always be modified or divided into subclasses. *Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984). Additionally a certification order at an initial stage of litigation may be withdrawn as the action progresses, *Rios v. Marshall*, 100 F.R.D. 395 (S.D.N.Y.1983), though such decertification possibly could have an adverse affect on class members “who failed or were unable to take independent steps to protect their rights precisely because they were members of the class.” *Woe v. Cuomo* at 107. As a bottom line, however, “judges should err in favor of certification.” *Horton v. Goose Creek Ind. School Dist.*,

RECOMMENDATION

Therefore, based on the foregoing, it is the considered opinion of the undersigned, upon careful review of the record as a whole that the named plaintiffs’ motion for class certification be granted as proposed with the exception that corporate plaintiff REAL be dismissed without prejudice as a plaintiff for lack of standing. If REAL is dismissed for lack of standing, its appointment as a *guardian ad litem* pursuant to Fed. R. Civ. P. 17(c) to assist the remaining named plaintiffs in representing the interests of the absent class members should be considered. Therefore, if REAL should decide this is appropriate, application should be made.

Pursuant to 28 U.S.C. section 636(b)(1), the parties have ten (10) days within which to lodge written objections to the foregoing report with the Honorable Charles E. Stewart. Such objections shall be filed with the Clerk of the Court with extra copies to be delivered to the Chambers of Judge Stewart, Room 2203, and to the Chambers of the undersigned, Room 121.

Footnotes

- ¹ The current living status of the named individual plaintiffs is immaterial, as a class certification determination relates back to the complaint’s filing date. *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975).
- ² The quoted section is from Rule 23(b)(2). As plaintiffs believe this to be “the archetypical 23(b)(2) class action” and therefore have relegated their Rule 23(b)(1) argument to a footnote in their Memorandum in Support of Class Certification (Memorandum in Support, pg. 15), the Court sees no reason to address plaintiffs’ (b)(1) argument further as it believes certification pursuant to (b)(2) is warranted.
- ³ It is noted that while the Second Circuit in *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239 (1984) “relied on [Youngberg] extensively” in reviewing the district court’s substantive rulings, it did not cite to *Youngberg* where affirming the certification of plaintiffs’ class. And in *Woe v. Cuomo*, 709 F.2d 96, *cert. denied*, 105 S.Ct. 339 (1984) the Second Circuit cites where stating that decertification was an abuse of discretion.
- ⁴ The only case cited by the State defendants factually similar to the present action is *Burnham v. Dept of Public Health of Georgia*, 349 F.Supp. 1335 (N.D.Ga.1972). That Court’s statement that the adequacy of treatment should not be considered on a classwide basis should be considered mere dicta inasmuch as only a motion to dismiss for want of subject matter jurisdiction was before the Court, and not a motion for class certification. Only after ruling that there was no federal constitutional right to treatment, and that therefore the action, brought pursuant to 42 U.S.C. section 1983, should be dismissed for want of jurisdiction, did the court briefly concern itself with the adequacy of classwide relief. Furthermore, as to the jurisdictional issue the court subsequently was reversed (502 F.2d 1319).
- ⁵ According to the affidavit of Jack Bernstein, President of the Welfare League, his organization is the “official parent group at Letchworth,” having been founded by parents of Letchworth residents in 1939.
- ⁶ Though the effect of the decertification decision on the action’s ultimate disposition is of no concern to this Court, it is noted that “loss of HHS certification may signal inadequate institutional conditions” *Woe v. Cuomo*, 729 F.2d 96, 106 n.11.

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- 7 For example, of 359 responses to the question, “Has your resident been subjected to any major incidents or accidents?” there were 109 ‘yes’ responses and 24 ‘don’t know.’ Similarly, as to a general question concerning whether “you are satisfied with the care and treatment your resident is currently receiving,” of 355 responses 67 answered in the negative with an additional 22 stating they had insufficient knowledge of the situation.
- 8 Albert P. Robidoux, the Director of Letchworth Village, testified that “similar deficiencies” to those documented in the March 1984 Federal survey were found in a State study (Plaintiffs’ Supp. Declaration, Ex. B).
- 9 *The irony of the situation in class certification motions where defendants are concerned with the adequacy of plaintiffs’ representation of the class is duly noted. See Fox v. Prudent Resources Trust, 69 F.R.D. 74 (E.D.Pa.1975).*
- 10 See *Society for Good Will to Retarded Children v. Cuomo*, 574 F. Supp. 994, 996 where Chief Judge Jack B. Weinstein noted that “[b]oth Mr. Schneps and Mr. Lottman represented their clients with extraordinary skill and tenacity.”
- 11 While the Court acknowledges the concern expressed by Jack Bernstein, President of the Welfare League, that the lawsuit will cause the State to divert “finite resources available for the treatment and habilitation of the residents,” and that possible gains may take years to achieve, these problems are not peculiar to the current plaintiffs but affect anyone who attempts to change the status quo through litigation. These are not reasons to deny class certification.
- 12 REAL is an organization of parents and representatives of residents, and thus no residents are members. Obviously residents have alleged sufficient injury for purposes of standing.