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VIA EMAIL ONLY

The Honorable Karen Molzen
United States Magistrate Judge
Pete V. Domenici United States Courthouse
Albuquerque, NM 87102
molzenchambers@nmcourt.fed.us

Re: *Jackson, et al. v. Los Lunas Center for Persons with Developmental Disabilities, et al., No. CIV 87-0839 JAP/KBM*

Dear Judge Molzen,

I am writing on behalf of counsel for the plaintiff class to explain why, in order for us to be able to adequately respond to Defendants' pending Rule 60(B)(5) motion to dismiss the case, Plaintiffs' counsel need to obtain information about participants in the State developmental disabilities system who are not Jackson class members and why we need the information that will enable us to compare what happens to Jackson class members with what happens to other people in the State developmental disabilities system, both those who have severe disabilities and those who do not have severe disabilities. As described below, applicable precedent establishes that we should be permitted to obtain such information.

The disparity in how Defendants and the community provider agencies they fund and supervise treat people with severe disabilities, compared to people without severe disabilities enrolled in the State's developmental disabilities system, was central to Judge Parker's 1990 memorandum opinion and order. Based on the disparate impact of Defendants' policies and practices, the Court held, *inter alia*, that Defendants were violating Section 504 of the Rehabilitation Act, stating,

There are few community based programs to accommodate individuals with behavior problems or with complex needs . . . Defendants lack control over existing community providers with whom they contract to serve the developmentally disabled. Community providers determine whether to accept or reject an individual. There is . . . no incentive for a community provider to want to serve persons with more challenging and complex needs. In fact, community programs are reluctant to accept certain individuals with challenging behavior. . . Instead, community providers tend to serve persons who have the least challenging needs

Jackson v. Fort Stanton, 757 F. Supp. 1243, 1295 (D.N.M. 1990) (emphasis added).

In 1990, Judge Parker also found that,

severely handicapped residents are precluded from living in community settings because *the programs lack amenities*, that could reasonably be furnished without substantial program changes, *necessary to accommodate the needs of the severely handicapped . . . Defendants' failure to accommodate the severely handicapped in existing community programs while serving less severely handicapped peers is unreasonable and discriminatory. . . Accordingly, the defendants should require those community programs that receive federal assistance funds to make reasonable accommodations for those severely handicapped residents of LLH & TS and FSH & TS* whose IDTs have determined that a community program could be appropriate, if reasonably modified.

Jackson v. Fort Stanton, 757 F. Supp. 1243, 1299 (D.N.M. 1990) (emphases added).

Defendants have indisputably put the question of whether they have remedied discrimination against people with severe disabilities squarely at issue. Their pending motion repeatedly claims that they have cured their violations of the Rehabilitation Act. For example:

“[T]he State's implementation of ISPs does not violate Section 504 of the Rehabilitation Act.” Doc 2188, p. 30

“[T]he State has supported and continues to improve a system of community providers who provide supported employment and other day habilitation services to JCMs in compliance with federal law and regulation including the Rehabilitation Act of 1973.” *Id.*, p. 57

“New Mexico has fulfilled all required components to cure any Fourteenth Amendment Substantive Due Process violation as well as any § 504 Rehabilitation Act violation that existed.” *Id.*, p. 75.

Plaintiffs' counsel's ability to conduct discovery regarding the extent to which Defendants' actions and inaction continue to discriminate against people with severe disabilities in violation of the Rehabilitation Act will control whether Plaintiffs are able to properly present their side of the case during the upcoming hearing on Defendants' motion to dismiss. As described below, relevant case law, including Tenth Circuit precedent, makes clear that, in cases involving discrimination, plaintiffs must be permitted to discover evidence about non-parties in order to prove their case.

I. Case Law and Defendants' Past Practices Both Support Production of Information and Data About Non-Class Members in this Discrimination Case.

It has been well established for decades that the plaintiffs' lawyers in discrimination cases are entitled to discover evidence about non-plaintiffs, non-parties and people outside of the class, in

order to show disparate impact discrimination. *See Rich v. Martin Marietta Corp.*, 522 F.2d 333, 344-345 (10th Cir. 1975) (concluding that plaintiffs have a right to information about non-parties in order to compare to plaintiffs); *Lang v. Intrado, Inc.*, No. CIVA07CV00589REB-MEH, 2007 WL 3407366, at *4 (D. Colo. Nov. 13, 2007) (concluding that evidentiary discovery of outcomes of comparitors is necessary to proving disparate impact discrimination); *Kennicott v. Sandia Corp.*, No. CV 17-188 JB/GJF, 2018 WL 2206880, at *4 (D.N.M. May 14, 2018) (concluding that discovery of information on related types of discrimination is proper to establish a culture of discrimination against similarly-situated individuals). *See also, Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995); *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980).

This principle extends beyond data created and held by the defendants to include confidential health-protected information in the possession of non-party providers and facilities. For instance, courts have compelled the production of medical records of persons outside of the class that includes confidential information. *See Ligas v. Maram*, No. 05 C 4331, 2007 WL 4225459, at *4-5 (N.D. Ill. Nov. 27, 2007) (concluding that discovery of medical and Intellectual/Developmental Disability (I/DD) service records is proper for unnamed class members and non-parties).

Moreover, the Department of Health has in the past recognized that it can provide non-party information to plaintiffs, when it suits them. Protected Health Information (PHI) regarding non-class members was provided to counsel for the Jackson class in 2004 pursuant to a Qualified Protective Order under HIPAA. Recently, in 2016, the Department of Health similarly provided PHI regarding non-plaintiffs and non-parties to plaintiffs' counsel in *JL et al v. NM Department of Health et al* No. 2:12-cv-1145 MV/GJF. Defendants' current opposition to providing information regarding non-class members to Plaintiffs' counsel contradicts their past practices, including quite recent actions.

In addition to enabling Plaintiffs to refute Defendants' claim that they have cured all violations of the Rehabilitation Act, there is a second reason why information regarding how Defendants treat non-class members is essential to Plaintiffs' ability to fairly litigate Defendants' motion to dismiss. As Your Honor knows, the Defendants have adopted both formal rules and informal practices that apply exclusively to Jackson class members. As a result, discovery regarding how Defendants treat Jackson class members compared to how they currently treat similarly situated people who are not members of the plaintiff class is integral to the Court's determination of whether Defendants have established a durable remedy that will protect class members from harm after judicial supervision is terminated and there is no such thing as a Jackson class member.

Because the Court must evaluate at its upcoming evidentiary hearing both whether discrimination against people with severe disabilities has been effectively remedied and also whether a durable remedy has been established, due process and fundamental fairness require that Plaintiffs' counsel have access to information about non-class members which is exclusively in Defendants' possession and control.

II. Plaintiffs Need Information About Non-Class Members from Specific Databases.

The Plaintiffs need access to the databases listed in Request for Production No. 2, to conduct comparative analyses between individuals with severe disabilities and those without severe disabilities, which was the basis for some of the Court's § 504 discrimination findings in its 1990 liability decision. Additionally, the question of whether Defendants have established a durable remedy will be informed by a comparison of how they currently treat class members compared to non-class members.

It is essential that Plaintiffs' counsel get information about non-class members to be able to determine whether Defendants have effectively remedied the 504 violation, and specifically whether Plaintiffs continues to experience disparate impact based upon severity of disability and the related consequences of their lengthy institutionalization. It also is essential to be able to compare the services available and accommodations provided to persons with severe disabilities, because of the Court's historical finding grounded in this condition, because of current information suggesting differential impact related to severity of disability, and because of the State's legal duty to accommodate people with severe disabilities, in order that they can fully participate in the State's services, programs, and benefits. In order to conduct these comparative analyses, a complete export of the source data is necessary. Exports of aggregate generalized information or summaries in unsearchable formats provide incomplete data and do not allow the needed comparative analysis.

Specifically, and as requested in Request for Production No. 2, the Plaintiffs need the complete databases requested in order to conduct the following analyses:

a. DHI Incident Management Database on Abuse, Neglect, and Exploitation

2a. The IMB database provides information on the number of reports of abuse, neglect, and exploitation for all individuals in New Mexico's DD system and the amount of time Defendants take to complete their investigations and to take needed corrective actions. This data will allow Plaintiffs to analyze differences in rates of reported abuse, investigation, and resolution between class members and non-class members as well as between persons with severe disabilities and those without severe disabilities. The monthly PDF reports currently provided by Defendants contain only a high-level overview, do not include any information about non-class members and do not allow for sufficient comparative analysis and assessment of trends.

b. DHI Quality Management Database on Provider Quality Reviews

2b. The QMB database reportedly contains client level information, drawn from a sample of individuals served by each provider, about assessments, service plans, case management activities, and other individual outcomes for both class and non-class members. Without the ability to search this database it is impossible to analyze disparities in care between class members and non-class members as well as between persons with severe disabilities and those without severe disabilities.

c. Division of Vocational Rehabilitation Database on Employment Services

2c. The DVR database reportedly contains information on vocational rehabilitation opportunities including eligibility, provision of DVR services, and whether the person obtains a successful job placement. This database evidently includes class members and non-class members. Historically DVR has served very few class members (who are persons with severe disabilities) and access to this database likely contains evidence indicating the extent to which this pattern of discrimination continues to the present time. Moreover, the class members who have had cases opened by DVR have had relatively few positive outcomes and the common experience for many individual class members was that their cases were closed without employment ever having been achieved. Presumably, DVR has served many more non-class members with IDD and the extent to which DVR has had better outcomes for these individuals is key evidence. It is essential to get this information about non-class members to be able to establish a discrimination claim and to demonstrate disparate impact.

Defendants state that data on Jackson class membership and/or I/DD is not linked in this database. However, using person-specific identifiers and Supports Intensity Scale (SIS) data Plaintiffs' counsel could match individuals in this database with Jackson Class membership and with I/DD levels of need, and conduct a comparative analysis between class members and non-class members as well as between persons with severe disabilities and those without severe disabilities.

d. DDS Databases on Day and Employment Services

2d. The Defendants have numerous data sets that track employment services, and other Day Services, and include information about wages paid and hours worked. Evidently, all members of New Mexico's DD system receiving employment services and day services are represented in some or all of these databases. Since Plaintiffs assert that Defendants' employment system continues to discriminate against class members, who, by definition, are persons with severe disabilities, it is essential that Plaintiffs' counsel have access to the comparative data and information necessary about the comparator group to analyze this claim.

The evidence at the 2011 hearing indicated that there were significantly fewer class members working per capita, compared to other individuals with IDD who Defendants claimed were employed because of their supported employment system. The Defendants' tracking and data management of the employment system are important sources of evidence about the current state of these patterns. It is essential to have access to this data to establish discrimination in the Defendants' employment system between class members and non-class members as well as between persons with severe disabilities and those without severe disabilities.

e. Databases Regarding Strike Force, SELN or Wage and Hour Reports

2e. The Defendants' defense will likely rely upon these processes and information. The Strike Force was created to increase class member employment and to address the "integration" experience of class members. The Supported Employment Leadership Network data bases evidently contains information regarding both class members and non-class members. The wage

and hour reports, and possibly other reports have been generated and relied upon by Defendants for tracking class member and non-class member employment outcomes. The Defendants' tracking and data management of the employment system are important sources of evidence about these patterns.

f. DDS Database on Aspiration

2f. The tracking of data for aspiration needs, events, and Comprehensive Aspiration Risk Management Plan (CARMP) development and updating is kept on a DOH database or spreadsheet and is the consolidated source of information for the status of aspiration risk management for the system. The information from the database or spreadsheet is necessary for Plaintiffs to ascertain the status of aspiration risk management for class members from 2013 to the present. It is our understanding that aspiration concerns and needs are tracked for both class members and non-class members and the data about non-class members will allow Plaintiffs to review how aspiration events and supports are managed for both class members and non-class members and how DOH responds to aspiration events and issues for persons with severe disabilities and those without severe disabilities.

g. DDS Database on General Events Reporting

2g. General Events Reporting (GER) in Therap is the Department' of Health's mechanism for tracking injuries and incidents at low, medium and high levels. Providers are mandated to report all types of events within the GER system. We believe that the GER tracking relates to both class members and non-class members. The information from the database demonstrates how DOH manages health and safety issues for class members. This data will allow Plaintiffs to analyze differences between class members and non-class members with respect to rates of General Events Reporting, which Events DOH decides they will address and the efficacy of DOH actions. Access to the data base will also allow comparison between how DOH responds to Events involving persons with severe disabilities and those without severe disabilities.

i. and j. DOH Databases on Supports Intensity Scale

2i and 2j. The complete SIS dataset contains a level of need determination for every individual in the New Mexico's DD system. The SIS Groups or "DD Waiver Groups" to which DOH has assigned people include Groups F and G, which identify people with extraordinary medical needs and with extraordinary behavioral needs, respectively. This information is essential for sorting or categorizing individuals in all of Defendants' various data sets by their levels of need, which is vital to conducting comparative analyses in the other databases.

k. DDS Database on Therap

2k. DOH instituted the Therap audit process to ascertain the status of the maintenance of complete and consistent medical records for class members. The consistency and completeness of medical records have been relevant to this case since the original findings of the Court in 1990. The Court determined in 1990 that class members cannot receive adequate medical care without accurate and

up to date medical records. The Therap audit results are a primary source of information maintained by the Department of Health to determine the accuracy, timeliness and completeness of medical records and the data regarding Therap is necessary to analyze the status of health care coordination, the accuracy of medical records and the medical care for class members. If Defendants have conducted Therap audits for non-class members, that data will allow Plaintiffs to analyze differences between how defendants treat class members compared to non-class members with respect to Therap which Therap audit results DOH decides will receive DOH intervention, and the efficacy of DOH actions. Access to the full database will also allow comparison between how DOH responds to persons with severe disabilities and those without severe disabilities.

1. Medicaid and DDS Databases on Durable Medical Equipment

21. In the past, HSD and its Medicaid managed care organizations maintained databases or spreadsheets which captured information regarding how long class members were waiting for durable medical equipment. We do not know whether any of the databases or spreadsheets maintained by the Defendants or by their contractors include information regarding non-class members. The Jackson Coordinating Committee received periodic reports from DOH's Clinical Services Bureau regarding gaps in therapy services and information from Specialty Services reports regarding delays in the provision of equipment and services. Review of information contained in all such databases and spreadsheets would enable Plaintiffs' counsel to ascertain the timeliness and completeness of the provision of durable medical equipment and therapy services for class members. Provision of all such databases and spreadsheets will also enable Plaintiffs' counsel to analyze differences in rates of delay in Defendants' responses to problems with respect to class members and non-class members, as well as differences between DOH's responses to persons with severe disabilities and those without severe disabilities.

III. Technical Data Issues

Plaintiffs recognize that, for certain databases, there may be issues concerning searching, transmitting, and sharing information from these databases. We have offered to work with State officials, and we will meet and confer in good faith with Defendants' information technology staff, to determine efficient and cost-effective ways of transmitting this information. We believe that, after such a meeting, the parties should be able to resolve any complications regarding the exportation of appropriate data.

For these reasons, Plaintiffs' counsel request that you direct the Defendants to provide Plaintiffs' counsel with the information sought in discovery about how Defendants treat non-class members including the information that will enable comparisons of how Defendants treat people with severe disabilities compared to how they treat people without severe disabilities.

Honorable Karen B. Molzen

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As we have in the past, we will enter into another Qualified Protective Order to ensure that all Protected Health Information we receive is protected from disclosure.

Please let us know if there is anything further we can do to assist Your Honor in resolving these disputes.

Respectfully submitted,

Peter Cubra

Peter Cubra

cc via email: Jerry Walz
James Grubel
Gabriel Sanchez-Sandoval
Maureen Sanders
Plaintiffs' co-counsel