Jerry A. Walz, Esq.*
---
*Also Admitted
in Texas & Colorado

Walz and Associates, P.C.
Attorneys at Law

"Making Legal History"

133 Eubank Blvd NE
Albuquerque, New Mexico 87123

James J. Grubel, Esq.
Alfred D. Creecy. Esq.

(505) 275-1800
(505) 275-1802 Facsimile

July 20, 2018

Via Email Only

Honorable Karen B. Molzen
Chief Magistrate Judge
United States District Court
333 Lomas Blvd., Suite 730
Albuquerque, NM 87102
molzenchambers@nmcourt.fed.us

Re: *Walter Stephen Jackson, et al. v. Los Lunas Center for Persons with Developmental Disabilities, et al.,* Case No. 87-cv-00839 JP/KBM
Discovery Dispute

Dear Judge Molzen:

We are submitting this response to Mr. Cubra's letter of July 13, 2018, wherein Plaintiffs claim they are entitled to information on non-Jackson Class Members to compare with data on Jackson Class Members asserting that their position is supported by legal precedent. Regardless of that position, Plaintiffs' assertion is not supported by case authority and the Rehabilitation Act provides the applicable standard of compliance is based on "meaningful access" not on delivery of the same services or equal outcomes as suggested by Plaintiffs.

Specifically, the "ADA and Rehabilitation Act require that participants have meaningful access to a public entity's services and benefits, but they do not guarantee equal benefits for all categories of persons with disabilities. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132." *Cohon ex rel. Bass v. New Mexico Dept. of Health*, 788 F. Supp. 2d 1245 (D.N.M. 2009), judgment aff'd, 646 F.3d 717 (10th Cir. 2011). [1]

[1] Section 504 and the ADA "involve the same substantive standards" and, therefore, are analyzed together. *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1245 (10th Cir. 2009).

In complete contravention of the appropriate legal standard, Plaintiffs' letter requests data on non-Jackson Class Members to "compare what happens to Jackson class members with what happens to other people in the State developmental disability system, both those who have severe disabilities and those who do not have severe disabilities." Letter at 1. Plaintiffs are effectively requesting data to compare results and outcomes rather than to discern meaningful access. However, even if Plaintiffs are asserting a disparate impact claim under Section 504, that claim must still demonstrate lack of meaningful access to benefits and services as a prerequisite. The Supreme Court has specifically held that disparate impact, by itself, does not state a prima facie case under § 504. *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712 (1985) "Rather, actionable disparate impact requires analysis of whether the individual is otherwise qualified and whether reasonable accommodations may provide meaningful access." *Hollonbeck v. U.S. Olympic Comm*., 513 F.3d 1191, 1197 (10th Cir. 2008)

In *Choate*, a group of disabled citizens sued the state of Tennessee alleging that state's reduction of inpatient hospital days that the state would pay hospitals on behalf of Medicaid from 20 to 14 days would have a disproportionate impact on the handicapped and was therefore discriminatory in violation of Section 504 of the Rehabilitation Act. *Id.* at 713. The Supreme Court found that Tennessee's reduction in hospital days did not violate the Rehabilitation Act reasoning that "the new limitation does not invoke criteria that have a particular exclusionary effect on the handicapped; the reduction, neutral on its face, does not distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having." *Id.* at 720-21.

The Supreme Court also rejected the disabled citizens' contention that the Tennessee's Medicaid plan as a whole violated the Rehabilitation Act because the 14 day limit most heavily affected the handicapped and because the harm could be avoided as there were alternative means of meeting the state's objectives without disproportionately disadvantaging the handicapped. (disparate impact) *Id* at 723. The Supreme Court held that Section 504 does not require Tennessee to make such changes noting that "nothing in the pre- or post-1973 legislative discussion of § 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid." *Id*. Further, the Court found the argument that Tennessee must single out the handicapped for more than 14 days of coverage to provide meaningful access to Medicaid services "simply unsound." *Id.* at 721. The Supreme Court reasoned the benefit to which individuals are entitled is the individual services not "adequate health care." *Id*.

Assuming *arguendo* that the requested data here would demonstrate different results between Jackson Class Members and non-Class Members, that in and of itself would not constitute a violation of Section 504 of the Rehabilitation Act, as there is no guarantee of equal outcomes and the state has wide latitude in creating and regulating the amount of services provided. Significantly, Plaintiffs request for comparative data on non-class Members is based on a faulty assumption that Class Members are more severely disabled

than non-Class Members. As a result, any comparison of data would not demonstrate disparate treatment of the severely disabled with respect to the less severely disabled. Further, Plaintiffs have been provided significant amounts of data relative to Jackson Class Members which would enable Plaintiffs to demonstrate whether they have been denied meaningful access to a benefit or service. Plaintiffs must first establish they have been denied access to services before proceeding with a disparate impact claim. Further, Plaintiffs request for data on non-Class Members is not likely to produce evidence that will be admissible at trial nor is it reasonably calculated to lead to admissible evidence relevant to issues that are or may become part of the case given the limited inquiry ordered by the Tenth Circuit. See Fed.R.Civ.P. 26(b); *Rubin v. Islamic Republic of Iran*, 349 F.Supp.2d 1108, 1111 (N.D.Ill.2004).

Moreover, Plaintiffs fail to cite to any authority that addresses meaningful access or the relevant legal standard. Instead, plaintiffs rely upon authority related to disparate impact in employment discrimination cases under Title VI of the Civil Rights Act of 1964 rather than the similarly titled, but fundamentally different, disparate impact analysis under Section 504 of the Rehabilitation Act.[2] The decisions cited by Plaintiffs for the broad proposition that non-Class Member data should be produced are distinguishable and facially irrelevant.

Plaintiffs cite to *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975) for the proposition "that plaintiffs have a right to information about non-parties in order to compare to plaintiffs." Letter at 3. However, in *Rich* the issue was whether the minority plaintiffs in an employment discrimination class action were entitled to information on other non-minority employees when it was found that class membership was improperly restricted. Here class membership has long ago been established. Moreover, *Rich* was brought pursuant to Title VII of the Civil Rights Act of 1964, not Section 504 of the Rehabilitation Act.

Plaintiffs cite to *Lang v. Intrado, Inc.*, 2007 WL 3407366, at *1 (D. Colo. Nov. 13, 2007) for the proposition that evidentiary discovery of outcomes of competitors is necessary to prove disparate impact discrimination. Letter at 3. *Lang* is likewise unavailing as it too concerns employment discrimination based on gender and not discrimination based on a handicap pursuant to Section 504 of the Rehabilitation Act.

Similarly, Plaintiffs cite to *Kennicott v. Sandia Corp.*, 2018 WL 2206880 (D.N.M. May 14, 2018) for the principle that discovery of information on related types of discrimination is proper to establish a culture of discrimination against similarly situated individuals.

[2] Assuming *arguendo* that the Title VII disparate impact standard were applicable, Plaintiffs position still fails. "[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2523, 192 L. Ed. 2d 514 (2015)

Letter at 3. *Kennicott* is equally immaterial as it also is an employment gender discrimination case. Plaintiffs parallel citations to *Weahkee v Norton*, 621 F.2d 1080 and *Gomez v Martin Marietta Corp*., 50 F.3d 1511 (10th Cir. 1995) are immaterial for the same reason.

Lastly, Plaintiffs cite to *Ligas v Maram* 2007 WL 4225459 for the principle that discovery of medical and intellectual Developmental Disability (I/DD) service records is proper for unnamed class members and non-parties. Letter at 3. *Ligas*, unlike the other cases cited by Plaintiffs, involved claims for violations of the Rehabilitation Act. However, *Ligas* is procedurally distinguishable. The discovery at issue was whether private Intermediate Care Facilities ("ICFs") could be subpoenaed to produce records of their residents. After initially quashing the subpoenas for being overly broad, the court in *Ligas* held that certain documents should be produced. The court reasoned that the residents of the ICFs were potentially unnamed or absent class members and therefore could be required to produce documents when "required by justice to all parties." *Ligas* at *4 Moreover, even if the residents were non-parties, which would subject the residents to greater protections, on balance, the information sough was relevant, probative and critical to the Plaintiffs case. *Id*.

Here, in contrast, information on non-party non-Class Members is not relevant nor critical to Plaintiffs' claims. Plaintiffs have been provided and have access to information on Class Members which would be required to make a lack of meaningful access claim. Plaintiffs' assertions that they need information relative to a disparate impact claim is a red-herring because that cause of action cannot stand alone. On balance, the request for non-Jackson Class Member data is unduly burdensome and seeks information that is not relevant to whether there are any alleged ongoing violations of 14th Amendment Substantive Due Process or Section 504 of the Rehabilitation Act. Requiring State Defendants to provide Plaintiffs with copies of their numerous sensitive databases that include potential health information of non-Class Member data is overly burdensome and seeks irrelevant information for the following reasons and is an intrusion on the PHI of non-Class Members regardless of whether a confidentiality order is entered or not. Moreover, even if provided

a. DHI Incident management Databases on Abuse, Neglect, and Exploitation

Plaintiffs request access to this database to provide data to allow them to analyze the 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. Letter at 4 As stated previously, comparisons of recipients with differing disabilities is not the proper inquiry under Section 504. Significantly, the Rehabilitation Act was enacted with three primary objectives, the eliminate discrimination in employment, education and the elimination of physical barriers to access. *Choate* at 723. Moreover, the primary goal of the Act is to increase employment. *Consolidated Rail Corporation v. Darrone*, 104 S.Ct., at 1254, n. 13

The time an expense that would need to be expended to produce data on non-Jackson Class members would be unduly burdensome and place a disproportionate cost on the State

Defendants because the data requested is generally irrelevant to the legal issues in dispute given that there is no clear connection between ANE investigations and the primary goals of the Rehabilitation Act regarding employment, education or removal of barriers.

b. DHI Quality Management Database on Provider Quality Reviews

Plaintiffs request access to this database to analyze disparities in care between Class Members and non-Class Members. Letter at 4. Plaintiffs appear to be making the same failed argument made by the disabled citizens in *Choate*. That is, Plaintiffs are claiming they are not provided with adequate health care. The relevant standard is whether Jackson Class Members are provided with meaningful access to a program of benefits and services regardless of any disability. Non-class Member data is not necessary to demonstrate lack of access.

c. Division of Vocational Rehabilitation Database on Employment Services

Plaintiffs demand access to non-Class Members in this database on the assumption that it contains information that will demonstrate that DVR has served more non-class members with IDD and has better outcomes for these individuals. Plaintiffs specifically assert it is essential to obtain this information to establish a discrimination claim and to demonstrate disparate impact. Letter at 5

Plaintiffs continue to misapprehend the standard of establishing discrimination under Section 504 of the Rehabilitation Act. The Supreme Court identified two powerful countervailing consideration that must inform any interpretation of Section 504; the need to give effect to the statutory objectives and the desire to keep Section 504 within manageable bounds. *Choate* at 719 Implicit in the Supreme Court's reasoning is that grounding violations of Section 504 on outcomes would quickly become unmanageable given individuals' particular needs. If states were required to consider accommodating every potential need, it is highly likely no program would remain manageable.

d. DDSD Databases on Day and Employment Services

Plaintiffs request information in these databases to establish discrimination between non-Class Members and Class Members. Letter at 5 Plaintiffs should not be provided with information on non-Class Members for the reasons set forth in response to the DVR Database.

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

Plaintiffs request as to these databases is unclear. State Defendants have produced Wage and Hour repots, Strike Force Files, and SELN data for Jackson Class Members and do intend to use this information to demonstrate that Jackson Class Members have been provided with numerous opportunities and meaningful access to employment and other day services. Thus, the extent that Plaintiffs are requesting access to non-Class Member data to compare

with Jackson Class Members data that request should be denied for the reasons set forth above.

f. DDSD Database on Aspiration

Plaintiffs have been provided with the the Statewide Aspiration Risk List (SARL) as to Jackson Class Members. Plaintiffs seek non-Jackson Class Member data to determine how aspiration events and supports are managed and how DOH responds to aspiration events and issues for persons with severe disabilities and those without sever disabilities. Letter at 6. Plaintiffs request is grounded on their flawed interpretation of disparate impact not on meaningful access. The data sought by Plaintiffs is irrelevant to the claims at issue and should be denied.

g. Database on General Events Reporting

Plaintiffs assert that the production of non-Class Members data will permit them to compare Class Members to non-Class Members to address the efficacy of DOH actions and to contrast how the response to events involving members of the two groups. For the reasons already set forth, comparisons to determine outcomes is not the proper analysis or inquiry.

h. Not at issue

i. and j. DOH Databases on Supports Intensity Scale

The Court has already ordered production of the SIS groups and State Defendants will comply. However, State Defendants maintain that this information is not relevant as it is effectively a comparison between different groups based on outcomes and does not provide information as to denial of meaningful access.

k. DDSD Database on Therap

Plaintiffs request for non-Jackson Therap data is not relevant as it seeks to inappropriately compare outcomes. Plaintiffs also misapprehend Judge Parker's reasoning for finding there were inadequate medical records in 1990. In 1990 Class Members were institutionalized and therefore State Defendants had a special relationship with the Class requiring the State to supply medical care for residents of the institutions. That special custodial relationship has long ago terminated and with it the duty pursuant to the 14th Amendment to provide medical care. Plaintiffs' request here amounts to a demand that the state provide "adequate medical care" which as discussed above was rejected by the Supreme Court in *Choate*.

l. Medicaid and DDSD Databases on Durable Medical Equipment

Plaintiffs' letter requests access to spreadsheets and databases related to durable medical equipment to enable Plaintiffs to determine how long Class Members had to wait for that equipment. Plaintiffs also seek the information to compare DOH's responses to

individuals who are severely disabled and those who are less severely disabled. Letter at 7 Plaintiffs have already been provided with information responsive to the tracking of Durable Medical Equipment for Jackson Class Members. Information on non-Class Members to be used to compare results and outcome is not relevant for the reasons set forth above.

Plaintiffs' request for data on non-Jackson Class Members should be denied because Plaintiffs misapprehend the standard for establishing a violation of Section 504 of the Rehabilitation Act. Rather than focus on whether Jackson Class Members have been provided with meaningful access to benefits and services, Plaintiffs attempt to misdirect the analysis to disparate outcomes for Class Members compared to other DD Waiver participants. The case authority cited by Plaintiffs to support the production of non-Class Members is facially distinguishable and in all but one case, relies on a disparate impact analysis pursuant to Title VII not the relevant standard pursuant to Section 504 of the Rehabilitation Act. Plaintiffs fail to recognize, let alone distinguish, the applicable analysis pursuant to *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712 (1985) or any of its progeny. State Defendants respectfully request the Court deny Plaintiffs' request for non-Class Member data in its entirety.

Respectfully,

WALZ AND ASSOCIATES, P.C.

/s/ James J. Grubel
Jerry A. Walz
James J. Grubel

cc: Plaintiffs' Counsel
Maureen Sanders, Esq.