Danny S. Wilde
Michael H. Reese
Michael R. O'Donnell
Attorneys for Plaintiffs
Protection & Advocacy System, Inc.
2424 Pioneer Avenue, Suite 101
Cheyenne, Wyoming 82001

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

ANNA MARIA WESTON, by her guardian Barbra Weston, *et al.*,	)	
Plaintiffs,	)	CIVIL ACTION NO. C90-0004
v.	)	**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**
WYOMING STATE TRAINING SCHOOL, *et al.*,	)	
Defendants.	)	

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS ACTION DETERMINATION

Introduction

Plaintiffs filed their complaint in this action on January 3rd, 1990, seeking declaratory and injunctive relief for alleged violations of their statutory and constitutional rights by defendants.

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1) Plaintiffs move the Court for an Order pursuant to Rule 23(c), Federal Rules of Civil Procedure (hereinafter, where appropriate, "Rule" or "Rules") to certify the present action as a class action because

a) The Class Plaintiffs number well in excess of 399 and the class is therefore so numerous that joinder of all its members in this action would be impracticable if not impossible. The class consists of:

(1) All persons who reside at the Wyoming State Training School (hereinafter "WSTS") on or after January 3rd, 1990;

(2) All persons with developmental disabilities who may be transferred or placed there in the future;

(3) All persons with developmental disabilities residing at home who, because effective community services to assist their families or themselves are unavailable, are at risk of being admitted to WSTS.

(4) All persons with developmental disabilities who have been transferred from WSTS to other institutions or agencies including, but not limited to, skilled nursing facilities, community programs, yet remain Defendants' responsibility and who, because of Defendants' failure to provide alternatives in the community, may either be forced to return to WSTS or receive inadequate care and training.

The delivery of educational, therapeutic, psychological, medical and dental services to persons with developmental disabilities is shared by the Wyoming State Training Hospital and the Division of Community Programs, hereinafter "DCP," of the Wyoming Department of Health and Social Services. While the WSTS provides services to individuals who are

mentally retarded and DCP provides services to persons with developmental disabilities, the overlap is apparent. As a general proposition, individuals who are served at the WSTS meet the federal definition of developmentally disabled. Therefore, there are members of the putative class who receive services at WSTS but should be in community residential programs, members who deserve an appropriate constitutional level of care at either WSTS or from DCP but, in fact, are without such care. The size of the members of the class are therefore unknown.

Due to the paucity of residential facilities within the State of Wyoming, WSTS remains unfortunately the choice for many individuals with developmental disabilities. Residential facilities outside WSTS are few and far between.

In terms of numbers, the following information is provided to assist the Court in understanding the size of the class:

1.) Individuals who are developmentally disabled: The estimated number of developmentally disabled persons within the adult population is five thousand two hundred and seventy-seven (5277). Governor's Planning Council of Developmental Disabilities, Wyoming: Developmental Disabilities, Two-Year Transitional Plan, 1990-1991, p. 10. The number of students is estimated at one thousand seven hundred and sixty (1760). *Id*, p. 9. The size of the numbers of individuals who need constitutional levels of care for mentally retarded individuals is unknown. Approximately four thousand (4000) individuals are estimated as not receiving any services.

2.) Individuals at the Wyoming State Training School: The number of residents served by WSTS is in a constant state of flux. In the complaint, three hundred ninety-five (395) individuals were identified, but only as approximate. According to the above-cited Plan, "The Wyoming State Training School, as of July 20, 1989, was serving 412 persons with developmental disabilities." *Id* at p. 10. This number is further broken down into: a) 61 individuals on rehabilitation leave or served off campus; 2) 2 individuals at the Wyoming State Hospital; 349 individuals at WSTS.

3.) Class numbers not only include the relatively finite number under the control of WSTS, but also the indeterminate number of the developmentally-disabled population as a whole who are at risk of being placed as WSTS because community programs are unavailable

RULE 23 PREREQUISITES TO CLASS ACTIONS
STANDARD OF REVIEW - IN GENERAL

The standards for certifying a class action appear in Rule 23, which requires a two-step analysis to determine whether a particular case can be conducted as a class action. First, plaintiffs need to satisfy the Rule 23(a) standards. Once these general requirements are met, plaintiffs must then satisfy one of the three Rule 23(b) categories of class action. Adamson v. Brown, 855 F.2d 668, 675 (10th Cir. 1988); Bard v. United Nuclear Corp., 462 F.2d 149, 154 n. 7 (10th Cir. 1972); Lyon v. United States, 94 F.R.D. 69, 73 (W.D. Okla. 1982).

Rule 23 is to be construed liberally. Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 273 (1049 Cir. 1977), Rutherford v. United States, 429 F.Supp. 506, 508 (W.D. Okla. 1977). Because class certification is subject to later modification, the Court should err in favor of, and not against, the maintenance of the class action. Joseph v. General Motors Corp., 109 F.R.D. 638 (D.Colo. 1986). As the Fifth Circuit has noted, "rule 23(a) must be read liberally in the context of civil rights suits . . . especially . . . when the class action falls under Rule 23(b)(2)." Jones v. Diamond, 519 F.2d 1090, 1099 (5th Cir. 1975). Moreover, the Tenth Circuit has cited Jones for the proposition that liberal construction should be applied. Horn v. Associated Wholesale Grocers, Inc., at 275. A court is "obliged to determined only whether the requirements of Rule 23 have been satisfied." Joseph v. General Motors Corp., 109 F.R.D. at 635. "Frequently, in a case such as this, the great emphasis is less on damages than on future compliance and a less strict adherence is seen to Rule 23(a) requirements." Horn v. Associated Wholesale Grocers, Inc., 555 F.2d at 275.

Plaintiffs and the class they seek to represent satisfy all of the requirements of Rules 23(a) and (b)(2). Subdivision (b)(2) was added to Rule 23 in 1966 in part to make it clear that civil rights suits for injunctive or declaratory relief can be brought as class actions. Wright, Miller & Kane, Federal Practice and Procedure, 2d § 1776 at 495 (1986).

Finally, class action certification is conditional and may be "altered, expanded, subdivided, or vacated as the case progresses toward restitution on the merits." Joseph v. General Motors Corporation, 109 F.R.D. at 638.

I. STAGE I - THIS ACTION MEETS ALL OF THE RULE 23(a) PREREQUISITES FOR CERTIFICATION AS A CLASS.

Rule 23(a) lists four (4) standards that must be met. It states:

> Prerequisites to a Class Action.
>
> 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.

The four requirements are commonly referred to as numerosity, commonality, typicality and adequacy of representation. Joseph v. General Motors Corp., 109 F.R.D. at 638; Smith v. MCI Telecommunications Corp., 124 F.R.D. 665, 674 (D. Kansas, 1989).

Before analyzing each of the four criteria, it is important to note at the outset that, as did the court in Penn v. San Juan Hospital, Inc., the "proposed class action is not a complex damage suit" but "merely seeks

protection of a class by injunctive relief against alleged discriminatory practices under Rule 23(b)(2)." Penn v. San Juan Hospital, 528 F.2d 1181, 1188 (10th Cir. 1975). In such cases, such as this one, "there are not difficult notice problems, nor does it present administrative complications involved in collecting and distributing funds such as are encountered in Rule 23(b)(3) damage actions." *Id.* at 1188. In view of the fact that plaintiffs seek only prospective relief, a "less strict adherence . . . to Rule 23(a) requirements" is permitted since "in a case such as this, the great emphasis is . . . on future compliance." Horn v. Associated Wholesale Grocers, Inc., 555 F.2d at 275.

A. Numerosity - The Proposed Class Is So Numerous That Joinder Of All Members Is Impracticable.

No magic figure can be used as an infallible guide to determine when the number of class members becomes so great that their joinder is not feasible. *Id.* at 275. For example, one case has held that eighteen (18) was a sufficient number to justify class action. Cypress v. Newport News General, 375 F.2d 648 (4th Cir. 1967). Joinder need not be impossible; this standard requires only that joinder would be difficult or inconvenient. *See* Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 907, 913-914 (9th Cir. 1964).

The resident population of WSTS is in constant flux, with residents being discharged and admitted on a continual basis. The most recent figures that the plaintiffs were able to obtain from the defendants indicate

four hundred twelve (412) individuals under their control including residents at WSTS and residents at other facilities or on rehab leave.

While it is impracticable to join four hundred twelve (412) residents in one lawsuit, it is impossible to join unknown future class members. Future residents of WSTS and individuals who are not receiving any level of care are part of the proposed class because the complaint seeks prospective relief that affects theirs rights as well.

Impracticability is dependent - not on arbitrary numbers - but upon the circumstances surrounding the case. Lyons v. United States, 94 F.R.D. at 275. "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 330 (1980). But "where the numerosity question is a close one, a balance should be struck in favor of a finding of numerosity . . . ." Evans v. United States Pipe & Foundry Co., 696 F.2d 925, 930 (11th Cir. 1983), *citing with approval* Foster v. Bechtel Power Corp., 89 F.R.D. 624 (E.D. Ark. 1981).

Here the question cannot be considered "a close one," since the current residents of WSTS alone constitute a class of approximately four hundred members. *Compare, e.g.*, Circle v. Jim Walter Homes, Inc., 535 F.2d 583, 585 (10th Cir. 1976) (358 persons who executed challenged negotiable notes); McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975) (262 lot purchases); Horn v. Associated Whole Grocers, Inc., 555 F.2d at 275 (46 employees).

The numerosity requirement is satisfied when a class includes future members. Lawson v. Wainwright, 108 F.R.D. 450, 454 (S.D. Fla. 1986) (inclusion of future inmates of Hebrew Israelite faith satisfied numerosity). Classes, which include future members, frequently have been approved by the courts, particularly in civil rights actions where the numerosity requirement is liberally construed. *See* generally Wright, Miller and Kane, Federal Practice and Procedure 2d § 1771 at 405-420 (1986).

Moreover, the class also includes unnamed and unknown persons still living in the community who currently require or who may in the future required services from defendants, and "who may be discriminated against" by defendants' practices. Jordan v. County of Los Angeles, 669 F.2d 1311, 1320 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). "The joinder of unknown individuals is inherently impracticable" for the purposes of Rule 23(a)(1). *Id.* at 1320, *citing* Jack v. American Linen Supply Co., 498 F.2d 122 (5th Cir. 1974) and Scott v. University of Delaware, 68 F.R.D. 606 (D. Del. 1975). *See also* Williams v. New Orleans Steamship Association, 673 F.2d 742, 755 (5th Cir. 1982); Bowe v. Colgate, 416 F.2d 711, 719 (7th Cir. 1969). Thus, the size of the class and the inclusion in that class of unknown persons make joinder impracticable and the numerosity requirement is met. Numerosity must be determined in light of the particular circumstances of each case. Joinder of unknown persons who could be denied coverage in the future was impracticable, therefore, the court concluded that numerosity had been established and

granted class certification. Weaver v. Reagen, 701 F.Supp 717 (W.D. Mo. 1988).

B. Commonality - There Are Questions Of Law Or Fact Common To The Class.

The second of the Rule 23(a) requirements is the necessity for questions of law or fact common to the class.

The commonality requirement is satisfied when there are either common questions of law or fact. Rule 23(a)(2) requires that there be questions of law or fact common to the class. Smith v. MCI Telecommunications Corp., 124 F.R.D. at 675, *citing* Fertig v. Blue Cross of Iowa, 68 F.R.D. 53, 57 (N.D. Iowa 1974). ("[a]s a general rule all that this section requires is either common questions of fact or common questions of law"). The existence of common questions of law and fact is readily apparent.

Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and "turn on questions of law applicable in the same manner to each member of the class." Califano v. Yamasaki, 442 U.S. 682, 701 (1979). *Accord,* General Telephone Co. v. Falcon, 457 U.S. 147, 155 (1982). The commonality provision does not require that all issues or facts in the case must be common to the class, only that some

factual or legal questions pertain to all. *See, e.g.*, Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1524 (1983); Bogle v. Crow-Brighton Co., 96 F.R.D. 1 (W.D. Okla. 1981).

"It is recognized that there may be varying fact situations among individual members of the class and this is all right as long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory." Penn v. San Juan Hospital, 528 F.2d at 1189.

Members of the plaintiff class share numerous factual questions (*e.g.*, the degrading conditions at WSTS, the inadequacy of the services provided by the defendants) and legal questions (*e.g.*, whether such failures at WSTS violate plaintiffs' constitutional and statutory rights and, rights arising from their shared need for services). It is well-settled that a class action is an appropriate mechanism to challenge conditions of confinement of handicapped persons in state institutions. Milonas v. Williams, 691 F.2d 931, at 936-38 (10th Cir. 1982); Halderman v. Pennhurst State School and Hospital, 612 F.2d 84, 109 (3d Cir. 1979), *aff'g* unreported order (E.D. Pa. Nov. 26, 1976), *rev'd on other grounds*, 451 U.S. 1 (1981).[1]

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[1] Society for Good Will to Retarded Children v. Cuomo, unreported order (E.D. N.Y. May 15, 1980), *as noted*, 572 F.Supp. 1300, 1303 (E.D. N.Y. 1983), *aff'd in part, rev'd in part on other grounds*, 737 F.2d 1253 (2d Cir. 1984); Association for Retarded Citizens of North Dakota v. Olson, 561 F.Supp. 473, 475 (D. N.Dak. 1982), *aff'd*, 713 F.2d 1384 (8th Cir. 1983); Medley v. Ginsberg, 492 F.Supp. 1294, 1297 (S.D. W. Va. 1980); Garrity v. Gallen, unreported decision (D. N.H. Feb. 22, 1980), *noted at* 522 F.Supp. 171, 176 (D. N.H. 1981); Michigan Association for Retarded Citizens v. Smith, unreported decision (E.D. Mich. March 3, 1978), *noted at* 475 F.Supp. 990, 991-92 (E.D. Mich. 1979); Johnson v. Brelje, 482 F.Supp. 121, 123 (N.D. Ill. 1979), *aff'd*, 701 F.2d 1201 (7th Cir. 1983); Cruz v. Collazo, 84 F.R.D. 307, 314-16 (D. P.R. 1979); Institutionalized Juveniles v. Secretary of Public Welfare, 459 F.Supp 30, 40-42 (E.D. Pa. 1978), *rev'd on other grounds*, 442 U.S. 640

Moreover, broad-based civil rights class actions seeking system-wide injunctive and declaratory relief by their nature present common questions of law and fact. Lawson v. Wainwright, 108 F.R.D. at 455 (challenging prison authorities' restrictions on inmates' ability to participate in Hebrew Israelite Religion). Indeed, the commonality requirement has been described as superfluous in Rule 23(b)(2) cases. *See* Wright, Miller & Kane, Federal Practice of Procedure § 1763, at p. 227 (1986).

Unhealthful and unsafe conditions in a facility affect every person in it. Thus class actions are particularly appropriate to challenge conditions in a single institution, or even in a group of similar institutions under single control. New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F.Supp. 715 (E.D. N.Y. 1975) (an institution for retarded children); Costello v. Wainwright, 397 F.Supp. 20, (M.D. Fla. 1975) (group of penal institutions).

C. Typicality - The Claims Of The Class Representatives Are Typical Of The Claims Of The Class.

(1979); Kentucky Association for Retarded Citizens, Inc. v. Conn, unreported order (W.D. Ky. Jan. 24, 1978), *noted in* 674 F.2d 582, 583 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 457 (1982); Goldy v. Beal, 429 F.Supp. 640, 648-49 (M.D. Pa. 1976); Woe v. Mathews, 408 F.Supp. 419, 429 (E.D. N.Y. 1976); Rowe v. Fireman, unreported order (N.D. Ohio March 9, 1976), *noted at* 473 F.Supp. 92, 96 (N.D. Ohio 1979); Rogers v. Okin, unreported order (D. Mass. Oct. 16, 1975), *as noted*, 475 F.Supp. 1342, 1352 n. 1 (D. Mass. 1979), *aff'd in part, rev'd in part on other grounds*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded on other grounds*, 457 U.S. 291 (1982).

Under Rule 23(a)(3) the claims or defenses of plaintiffs must be typical of the claims or defenses of the proposed class. "The typicality requirement is said to limit the class to those fairly encompassed by the named plaintiff's claims." General Telephone Co. of the Northwest v. EEOC, 446 U.S. at 330. Title VII actions, for example, in which it is alleged that discrimination is present, are in their nature, class action suits. Horn v. Associated Wholesale Grocers, Inc. 555 F.2d at 275; *accord*, Rich v. Martin Marietta Corporation, 522 F.2d 333, 340 (10th Cir. 1975) ("class actions are generally appropriate" in civil rights cases). The typicality standard does not, therefore, require that named plaintiffs "be in a position identical to that of every member of the putative class." Smith v. MCI Telecommunications Corp, 124 F.R.D. at 675.

While of course there may be some variation in factual patterns among individual class members, such "[f]actual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist." Milonas v. Williams, 691 F.2d at 938, *accord*, Penn v. San Juan Hospital, 528 F.2d at 1189, ("there may be varying fact situations among individual members of the class and this is all right so long as the claims of the plaintiffs and the class members are based on the same legal or remedial theory"); Gerstle v. Continental Airlines, 50 F.R.D. 213, 219 (D. Colo. 1970) ("Although varying fact patterns may underlie individual claims[,] it is alleged that the same unlawful conduct was directed at plaintiff and those she represents. This is

sufficient to meet the common questions and typicality requirements of the rule . . . ."), *aff'd*, 466 F.2d 1374 (10th Cir. 1972).[2]

Indeed, different fact situations of various class members would not necessarily defeat typicality requirement of Rule 23(a)(3) as long as the claims are based on the same legal or remedial theory. Adamson v. Brown, 855 F.2d 668 (10th Cir. 1988).

Here, if plaintiffs prevail, all class members will be afforded the care, treatment and placement which is required. There is no adversity of interest; rather, the interest of the named plaintiffs and the class coincide precisely.

D. Adequacy of Representation - The Plaintiffs Will Fairly And Adequately Protect The Interests Of The Class.

The requirement of adequacy involves two aspects: (1) whether the named representatives have interest antagonistic to the rest of the class, and (2) whether the representatives' counsel are qualified, experienced and generally able to conduct the proposed litigation. Kirkpatrick v. J.C.

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[2]Thus, even the claims under the Education of the Handicapped Act for individualized educational programs are proper class claims. "That the Act requires individual placement decisions does not of itself bar all class actions." Roncker v. Walter, 700 F.2d 1058, 1064 (6th Cir.), cert. denied, 104 S.Ct. 196 (1983). As in *Roncker*, one of the plaintiffs' claims here is that defendants "automatically send students" to a segregated school. "Such an allegation, if proven, would show a violation of the Act for the very reason that placements are not individually made." *Id.* at 1064. *See also*, Battle v. Pennsylvania, 629 F.2d 269, 274-75 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); Parks v. Pavkovic, 557 F.Supp. 1280, 1285-86 (N.D. Ill. 1983); Green v. Johnson, 513 F.Supp. 965, 968-70, 974-76 (D. Mass. 1981).

Bradford of Co., 827 F.2d 718, 726 (11th Cir. 1987) (securities fraud action.)

The first aspect of adequacy is met where there is no conflict among class members, named representatives or plaintiffs' counsel. No money damages are sought, and all seek a common goal of improving practices and policies at WSTS and throughout Wyoming's developmental disabilities system.

Plaintiffs include residents of WSTS and their families, guardians or next friends of people segregated at WSTS and of persons in jeopardy of being institutionalized there by the State, as well as retarded people presently institutionalized or in jeopardy of being segregated there. These plaintiffs represent a broad spectrum of experience and attitudes concerning the needs of retarded persons. Plaintiffs' sole reason for bringing this action is to seek prospective relief, and therefore, substantially improving the lives of persons with developmental disabilities.

The second aspect of adequacy also is met as the named representatives are represented by qualified, experience counsel. Messrs. Dan Wilde is General Counsel with Protection and Advocacy Systems, Inc. (hereinafter "P&A"); and Michael Reese and Michael O'Donnell are attorneys engaged in the private practice of law.

P&A is a federally chartered non-profit corporation organized to protect the interests of developmentally disabled individuals, and it has experience in litigation concerning civil rights cases.

Mr. Dan Wilde is currently General Counsel of the Wyoming P&A. He is admitted to practice before state and federal courts. As General Counsel, he oversees the handling of legal issues and complaints related to developmental disabilities. His knowledge of the civil rights issues of individuals with developmental disabilities is generally unsurpassed within the State of Wyoming. A copy of his resume is attached as Exhibit "A".

Mr. Michael O'Donnell is engaged in the sole practice of law as Michael R. O'Donnell, P.C. of Cheyenne, Wyoming. Among his many areas of practice, Mr. O'Donnell is experienced in litigation. A copy of his resume is attached as Exhibit "B"

Mr. Reese is a member of a firm experienced in many facets of law. Mr. Reese himself has been involved with civil rights litigation and has attended seminars on § 1983 litigation. A copy of his resume is attached as Exhibit "C."

II. THIS ACTION IS MAINTAINABLE AS A CLASS ACTION UNDER RULE 23(b).

In addition to meeting the requirements of Rule 23(a) for a case to proceed as a class action, it must fit into one of the categories described in Rule 23(b). Rule 23(b) states:

"Class Actions Maintainable.

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(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 interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect 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 . . ."

Plaintiffs make no claim pursuant to subsection (b)(3). Plaintiffs meet the requirements of either Rule 23(b)(2) or in the alternative, 23(b)(1).

A. **Defendants 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.**

Class certification under Rule 23(b)(2) is appropriate here because both of the two basic factors that govern (b)(2) certification are present: "(1) the opposing party's conduct or refusal to act must be 'generally

applicable' to the class and (2) final injunctive or corresponding declaratory relief must be requested for the class." Wright, Miller & Kane, Federal Practice and Procedure 2d, § 1775 at 447, 448 (1986).

The proposed class easily meets the requirements of Rule 23(b)(2) since "[c]ommon to each member of the class are the questions of allegedly discriminatory commitment procedures and conditions of confinement" approved and permitted by defendants, and "the relief sought on behalf of the class includes a declaration that certain present commitment procedures and conditions of confinement are unconstitutional. Therefore, a class may be maintained under Rule 23(b)(2), which is an especially appropriate vehicle for civil rights actions seeking declaratory relief in institutional reform litigation." Coley v. Clinton, 635 F.2d 1364, 1378 (8th Cir. 1980), *citing with approval* 3B Moore's Federal Practice Para. 23.40[1] (1987) (referring to claims for injunctive relief for discriminatory actions by state officials as the "paradigm of a (b)(2) action"). Indeed, the 1966 Advisory Committee on the revisions to Rule 23 singled out in its official analysis of the revised rule "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class" as the type of class action maintainable under section (b)(2). *Reprinted* at 39 F.R.D. 98, 102. "Because one purpose of Rule 23(b)(2) was to enable plaintiffs to bring lawsuits vindicating civil rights, the rule 'must be read liberally in the context of civil rights suits.'" Coley v. Clinton, 635 F.2d at 1378, 1379 n. 14, *quoting* Ahrens v. Thomas, 570 F.2d 286, 288 (8th Cir. 1978); *accord*, Rich v. Martin Marietta Corp., 522 F.2d at 340.

B. The Class Members Should Not Be Forced To Enforce Their Rights Through The Prosecution Of Separate Actions.

Since the proposed class so easily meets the requirements of Rule 23(b)(2), the Court need not reach the criteria of Rule 23(b)(1). In any event, the proposed class satisfied the requirements of that subsection as well.

The prosecution of separate actions by the class members certainly would create a risk of "inconsistent to varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. . . ." Rule 23(b)(1)(A). If each WSTS resident were required to bring an individual action, the results would undoubtedly vary widely, providing defendants no uniform standard to enable them to determine whether they have met their legal duties.

Requiring that all class members bring their own actions would also create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not party to the adjudications or substantially impair or impede their ability to protect their interests. . . ." Rule 23(b)(a)(B). The claims made and the relief sought by plaintiffs concern the policies and practices of the defendants as they affect all class members. If class members are forced to litigate the issues individually, and are successful in obtaining injunctions, the interest of the non-parties will be affected.

With respect to satisfying the Rule 23 requirements, the Tenth Circuit has stated that "if there is error to be made, let it be in favor and not against the Maintenance of the class action." Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928, 89 S. Ct. 1194, 22 L. Ed. 22 459 (1969); Smith v. MCI Telecommunications Corp., 124 F.R.D. at 674.

Conclusion

For the foregoing reasons, the proffered class should be certified.

Respectfully submitted,

Danny S. Wilde

Michael H. Reese

Michael R. O'Donnell
Attorneys for Plaintiffs
Protection & Advocacy System, Inc.
2424 Pioneer Avenue, Suite 101
Cheyenne, Wyoming 82001

Exhibit "A"

CURRICULUM VITAE
OF
DANNY S. WILDE

EDUCATION

JURIS DOCTOR: 1985

University of Wyoming College of Law

BACHELOR OF ARTS: 1982

Brigham Young University
Major in Political Science
Minor in Native American Education

CAREER SUMMARY

Presently the General Counsel of the Wyoming Protection & Advocacy System, Inc. Admitted before the state and federal courts of Wyoming. Previously served as the prosecuting attorney for the City of Cheyenne, and as an associate in general practice with the law firm of Edwards & Johnson, P.C. Experienced in the general practice of law with a broader knowledge in civil rights, administrative law, civil, criminal, family, estate planning and business law. Practice is presently centered entirely in the civil rights field, with an emphasis on the civil rights of individuals with developmental disabilities. Experienced in the legal systems of the United Kingdom of Great Britain and Northern Ireland including a six month Barrister's internship in the Queens Court in London, England.

PROFESSIONAL KNOWLEDGE

GENERAL COUNSEL PROTECTION & ADVOCACY SYSTEM, INC.
(1988 - Present)

General counsel over legal issues of Protection & Advocacy System, Inc. delivery of legal services under Public Laws 94-103 (42 USC 6000 et seq) and 99-319 (42 USC 10800 et seq), as amended and the Rehabilitation Act of 1973, as amended. Legal services are provided to protect and advocate the rights of persons with developmental disabilities and persons with mental illness. Emphasis in administrative law, civil rights, Education of All Handicapped Children's Act, and civil rights representation in State and Federal Court.

ASSOCIATE WITH EDWARDS & JOHNSON, P.C. (1986 - 1988)

Associate with the law firm of Edwards & Johnson, P.C. in the general practice of law. Admitted to the state and federal courts in Wyoming. Emphasis in civil, criminal, family, estate planning and business law. Involved in all aspects of research and legal writing.

ASSISTANT CITY ATTORNEY (1985 - 1986)

Assistant City Attorney handling all criminal cases in and for the City of Cheyenne. As the chief prosecutor for trials as well as representing to conclusion the City of Cheyenne in over 500 civil and criminal cases. Head counsel in an appeal to the Wyoming Supreme Court in researching, writing and delivering the oral arguments thereof. Represented and advised City Council Committees and the division of city government. Author of daily legal memorandums and opinions to all city departments.

Exhibit "B"

MICHAEL R. O'DONNELL

2618 Warren ave.
Cheyenne, WY 82601
(307) 635-1706

LEGAL EXPERIENCE

Michael R. O'Donnell, P.C.
Cheyenne, Wyoming
March, 1986 to Present

Solo practitioner with emphasis in plaintiff's personal injury, medical malpractice and civil rights actions. Additional areas of practice include criminal defense, general business and domestic litigation together with landowner's royalty oil and gas litigation.

Wyoming Attorney General
Cheyenne, Wyoming
Assistant Attorney General
August, 1984 to February, 1986

Original member of State of Wyoming natural resources litigation team. Primary concentration in oil and gas royalty litigation. Duties included full responsibility for major royalty and tax litigation, including appeals. Additional responsibilities included representation of and litigation for the Wyoming Department of Revenue and the Wyoming Secretary of State.

Vlastos, Reeves, Murdock & Brooks
Casper, Wyoming
Legal Intern
May 1983 - March 1984

Primary responsibilities included drafting of pleadings, briefs and memoranda in the areas of tort defense and commercial law; additional responsibilities included depositions, interrogatories, appellate briefs and arguments, County and District court appearances.

G. Joseph Cardine
Casper, Wyoming
Legal Intern
May 1982 to December, 1982

Responsibilities included preparation of cases for trial in areas of tort, contract and corporate law; motion hearing and trial court appearances; pre-trial preparation and appearances; discovery, briefs, memoranda of law and legal research.

NON-LEGAL EXPERIENCE

Dimension Systems & Insulation, Inc.
Casper, Wyoming
Vice-President
August 1980 - August 1981

Supervision and responsibility for all corporate activities including corporate budgets, long and short term financing, preparation of job cost estimates for bid, supervision of jobs in progress, inventory management, personnel management.

ADMISSIONS TO PRACTICE

1984 - Admitted to the Bar of the State of Wyoming
1984 - Admitted to the United States District Court for the District of Wyoming.
1984 - Admitted to the United States Court of Appeals for the Tenth Circuit.
1986 - Admitted to the United States Court of Appeals for the District of Columbia Circuit.

LEGAL ORGANIZATIONS

American Bar Association
Wyoming Bar Association
Laramie County, Wyoming Bar Association
Association of Trial Lawyers of America
Wyoming Trial Lawyers Association

LEGAL EDUCATION

1984 - Juris Doctorate
University of Wyoming
Honors: 1983-1984 - President, University of Wyoming Student Bar Association
1984 - National Finalist, *ATLA Student Trial Advocacy competition* (5th in nation)
1982-1983 - Vice-President, University of Wyoming Student Bar Association
1983 - National Finalist, *ATLA Student Trial Advocacy competition* (3rd in nation)
1983 - Regional Representative, *ABA Moot Court competition.*
1983-1984 - Recipient, Alfred M. Pence Memorial Scholarship awarded to the 1984 graduate with the greatest potential as a trial attorney.

NON-LEGAL EDUCATION

1980 - Bachelor of Science - Finance
University of Wyoming

REFERENCES

Employment, client, judicial and other attorney references together with representative cases handled available upon request.

March 1, 1989

Exhibit "C"

MICHAEL REESE

Michael Reese was born in Rock Springs, Wyoming. He attended George Washington University in Washington, D.C. for one year before transferring to the University of Wyoming. He was graduated from the University of Wyoming in 1971 with a Bachelor of Arts degree in Political Science. He then attended the College of Law at the University of Wyoming, and was graduated in 1974 with his Juris Doctor degree. His initial position was as an attorney for the Wyoming Legislative Service Office. His duties included being counsel to the Wyoming State Senate.

In 1975, Mr. Reese assumed duties as the Wyoming Department of Economic Planning and Development, first as its Community Affairs Director and later as Chief of State Planning. In these roles, he was responsible for coordinating and managing energy impact programs and community development in Wyoming. As chief of State Planning, Mr. Reese was also responsible for completing the HUD '701' state land use plan, and he also was an advisor to the State Land Use Commission and assisted the Commission in its preparation of the State Land Use Plan. Mr. Reese was among the group of several state agency administrators to sit on the "A-96" review process and review most environmental impact statements completed in the State of Wyoming. In 1980, Governor Herschler appointed him to be the first Administrator of the newly created Wyoming Water Development Commission, a position which he held until 1983. Mr. Reese developed the state's existing water development legislation, including the concept of sequential water development known as Level I, II, III and IV.

Mr. Reese has been involved with many aspects of environmental and natural resource law. His involvement has ranged from preparation of Environmental Impact Statements for water projects, negotiations and discussions with federal and state agencies on such matters as wildlife benefits, endangered species, documentation of need, groundwater pumping, minimum streamflows, water quality and other issues. Mr. Reese has also represented individuals in actions in the State of Wyoming relating to solid waste disputes and he has represented individuals who were interested in investigating commercial solid waste sites within the State of Wyoming.

In 1983, Mr. Reese joined the investment banking firm of Kirchner Moor and Company and he opened the Cheyenne, Wyoming office. Mr.

Reese specialized in tax-exempt municipal bonds for schools, water development, hospitals, housing developments and other governmental activities. He became a Vice President in 1985. In 1987, Mr. Reese joined the law firm of Oitzinger and Wiederspahn, a firm specializing in public and private offerings of municipal bonds. Mr. Reese has had a Series 7 and Series 63 license from the National Association of Security Dealers.

Mr. Reese has experience and practice in the areas of municipal finance, planning and real estate, environmental law, municipal law and securities. Mr. Reese also has experience in civil rights cases -- for example, discrimination and employment. He has successfully defended a corporate client on Title VII claims based on racial discrimination. And, he has attended legal seminars on § 1983 litigation. In addition to these specialty fields, Mr. Reese counsels a variety of business entities and individuals on day-to-day legal concerns embracing a wide variety of issues.

Mr. Reese is a member of the Wyoming and Laramie County Bar Associations and he is admitted to practice before the Wyoming Supreme Court, the Federal District Court for the District of Wyoming, and the United States Tenth Circuit Court of Appeals.

Mr. Reese is active in many youth activities and is a member of the Cheyenne Soccer Association, Cheyenne Sting Soccer Club and a coach for youth softball.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MOTION AND MEMORANDUM OF LAW FOR CLASS CERTIFICATION were served on the Defendants by placing true and correct copies in the United States Mail, postage prepaid, on the 16th day of March, 1990, addressed as follows:

Dennis M. Coll
Senior Assistant Attorney General
Tort Litigation Division
State of Wyoming
Barrett Building, 4th Floor
Cheyenne, WY 82002

Michael Reese

Michael Reese