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United States District Court,
D. Massachusetts.

Loretta ROLLAND, et al., Plaintiffs
v.
Deval PATRICK, et al., Defendants.

Civil Action No. 98-30208-KPN. | Aug. 19, 2008.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER WITH REGARD TO THE GROTON PARENTS' MOTION TO DECERTIFY THE CLASS (Document No. 485)

NEIMAN, United States Chief Magistrate Judge.

***1** Presently before the court is a motion filed by a number of parents and guardians of certain class members at the Seven Hills Pediatric Center ("Seven Hills") (hereinafter referred to as the "Groton parents") which seeks to decertify a class certified by this court nearly ten years ago. The Groton parents' motion was filed together with their opposition to the parties' joint request for approval of a supplemental settlement agreement and, thus, many of their arguments were addressed by the court when it approved the agreement. Accordingly, the court will concentrate here on those arguments which go to the heart of the certification issue. In the end, the court will deny the motion to decertify.

I. *BACKGROUND*

Seven individually named plaintiffs filed the instant action on October 29, 1998, followed shortly thereafter by a motion for class certification. Defendants opposed the motion at the time, claiming that clinical differences between proposed class members undermined commonality and typicality and that many individuals were not appropriate for, or interested in, community placement, thereby defeating the adequacy of representation of the named plaintiffs. After several rounds of briefing, the court certified a somewhat modified class on February 2, 1999. *See Rolland v.Cellucci,* 1999 WL 34815562 (D.Mass. Feb.2, 1999). Defendants then sought leave to appeal that certification pursuant to Fed.R.Civ.P. 23(f), based upon the same arguments of clinical differences and placement preferences, but the First Circuit denied the request. (See Court of Appeals Docket No. 99-8009.) Soon thereafter, the parties entered into a Settlement Agreement, which was approved by the court after a fairness hearing.

Over the ensuing years, the court was called upon to resolve a number of disputes between the parties.[1] Suffice it to say for present purposes, the parties recently came to an understanding that the Settlement Agreement needed to be revised and jointly moved that the court approve their Settlement Agreement on Active Treatment ("Agreement"). The revisions proposed in the Agreement would fill 640 new community placement slots for class members over the next four fiscal years, continue current levels of specialized services for class members awaiting community placement, continue current diversion efforts and develop a corrective action plan if the number or rate of diversion fell off, and provide active treatment for all class members who remain in nursing facilities at the end of the four years as well as for class members who have been deemed unsuitable for community placement in the interim. After approving a written notice to class members and conducting a fairness hearing on May 22, 2008, at which several of the Groton parents testified, the court approved the parties' joint motion for the reasons set forth in its Memorandum and Order of June 16, 2008. (See Document No. 496.)

It was in the context of this approval process that the Groton parents, new to the litigation, pursued three arguments in opposition to the Agreement. First, the Groton parents indicated their satisfaction with the quality of care provided at Seven Hills. Second, they expressed their concerns that community residences would not be able to meet the particular needs of their loved ones. And third, they questioned why the Agreement did not give class members an absolute right to veto community placements. These concerns were addressed in detail by the court in its June 16th Memorandum and, accordingly, will not be re-addressed here. Nevertheless, the court again expresses its hope that, over time, the import of the

Agreement, as well as the rights it protects, will come to be more fully understood, if not appreciated, by the Groton parents.

***2** For the moment, however, the Groton parents would have the court revisit its class certification, decertify the class and void both the Agreement and, in effect, the original Settlement Agreement as well.

II. *DISCUSSION*

The Groton parents' motion to decertify the class necessarily invokes Fed.R.Civ.P. 23. The court will address the requirements of that rule, as well as some substantive concerns with respect to the requested relief. First, however, the court will consider several procedural issues and the burden of proof.

A. *Procedural Issues*

The court questions whether the Groton parents' motion to decertify the class is timely or procedurally proper. First, as even the abbreviated history of this litigation reveals, the motion comes quite late in the process. In this regard, the Groton parents' reliance on *Duhaime v. John Hancock Mutual Life Ins. Co.,* 177 F.R.D. 54 (D.Mass.1997), as support for the timelines of their motion, is inapposite; *Duhaime* did not involve decertification but, rather, a final class certification at the time of a proposed settlement, *i.e.,* the court was merely revisiting its preliminary certification. *See id.* at 57-59. *See also Amchem Prods. v. Windsor,* 521 U.S. 591, 597-612, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (similar). Second, as Plaintiffs note, there is some doubt as to whether the Groton parents can file a motion to decertify absent a motion to intervene pursuant to Rule 24. *See Brown v. Bush,* 194 Fed. Appx. 879, 881-82 (11th Cir.2006). Third, the Groton parents have failed to notify-let alone seek to notify-the class about potential decertification; they appear to deem adequate the service of their motion upon Plaintiffs' counsel, the very counsel whose representation of the class they now challenge.[2]

Notwithstanding these procedural concerns, the court has chosen to address the substance of the Groton parents' motion. In choosing to do so, the court has considered the Supreme Court's decision in *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), which suggests that, in certain circumstances at least, a court might revisit a class certification. *See id.* at 157. To be sure, the circumstances in *Falcon* were quite different, involving an "across-the-board rule" utilized by the Fifth Circuit which has little to do with the searching inquiry made by this court when it certified the class. *See id.* Nonetheless, the court, believing that resolution of the issue would be helpful to all concerned, deems this is an opportune time to address the underlying merits of the motion.

B. *Burden of Proof*

Given that it was their motion, the court was prepared to look to the Groton parents to demonstrate that class decertification was appropriate. The Groton parents, however, citing *Baldridge v. Clinton,* 134 F.R.D. 119 (D.Ark.1991), suggest that it is Plaintiffs' burden to demonstrate the ongoing viability of the class. The court disagrees. First, *Baldridge* is distinguishable on its facts. All the issues there had been resolved and the case closed when the court was asked to address a discrete matter; here, in contrast, the case has remained open and many of the original issues, particularly ones concerning specialized services, have been actively litigated, so much so that the court found it necessary to appoint a Court Monitor.

***3** Second, the defendants in *Baldridge* joined certain intervenors in seeking decertification; as a result, the court ordered the plaintiffs to show cause why the class ought not be decertified. Here, in contrast, Defendants have not allied themselves with the Groton parents' motion but, in fact, have joined Plaintiffs in seeking to extend benefits to the class as a whole. In turn, the Groton parents have not made even a preliminary showing as to require Plaintiffs themselves to bear the burden of demonstrating the viability of the class. *Cf.* 3 Newberg on Class Action § 7.47 (4th ed.) ("In the absence of materially changed or clarified circumstances, or the occurrence of a condition on which the initial class ruling was expressly contingent, courts should not condone a series of rearguments on the class issues by either the proponent or the opponent of the class, in the guise of motions to reconsider the class ruling.")

Third the Groton parents acknowledge that the original class certification was appropriate. That being so, the "law of the case" doctrine would appear to apply. *See Flibotte v. Pennsylvania Truck Lines, Inc.,* 131 F.3d 21, 25 (1st Cir.1997) ("[t]he venerable law of the case doctrine ... states in the large that, unless corrected by an appellate tribunal, a legal decision made at one stage of a civil or criminal case constitutes the law of the case throughout the pendency of the litigation.") (citations omitted). *See also Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); *Naser Jewelers, Inc. v. City of Concord, New Hampshire,* --- F.3d ---- 2008 WL 3306660 at *1 (1st Cir. Aug.12, 2008). Moreover, the Groton parents have not persuaded the court that any of the exceptions to the doctrine should be invoked. *See United States v. Bell,* 988 F.2d 247, 251 (1st Cir.1993).

Yet even were the court to look to Plaintiffs to bear the burden of demonstrating the continued viability of the class, as the Groton parents suggest, Plaintiffs have more than met that burden. For the reasons which follow, Plaintiffs have demonstrated, based on both the law and the facts, that decertifcation is not appropriate. Quite to the contrary, the court has been convinced that the class as originally certified continues to meet all the relevant requirements of Rule 23.

C. ***Class Viability Pursuant to Rule 23***

As noted, the Groton parents' motion necessarily involves Rule 23 which, in pertinent part, provides as follows:

> **(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members 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.
>
> ***4 (b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
>
> * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole [.]

Fed.R.Civ.P. 23. The numerosity component of Rule 23(a)(1) is not challenged and, therefore, not addressed. As to the remaining requirements, the class certification withstands the Groton parents' challenges as well.

1. ***The Class Continues to Meet the Commonality Requirement of Rule 23(a)(2).***

The proper standard for class certification is not that all of the class members be identical, but that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). Courts have interpreted the "commonality" prong as a low hurdle, easily surmounted. *See, e.g., Duhaime,* 177 F.R.D. at 63; *Mulligan v. Choice Mortg. Corp. USA,* 1998 WL 544431, at *3 (D.N.H.1998). This court, too, determined that the commonality prong "does not mean that each member of the class can be or is identically situated." *Rolland,* 1999 WL 34815562, at *4 (citing *General Tel. Co.,* 457 U.S. at 155). Rather, "commonality refers to the defendants' conduct and is not defeated by individual differences among class members." *Id.* (citing cases).

As the parties' Joint Motion to Approve Settlement Agreement on Active Treatment reveals, the class members still share common questions of law under the Nursing Home Reform Amendments, 42 U.S.C. § 1396r(e)(7) and the Secretary's PASARR regulations, 42 C.F.R. § 483.100 *et seq.* In particular, they share common questions of fact concerning Defendants' failure to provide them with active treatment; it was, after all, Defendants' actions and inactions which prevented class members, including those at Seven Hills, from receiving active treatment and from being considered for community placement. Those issues remain very much alive. *Compare Key v. Gillette Co.,* 782 F.2d 5, 6 (1st Cir.1986) (finding sufficient basis to decertify when claims of the named plaintiff were dismissed); *Rand v. Cullinet Software, Inc.,* 847 F.Supp. 200, 213-14 (D.Mass.1994) (expressing intent to decertify class after granting summary judgment for defendant on named plaintiff's claims).

At best, the Groton parents assert, but certainly do not prove, that certain class members, *i.e.,* some residents of Seven Hills, have different and more severe disabilities than the named plaintiffs and that those same class members, or their guardians, may not seek community placement. These same types of issues, it should be noted, were considered by the court when it addressed Defendants' opposition to Plaintiffs' motion for class certification in 1999. The court determined at the time that any identified factual differences between the named Plaintiffs and some of the class they sought to represent did not undermine commonality and, in particular, did not preclude certification of a class of persons with mental retardation who were challenging Defendants' practices. *See Rolland,* 1999 WL 34815562, at ----3-9.

***5** Little has changed since then. Most particularly, the differences to which the Groton parents point are not significant enough to decertify the class. First, as the court noted in its Memorandum and Order of June 16, 2008, the fact that a relatively small number of class members might not benefit from community placement because of their medical or personal circumstances was actually incorporated into the parties' Agreement. In fact, roughly half the class members who reside at Seven Hills have been deemed *inappropriate* for community placement.[3] Second, there is now considerable evidence-based upon Defendants' placement of over a thousand class members

from nursing facilities into the community, many of whom have as challenging or even more challenging conditions than the Groton parents' loved ones and many of whom initially opposed placement-that such differences are not determinative of a successful transition to the community. Third, and most importantly for present purposes, the present Agreement and the court's prior orders require active treatment for class members, like many of those at Seven Hills, who will remain in nursing facilities because of their particular medical and personal needs.

2. ***The Class Continues to Meet the Typicality Requirement of Rule 23(a)(3).***

This court, following the lead of other Massachusetts courts, broadly applied the typicality requirement when it first certified the class. *Rolland,* 1999 WL 34815562, at *7 (citing, *inter alia, Guckenberger v. Boston Univ.,* 957 F.Supp. 306, 326 (D.Mass.1997)). Thus, the fact that class members may have had somewhat different medical needs or placement preferences did not mean the typicality requirement had not been met. That remains true today.

To be sure, the Groton parents raised a number of arguments in opposition to the joint motion to approve the most recent Agreement, many of which were grounded on what they perceived to be the unique circumstances of their children and wards. Those concerns were considered by the court and need not be re-addressed here. Suffice it to say, as the court previously indicated, "[t]he fact that individual class members may have somewhat different needs, or may have entered the nursing homes through different processes, or may be entitled to or need different services, does not justify denying class certification." *Rolland,* 1999 WL 34815562, at *7 (citing cases).

3. ***The Class Continues to Meet the Adequacy of Representation Requirement of Rule 23(a)(4).***

The Groton parents' claim that Plaintiffs' fail to meet the standards of Rule 23(a)(4) is unconvincing. That there might be differences in placement preferences among class members, as the Groton parents maintain, in no way undermines the adequacy of their representation, particularly where there is an individual clinical assessment process for determining which persons are appropriate for community placement, as well as a panoply of procedural protections to challenge adverse placement decisions.

***6** Nor is there any basis under Rule 23(a)(4) to question the competency of class counsel. "An essential ingredient in this requirement is that the class representative's attorneys be qualified to vigorously and adequately prosecute the interests of the class." *Key,* 782 F.2d at 7 (citation omitted). As the court noted nearly ten years ago and as remains true today, Plaintiffs' attorneys have demonstrated that they have the skills and resources to adequately, professionally and vigorously represent the class. *See Rolland,* 1999 WL 34815562 at *8.[4]

To be sure, the Groton parents assert that class counsel failed to explain the terms of the proposed Agreement to class members. This assertion, however, is belied by the facts. As Plaintiffs point out, not only had notice of both the original Settlement Agreement and the proposed Agreement been sent to all class members, but Plaintiffs' lead counsel went to Seven Hills on May 6, 2008, to meet with the Groton parents in particular to explain the meaning and implications of the proposed Agreement. This meeting was initiated after counsel learned of the Groton parents' concerns, organized by the administrator of Seven Hills, and attended by over forty persons, including many of the Groton parents, their attorney, and nursing facility staff. In addition, the Agreement itself mandates that Plaintiffs' counsel provide ongoing information and education to class members and their guardians about the provisions of the Agreement, including community placement procedures and the appeal process.

4. ***The Class Continues to Meet the Requirement of Rule 23(b) (2).***

Federal courts have recognized that class actions certified pursuant to Rule 23(b)(2) are particularly important in cases involving civil rights actions, specifically those related to hospital or prison reform. *See, e.g., Coley v. Cinton,* 635 F.2d 1364, 1378 (8th Cir.1980); *Hoptowit v. Roy,* 682 F.2d 1237, 1245 (9th Cir.1982). In such cases, class certification is crucial to ensure that the granted relief benefits all members of the class. *Jane B. v. N.Y. Dep't of Social Servs.,* 177 F.R.D. 64, 72 (S.D.N.Y.1987). As this court previously found, and as remains true today, "[g]iven the fact that Defendants appear to be acting or refusing to act in a manner that is 'generally applicable' to the entire class, proposed class certification is eminently appropriate." *Rolland,* 1999 WL 34815562, at *9. Moreover, as evidenced by the court's numerous rulings on active treatment, as well as the Monitor's findings in her recent active treatment reviews, there is no doubt that Defendants have acted in ways generally applicable to the class as a whole with regard to specialized and medically necessary services, active treatment, and integrated community living opportunities. See, *e.g.,* Rolland Active Treatment Review, August 2007-May 2008 (Document No. 500). Accordingly, the continued certification of the class remains necessary to ensure that the relief mandated by the court runs to all classmembers.

D. ***Decertification and Recertification Alternative.***

***7** The instant class was certified pursuant to Rule 23(b)(2), not Rule 23(b)(3). Rule 23(b)(3) allows class members to opt out. *See In re New England Mut. Life Ins. Co. Sales Practice Litig.,* 183 F.R.D. 33, 41 (D.Mass.1998).[5] The opt-out alternative, however, is not generally available to Rule 23(b)(2) class actions where, as is true here, declaratory or injunctive relief is sought. *See* Wright, Miller & Kane, 7AA Fed. Practice & Proc. Civil 3d § 1784.1; *Messer v. Santebury Training Sch.,* 183 F.R.D. 350, 353 (D.Conn.1998). As a consequence, the Groton parents have not sought to opt out of the class on behalf of their children and wards.

The Groton parents, however, do suggest that the court could decertify the class and then recertify a class which, by definition, would somehow carve out residents at Seven Hills. Of course, this procedure, in effect, would enable them to opt out of the class. For the reasons which follow, the suggested procedure is unacceptable to the court.

First, the decertification and recertification process would not only be cumbersome, as is obvious, but confusing as well. By way of examples only, the Groton parents do not specify what the new class might look like, or whether it would exclude all residents at Seven Hills (despite the fact that the Groton parents do not appear to represent all class members at Seven Hills), or whether it would include or exclude individuals at facilities similar to Seven Hills. Second, the process, even if doable, would, in the end, accomplish little. As explained in the court's June 16, 2008 Memorandum and Order, the approved Agreement addresses most if not all of the concerns raised by the Groton parents.

Third, the course suggested by the Groton parents would not only jeopardize the rights accorded the class by the parties' agreements but, in particular, place at risk their own children's receipt of active treatment. Granted, the Groton parents maintain that they are pleased with the services provided at Seven Hills. However, given the court's concerns that Defendants have still not fulfilled their obligations to the class with regard to active treatment, the Groton parents' acceptance of the level of care at Seven Hills is simply not enough to support decertification. *See Lanner v. Wimmer,* 662 F.2d 1349, 1357 (10th Cir.1981) ("It is not fatal if some members of the class might prefer not to have violations of their rights remedied") (citations and internal quotation marks omitted); *Wyatt v. Poundstone,* 169 F.R.D. 155, 161 (M.D.Ala.1995) (decertification not warranted merely because of some differences of opinion amongst class members); *Wilder v. Bernstein,* 499 F.Supp. 980, 993 (S.D.N.Y.1980) ("the fact that some members of the class may be personally satisfied with the existing system and may prefer to leave the violation of their rights unremedied is simply not dispositive of a determination under Rule 23(a).") (citations and footnote omitted); Newberg on Class Actions § 16:17 (4th ed.) ("The fact that some class members may be satisfied with the challenged activity is irrelevant when relief would be beneficial to all members of the class."). *See also Waters v. Barry,* 711 F.Supp. 1125, 1131-32 (D.D.C.1989) (concluding that diversity of opinion within a Rule 23(b)(2) class does not prevent certification) (citing, *inter alia, United States Fid. & Guar. Corp. v. Lord,* 585 F.2d 860, 873 (8th Cir.1978)).[6]

E. ***Effect of Decertification***

***8** Given the Groton parents' understandable focus on their own loved ones, they do not appear to the court to have fully grasped the consequences of their motion to decertify on the class as a whole. Accordingly, those consequences, mentioned above, need to be reemphasized.

If the motion to decertify were granted, class members who remain confined in nursing facilities would be deprived of new transition services, expanded community placements, the education and outreach program, enhanced monitoring, and increased funding which is guaranteed under the new Agreement. In addition, over two thousand individuals who are members of the class, aside from the seven named plaintiffs, would lose their entitlement to the rights and protections established in the original Settlement Agreement, as well as the court's orders enforcing that agreement. Finally, decertification would force class members, if they were able, to bring separate actions to enforce their rights under federal law or to regain the benefits of the two settlements. Thus, decertification would not only be far-reaching and complicated but detrimental to the many class members who depend on the parties' settlements to retain the benefits of this litigation.

Given the fact that the Agreement compromises no rights which do not exist and jeopardizes no rights which do, decertification is not acceptable to the court. As far as the court is concerned, the drastic step of decertification is not a remedy for the concerns expressed by the Groton parents but, rather, a recipe for unacceptable consequences to the class as a whole.

II. *CONCLUSION*

For the reasons described, the court denies the Groton parents' motion to decertify the class.

IT IS SO ORDERED.

Footnotes

1 Prior decisions in this case include *Rolland v. Romney,* 318 F.3d 42 (1st Cir.2003); *Rolland v. Patrick,* 483 F.Supp.2d 107 (D.Mass.2007); *Rolland v. Romney,* 292 F.Supp.2d 268 (D.Mass.2003); *Rolland v. Romney,* 273 F.Supp.2d 140 (D.Mass.2003); *Rolland v. Cellucci,* 198 F.Supp.2d 25 (D.Mass.2002); *Rolland v. Cellucci,* 164 F.Supp.2d 182 (D.Mass.2001); *Rolland v. Cellucci,* 151 F.Supp.2d 145 (D.Mass.2001); *Rolland v. Cellucci,* 138 F.Supp.2d 110 (D.Mass.2001); *Rolland v. Cellucci,* 106 F.Supp.2d 128 (D.Mass.2000); *Rolland v. Cellucci,* 52 F.Supp.2d 231 (D.Mass.1999); *Rolland v. Cellucci,* 191 F.R.D. 3 (D.Mass.2000); *Rolland v. Patrick,* 2007 WL 184626 (D.Mass. Jan.16, 2007); and *Rolland v. Cellucci,* 1999 WL 34815562 (D.Mass. Feb.2, 1999).

2 The only notice class members received with respect to present events was provided by Plaintiffs' and Defendants' counsel and pertained only to the parties' proposed Agreement. (See Joint Motion to Preliminarily Approve Settlement Agreement and Approve Class Notice (Document No. 469).)

3 As the court noted in its June 16th Memorandum and Order, of the four Groton parents who testified at the fairness hearing, two have children who had been preliminarily deemed *inappropriate* for community placement, one has a child who had not yet been evaluated because of his age and only one other has a child-who leaves Seven Hills on a daily basis to go to high school-who had been tentatively placed on the community placement list.

4 The Center for Public Representation, through its senior attorneys, Steven Schwartz and Cathy Costanzo, has been involved in complex class action litigation throughout the country on behalf of disabled persons with disabilities for the past thirty years. Frank Laski, the Committee's director, has also been lead counsel in a number of class action suits throughout the country. The Mental Health Legal Advisors Committee advocates for and represents persons with mental disabilities throughout the Commonwealth. The Disability Law Center, a federally designated protection and advocacy agency for persons with disabilities in Massachusetts, has also litigated on behalf of persons with mental retardation and developmental disabilities on a broad range of issues. Foley Hoag LLP, a private law firm in Massachusetts, has also been involved in several major class actions on behalf of institutionalized persons with mental disabilities.

5 A Rule 23(b)(3) class exists where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b) (3). For such classes, members must be notified of their ability to opt-out, *i.e.,* "that the court will exclude from the class any member who requests exclusion." Fed.R.Civ.P. 23(c)(2)(v).

6 Interestingly enough, the very services with which the Groton parents are satisfied are likely the result of the parties' original Settlement Agreement. The latest Agreement, too, requires that active treatment be provided to all class members who have been deemed unsuitable for community placement, including many of those at Seven Hills.