

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division**

WILLIAM THORPE, *et al.*,

Plaintiffs,

V.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

Case No. 2:20-cv-00007-JPJ-PMS

**DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT REGARDING
PROPOSED CLASS REPRESENTATIVES AND NOTICE**

Defendants submit the following response to Plaintiffs' Statement Regarding Proposed Class Representatives and Notice (ECF No. 310).

A. Defendants Renew Their Objection to the Typicality and Adequacy of the Proposed Class Representatives.

Plaintiffs propose Peter Mukuria to represent the Constitutional Violation Injunction Class and the Constitutional Violation Damages Class, and Gary Wall to represent the Disabilities Injunction Class and the Disabilities Damages Class.

Defendants opposed Plaintiffs’ motion to certify classes in this action, based in part on the proposed class representatives’ inadequacy and the atypicality of their claims. ECF No. 195 (Defs.’ Br. in Opp. to Mot. for Class Cert.). In ruling on the motion, the Court held that “the plaintiffs have sufficiently established Rule 23(a)’s typicality and adequacy for all four proposed classes.” ECF No. 299 (Op. & Order) at 27.

Defendants maintain that Mukuria is neither a typical nor an adequate representative of the Constitutional Violation classes, and Wall is neither a typical nor an adequate representative of the Disabilities classes. By way of example, Mukuria successfully completed the Step-Down Program

in 2020 and has been housed in a Maryland correctional facility under the Interstate Compact since 2021. Because he is not only outside of Red Onion State Prison but outside *the Commonwealth*, Mukuria has—at best—a tenuous connection to current conditions at the facility.

Yet Plaintiffs propose Mukuria as the best representative for a class of “[a]ll persons who are currently, or will in the future, be confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program.” ECF No. 310 at 2. Mukuria cannot testify about post-2020 Step-Down Program conditions (such as increased out-of-cell time) because he completed the program. He cannot testify about current conditions at Red Onion because he is not there. Plaintiffs assert that because Mukuria might, at some point in the future, be reassigned to the Step-Down Program, “his claim [is not] moot.” *Id.* Even if that were true, non-mootness is not the standard for typicality and adequacy.

Similarly, Plaintiffs propose Wall to represent the Disabilities classes because, according to Plaintiffs, “[h]e suffers from a variety of mental health disabilities, including depression, anxiety, and suicidal ideations, which inhibited his progression through the Step-Down Program.” *Id.* at 3. In its certification decision, the Court held that at least some inmates in the Step-Down Program had mental-health disabilities, because the Americans With Disabilities Act’s definition of “mental impairment” “encompasses those inmates classified as M[H]-2S and higher.” ECF No. 299 at 16. The Court further stated that the ADA’s definition “likely encompasses individuals who are classified by the VDOC at even lower mental health classification codes.” *Id.*

Wall has never received a mental-health classification of MH-2S or higher. Thus, Wall will have to prove to the trier of fact that he has a “disability” covered by the ADA. If Wall fails to establish that he is “disabled” within the meaning of the ADA, then Wall—by definition—would no longer be a member of the Disabilities Classes. Under that scenario, Defendants would

defeat ADA and RA claims of the representative of the Disabilities classes. But Wall will no longer be a member of those classes, leaving in doubt the classwide effect of the judgment against Wall. If a defendant cannot defeat the claims of a class by defeating the claims of the class representative, then there is something inadequate about the representative. Plaintiffs' proposal sets up a tails-I-win, heads-you-lose scenario.¹

The Court has given Plaintiffs an opportunity to select their own class representatives. Defendants disagree that either of the proposed class representatives are typical or adequate. But at a minimum, if the Court accepts Plaintiffs' proposed class representatives, then a decision in favor of Defendants against those representatives should bind the classes as a whole—whatever the basis for such a decision.

B. Class Counsel Has Failed to Provide Defendants and the Court Sufficient Information to Determine Whether The Proposed Notice and Process Are Adequate.

The Court directed Class Counsel to “submit a proposed notice and process for notice to class members.” ECF No. 299 at 42. Class Counsel submitted a proposed Notice of Class Action and outlined a method for sending the notice. ECF No. 310.

Plaintiffs' submission to the Court does not include elements typically required of a class notice; nor does it explain how their proposed Notice satisfies those requirements. A class notice:

... must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;

¹ In part, this problem arises from the fact-intensive inquiry needed to determine whether most potential members of the Disabilities classes actually qualify as members. The class certification order posits that “defendants’ discovery responses, as well as other VDOC records, including medical records and mental health services progress notes, indicate that class members can be easily identified.” Op. & Order at 17. That may be true for inmates with mental health codes of MH-2S and higher—though Defendants disagree even with that. But for the great majority of potential class members, who, like Wall, have mental health codes lower than MH-2S, mini-trials will be needed to determine class membership.

- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and
- (vi) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). Those requirements are the bare minimum for due process. *See* Fed. R. Civ. P. 23(d)(2) advisory committee's note to 1966 amendment.

To determine if the proposed notice is “the best ... that is practicable under the circumstances,” Fed. R. Civ. P. 23(b)(2)(B), Defendants propose that the Court consult the Federal Judicial Center's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, attached as Exhibit A (“FJC Checklist”).² The FJC Checklist details the issues the Court should consider in determining whether a proposed notice and the notice plan are adequate.

As explained below, comparison of Class Counsel's proposal to the FJC Checklist reveals multiple inadequacies in Class Counsel's submission.

Lack of Adequate Notice to the Disabilities Damages Class. A critical flaw in Class Counsel's notice plan is lack of adequate notice to the Disabilities Damages Class. That flaw arises directly from the lack of objective criteria to identify the purported members of the Disabilities Damages Class. As a result, Class Counsel has not explained how the notice plan will effectively reach those individuals.

Two subclasses must receive notice: the Constitutional Violation Damages Class, and the Disabilities Damages Class. The Constitutional Violation Damages Class members can be identified using objective criteria available to the parties (assignment to certain facilities and

² Also available at <https://www.fjc.gov/content/301350/illustrative-forms-class-action-notice-notice-checklist-and-plain-language-guide> (last visited May 15, 2023).

security levels, and participation in the Step-Down Program).³ Membership in the Disabilities Damages Class, on the other hand, depends on whether a particular individual (i) satisfies the criteria for the Constitutional Violation Damages Class, and (ii) “suffer[s] from mental health disabilities and [is] qualified as [an] individual[] with disabilities under either the Americans with Disabilities Act or the Rehabilitation Act.” ECF No. 299 at 41-42.

Every member of the Disabilities Damages Class is also a member of the Constitutional Violation Damages Class. But the inverse is not true—the Disabilities Damages Class is, in relative terms, a small fraction of the Constitutional Violation Damages Class.⁴

Class Counsel proposes to send individual notice to every member of the Constitutional Violation Damages Class, telling the recipients that they also may be members of the Disabilities Damages Class. Hundreds of inmates will receive *individual* notice regarding the Disabilities Damages Class even though they are not class members.

A class notice must “contain sufficient information to make an informed decision.” FJC Checklist at 5. The proposed Notice includes the Court’s class definitions, but never explains to the recipients how to determine whether they are members of the Disabilities Damages Class. The recipients will not know whether they should consider opting out, and they will not know if they have a right to intervene. They will only know that if they do not opt out, they “WILL REMAIN

³ There may be some question about Constitutional Violation Damages Class membership at the margins—e.g., whether a particular individual was “subject to the Step-Down Program.” Defendants anticipate those cases will be rare.

⁴ In analyzing numerosity for the Constitutional Violation classes, the Court noted that within the class period, “almost five hundred individuals have spent time at SL-S since 2012.” *Id.* at 15. In contrast, the Court based its numerosity determination for the Disabilities classes on a VDOC discovery response “list[ing] 74 individuals who were assigned a VDOC mental health code of 2S, 3 or 4 at the time of their SL-S or SL-6 security level classifications” during the class period. *Id.* The Court noted that the Disabilities classes might also include inmates with less serious mental health codes. *Id.* In any event, the Constitutional Violation Damages Class could easily be five times larger than the Disabilities Damages Class.

A MEMBER IN ONE OR MORE OF THE DAMAGES SUB-CLASSES.” ECF No. 310-1 (Proposed Notice) at ¶ 11.

Many recipients of the proposed Notice will wrongly assume they are members of the Disabilities Damages Class. And unless or until Class Counsel says otherwise, the Court and Defendants will have to assume that, too. If Defendants are supposed to prepare to defend against the “damages” aspect of the Disabilities Damages Class, they will have to identify affirmative defenses, and analyze class membership, for hundreds of individuals who should never have been told they are Disabilities Damages Class members.

The indiscriminate Disabilities Damages Class notice also undermines the Court’s ability to determine the adequacy of the notice method. Class Counsel should ultimately tell the Court the percentage of each class that received notice—i.e., a reach calculation. *See* FJC Checklist at 3. Class Counsel should provide “reach calculations based on accepted methodology.” *Id.* Without identifying the members of the Disabilities Damages Class, Class Counsel cannot tell the Court the percentage of that class that received individual notice.

On May 10, counsel for Defendants asked Class Counsel to provide a list of members of the Disabilities Damages Class, in order to prepare this filing. At 7:25 p.m. on May 16—i.e., the night before this filing was due—Class Counsel responded that they do not know who is in the Disabilities Damages Class (beyond 74 individuals in VDOC’s discovery responses identified as having mental health codes of MH-2S or higher, plus—in their view—Wall). *See* Email of W. O’Neil to T. Waskom, attached as Exhibit B. Class Counsel states that class membership could be determined by reviewing a hodgepodge of documents from each *potential* class member’s medical / mental health file or other, unspecified sources. *See id.* Class Counsel identified “at

least” 10 types of documents that might “contain relevant information that could be used to identify the remaining Disability Damages Class members.” *Id.*

In other words, Class Counsel proposes that the parties review tens of thousands of pages of documents—and that Defendants be required to spend hundreds of hours and tens of thousands of dollars collecting, reviewing and producing documents that primarily are maintained in hard copy on site at prison facilities—after which the parties could litigate whether *each* potential class member (with a mental health code of less than MH-2S) has a covered disability. Magistrate Judge Sargent already held that the collection and production of those records would be unduly burdensome and “outweighs its likely benefit.”⁵ *See* Mem. Order Granting in Part and Denying in Part Mot. to Compel (ECF No. 296). Class Counsel would then have to use those records to *prove*, by a preponderance of evidence, that each purported class member has a disability—an element of each class member’s ADA and RA claim. All of that, just to compile the list of Disabilities Damages Class members. Class Counsel’s lack of an adequate plan to provide notice to those individuals is the immediate problem before the Court, but foreshadows another problem more fundamental to the Disabilities Damages Class itself.

Method and Process for Mailing Notice. Class Counsel has provided the Court insufficient information regarding the notice process with respect to the Constitutional Violation Damages Class as well.

First, Class Counsel has not clearly stated the delineation of responsibility for providing notice to inmates housed outside the Commonwealth under the Interstate Compact. Class Counsel proposes that VDOC distribute the notice to “class members that are in [its] custody and control.” ECF No. 310 at 4. Class Counsel offers to mail notice to everyone else, using last known addresses

⁵ Plaintiffs did not file objections to Magistrate Judge Sargent’s ruling.

received from VDOC. Splitting the classes into those two categories ignores a third category: individuals in custody in other states, under the Interstate Compact. VDOC is not best situated to distribute notice to those individuals because they are not in VDOC custody. Class Counsel should be responsible for providing them notice.

Second, Class Counsel has not provided the Court sufficient information regarding the mechanics of its mailing program. The FJC recommends that class counsel’s “plan ... detail steps to update addresses before mailing, including postal service change-of-address records.” FJC Checklist at 3. By all appearances, Class Counsel does not intend to retain an administrator to oversee notice. Class Counsel states that “[i]f VDOC does not have address information for a class member”—and, presumably, if VDOC’s last known address for an already-released inmate is stale—“Plaintiffs will make reasonable efforts to locate class members’ last known addresses via skip-tracing or a similar service.” ECF No. 310 at 4. With respect, this is not a plan. Nor does Class Counsel provide information about re-mailing notices returned as undeliverable. It is unclear that Class Counsel’s proposed notice schedule provides sufficient time for a second round of notice.

The Content of the Proposed Notice. The Proposed Notice itself does not track the format recommended by the FJC. It lacks the question-and-answer format generally used in class notices. In Defendants’ view, it is not written in plain language and will not be readily comprehensible to potential class members.

The Proposed Notice Schedule. Beyond the potential difficulty in sending more than one round of notice by mail within 21 days, Defendants take no position on Class Counsel’s proposed schedule.

Dated: May 17, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

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