

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

D.D. and all other similarly situated, et al.,	:	Case No. 2:10-cv-1097
	:	
Plaintiffs,	:	Judge Sargus
	:	
v.	:	Magistrate Judge Kemp
	:	
WASHINGTON COUNTY, OHIO, et al.,	:	<u>MOTION BY PLAINTIFFS TO</u>
	:	<u>CERTIFY CLASS</u>
Defendants.	:	

Pursuant to Fed. R. Civ. Proc. 23(a), (b)(2) and (b)(3), the plaintiffs move this court to provisionally certify the following plaintiff class:

All persons under twenty-two years of age as of December 6, 2010, the date on which this lawsuit was filed, who have been, are now, or in the future, will be held in custody at the Washington County, Ohio Juvenile Center.

Plaintiffs further move that this court appoint K.M., D.D., N.B., B.M., C.M., W.G., J.L., and J. R., as class representatives and the undersigned counsel as class counsel.

Plaintiff's further move to temporarily lift the stay on filing pleadings in this case solely to permit the filing of this motion.

Defendants do not oppose this motion to provisionally certify the class on the condition that their lack of opposition is not deemed a waiver of any right to move to decertify the class and assert any defenses to certification. Plaintiffs accept that condition and agree that in the event of a motion to decertify the class the burden is on the plaintiffs to satisfy the elements of Rule 23. A draft order is attached.

MEMORANDUM IN SUPPORT

I. Introduction

This is a civil rights class action lawsuit seeking monetary and injunctive relief, including a preliminary and permanent injunction to end the unconstitutional conditions of confinement endured by juveniles housed at Washington County Juvenile Center (“The Center”). Plaintiffs are former and current residents who have been confined at The Center. As a result of the unconstitutional conditions, policies, and practices of defendants, class members have been: locked in cells for 23 hours per day, with only limited recreation; denied water and hygiene products for extended periods;; denied privacy due to interactions with staff of the opposite gender; required to wear suicide smocks as punishment; subjected to punishment without due process; forced to work at for profit businesses in the community without remuneration; required to languish in detention cells for extended periods of time; subjected to arbitrary extensions of their program time; required to engage in degrading activities, such as cleaning an entire gymnasium with toothbrushes; denied education and other programming; and denied necessary physical and mental health care.

Plaintiffs seek a court order requiring reforms at the Center and compensatory damages.

II. Argument

A. Standard for Certification of Class Action

The determination that an action will be maintained as a class action involves a two step process. First, the Court must find that the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – have been

satisfied. The court must then decide whether the proposed class qualifies under one or more of the three alternative bases of certification set forth in Rule 23(b).

In this case the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the plaintiff's claims are typical of the class; and plaintiff will fairly and adequately protect the interest of the class. Plaintiffs satisfy the requirements of Fed. R. Civ. Pro. 23(b)(2) because the primary relief sought by plaintiffs is injunctive and declaratory, while also satisfying the requirements of Fed. R. Civ. Pro. (b)(3) because the common questions of law and fact predominate and a class action is superior to other available methods of adjudicating this controversy.

B. The Requirements Of Rule 23(a) Are Satisfied.

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable.

Rule 23(a)(1) requires that, for certification purposes, the class be so numerous that the joinder of all members is impracticable. Impracticability means only difficulty or inconvenience of joining all members of the class. *Senter v. General Motors Corp.*, 532 F.2d 511,523 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 158 (S.D. Ohio 1992). While the exact number of class members is unknown at this time, plaintiff believes that the class consists of hundreds of persons. Defendants acknowledge the class is approximately 300 people. The sheer number of class members establishes that the numerosity requirement is satisfied. *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

2. Questions Of Law Or Fact Are Common To The Class.

The alleged nature of the defendants' conduct in this case together, with the similar legal status of the class members, requires this Court to find that questions of law

or fact are indeed common to the class. The claims of the named individuals and representative plaintiffs are typical of the claims of the class, for plaintiffs and all class members have suffered, are currently suffering, or will continue to suffer injuries arising from defendants' wrongful conduct as alleged herein. Plaintiffs and the class members share the following nonexhaustive list of problems encountered because of the unconstitutional conditions of confinement:

- Locking youth in cells 23 hours per day, permitting only limited recreation
- Denying water and hygiene products to youth in detention cells for extended periods
- Requiring youth to recreate and attend classes in shackles
- Invading privacy of youth through surveillance and other practices
- Requiring that suicide smocks be worn as punishment
- Removing youth from programs without due process
- Assigning degrading and humiliating tasks to youth such as cleaning large surfaces with a toothbrush
- Delaying and denying adequate medical and mental health treatment
- Denying education to youth
- Requiring youth to work for-profit business without pay
- Arbitrarily extending confinement without due process

Common questions exist whenever the action arises from a nucleus of operative facts. *Thompson v. Midwest Foundation Independent Physicians Association*, 117 F.R.D. 108, 112 (S.D. Ohio 1987). *See also, Sterling v. Velsicol Chemical Corporation*, 855 F.2d 1188 (6th Cir. 1980). The focus of the Court's consideration of class certification

should be directed at, and fixed upon, the factual and legal nature of defendants' liability and course of conduct as it uniformly affects all plaintiffs. *Thompson* at 109. This prerequisite is satisfied "as long as the members of the class have allegedly been affected by a *general* policy of the defendant, and the general policy is the focus of the litigation." *Sweet v. General Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976)(emphasis in original). That standard has certainly been met in this case.

3. The Claims Of The Plaintiff Is Typical Of The Claims Of The Class.

One of the purposes of the typicality requirement is to ensure that the named representatives' claims are similar enough to those of the class to ensure that the named representatives will adequately represent the class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982). To be typical, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Senter v. General Motors Corporation, supra*, at 525, n.31. While a representative's claims need not mimic the claims of every class member, the named plaintiff must advance the interests of the class members. *American Medical Systems*, 75 F.3d at 1082.

An examination of the complaint reveals that plaintiffs' claims are certainly typical of the claims of the other class members. Plaintiffs' claims focus upon Defendants' alleged wrongful conduct with respect to the conditions of confinement at the Center. Thus, their claims "are typical of the claims . . . of the class." *Sweet v. General Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976). In such circumstances, a class action may be the best suited vehicle to resolve such a controversy. *Sterling v. Velsicol Chemical Corporation*, 855 F.2d at 1197 (6th Cir. 1980). As long as

the theories of liability transcend factual differences among the plaintiffs, this Court should find that plaintiff has satisfied the typicality requirement. *Sterling v. Velsicol Chemical Corporation*, 855 F.2d at 1197. “While the focus is on the relatedness of the named plaintiffs’ claims and those of the class members, the harm suffered by the named plaintiffs may differ in degree from that suffered by the other members of the class so long as the harm suffered *is of the same type*.” *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio, 1991) quoting *In re Asbestos School Litigation*, 104 F.R.D. 422, 430 (E.D. Pa. 1984) (emphasis in original).

4. The Representative Plaintiff Will Fairly And Adequately Protect The Interest Of The Class Members.

Rule 23(a)(4) requires that the named plaintiff “will fairly and adequately protect the interests of the class.” The adequacy inquiry under Rule 23(a)(4) serves “to uncover conflicts of interest between named parties and the class they represent.” *Amchem Products, Inc., supra*, at 31. The adequacy of representation requirement “tends to merge” with the commonality and typicality criteria of Rule 23(a) which “serve as guideposts for determining whether . . . maintenance of a class action is economical and 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.” *Amchem Products, Inc.* at 32 quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982).

In determining the adequacy of class representation, the Sixth Circuit has directed that the Court must examine two factors: 1) whether the named representatives have common interests with the unnamed class members; and 2) whether the named representatives will vigorously advance the interests of the class through qualified

counsel. *See, Senter v. General Motors Corporation, supra*, at 525. *See also, Bowling v. Pfizer, Inc.*, 143 F.R.D. at 159 (S.D. Ohio 1992).

Here, the named representatives' claims are so interrelated to the other class members' claims that the plaintiffs will be fair and adequate representatives. In the case at bar, there are no conflicts of interest between the proposed class representatives and the members of the class since the claims of all parties arise from similar facts and are based upon identical theories of law.

The proposed class representatives are knowledgeable about the facts which are key to the issues presented in this case. The representatives understand the duty owed all plaintiffs in protecting their legal rights.

The second prong of the Sixth Circuit's adequacy of representation test, the qualifications of class counsel, is also satisfied. Proposed class counsel is experienced in the prosecution of class actions, including cases arising from the deprivation of civil rights in the criminal justice system and experienced in cases involving complex litigation.

C. The Present Action Is Appropriate For Class Certification Under Rule 23(b)(2).

The injunctive relief sought by the class in this case is the primary relief requested, and is directed towards policies that affects each and every member of the class. The relief sought by the class is best awarded to the class as a whole rather than on a class member by class member basis. Thus, plaintiffs satisfy the requirements contained in Rule 23 (b)(2).

Plaintiffs challenge an action which was directed towards the class as a whole and final class-wide declaratory injunctive relief would be appropriate. This is all that is required under sub-section 23(b)(2).

Bower v. Bunker Hill Co., 114 F.R.D. 587, 596 (E.D. Wash. 1986).

Certification of a 23(b)(2) class is the most legally sound method available to properly manage and adjudicate all issues and claims. This court recently certified a comparable class of inmates under (b)(2). Specifically, inmates challenged the use of tasers in the custodial setting and this court deemed these allegations appropriate for class action determination. See generally, *Shreve et al v. Franklin County, et al.*, USDC, SD OH Case No. 2:10-cv-644., Doc. 69. The same reasoning should apply here.

D. Certification of Claim for Damages under Rule 23 (b)(3).

Under Rule 23(b)(3), class certification is appropriate where (i) questions common to the class predominate over questions affecting only individual class members, and (ii) class resolution is superior to alternative methods for adjudicating the controversy. *In re: Scrap metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008), rehearing and rehearing *en banc* denied (Oct. 20, 2008); *Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004), rehearing *en banc* denied (Nov. 10, 2004). When a court can determine liability on a class-wide basis, common questions predominate despite the fact that the damages calculation may involve individualized analysis. *Olden*, 383 F.3d at 508; *Van Horn*, 2008 WL 347758 at*11; *City of Columbus*, 2008 WL 3981459 at *7; and *Patrick*, 2008 WL 4758673 at *6. See also *Velsicol Chem. Corp.*, 855 F. 2d at 1197 (common issues relating to liability warranted class certification). In this case, the issues at the core of liability can indeed be determined on a class wide basis. That will leave to the parties the task of determining damages (if necessary) in further proceedings. The common issues predominate in this case.

In addition to the requirement that common questions of law and fact predominate over individual issues, Rule 23(b)(3) requires that class treatment be superior to other methods of adjudication. The “superiority” requirement is intended to ensure that “a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997), citing advisory committee notes for the 1966 revision of Rule 23.

Rule 23(b)(3) identifies four factors pertinent to finding superiority: (i) the interest of class members in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) any difficulties likely to be encountered in managing a class action. See *Olden*, supra, 383 F.3d at 507. All of these factors are clearly satisfied in this case. The Defendants will be served by clarifying in one action all of the questions raised by this case and not being subjected to separate rulings based on similar facts. Similarly the youth will be assured uniform adjudication of these similar claims in one proceeding.

III. Conclusion

The plaintiffs respectfully request that this Court provisionally order this action be maintained as a class action, that the named plaintiffs be appointed class representatives, and that the undersigned counsel be appointed counsel for the class. The class should be defined as:

All persons under twenty-two years of age as of December 6, 2010, the date on which this lawsuit was filed, who have been, are now, or in the

future, will be held in custody at the Washington County, Ohio Juvenile Center.

Plaintiffs request only a provisional class order. Defendants have agree not to object to this motion contingent on preservation of their right to move to decertify based upon future developments in this case, to move for subclasses and assert any defenses they deem appropriate in this matter. Plaintiffs agree to this condition. The attached proposed order is very similar (except with respect to the Rule 23 (b) (3) claims) to the order issued by this court in the case of *SH v. Stickrath*, USDC, SD OH, Case No., 2:04-cv-1206)(Doc. 67). Should a motion to decertify be filed, the parties agree that the burden of proof rests with the plaintiffs to satisfy all of the requirements of Rule 23. Notice to the class is attached and plaintiffs request that said notice be approved by the Court. Plaintiffs request that they not be ordered to publish the notice until after the mediation scheduled for April 14, 2011. The parties will agree to a publication date during the mediation. After the mediation, Plaintiffs shall publish the notice in the local newspapers in Marietta and Parkersburg post it on the website of Gerhardstein & Branch; mail it to the last known address of every putative class member or their guardian; and as otherwise ordered by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2011, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Jennifer L. Branch
Attorney for Plaintiffs