

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOSHUA DUNN, et al.,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO.
)	2:14cv601-MHT
)	(WO)
JEFFERSON S. DUNN, in his)	
official capacity as)	
Commissioner of)	
the Alabama Department of)	
Corrections, et al.,)	
)	
Defendants.)	

PHASE 1 PRELIMINARY SETTLEMENT APPROVAL ORDER

Pursuant to Federal Rule of Civil Procedure 23(e), the parties jointly move the court to grant preliminary approval to their proposed settlement agreement of Phase 1 of this litigation (doc. no. 518); to approve the form of notice to class members of the proposed settlement agreement (attached as Exhibit A); to approve the form for objecting to or commenting on the proposed settlement agreement (attached as Exhibit B); and to approve the process for distributing these

documents and collecting comments, as further set out below. Based on the entire record before the court, the court finds as follows:

First, the court finds that the proposed settlement agreement should be and is preliminarily approved, that notice should be provided to interested parties, and that a fairness hearing should be conducted.

The court further finds it appropriate to provisionally certify a Rule 23(b)(2) injunctive-relief settlement class composed of "any current or future inmate in the physical custody of the Alabama Department of Corrections who has a disability as defined in 42 U.S.C. § 12012 and 29 U.S.C. § 705(9)(B), excluding those inmates whose disabilities relate solely to or arise from mental disease, illness, or defect." For reasons to be articulated in a final decision regarding whether to approve the settlement, the court preliminarily finds that the settlement class meets the requirements of Rule 23(a)--numerosity, commonality, typicality, and adequacy of

representation--as well as the requirement of Rule 23(b)(2) that the issues involved "apply generally to the class," such that "relief is appropriate respecting the class as a whole." The court preliminarily finds that plaintiffs' counsel in this case can capably serve as and should be appointed class counsel, based on the factors outlined in Rule 23(g).

Finally, the court finds that the notice and comment forms attached as exhibits to this order, and the process for distributing and collecting these outlined below, constitute sufficient notice of, and--together with the fairness hearing(s) described below--opportunity to be heard on, the proposed settlement agreement, as is required by due process and Rule 23(e).

It is therefore ORDERED that the joint motion for preliminary approval (doc. no. 520) is granted as follows:

1. The proposed settlement agreement (doc. no. 518) is preliminarily approved, with final

approval subject to a hearing and to review by the court of any objections to or comments about its terms submitted by class members, and to the court's resolution of certain outstanding issues identified in open court at a hearing held on June 3, 2016, and set for briefing below.

2. An injunctive-relief settlement class, defined as "any current or future inmate in the physical custody of the Alabama Department of Corrections who has a disability as defined in 42 U.S.C. § 12012 and 29 U.S.C. § 705(9)(B), excluding those inmates whose disabilities relate solely to or arise from mental disease, illness, or defect," is provisionally certified under Federal Rule of Civil Procedure 23(a) and (b)(2).

3. The Southern Poverty Law Center, the Alabama Disabilities Advocacy Program, and Baker Donelson Bearman Caldwell & Berkowitz are appointed as class counsel to represent the settlement class under Federal Rule of Civil Procedure 23(g).

4. The Alabama Department of Corrections (ADOC) is to provide notice of the proposed settlement agreement as further outlined below by June 24, 2016, and to collect comments from class members as further outlined below by the submission deadline of July 25, 2016.

a. As a preliminary matter, the proposed settlement agreement (doc. no. 518) and notice and comment forms (Exhibits A and B) are to be translated into Spanish, and printed in both Braille and large print, and these alternative format documents are to be distributed to each ADOC facility prior to June 24, 2016. Although posted documents need not be provided in any alternative format, any individual inmate known to or believed by correctional officers to read only Spanish or to be vision-impaired must be provided individual copies of both the notice and comment forms in an appropriate

alternative format, and must be provided the agreement itself in an appropriate alternative format upon request. If an inmate who had difficulty reading any of the alternative format documents or who has difficulty writing requests that the forms or the agreement itself be read to him or requests assistance in completing a comment form, this request must be promptly accommodated by ADOC.

b. Copies of the proposed settlement agreement are to be made available for inmates to review in the law library of each ADOC prison or work-release facility or, for facilities that have no law library, in the area where information for inmates is made available. At least one copy is to be made available per 100 inmates housed in any particular facility.

c. A copy of the proposed settlement agreement is to be provided promptly upon request to any inmate who is not authorized or able to access the law library or other area where copies of the agreement are being made available.

d. For inmates housed in dorms at ADOC's prison or work-release facilities, the notice form is to be posted in each of the libraries and dorms of these facilities, wherever information for inmates is ordinarily posted. Sufficient copies of the comment form are to be made available to inmates housed in dorms in their facilities' libraries and in their shift commanders' offices.

e. Any inmate whose housing assignment is other than a dorm is to be provided, by hand delivery: (1) a copy of the notice form, (2) a copy of the comment form, and (3) a

letter-sized envelope. A correctional officer employed by ADOC is to distribute these papers. ADOC is to maintain a roster that indicates, by name and AIS number, the inmates to whom these forms have been individually distributed. Inmates are to sign this roster upon receipt of the forms; in the event that an inmate refuses to sign or rejects the forms, the distributing officer is to note this on the roster.

f. ADOC is to inform all inmates of the notice and opportunity to object or comment by means of a weekly oral announcement, to be made during morning count each Monday of the comment period, as follows: "Attention. There is a proposed settlement of the Dunn v. Dunn Americans with Disabilities Act lawsuit that affects all inmates. You have until July 25, 2016, to provide written comments about that settlement. You can

review the proposed settlement agreement in the law library [for facilities that have no law library, specify alternate location]. If you are not able to access the law library [for facilities that have no law library, specify alternate location], a copy of the agreement will be provided to you if you request one from a correctional officer. By July 25, 2016, you should place all written comments in the ADA Settlement Comment Box, located next to the inmate request slip box. If you need a copy of the comment form, you can get one from the correctional officer supervising your living area or from the law library. If you cannot access the ADA Settlement Comment Box, you should ask a correctional officer to have your comment form collected and placed in the comment box."

g. At each ADOC prison or work-release facility, a secured box clearly labeled "ADA Settlement Comment Box" is to be placed adjacent to the box where inmate request slips are collected. This box may be a securely taped cardboard box, and must be of sufficient size to accommodate all comment forms that are submitted. This box is to be used exclusively for the collection of comment forms.

h. Inmates who are allowed freedom of movement within a facility are to be allowed to place their comment forms in the designated comment box. Comment forms are to be collected from those inmates who do not have freedom of movement within a facility as follows, with records of the inmates from whom forms have been collected to be maintained on rosters by those responsible for the collection:

- i. In segregation units, the forms are to be collected by members of the Institutional Segregation Review Board during normal rounds and deposited in the comment box.
 - ii. In mental-health units and stabilization units and on death row, the forms are to be collected by the Captains who are responsible for those units and deposited in the comment box.
 - iii. In segregation units or holding units at work-release facilities, the forms are to be collected by the Wardens of those facilities and deposited in the comment box.
- i. The Warden of each ADOC facility is to certify in writing that the facility has complied with the above requirements regarding the provision of notice and the collection of forms, and that all comment

boxes have been transmitted to ADOC's general counsel as required below.

j. On the 20th day of the comment period, the Warden at each facility is to transmit to the office of ADOC's general counsel the comment box(es) at the facility, and immediately replace the comment box(es) with a box or boxes of the same design and labeling as the box replaced. At the end of the final day of the comment period, the Warden at each facility is to transmit the replacement comment box(es) to the office of ADOC's general counsel.

k. After each set of comment boxes is received by ADOC's general counsel, counsel for ADOC will promptly arrange with class counsel and a representative of the clerk of court for the Middle District of Alabama a time for the parties to meet at the United States Courthouse in Montgomery in order to

confirm that comment boxes from all ADOC facilities have been received and to open those boxes.

1. Each of these two sets of comments is to be scanned by the clerk of court and docketed as a single filing. At the same time as these comments are docketed, comments received by the clerk of court by mail by that date are also to be compiled and docketed. Finally, on August 12, any additional comments received by the clerk of court by mail are to be compiled and docketed. The clerk of court is to retain the original copies of all comments, whether submitted to comment boxes or by mail.

i. To be clear, five compilations of comments are to be docketed and marked as follows:

1. First round of comments submitted to comment boxes.

2. First round of comments submitted by mail.
 3. Second round of comments submitted to comment boxes.
 4. Second round of comments submitted by mail.
 5. Third round of comments submitted by mail.
5. By no later than July 15, 2016, the parties are to file a joint supplemental brief addressing comprehensively and in detail the following questions raised previously by the court at a hearing held in open court on June 3, 2016:
- a. Do the official-capacity defendants consent to the amendment of the complaint and proposed settlement agreement to include them as defendants, to ensure that in a potential future enforcement action, Eleventh Amendment immunity would not bar plaintiffs from raising claims under the

Americans with Disabilities Act (ADA) regarding conduct by prison administrators which does not violate the Fourteenth Amendment? See United States v. Georgia, 546 U.S. 151, 159 (2006). If they do not, what are the implications for any future action to enforce the proposed settlement agreement, and would it be fair to grant approval in light of these implications?

b. Under relevant binding and persuasive precedent, are there claims arising under the ADA which an individual prisoner would not be precluded from bringing by the substantive terms of the proposed settlement agreement--that is, absent the provision creating a mechanism for dispute resolution? Assuming that there are, can the court lawfully enter an order containing a provision requiring unnamed class members to arbitrate these claims and barring them from

federal court; would this order be enforceable? Assuming that the court has the authority to do so, would it be fair to enter such an order?

6. By no later than July 15, 2016, the parties are to confirm in written filings with the court the following agreements, stipulated to during a hearing held in open court on June 3, 2016:

a. The parties agree that 18 U.S.C. § 3626(b)(1), which authorizes defendants in prison litigation to seek termination of prospective relief after two years, can be and has been waived by defendants with respect to their proposed settlement agreement, and that defendants, having taken this position, will be estopped from arguing to the contrary in any future litigation related to enforcement of the proposed settlement agreement.

b. The parties agree that the maximum term contemplated by the proposed settlement agreement, beyond which plaintiffs will be required to seek an extension in order for the court to retain jurisdiction, is a period of 72 months to begin upon the court's final approval of the settlement.

c. The parties agree that the word "binding," should be omitted from Subsection 1 of Section VII of the proposed settlement agreement, and that the decision of the arbitrator is binding (that is, not subject to appeal) only if the issue being arbitrated affects fewer than 12 inmates. The parties further agree that the arbitrator's decision as to whether a particular issue affects more than 12 inmates will be subject to review by the district court for abuse of discretion.

7. By no later than August 17, 2016, the parties are to file pre-hearing briefs, both summarizing by topic and responding to the objections to and comments on the proposed settlement agreement that have been submitted by class members. These briefs must include citations to the page numbers on which any referenced objections or comments appear in the docketed compilations of responses.
8. A fairness hearing is set for 10:00 a.m. on August 31, 2016, in Courtroom 2FMJ of the Frank M. Johnson Jr. United States Courthouse Complex, One Church Street, Montgomery, Alabama. At this hearing, counsel for both parties must be prepared to respond to the objections raised and comments made by class members, as well as to the court's concerns as outlined above.
9. The court will determine, after receiving objections and comments from class members, from which of them it intends to hear oral testimony.

This testimony will be heard by videoconference from various ADOC facilities.

a. By no later than August 17, 2016, the parties are to consult with the clerk of court and file under seal a joint proposal as to arrangements for videoconferencing.

b. By no later than August 22, 2016, the court will inform the parties which class members will testify, and which dates during the week of August 29, 2016, the court will hear testimony.

c. By no later than August 26, 2016, the parties are to file a list of which class members will testify from which facilities.

DONE, this the 13th day of June, 2016.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE