1990 WL 73418
United States District Court, N.D. New York.

INMATES OF NEW YORK STATE WITH HUMAN IMMUNE DEFICIENCY VIRUS, for themselves and all others similarly situated, Plaintiffs,
v.
Mario M. CUOMO, Governor of the State of New York, Thomas A. Coughlin, III, Commissioner of the New York State Department of Correctional Services, et al., Defendants.

No. 90–CV–252. | May 31, 1990. | Order and Report–Recommendation May 14, 1990.

Attorneys and Law Firms

The Legal Aid Society, Criminal Appeals Bureau, Prisoners' Rights Project, New York City, for plaintiffs; William J. Rold, John A. Beck and Michael Wiseman, New York City, of counsel.

Robert Abrams, Attorney General, State of New York, Department of Law, Albany, N.Y., for defendants; Darren O'Connor, Albany, N.Y., of counsel.

Opinion

ORDER

McAVOY, District Judge.

***1** Plaintiffs, all of whom are inmates infected with the Human Immunodeficiency Virus, have commenced the present civil rights action under 42 U.S.C. § 1983 challenging defendants' delivery of medical, mental health, education and preventive services as violative of their rights under the 8th, 9th and 14th amendments to the Constitution; they seek declaratory and injunctive relief and have moved to have their proposed class certified under Rule 23(b)(1) and (b)(2). That matter was referred to Magistrate Ralph Smith who prepared a report (appended) recommending that plaintiffs' motion, unopposed by defendants, be granted. The magistrate's recommendation is adopted. *See* 28 U.S.C. § 636(b)(1)(A).

Plaintiffs also sought an order requiring that notice of the action be given to all members of the class by providing each with individual notice as well as by posting the notice in appropriate places within State penal institutions. Defendants oppose any individual notice requirement. Upon careful consideration of the notice issue, Magistrate Smith determined that posting would be sufficient and that any individual notice requirement would be excessively burdensome. He thereupon denied plaintiffs' motion insofar as it sought individual notice to all current inmates and to all inmates who enter State penal institutions during the pendency of the lawsuit and ordered that notice be accomplished by posting.

Plaintiffs object to the magistrate's ruling on the notice issue by stating in a letter to the court, dated May 21, 1990, that "[w]e intend to appeal the Magistrate's decision on this point, and we ask that the issue of notice be reserved pending our appeal." Regardless whether the magistrate had the authority to rule on the notice issue in a manner other than making a recommendation to the court, the court, noting that the parties do not challenge the magistrate's authority here and that plaintiffs have curiously not sought reconsideration of the ruling, *see* 28 U.S.C. § 636(b)(1)(A), agrees with the magistrate's determination. Ordering notice by posting and denying the request for individual notice is neither clearly erroneous nor contrary to law given that in class actions under Rule 23(b)(1) and (b)(2) notice is not required at all. *See Marcera v. Chinlund,* 595 F.2d 1231, 1240 n. 13 (2d Cir.), *vacated and remanded on other grounds,* 442 U.S. 915 (1975). It is only in class actions under Rule 23(b)(3) that the court must direct "the best notice practicable under the circumstances". Fed.R.Civ.P. 23(c)(2).

ORDER AND REPORT–RECOMMENDATION

RALPH W. SMITH, JR., United States Magistrate.

In this civil rights action pursuant to 42 U.S.C. § 1983, plaintiffs, all of whom are inmates infected with the HIV virus, challenge defendants' delivery of medical, mental health, education and preventive services as violative of their rights under the Eighth, Ninth and Fourteenth Amendments to the United States Constitution and seek declaratory and injunctive relief. Plaintiffs seek an Order certifying this action as a class action pursuant to Fed.R.Civ.P. 23(b)(1) and (b)(2), a motion not opposed by the defendants.

***2** Plaintiffs also seek an Order requiring that notice of the action be given to all members of the class by providing each with individual notice as well as by posting the notice in appropriate places within state penal institutions. Defendants do not object to posting but oppose any requirement that a copy of the notice be delivered individually to each current and future inmate.

Plaintiffs propose that individual notice be given to every prisoner currently incarcerated in New York State penal institutions operated by the New York State Department of Correctional Services and to every inmate who enters each such institution during the pendency of this action. They contend that this is necessary to ensure that every potential class member receives actual notice of the pendency of this action and to protect the privacy of those actually infected with the HIV virus. They submit that successful prosecution of this action requires information from potential class members. They further argue that to restrict notice to posted copies will tend to identify those observed reading or copying information from the notices as individuals infected with the HIV virus, thus singling them out for discriminatory treatment at the hands of other inmates and staff. They rest this claim on a potential violation of the inmates' privacy.

Defendants, in opposition, claim that the delivery of individual notice to all current inmates numbering in excess of 53,000 and to the estimated 34,000 additional inmates expected to be received within the next 12 months with the potential for even more if this action is not resolved within that time, is extremely burdensome. They argue that by plaintiffs' own reckoning, as many as 80 percent of these inmates are not infected and thus have no interest in the outcome of the litigation. While willing to post the notice in medical clinics, law libraries, housing areas, and mental health clinics at each of the more than 60 prisons in the state, they contend that to distribute this notice individually in the manner demanded by the plaintiffs with the obtaining of receipts from each prisoner necessary to protect the state from future claims is burdensome. They also express concern about the need to see that notice is delivered to those inmates who are out of the institutions on any given day for outside court appearances or for other reasons.

In response, plaintiffs argue that neither do they insist on any receipt requirement nor do they find it necessary. They also contend that defendants' argument concerning the difficulty of seeing that notice is served on those prisoners who are temporarily being held outside a state prison is an imagined burden.

In class actions maintained pursuant to Fed.R.Civ.P. 23(b)(3) where potential class members are permitted to "opt out" the giving of notice is required. Rule 23(c)(2). Those class actions maintained under Rule 23(b) 91) or 23(b)(2) do not require such notice but notice may be ordered in the discretion of the Court (Rule 23(d)(2)). *See Marcera v. Chinlund,* 595 F.2d 1231, 1240 n. 13 (2d Cir.), *vacated and remanded on other grounds,* 442 U.S. 915 (1975). Plaintiffs have provided examples of notice ordered in other class action litigation but concede that there is no precedent for providing individual notice to every inmate held in the state's penal institutions.

***3** To require defendants to provide each present and future inmate with such notice by individual delivery when done in the manner felt necessary by defendants to protect themselves from future claims is an excessive burden both in administrative and economic terms. Their concerns about future claims and litigation by prisoners claiming not to have received notice are, in the experience of this Court, well founded. Even were distribution to be made without obtaining of receipts, this would constitute a burden on defendants, a burden not justified by the benefit of individual notice. Furthermore, I am not convinced that the privacy concerns expressed by the plaintiffs are valid. Prison bulletin boards are traditionally used for the posting of notices on a variety of subjects and to presume that an inmate reading a posted notice concerning this litigation is thereby exposing himself as a potential class member is far too speculative to support a requirement of individual notice.

The proposed notice by posting found acceptable by the defendants has been approved in similar circumstances. *See Ahrens v. Thomas,* 570 F.2d 286, 288 (8th Cir.1978). I find it equally acceptable in the instant action. It is, therefore,

RECOMMENDED, that the plaintiffs' unopposed motion to permit maintenance of a class action be granted. See 28 U.S.C. § 636(b)(1)(A). Further, if this recommendation is accepted, it is

ORDERED, that plaintiffs' motion for individual notice is denied, and notice shall be given to potential class members by posting in all medical clinics, law libraries, and housing areas in prisons operated by the Department of Correctional Services as well as in all mental health clinics operated by the New York State Office of Mental Health within those prisons.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten days within which to lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court with an extra copy to be mailed to the chambers of the undersigned at P.O. Box 1818, Albany, New York 12201–1818. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. *Small v. Secretary of Health and Human Services,* 892 F.2d 15 (2d Cir.1989); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

Parallel Citations

16 Fed.R.Serv.3d 1397