

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ASHOOR RASHO, FAYGIE FIELDS,)
BRIAN NELSON, and ROBERT BOYD,)
)
Plaintiffs,)
)
vs.)
)
DONALD N. SNYDER, JR., et al.,)
)
Defendants.)

Civil No. 00-528-DRH

FILED

NOV 06 2001

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

REPORT AND RECOMMENDATION

PROUD, Magistrate Judge:

Before the Court is the plaintiffs’ motion for class certification and their memorandum of law in support thereof, along with defendants’ response and plaintiffs’ reply. (**Docs. 29, 38, 41 and 45**). Pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C), this Report and Recommendation is respectfully submitted to the District Court.

The Nature of the Case

The named plaintiffs, Rasho, Fields, Nelson and Boyd, all prisoners at Tamms Correctional Center¹, contend that they and all other “seriously mentally ill prisoners” housed at Tamms, presently and in the future², are subject to conditions of confinement and systemic deliberate indifference to their mental health needs amounting to cruel and unusual punishment

¹Boyd was transferred from Tamms, but he argues that his claims are not moot because they are capable of repetition—presumably meaning that he could be transferred back to Tamms at any time. (**See Doc. 45, p. 22 fn 10; see also fn2 of this Order**).

²Plaintiffs recognize that, because only declaratory and injunctive relief is sought on behalf of the class, inmates who were but are not now at Tamms would not be a part of the class, except insofar as they might subsequently return to Tamms. (**Doc. 45, p. 3 fn1**).

64

in violation of the Eighth Amendment, and in violation of the Rehabilitation Act, 29 U.S.C. § 794.³ **(Doc. 1)**. With respect to the proposed class claims for declaratory and injunctive relief (Counts VI and VII), plaintiffs pray that the Court will declare the rights and relations of the parties, enjoin the defendants from further treading on plaintiffs’ rights, and taking any action deemed necessary to further that end. *(See Doc. 1, pp. 34-35)*.

Although the complaint includes 27 pages of factual allegations, in general terms plaintiffs contend that extreme social isolation, restricted environmental stimulation, severely restricted movement, and harsh punishment for problematic behavior caused by mental illness cause “tormenting pain.” **(Doc. 1, p. 3)**. Plaintiffs further allege that the overall mental health care system at Tamms does not comport with constitutional standards, particularly with respect to screening and diagnosis. **(Doc. 1, pp. 5 and 15)**. Plaintiffs perceive a cycle where the combination of conditions cause seriously mentally ill inmates to decompensate mentally, which leads to problematic behavior, which leads to punishment (often masquerading as treatment), which worsens their mental illness, leading again to more problematic behavior. *(See Doc. 1, pp. 8-11)*. Plaintiffs opine that “Tamms lacks the commitment of a psychiatrist to oversee individual monitoring and treatment, and instead utilizes multiple pill-pushing psychiatrists who under-diagnose mental illnesses and let security concerns compromise their duties to their prisoner-patients. **(Doc.1, p. 16)**.

³Count III, alleging a Fourteenth Amendment violation of state-created liberty and/or property interests stemming from the Illinois Mental Health and Developmental Disabilities Code, 405 ILCS 5/2-102), and Count IV, alleging discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., have both been dismissed.

Federal Rule of Civil Procedure 23

Class certification pursuant to Federal Rule of Civil Procedure requires a two-stage analysis. First, the “prerequisites” to a class action must be met:

One or more members of a class may sue or be sued as representative parties on behalf of all 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.

Fed.R.Civ.P. 23(a).

Second, a class action must be “maintainable,” in that one of the following applies:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has 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; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b).

Plaintiffs believe that they comport with all of the prerequisites of Rule 23(a), as well as Rule 23(b)(1) and (2). Defendants oppose class certification arguing that plaintiffs do not meet the Rule 23(a) prerequisites, and their claims are not maintainable under Rules 23(b)(1) or (2). The thrust of defendants' opposition is aimed at the "numerosity" and "commonality" requirements. Defendants contend that there are far too few inmates presently at Tamms who fit the class definition to warrant class status, and that the individual nature of each inmate's confinement, illness and treatment predominates over their shared experience of confinement. Defendants repeatedly indicate that since the filing of this action a special treatment unit has been established for seriously mentally ill inmates, and that new policies prevent seriously mentally ill inmates from being transferred to Tamms, "except in the rarest of cases." (**Doc. 41, p. 4**).

Class Definition

"It is axiomatic that for a class action to be certified a 'class' must exist." *Simer v. Rios*, **661 F.2d 655, 669 (7th Cir. 1981)**. "If the conceived injury is abstract, conjectural or hypothetical . . . instead of real, immediate or direct, the complaint fails to cite an actual case or controversy under Article III of the Constitution." *O'Shea v. Littleton*, **414 U.S. 488, 493-94 (1974)**. Therefore, the class definition must be clarified before any meaningful analysis under Rule 23 may be undertaken.

According to the complaint:

This action is brought by the named plaintiffs on behalf of all prisoners who are now. . .⁴or will be hereafter incarcerated at Tamms who have serious mental illnesses, defined as a substantial disorder of thought and mood which significantly impairs the judgment, behavior, and capacity to recognize reality or

⁴Again, plaintiffs no longer desire to include those inmates who were at Tamms in the past, but have since left, so the reference to those who "have been before" is omitted.

cope with the ordinary demands life within the prison environment and is manifested by substantial pain or disability.

(Doc. 1, p. 4).

Defendants do not attack the class definition per se; rather, in accordance with Rule 23(a)(1), they argue that there are simply too few “seriously mentally ill” inmates presently at Tamms to make joinder impracticable. Defendants contend that only Rasha fits the definition. **(Doc. 41, Exhibit B, pp. 3-4).** Defendants further argue that new Department of Corrections Administrative Directive 05.12.110 drastically limits the possibility that seriously mentally ill inmates will be transferred into Tamms in the future—thereby limiting the prospective class.

Plaintiffs assert that the class is sufficiently identifiable as initially defined. However, plaintiffs’ expert utilizes a broader definition of “serious mental illness.” **(Doc. 45, Exhibit 1).** Plaintiffs insist that all four of them fit the definition. **(Doc. 45, Exhibit 1, p. 5).** Nevertheless, plaintiffs propose an alternate definition, a so-called “records definition,” premised upon Illinois Department of Corrections Administrative Directive 05.12.110, § II(G)(3), which is now utilized to identify those whose mental status may preclude their placement at Tamms. **(Doc. 41, Exhibit B attachment: IDOC Admin. 05.12.110).**

Under the proposed alternate scheme, medical and master file records would be reviewed for indicia of serious mental illness or serious mental health concerns. As plaintiff acknowledges, “[t]he benefits of this definition are obvious: class members could be identified based on undisputed factors.” **(Doc. 45, p. 11).**

Administrative Directive 05.12.110 dictates a pre-placement review of medical and master file records for indicia of serious mental illness— so called “concerns.” For purposes of

the Directive, “seriously mentally ill” is defined as being found to have *current* symptoms, or currently being treated for certain Axis I diagnosis based on the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM IV). **(Doc. 41, Exhibit B attachment: IDOC Admin. 05.12.110, § 2(E) (emphasis added))**. However, in most situations, Section 3(G) encompasses those with mental health concerns noted within the past two years. This Court recommends adopting a general two-year time limit.

It should be noted that even if Section II(G)(3) criteria/concerns are appreciated, it merely triggers further review by Mental Health staff to determine whether the inmate is “seriously mentally ill,” and whether placement at Tamms is appropriate, either in general placement or in the Special Treatment Unit. **(Doc. 41, Exhibit B attachment: IDOC Admin. 05.12.110, § II(G)(5))**. Thus, the alternate records definition would include those inmates who may not have been ultimately deemed “seriously mentally ill” by prison officials but who plaintiffs contend should be receiving mental health treatment and who are being subjected to the allegedly objectionable conditions of confinement.

A medical condition is serious if failing to treat it could lead to further significant injury or unnecessary and wanton infliction of pain. *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir.1997). A medical condition is likely to be serious when it causes chronic and substantial pain, significantly affects the individual's daily activities, or involves an injury that a reasonable doctor or patient would find important and worthy of treatment. *Id.* The records definition would appear to capture all inmates with psychological injuries that have merited some notation within the last two years. The records definition also seems to conform with plaintiffs’ burden of showing that the officials are “aware of facts from which the inference could be drawn that a

substantial risk of serious harm exists, and they must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 937 (1994).

Plaintiffs suggest altering the Directive to (1) include those diagnosed with certain disorders which can be considered life-long, regardless of whether the inmate is symptomatic or in treatment; and (2) number and intensity of symptoms of the (Axis I) disorder. (**Doc. 45, Exhibit 1, pp. 3-4; and Exhibit 2**). Including those who are not symptomatic or in treatment in this case is counter to the interests of the named plaintiffs and those who already would fall within the scope of Directive 05.12.110, § II(G)(3). (*See discussion in re Typicality below*). Broadening the definition to include those with “many” signs and symptoms is amorphous and destroys the appealing ease of using the records definition. The recommended two-year parameter is sufficient to protect plaintiffs’ concerns.

Administrative Directive 05.12.110, § II(G)(3)– unaltered– is moderately broader than plaintiffs’ initial proposed class definition, but it is far more discernable. It is also consistent with the notion that the Eighth Amendment protects against conditions that are sure or very likely to cause future harm. *See Helling v. McKinney*, 509 U.S. 25, 33-34 (1993). Thus, this Court recommends adoption of the alternate class definition proffered by plaintiff, the so-called “records definition,” albeit without the two modifications suggested by plaintiffs. With regard to whether the class should include those who may be transferred to Tamms in the future, for reasons addressed in relation to the adequacy of representation, this Court does not find that plaintiffs have met their burden on this point. Consequently, the recommended class should be limited to those presently at Tamms.

Numerosity

As plaintiffs and defendants note, there is no magic number which satisfies the Rule 23(a)(1) requirement that joinder of all members of a class be impracticable. Nevertheless, plaintiffs note that *Toney v. Rosewood Care Center, Inc. of Joliet*, 1999 WL 199249 (N.D.Ill. March 31, 1999), held that 40 is generally believed to be sufficient.⁵

Plaintiffs estimate the number of class members to be 44 and 113, based on a 1997 study that estimated that 8-19% of prisoners have psychiatric disorders that result in significant functional disabilities. (**Doc. 38, pp. 4-5 fn 5 (citing Jeffrey L. Metzner, M.D., An Introduction to Correctional Psychiatry: Part I, J.Am. Acad. Psychiatry Law, Vol. 25, No. #, 1997, p. 376)**). Defendants claim the number of class members presently at Tamms is no more than five. (**Doc. 41, p. 4 (citing Exhibit B, Affidavit of Dr. Hopkins, Chief of Mental Health Services for the IDOC)**). There are problems with each side's estimates.

Plaintiffs' calculations assume that the average is 10-20%, which is inconsistent with the source study cited, which indicates 8-19%. If Tamms houses between 260-500 inmates, as the Warden's affidavit indicates (*see Doc. 41, exhibit A*), the potential class range would be between 21 and 95 inmates. Because Tamms has never held more than 280 inmates, the more realistic range is between 22 and 53 inmates— if the 8-19% average is accurate, which defendants dispute. More important, the study cited by plaintiffs is not specific to Tamms, so the 8-19% figure is not dispositive.

In contrast, defendants' estimate of five is at least supported by the affidavit of Dennis P.

⁵Reliance on *Toney* and other district court cases, whether from within or outside the Seventh Circuit, is misplaced, as a district court's decision does not have precedential authority. *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 359 (7th Cir. 1998).

Hopkins, the psychologist who is Chief of Mental Health Services for the Illinois Department of Corrections, who arrived at his estimate after reviewing all Tamms inmates' initial screening and orientation evaluations and relevant testing. (**Doc. 41, Exhibit B, ¶ 15**). Of course, Hopkins is himself a defendant, so his records review and conclusion must be taken with a grain of salt. Insofar as defendants attempt to limit the "future" class members, defendants can say with certainty only that Directive 05.12.110 is likely to limit the number of seriously mentally ill inmates housed at Tamms, not that the Directive eliminates their housing at Tamms. (**See Doc. 41, Exhibit B, ¶ 6**).

This Court has not conducted any additional evidentiary hearings regarding class certification. This Court finds the briefs, affidavits and exhibits submitted by the parties to be sufficient. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (**directing that a judge make whatever factual and legal inquiries are necessary under Rule 23 when a key factor is in dispute, resolving disputes based on evidence received, even if only by affidavit**). One would assume that the parties have put forth their best evidence. *See Local Rule 7.1(a)*. Based on the evidence received, plaintiffs have not carried their burden. "[A]ctual, not presumed conformance with Rule 23(a) remains . . . indispensable." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d at 677 (quoting *General Telephone Co. v. Falcon*, 457 U.S. 147, 160 (1982)).

Even accepting the 22-53 estimate extrapolated using plaintiffs' study, joinder is not out of the question. Particularly since it is likely that a large number of opt-outs will occur once potential class members recognize that money damages are not available to them in this case.

Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” “A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2). Common nuclei of fact typically manifest where . . . the defendants have engaged in standardized conduct towards members of the proposed class [F]actual variations among class members’ grievances do not defeat a class action.” *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (citations and internal quotations omitted).

A. Conditions of Confinement (Count II)

With regard to plaintiffs’ conditions of confinement claim, common question of fact and law clearly exist. The alleged extreme social isolation, restricted environmental stimulation, severely restricted movement, and harsh punishment for problematic behavior appear to be conditions applicable to all inmates, the effects of which allegedly cause the seriously mentally ill “tormenting pain.”

B. Medical/Psychiatric Indifference (Count I)

Plaintiffs’ medical/psychiatric indifference claim is pled as an attack on the overall mental health care system at Tamms. (**Doc. 1, p. 5**). Allegations of inadequate screening and identification of mental illness, and indifference to the treatment of the mentally ill prisoners are also pled as systemic problems. Thus, there is a common core of facts involved.

C. The Rehab Act (Count V)

A common nucleus of operative fact is not present in relation to plaintiffs’ Rehab Act claim (Count V). A practice of not allowing seriously mentally ill inmates access to programs may exist, but that is one aspect of the factual inquiry necessary for a Rehab Act claim.

To state a prima facie case under Section 504 of the Rehab Act (29 U.S.C. § 794), plaintiffs must allege: (1) that they are “handicapped individuals” under the Act; (2) that they are “otherwise qualified” for the benefit(s) sought; (3) that they were discriminated against solely by reason their handicap(s); and (4) that the program or activity in question receives federal financial assistance. *Grzan v. Charter Hospital of Northwest Indiana*, 104 F.3d 116, 119 (7th Cir. 1997).

“Disability” is defined as “a physical or mental impairment that substantially limits one or more major life activities.” 29 U.S.C. § 705. The Rehab Act regulations provide a representative list, defining the term to include “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 45 C.F.R. § 84.3(j)(2)(ii). *Conley v. Gibson*, 355 U.S. 41, 46 (1957). As a class, seriously mentally ill inmates may very well be said to be “disabled” as a group.

In contrast, the “otherwise qualified” element requires each individual’s situation to be evaluated. “‘Otherwise qualified’ means that were [they] not handicapped, [plaintiffs] would have qualified for the program or treatment [they were] denied because of [their] handicap. ‘An otherwise qualified person is one who is able to meet all of the program’s requirements *in spite* of [their] handicap.’” *Grzan*, 104 F.3d at 120 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)).

Plaintiffs cite *Vaughn v. Sullivan*, 83 F.3d 907 (7th Cir. 1996), as an example of a certified class action Rehab Act case. The Rehab Act claim at issue in *Vaughn* is distinguishable from what is at issue in this case. The *Vaughn* class consisted of non-blind disabled persons who, essentially, felt they were denied equal protection because a State benefits scheme gave more

favorable economic treatment to the blind by excluding a larger portion of their earnings from a benefits eligibility calculation. The only factor that distinguished between how recipients under the State benefits scheme were treated was whether or not the recipient was blind. In contrast, prison “benefits”–programs and privileges– may properly be denied for a variety of reasons, such as security concerns. *See* 20 Ill. Admin. Code §§ 415.60 (placement in specialized mental health care setting), 420.40 (removal/reassignment), and 425.60 (religious activities). Class members’ individual characteristics will certainly predominate over their one common characteristic, serious mental illness. Therefore, plaintiffs’ Rehab Act claim (Count V) fails to meet the “commonality” prerequisite of Rule 23(a)(2), which precludes class certification.⁶

Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Commonality and typicality are closely related. *Id.* At first blush, it would seem that the systemic constitutional violations alleged by plaintiffs would each meet the typicality requirement, since both are premised upon certain “threshold” constitutional standards for conditions and/or treatment. These sorts of claims are often litigated in class form. *See Bruscano v. Carlson*, 854 F.2d 162 (7th Cir. 1988) (class action challenging conditions of confinement at U.S.P. Marion); and *Lightfoot v. Walker*, 486 F.Supp. 504 (S.D.Ill. 1980) (class action challenging the adequacy of the health care system at Menard Correctional Center). However, the circumscribed class and the nature of the legal issues, particularly the possible defenses, cause individualized legal arguments to predominate. Neither

⁶Having failed to satisfy the commonality requirement, the Rehab Act claim will not be analyzed further in this Report and Recommendation. Should the District Court conclude that there is a common nucleus of fact, this Court will gladly provide further analysis of this claim.

Count I nor Count II satisfy the typicality requirement. An appreciation of the elements of an Eighth Amendment claim helps to illuminate just how atypical the legal aspects of this case are likely to become.

The Eighth Amendment prohibits the infliction of “cruel and unusual punishment.”⁷ **U.S. Const. amend. VIII.** Confinement in a prison and the accompanying “conditions of confinement” fall under the ambit of “punishment” subject to Eighth Amendment scrutiny. *Rhodes v. Chapman*, 452 U.S. 337, 345-356 (1981). Medical and mental health treatment are considered “conditions of confinement.” See *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); and *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983).

There are two elements to an Eighth Amendment claim, one objective, the other subjective. First, the deprivation alleged must be, objectively, “sufficiently serious”— meaning a prison official’s act or omission must result in the denial of “the minimal civilized measure of life’s necessities.” Second, the defendant prison official, subjectively, must have a “sufficiently culpable state of mind”— meaning “deliberate indifference.” *Farmer*, 511 U.S. at 834. The two-pronged objective/subjective test applies whether the offensive condition affects all inmates or only one. See *Wilson v. Seiter*, 501 U.S. 294, 300 fn 1 (1991).

Relative to the objective element, “[n]o static ‘test’ can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing

⁷The Eighth Amendment is applicable to the States via the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962).

society.” *Rhodes*, 452 U.S. at 346 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

However, *Rhodes v. Chapman* identifies three guiding principles applicable when conditions of confinement compose the punishment at issue: (1) conditions must not involve the “wanton and unnecessary infliction of pain;” (2) conditions may not be “grossly disproportionate to the severity of the crime warranting imprisonment;” and (3) conditions, alone or in combination, should not deprive inmates of “the minimal civilized measure of life’s necessities”– “basic human needs.” *Rhodes*, 452 U.S. at 347.

With respect to “deliberate indifference,” the subjective element:

a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer, 511 U.S. at 837. This element does not evaporate in class actions. *See generally Wilson v. Seiter*, 501 U.S. 294, 300-301 (1991). A fact finder may conclude that a defendant drew this inference from “the very fact that the risk was obvious.” *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996).

A. Conditions of Confinement (Count II)

The proposed plaintiff class consists of only those Tamms inmates who are “seriously mentally ill,” not all Tamms inmates. Plaintiffs complain of the “harsh and psychologically injurious conditions.” (Doc. 1, p. 2). More specifically, plaintiffs make a blanket assertion that the sensory deprivation, near-total isolation, restricted movement and harsh punishment, while harmful for most prisoners, are “more agonizing for the seriously mentally ill,” and “bring tormenting pain.” (Doc. 1, p. 3; *see also* p. 5). Plaintiffs’ legal claim can be said to be typical

with regard to individual and class members. In essence, plaintiffs cite a common cause having a common effect on similar “eggshell” plaintiffs. However, such an “eggshell” theory, premised upon notions of pain, will undoubtedly raise a multitude of individualized legal defenses.

With regard to the objective element, plaintiffs must first overcome the fact that they have essentially conceded that the conditions of confinement are not unconstitutional per se, because not all inmates are alleged to be harmed. The obvious defense is to attack the notion that there is a common effect and a common cause. Each plaintiffs’ mental condition will be explored in an attempt to show that blanket conclusions cannot be made. The conditions of confinement issues will quickly meld into individual diagnosis and treatment issues, which are supposedly not at issue in this case (*see Doc. 45, p. 19*), blurring the line between the two constitutional claims. Further complicating matters, there are now two different areas of the prison involved, the general population area and the new Special Treatment Unit (STU); some of the named plaintiffs are housed in the STU, some are not. (*See Doc. 41, Exhibit B, pp. 3 and 5*).

Similarly, the subjective element, deliberate indifference, will generate a multitude of legal defenses. The fact that not all inmates at Tamms are alleged to be affected begs the question, how were prison officials to know who would be caused an unconstitutional amount of pain?

B. Medical/Psychiatric Indifference (Count I)

Plaintiffs’ treatment claim generally revolves around the following allegations:

Defendants do not screen prisoners adequately when they are transferred to Tamms to determine if they are seriously mentally ill, they do not examine them adequately as they continue to reside at Tamms to determine if they have decompensated to a greater degree than they would have at another facility, and they do not remove prisoners from Tamms even when they know that the

prisoner's placement at Tamms has caused him to decompensate mentally.

(Doc. 1, p. 9).

Mental health treatment at Tamms lacks the commitment of a psychiatrist to identify and treat in an individualized manner those prisoners suffering from serious mental disorders. Instead, the prison has been served by a series of psychiatrists whose main function is to oversee the individual monitoring, evaluation, and treatment of prisoners.

(Doc. 1, p. 16).

Systemic deficiencies in prison and/or psychiatric care, such as staffing, facilities or procedures, are well suited for class treatment. *See Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983). However, the named plaintiffs' claims clearly illustrate that individual disputes about evaluation and treatment predominate, not systemic deficiencies. (*See Doc. 1, pp. 18-30*). For example, plaintiff Rasha complains that he does not have as good a relationship with his psychiatrist at Tamms as he had with his psychiatrist at Pontiac Correctional Center; he takes issue with the medications prescribed; he does not like the diagnosis of the Tamms health care professionals; and he takes issue with the behavior modification therapy offered at Tamms. Plaintiff Nelson complains about adverse side effects after his medications were changed; he also feels that Tamms mental health care staff minimize his symptoms. Plaintiff Boyd takes issue with being administered psychotropic drugs; he considers waiting overnight to stitch his cuts to be too long; and he does not like the conditions of confinement of a suicide watch.

Plaintiffs focus on the easily discernable class definition and the overarching, systemic claims, as they must to merit class certification. The use of a class action to examine the unique environment at Tamms, the impact on the mentally ill, and the mental health care system seems very appealing, but that does not mean that the Court can ignore the glaring realities of how the

case is likely to be litigated. *See generally Isaacs v. Sprint*, 261 F.3d 679 (7th Cir. 2001). The Court may look beneath the surface of the complaint to conduct the Rule 23 inquiries and in exercise of its discretion. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001). As this Court has attempted to illustrate, the many subtly different legal arguments pertinent to these Eighth Amendment issues overwhelm the common issues plaintiffs would prefer to focus on.

Adequacy of the Class Representatives

Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” As a preliminary matter, to be an adequate class representative, the named plaintiff(s) must fall within the class definition at the time the class action is certified. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). In addition, Rule 23(a)(4) has been interpreted to require the court to assess the class lawyer’s competence before certifying a suit to proceed as a class action. *Greisz v. Household Bank (Illinois), N.A.*, 76 F.3d 1012, 1013 (7th Cir. 1999).

A. Plaintiff Boyd and Prospective Transferees

Plaintiff Boyd has been transferred from Tamms. “If a prisoner is transferred to another prison, his request for injunctive relief against officials of the first prison is moot unless he can demonstrate that he is likely to be retransferred. Allegations of a likely retransfer may not be based on mere speculation.” *Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996) (internal citations and quotations omitted).

Boyd argues that his claims are not moot because they are capable of repetition⁸–

⁸To fall within the “capable of repetition” exception to the mootness doctrine, the alleged injury must be of inherently limited duration and likely to happen again to the same complaining

presumably meaning that he could be transferred back to Tamms at any time. (*See Doc. 45, p. 22 fn 10*). Boyd offers no more than this assertion. Defendants counter that a new policy, Department of Corrections Administrative Directive 05.12.110, prevents seriously mentally ill inmates from being transferred to Tamms, “except in the rarest of cases.” (*Doc. 41, p. 4; and Exhibit B, p. 4*). Thus, defendants leave open the possibility of repetition. However, since plaintiff has the burden on this issue, this Court finds that the possibility of being retransferred to be too speculative to satisfy Rule 23(a)(4). Furthermore, this Court does not construe the complaint as attacking the new screening policy, so the interests of prospective seriously mentally ill transferees are not represented.

B. Plaintiffs Rasho, Fields and Nelson

The parties disagree on the proper diagnosis for plaintiffs Rasho, Fields and Nelson. Utilizing the records definition, this Court finds that Rasho and Nelson fall within the class definition, but not Fields.

Even Dr. Hopkins (Chief of Mental Health Services for the State of Illinois and a named defendant) finds that Rasho is severely mentally ill. Rasho has been placed in the Tamms “Special Treatment Unit” (*Doc. 41, exhibit B, p. 5*), which further indicates that he fits the records definition.

It appears that Nelson falls under the records definition, in that he was diagnosed with and has been treated for a listed Axis I disorder within the last two years. (*See Doc. 41, Exhibit 1, pp. 5-6*).

party. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *see also Tobin for Governor v. Illinois State Bd. of Elections*, 2001 WL 1173227, *9 (7th Cir. Oct. 5, 2001).

Plaintiff Fields does not fall under the records definition as it stands now; he would if the definition were expanded to include those with an Axis I diagnosis, but who are not symptomatic or under treatment. (*See Doc. 41, Exhibit 1, pp. 6-7; and Doc. 45, Exhibit B, p. 4*). For reasons set forth in detail above, this Court does not recommend expanding the records definition.

C. Plaintiffs' Counsel

Defendants do not take issue with plaintiffs' counsel. (*See Doc. 41, pp. 17-18*). The attorneys presently representing the plaintiffs are affiliated with the University of Chicago Law School. A review of the record in this case and its predecessor, *Boyd v. Snyder*, 99-280-DRH, demonstrates that the attorneys are committed in terms of time and money to litigate this matter to fruition. Compared with many of the class actions prosecuted in this district, this case is not likely to involve tremendous expenditures, or overly complex legal issues. This Court perceives plaintiffs' counsel as being more than adequate for the task at hand.

Propriety and Value of Utilizing the Class Action Device

The Subdivision (b) of Rule 23 is aimed at evaluating the propriety and value of utilizing the class action device. *See Fed.R.Civ.P. 23, Advisory Committee Notes, 1966 Amendment, Subdivision (b)(1)*. The considerations enumerated in Rule 23(b) reflect the difficulties likely to arise if separate actions were prosecuted, as well as factors relevant to the propriety of joinder under Federal Rule of Civil Procedure 19. *Id.*

Rule 23(b) provides that a class action must be "maintainable," in that one of the following applies:

- (1) the prosecution of separate actions by or against individual members of the

class would create a risk of

- (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
- (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has 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; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b).

Plaintiffs argue that subdivisions (b)(1) and (b)(2) both apply. (**Doc. 45, p. 23**).

Defendants counter that the predominate individual nature of the claims ensures that there is not a risk of inconsistent verdicts; and that individual treatment issues relevant to the requisite mens rea are antithetical to a class action and remedy. (**Doc. 41, pp. 19-21**).

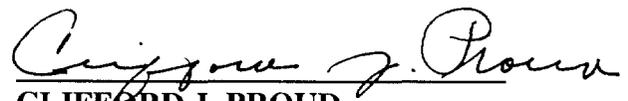
For the reasons set forth above regarding “typicality,” this Court is of the opinion that proceeding as a class is not appropriate under either Rule 23(b)(1) or (2). In brief, Eighth Amendment conditions of confinement and treatment claims are routinely prosecuted by individuals in the same prison, even though the same conditions and treatment protocols often apply systemically, because medical and/or mental health concerns are by their very nature so

individual. Plaintiffs place themselves in an awkward legal posture by arguing that the conditions and treatment at Tamms offend the constitutional rights of only the seriously mentally ill, not all inmates. Despite plaintiffs' focus on common facts and issues, there is no keeping the defendants from focusing on individual concerns with plaintiffs' "eggshell" theory. If a jury were to find against one of the two representative plaintiffs, even if there were special interrogatories regarding the class, the inconsistent verdicts are likely to doom the class claims, to the prejudice of the unnamed class members.

RECOMMENDATION

For the aforestated reasons, it is the **RECOMMENDATION** of this Court that plaintiffs' motion for class certification (**Doc. 38**) be **DENIED**, and that the named plaintiffs, Rasho, Fields, Nelson and Boyd, proceed with their joined individual claims.

Submitted: November 6, 2001


CLIFFORD J. PROUD
U. S. MAGISTRATE JUDGE

NOTICE

PURSUANT to Title 28 U.S.C. §636(b) and Rule 73.1(b) of the Local Rules of Practice in the United States District Court for the Southern District of Illinois, any party may serve and file written OBJECTIONS to this Report and Recommendation/Proposed Findings of Fact and Conclusions of Law within ten days of service.

Please note: You are not to file an appeal as to the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law. At this point, it is appropriate to file **OBJECTIONS**, if any, to the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law. An appeal is inappropriate until after the District Judge issues an Order either affirming or reversing the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law of the U.S. Magistrate Judge.

Failure to file such OBJECTIONS shall result in a waiver of the right to appeal all issues, both factual and legal, which are addressed in the the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law. *Video Views, Inc. v Studio 21, Ltd. and Joseph Sclafani, 797 F.2d 538 (7th Cir. 1986).*

You should mail your OBJECTIONS to the Clerk, U.S. District Court at the address indicated below:

301 West Main St.
Benton IL 62812

750 Missouri Ave.
P.O. Box 249
East St. Louis, IL 62202