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United States District Court,
D. Massachusetts.

Loretta ROLLAND, et al., Plaintiffs
v.
Argeo Paul CELLUCCI, et al., Defendants

No. CIV A 98–30208–KPN.
|
Feb. 2, 1999.

Attorneys and Law Firms

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MEMORANDUM AND ORDER WITH REGARD TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (Docket No. 05)

NEIMAN, Magistrate J.

***1** On October 29, 1998, the named Plaintiffs, Loretta Rolland, Terry Newton, Bruce Ames, Frederick Cooper, Margaret Pinette, Leslie Francis and Timothy Raymond, filed a complaint seeking declaratory and injunctive relief on behalf of themselves and a class of persons with mental retardation and other developmental disabilities in nursing facilities. Defendants include the Governor of the Commonwealth of Massachusetts and various executive officials who, Plaintiffs allege, are responsible for providing medically necessary services to persons with disabilities. With the parties' consent, the case has been assigned to the court pursuant to 28 U.S.C. § 636(c) for all purposes, including trial and entry of judgment.

Presently before the court is Plaintiffs' motion for class certification, filed on November 25, 1998. Heeding the admonition in Fed.R.Civ.P. 23(c)(1) that a court determine whether an action may be maintained as a class action "as soon as practicable" after its commencement, the court scheduled a hearing on Plaintiffs' motion for January 13, 1999. For the reasons which follow, the court will certify the class as subsequently reconfigured by Plaintiffs at the court's request. *See* Memorandum in Support of Revised Class Certification Order (Docket No. 39).

I. *BACKGROUND*

The named Plaintiffs are all asserted to have mental retardation or mental disabilities and live in nursing facilities in the Commonwealth of Massachusetts. (Compl. (Docket No. 01) ¶¶ 1, 15–21.) In essence, each of the named Plaintiffs asserts that he or she was unnecessarily admitted to and is inappropriately confined in a nursing facility in contravention of his or her preference and the professional judgment of the Massachusetts Department of Mental Retardation's clinical review team. In addition, each named Plaintiff asserts that he or she has not been provided with minimally adequate training, habilitation and support services. Specifically, Plaintiffs claim that Defendants' actions violate a panoply of federal statutes, specifically, in Counts I and II, the Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.,* (Compl.¶¶ 175–180), in Counts III and VII, the Medical Assistance (Medicaid) Act, 42 U.S.C. §§ 1396a, 1396n, 1396d, (Compl.¶¶ 181–192), and in Count VIII, of the Nursing Home Reform Amendments, 42 U.S.C. § 1396r. (Compl.¶¶ 193–195).

As originally drafted, Plaintiffs' motion sought to have the court certify a class

> consisting of all adults with mental retardation and other developmental disabilities in Massachusetts who are, have been, or may be confined in nursing facilities, and who are not receiving medically necessary services in the most integrated setting consistent with their individual needs.

(Pl. Mot. (Docket No. 05). As explained below, the court believes that a class, as so defined, ought not be certified, but that a class as subsequently proposed by Plaintiffs at the request of the court should be. That revised class is defined as

> ***2** all adults with mental retardation and other developmental disabilities in Massachusetts who reside in nursing facilities, who resided in nursing facilities on or after October 29, 1998, or who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq* .

(Pl. Mem. Supp. Revised Class (Docket No. 39) at 1–2.) Both the statutory and regulatory references within the proposed class govern state requirements for preadmission screening and review.[1]

Responding to Plaintiffs' revised definition, Defendants, without waiving their objections to the certification of any class, proposed a class consisting of

> all residents of Massachusetts, as determined in accordance with federal and state Medicaid law, over the age of twenty-two with mental retardation and other developmental disabilities who are categorically eligible for Medicaid and at any time since October 29, 1998, resided in a nursing facilities in Massachusetts and were determined to require, as a result of a PASARR evaluation pursuant to 42 U.S.C. § 1396r(e)(7), the level of services provided in nursing facilities and specialized services.

(Def. Resp. (Docket No. 40) at 3–4.) PASARR stands for "Pre–Admission Screening and Annual Resident Review."

II. *DISCUSSION*

In order to meet the requirements for class certification, Plaintiffs must satisfy all the requirements set forth in Rule 23(a), as well as at least one of the requirements of Rule 23(b). Rule 23(a) has four distinct prerequisites: (1) numerosity—the class must be "so numerous that joinder of all members is impracticable," (2) commonality—there must be "questions of law or fact common to the class," (3) typicality—the claims or defenses of the class representatives must be "typical of the claims or defenses of the class," and (4) representativeness—the class representatives must "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a). *See Griffin v. Burns,* 570 F.2d 1065, 1072 (1st Cir.1978).

Although Rule 23(b) has three subparts, only one must be satisfied to support class certification. The parties agree that the relevant provision for purposes of this case requires that the parties opposing the class have 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). *See Yaffe v. Powers,* 454 F.2d 1362, 1366 (1st Cir.1972).

In their opposition to class certification, Defendants claim that Plaintiffs "have not shown the absence of significant differences in their individual circumstances, including their medical needs, and have not proposed a class that is adequately defined and clearly ascertainable." (Def. Opp. (Docket No. 19) at 5.) Plaintiffs characterize this opposition as limited to two grounds—the lack of an ascertainable class and the lack of commonality between putative class members. (Pl. Reply (Docket No. 21) at 1.) Defendants contend, however, that their opposition cuts across all elements of Rule 23.

***3** Although the court believes that Defendants' opposition is indeed somewhat limited, the court will address each of the elements of Rule 23 at play here. At bottom, the named Plaintiffs have the burden of showing that the requirements of Rule 23 are met. *See Lamphere v. Brown Univ.,* 553 F.2d 714, 715 (1st Cir.1977). The failure on the part of the named Plaintiffs to satisfy each of the requirements may be fatal to certification. *See Perez v. Personnel Bd. of City of Chicago,* 690 F.Supp. 670, 672 (N.D.Ill.1988).

A. *Numerosity*

The numerosity aspect of Rule 23(a)(1) has two components, the number of class members and the practicality of joining them in a single case. Plaintiffs satisfy both requirements.

Plaintiffs need not establish the precise number or identity of class members, *Westcott v. Califano,* 460 F.Supp. 737, 744 (D.Mass.1978), particularly where, as here, only declaratory and injunctive relief is sought. *McCuin v. Secretary of Health & Human Servs.,* 817 F.2d 161, 167

(1st Cir.1987). Rather, the court may draw a reasonable inference as to the size of a class given the facts before it. *Westcott,* 460 F.Supp. at 744.

In some contrast to a typical civil rights case, the membership in the instant class is not "incapable of specific enumeration." *Yaffee,* 454 F.2d at 1362. *See also Powell v. Ward,* 487 F.Supp. 917, 922 (S.D.N.Y.1980) (citing Fed.R.Civ.P. 23 advisory committee's note; *Robertson v. Nat'l Basketball Assoc.,* 389 F.Supp. 867, 897 (S.D.N.Y.1975)). Indeed, based on the facts presented, the court finds that the number of the proposed class is reasonably ascertainable. As Plaintiffs note, Defendants' own independent assessment indicates that at least sixteen hundred persons with mental retardation and other developmental disabilities presently reside in Massachusetts nursing homes, with a significant number admitted to such facilities each year. (*See* Pl. Mot. (Docket No. 05) Exh. 1 at 2). Classes are typically certified with far fewer numbers. *See Griffin,* 570 F.2d at 1072 (123 voters sufficient to satisfy Rule 23(a)(1)); *Korn v. Franchard Corp.,* 456 F.2d 1206, 1209 (2d Cir.1972) (class consisting of 212 members); *Grace v. Perception Tech. Corp.,* 128 F.R.D. 165 (D.Mass.1989) (class consisting of between 300 and 1300 shareholders). Given the reasonable estimate of the proposed class size, this action may otherwise proceed.

As to the practicality of joining members of the class, Rule 23(a)(1) merely requires a determination that the class is so numerous as to make joinder impracticable. In this respect, courts have given significant weight to such factors as the ability of class members to bring their own separate actions, their geographical diversity and the type of relief sought. *See Jordan v. Los Angeles County,* 669 F.2d 1311, 1319 (9th Cir.1982), *vacated on other grounds,* 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982); *Nat'l Assoc. of Radiation Survivors v. Walters,* 111 F.R.D. 595 (N.D.Cal.1986). Here, the inability of nursing home residents with mental retardation and developmental disabilities to initiate actions on their own behalf is an obvious factor strongly supporting class certification. In this regard, Plaintiffs point out that numerous courts have relied upon the combination of confinement and disability to certify classes in similar situations. *See Brewster v. Dukakis,* 544 F.Supp. 1069 (D.Mass.1982) (persons with mental illness hospitalized at Northampton State Hospital); *Consumer Advisory Bd. v. Glover,* 151 F.R.D. 490 (D.Mass.1993) (residents and outpatients at Pineland Center); *Ricci v. Okin,* 537 F.Supp. 817 (D.Mass.1982) (consolidated cases concerning mentally retarded residents at five Massachusetts institutions). Plaintiffs also highlight a variety of other such classes throughout the nation. (*See* Revised Exh. 2 to Motion to Certify Class (Docket No. 22).) "Considering plaintiffs' confinement, their economic resources, and their mental handicaps, it is highly unlikely that separate actions would follow if class treatment were denied. This is precisely the type of group which class treatment was designed to protect." *Armstead v. Pingree,* 629 F.Supp. 273, 279 (M.D.Fla.1986). *See also Jordan,* 669 F.2d at 1319 (highly unlikely that individual claimants would institute separate suits for declaratory and injunctive relief).

B. *Commonality*

***4** Subsection 2 of Rule 23(a) requires that proposed class members have at least one common issue, the resolution of which will effect all or a significant number of putative class members. Because a class need only share a single legal or factual issue for class certification, the commonality prerequisite is ordinarily easily satisfied. *Duhaime v. John Hancock Mut. Life Ins. Co.,* 177 F.R.D. 54, 63 (D.Mass.1997). However, if the individual and class claims are so different that they might as well be tried separately, the court may conclude that the class action would not promote "the efficiency and economy of litigation which is the principal purpose of the procedure." *Gen. Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 159, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (quoting *American Pipe and Constr. Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)).

Defendants concentrate much of their opposition to Plaintiffs' motion on this factor. Defendants claim that the requisite common issues of fact and law do not exist in the present matter. Indeed, Defendants assert, Plaintiffs' complaint, which describes the varying nature and severity of the named Plaintiffs' conditions, at least impliedly acknowledges that each plaintiff will need different services. (*See* Def. Opp. at 8.) "As a result," Defendants assert, "the individual Plaintiffs and the members of the proposed class, will have varying needs and inevitably will require different medical personal care attendant, transportation, visiting nurse, home health aide, or behavioral support services." (Id.) Plaintiffs' assertion of commonality, Defendants continue, "ignores the very basis of the request for 'medically necessary services' in the 'most integrated setting' consistent with their 'individual needs.' " (Id. at 9.) These internally quoted phrases were incorporated into the class definition originally proposed by Plaintiffs.

Defendants' arguments to the contrary, "commonality" does not mean that each member of the class can be or is identically situated. *Gen. Tel. Co.,* 457 U.S. at 155. Generally speaking, commonality refers to the defendants' conduct and is not defeated by the presence

of individual differences among class members. *Adamson v. Bowen,* 855 F.2d 668, 676 (10th Cir.1988); *Appleyard v. Wallace,* 754 F.2d 955, 958 (11th Cir.1985); *Milonas v. Williams,* 691 F.2d 931, 938 (10th Cir.1982); *Penn v. San Juan Hosp., Inc.,* 528 F.2d 1181, 1189 (10th Cir.1975). That is true here as well.

Perhaps more importantly, as described by Plaintiffs, there are at least five common questions of law at issue in the present matter: (1) whether Defendants have failed to provide appropriate Medicaid habilitative services to the Plaintiff class; (2) whether Defendants have failed to provide such services with reasonable promptness; (3) whether Defendants have failed to provide specialized services in violation of the Nursing Home Reform Amendments, 42 U.S.C. § 1396r; (4) whether Defendants have failed to provide mental retardation and developmental disability services in the most integrated setting appropriate, in violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.;* and (5) whether Defendants have discriminated against persons with developmental disabilities in the provision of habilitation services in violation of the ADA. In the court's opinion, these claims predominate over any particularized factual questions relating to individual members of the class.

***5** Still, Defendants maintain that at least two of the named Plaintiffs are also members of the class certified in *Ricci v. Okin, supra,* and have available to them administrative remedies unavailable to the other Plaintiffs. This, in Defendants' estimation, destroys the commonality of claims of the proposed class.

As Plaintiffs point out, *Ricci* actually supports a finding of commonality. In *Ricci,* District Judge Joseph L. Tauro certified a class of current and future residents of the Belchertown State School. Like Plaintiffs here, the *Ricci* plaintiffs challenged institutional conditions for lack of appropriate habilitation services and, like Plaintiffs here, sought community placement. Moreover, as Defendants themselves assert, once the class was certified in *Ricci,* "the defendants were required to provide services to the plaintiffs which recogniz[ed] that determinations of what services and placements were appropriate were dependent on the circumstances of each individual ..." (Def. Opp. at 10.) That these individualized determinations might differ did not persuade the *Ricci* court that class certification was inappropriate. Rather, individualized determinations of needs and services were more properly left for post-judgment relief, such as the administrative process adopted by the Department of Mental Retardation. *See* 115 C.M.R. § 6.20–32.

Defendants' assertion that former *Ricci* class members may have inconsistent interests with other proposed class members is unavailing. First, there no longer appears to be a class certified in *Ricci.* The order attached to Defendants' opposition explicitly and unconditionally vacates all outstanding court orders, presumably including the class certification order. Second, even if prior *Ricci* class members maintain certain rights, those rights have not been shown to be contrary to the rights sought by the present class members. If anything, as Plaintiffs point out, it is precisely because former state school residents may have special status under Judge Tauro's May 25, 1993, final order in *Ricci,* as well as under DMR regulations, that it is appropriate to include two plaintiffs who are former residents at Belchertown. In that way, those plaintiffs can insure adequate representation of their special status, if any. That these individuals might possess rights under *Ricci* does not mean those rights are in conflict with the remedies sought here.

Still, Defendants' argument that the use of certain terms in Plaintiffs' originally proposed class may be susceptible to individualized interpretation is well taken. Defendants' argument, in fact, caused the court to eliminate from the definition of the class the very terms which appeared to subsume the remedy sought by Plaintiffs. The court also believes that the originally proposed modifying phrase—adverting to individuals "who are not receiving medically necessary services in the most integrated setting consistent with their individual needs"—would unfairly incorporate into the class definition the very legal conclusion which Plaintiffs seek to have the court ultimately draw. For those reasons, the court explored alternative class definitions with the parties at oral argument and requested that Plaintiffs redefine the class that they were seeking to certify.

***6** In response, Plaintiffs proposed a new definition which, as described, includes "all adults with mental retardation and other developmental disabilities in Massachusetts who reside in nursing facilities, who resided in nursing facilities on or after October 29, 1998, or who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq."* This description differs in three material respects from the class originally proposed by Plaintiffs.

First, Plaintiffs have eliminated from the proposed definition the phrase which most concerned the court. As explained, that phrase improperly emphasized individualized clinical determinations which could be part of a remedy, but not the class definition. The revised class definition seeks to certify a class in a more factual and

objective manner. In addition, the revised class includes the same number of persons described in Plaintiffs' motion, approximately sixteen hundred current residents of nursing facilities and others who are to be screened for admission each year.

Second, the revised definition makes clear that only persons with mental retardation or other developmental disabilities who have been residents of nursing homes since the filing of the instant matter are members of the class. This addresses Defendants' initial concern about the uncertainty of the phrase "have been confined in nursing facilities." Defendants themselves now make reference to the filing date in their proposed class definition. The filing date of the lawsuit, rather than the entry date of the certification order, is consistent with Rule 23 requirements that certification relate back to the initiation of litigation. *See Sosna v. Iowa,* 419 U.S. 393, 402 n. 11, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

Third, to address Defendants' and, indeed, the courts' concern with the expansiveness of the phrase, "may be confined in nursing facilities," the revised definition limits the class to persons "who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq .*" Plaintiffs contend that the phrase "should be" is important because persons with disabilities sometimes are actually admitted before the pre-screening process occurs.

Focusing on this aspect of Plaintiffs' revised proposal, Defendants claim that this definition broadens rather than narrows the class and includes persons who are not adequately represented by the named Plaintiffs. More specifically, Defendants assert that the revised class proposed by Plaintiffs may improperly include (1) individuals who no longer reside in nursing homes as well as (2) persons who may never go into nursing homes, either because screening evaluations determine that they do not require that level of services or who choose not to reside in a nursing home. In addition, Defendants argue that Plaintiffs' revised class definition—to the extent it includes persons who "should be screened for admission to nursing facilities"—are not fairly represented by the named Plaintiffs, all of whom have been screened for admission. Moreover, Defendants asserts, the mere fact that an individual may be eligible for a screening evaluation does not mean that he or she will be determined to require specialized screening or will be recommended for community placement.

***7** The court does not believe that Plaintiffs' revised class definition presents the problems which Defendants raise. First, Plaintiffs may fairly represent not only those who have already been screened, but those who are to be screened in the future. Plaintiffs ought not be required to include as a named Plaintiff one who is actually in the initial process, but not yet screened. To have Plaintiffs time the filing of a complaint to address that aspect of the class is asking too much. Second, the phrase "should be screened" should remain part of the class definition for, as Plaintiffs note, some persons with disabilities may become residents of nursing homes without having undergone any prescreening.

In turn, the court finds Defendants' proposal to be an overly restrictive definition of the class. First, Plaintiffs' claims do not simply arise under federal Medicaid law. Both the ADA and the NHRA have also been invoked. Second, Plaintiffs have not limited their lawsuit to persons over the age of twenty-two, and Defendants have not explained why such a limitation would be appropriate. Third, as Plaintiffs note, not all residents of nursing facilities are categorically eligible for Medicaid, as Defendants' proposal would appear to limit the class. Finally, the court sees no particular reason to define the class by reference to existing statutes, but not regulations.

C. *Typicality*

The third component of Rule 23(a) requires that the named Plaintiffs' claims be typical of the claims of the absent class members. As is the case with commonality, typicality does not require that claims made by named plaintiffs be identical to the claims of the other class members. Rather, the class representatives must be shown to generally "possess the same interests and suffer the same injury" as the unnamed class members. *Gen. Tel. Co.,* 457 U.S. at 156 (citing *East Texas Motor Freight Systems v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)). Like the commonality requirement, the typicality requirement is not particularly onerous. *See Celestine v. Citgo Petroleum Corp.,* 165 F.R.D. 463, 467 (W.D.La.1997); *Neff v. VIA Metro. Trans. Auth.,* 179 F.R.D. 185, 194 (W.D.Tex.1998). Sister courts in Massachusetts agree. *See Guckenberger v. Boston Univ.,* 957 F.Supp. 306, 326 (D.Mass.1997) (learning disabled students challenging university special needs program satisfy standards for class certification despite the fact that individual class members have different disabilities and require different types of accommodations); *In re Bank of Boston Corp. Securities Litig.,* 762 F.Supp. 1525, 1532 (D.Mass.1991) ("to be considered typical, a named plaintiff need not show 'substantial identity' between his claims and those of the absent class members"). *See also Griffin,* 570 F.2d at 1073 (typicality does not require that all class members be aggrieved by a singular practice).

Here, too, the representative class members present substantially similar factual situations giving rise to common legal issues. The 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. *See Doe v. Chiles,* 136 F.3d 709 (11th Cir.1998) (class of persons with developmental disabilities entitled to various services through community based waiver programs); *Chisholm v. Jindal,* 1998 WL 92272 at *7 (E.D.La. March 2, 1998) (class certified of all current and future Medicaid recipients not promptly provided with services in state's community based waiver program). If anything, the requisite typicality is established precisely because Plaintiffs' claims are broadly typical of the class, namely, that they have not been appropriately placed in the community or provided certain medically necessary supportive services.

D. *Representativeness*

***8** Rule 23(a)(4) requires that the representative plaintiffs fairly and adequately represent the interest of the entire class. In order to meet this requirement, Plaintiffs must satisfy two criteria: (1) the attorneys representing the class must be qualified and competent; and (2) the class representative must not have antagonistic or conflicting interest with the unnamed members of the class. *In Re Bank of Boston,* 762 F.Supp. at 1534; *Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir.1978). Defendants do not appear to seriously dispute that both of these elements have been met.

1. *Adequacy of Counsel*

In the present matter, the court has considered Plaintiffs' attorneys' professional skills, experience and resources and has determined that they can more than adequately represent the interests of the class. *See North American Acceptance Corp. v. Arnall, Golden & Gregory,* 593 F.2d 642 (6th Cir.1979). The Center for Public Representation, through Attorneys Steven Schwartz and Cathy Costanzo, have been involved in significant class action litigation on behalf of institutionalized persons with disabilities for the past twenty years. Similarly, the Disability Law Center, through which Christine M. Griffin, Stacie B. Siebrecht and Matthew Engel appear before the court, is the federally designated protection and advocacy agency for persons with disabilities in Massachusetts. That organization has litigated on behalf of persons with mental retardation and developmental disabilities on a broad range of issues. Foley, Hoag & Eliot, through which both Richard d'A. Bellin and Nima R. Eshghi appear, is a well known private law firm in Massachusetts that has been involved in several major class actions on behalf of institutionalized persons with mental disabilities. The Massachusetts Legal Advisors Committee is a state created advocacy and education program authorized to represent persons with mental disabilities in the Commonwealth. Its director, Frank Laskey, whose appearance has been filed in the present matter, has been lead counsel in a number of class action lawsuits throughout the country, including many involving institutionalized persons and nursing home residents with disabilities. Finally, Plaintiffs' attorneys have represented that their resources are more than adequate to represent the class completely and that they have no other professional commitments which are antagonistic to or would detract from their efforts to seek a favorable decision in this case.

2. *Adequacy of a Named Representative*

For the named representatives to be adequate to represent the class, their interests must coincide with those of the unnamed class members. *Gen. Tel. Co. of the Southwest,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740. In addition, the interests of the named plaintiffs must not be antagonistic to the unnamed class members. *Andrews,* 780 F.2d at 130.

Here, as discussed, while all members of the proposed class may not have the same treatment recommendations or needs, they have all allegedly suffered the same injury as a result of Defendants' policies and practices. In addition, they all seek the same remedy, specialized services and integrated community living opportunities. As described above, there are no meaningful differences among the class members on these fundamental issues. Accordingly, the named Plaintiffs can fully and adequately represent the legal rights and seek remedies to which they believe all members of the class are entitled.

E. *Rule 23(b)(2)*

***9** Plaintiffs assert that they satisfy the prerequisite of Rule 23(b)(2) insofar as Defendants are claimed to have acted or refused to have acted on grounds generally applicable to the class, "thereby making appropriate final injunctive relief or clarifying declaratory relief with respect to the class as a whole." As the First Circuit has explained, if injunctive or declaratory relief is appropriate with respect to the whole class, certification is proper. *Dionne v. Bouley,* 757 F.2d 1344, 1356 (1st Cir.1985). The First Circuit has also indicated that Rule 23(b)(2) is "uniquely suited to civil rights action." *Yaffe,* 454 F.2d at 1366. Certification of such classes has been deemed "an especially appropriate vehicle for civil rights action" seeking hospital or prison reform. *Coley v. Clinton,* 635

F.2d 1364, 1378 (8th Cir.1980). *See Hoptowit v. Ray,* 682 F.2d 1237, 1245 (9th Cir.1982). Certification is likewise appropriate where there is a danger that the individual claims may be moot, or a declaration of rights with respect to one plaintiff may not automatically translate into an appropriate time or relief for other class members, and when certification would not impose any additional burden on the court. *Dionne,* 757 F.2d at 1356.

Here, Plaintiffs claim, the risk of mootness is real. Since the filing of the complaint, Plaintiffs aver, the Department of Mental Retardation has indicated that two of the named Plaintiffs are currently on waiting lists for transfer to group homes. (*See* Def. Opp. at 8.) These individuals, Plaintiffs assert, previously had been waiting two years for such placement to no avail. Similarly, a declaration of rights as to one plaintiff will not resolve the problems of other class members. For example, even if it were declared that a named Plaintiff was entitled to special services or community placement, together with the mechanism to accomplish that, it would not follow that all class members would be afforded similar opportunities in a timely manner. Given 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. As noted, Plaintiffs point to at least thirty-seven cases in which institutionalized persons with mental disabilities have challenged the conditions, necessity or appropriateness of their placement have been certified as classes under Rule 23. (*See* Pl. Revised Exh. 2 (Docket No. 22).)

III. *CONCLUSION*

For the reasons stated, Plaintiffs' motion for class certification, as amended, is ALLOWED.

A separate order shall issue.

All Citations

Not Reported in F.Supp.2d, 1999 WL 34815562

Footnotes

1 The court has chosen not to utilize yet another class definition suggested by Plaintiffs, which Plaintiffs themselves acknowledge is somewhat redundant. *See* Pl. Mem. Supp. Revised Class at 3 n. 1.