

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JOSEPH LEWIS, JR., KENTRELL PARKER,
FARRELL SAMPIER, REGINALD
GEORGE, JOHN TONUBBEE, OTTO
BARRERA, CLYDE CARTER, CEDRIC
EVANS, EDWARD GIOVANNI, RICKY D.
DAVIS, LIONEL TOLBERT, and RUFUS
WHITE, on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

BURL CAIN, Warden of the Louisiana State
Penitentiary, in his official capacity;
STEPHANIE LAMARTINIERE, Assistant
Warden for Health Services, in her official
capacity; JAMES M. LEBLANC, Secretary of

Under the Eighth Amendment, the Louisiana Department of Public Safety and Corrections (“DOC”) has an obligation to provide adequate medical care that does not subject prisoners to a “substantial risk of serious harm.” *Brown v. Plata*

I. STATEMENT OF FACTS

A. Defendants' Policies and Practices Expose Class Members to an

medical experts found that “LSP staff do not adhere to procedures to safely administer and document medication administration . . . increas[ing] the risk of harm to patients.” *Id.* at 53.

2. *Defendants’ Policies Regarding Access to Primary Care Expose Class Members to an Unreasonable Risk of Serious Harm*

Defendants’ policies impose a number of barriers between Plaintiffs and timely access to adequate medical care. First, as noted, unqualified EMTs are the first line of diagnosis and treatment. The medical evaluations provided in response to sick call requests are “completely inadequate,” conducted without proper physical assessments or meaningful consideration of a patient’s medical history. *Id.* at 32. This failure to adequately assess medical complaints has contributed to “serious medical conditions resulting in adverse outcomes, including death.” *Id.* at 33. Moreover, Defendants’ protocols for providing care “are defective in that they provide EMTs inadequate guidance to adequately assess and timely refer patients with serious medical conditions.” *Id.* at 40.

Defendants also employ a policy of disciplining or threatening to discipline inmates for “malingering,” which forces inmates to weigh the chance they will receive appropriate medical care against the risk they will be disbelieved and disciplined.¹ To further reduce their costs, Defendants have imposed an “unreasonable barrier” to accessing care: a co-pay system in which inmates are charged \$3 for routine sick call and \$6 for emergency sick call, along with \$2 for each medication or prescription. *Id.* at 33. Given that inmates are paid just a few cents per hour, it can amount to more than a month’s pay for an emergency call without any guarantee of treatment. As Major Darren Cashio, who supervises Angola’s EMTs, testified, the purpose of this charge is to keep inmates from making repeated calls “until somebody sees [them].” Ex. 7 at 86:17. “This co-pay structure likely discourages inmates from accessing emergency care when they need it.” Med. Report at 33.

¹ See, e.g., Ex. 6 (“I am aware that if I declare myself a medical emergency and health care staff determine that an emergency does not exist, I may be subject to disciplinary action for malingering.”).

3. *Defendants' Policies Regarding Access to Specialty Care and Outside Facilities Expose Class Members to an Unreasonable Risk of Serious Harm*

Defendants' policies deny Plaintiffs timely access to specialists and procedures that

on the doctors talking, who gets treated and who don't."). As DOC's scheduling nurse acknowledged, "there are frequent delays of care." Med. Report at 73. Entire classes of procedures, from hernia surgery to cataract surgery to colonos

80. Nor are these inmate workers “actively supervised by registered nurses.” *Id.* This leaves the most vulnerable patients at the mercy of fellow inmates with limited training, which “places the patient at risk of harm, and gives inmates unwarranted power over their peers.” *Id.* at 81. This has resulted in “a dire situation” in the infirmary, as orderlies do not do even “the housecleaning tasks they are supposed to do.” Ex. 19; *see also* Ex. 20 (“On Nursing Unit 2 some of the beds are grossly dirty. . . .”).

B. These Deficient Policies and Practices Have Exacerbated Medical ‘dical’ s.Uytingpre

plaintiffs have similarly suffered. For example:

- Plaintiff Shannon Hurd complained for years of weight loss, pain in his side, and other symptoms of kidney cancer. By the time he was finally screened for cancer after five years of sick call requests, his cancer had metastasized throughout his body. Compl. ¶¶ 18-21.²
- Plaintiff Joseph Lewis, Jr. complained for years of throat problems, while telling Defendants he had a family history of cancer. He did not receive a laryngoscopy until meeting with Plaintiffs' counsel, by which point he had advanced throat cancer. Compl. ¶ 56.
- Defendants denied Plaintiff Alton Adams stents for his peripheral artery disease, providing minimal treatment until amputation was necessary. They then failed to catch major infections for weeks, resulting in severe pain and further amputations. Compl. ¶¶ 22-26.
- Before he was incarcerated, Plaintiff Otto Barrera was receiving reconstructive surgery to repair a disfiguring gunshot wound to his face that interferes with talking and eating.

that have devastated so many class members: “[w]hen we are stretched thin, chances for errors are high and it is very possible for cancers and other diseases to be missed early on.” *Id.* But despite this recognition that DOC was understaffed, LSP’s staffing shortage has become *more* dire. LSP now has *fewer* medical employees than in 2009—despite adding roughly 1000 inmates. Med. Report at 17.

Defendants have received repeated warnings, both internal and external, about their deficient care. For example, in August 2014, the Stroke Program Coordinator at Interim LSU Hospital alerted Defendants that “in the last month and a half . . . I have had three inmates from Angola that presented with obvious stroke symptoms. All of them were out of the window because it either took them a while to get here or the medical staff at Angola did not think the inmate was having a stroke.” Ex. 24. As the nurse explained, prompt emergent care for stroke victims was necessary to “prevent severe disability.” *Id.* That same week, the Interim Chairman of Oral Maxillofacial Surgery at LSU warned Angola about the “number of inmates who present to us with 3 week old fractures that are already infected.” Ex. 25. Despite these emails going to senior medical leadership at the DOC, including multiple Defendants, the EMTs were not informed that they were failing to recognize signs of stroke or infection. Ex. 7 at 77:9-19. As Dr. Lavespere’s predecessor, Dr. Collins, put it, a patient has to “want to change before you can help them,” but the DOC refused to fix its problems—like a “cancer patient that’s refusing chemo.” Ex. 26 at 124:24-125:9.

Indeed, Defendants’ awareness of their legal exposure leads them to consciously *avoid* documenting problems.³ Staff members have been advised not to put things in emails because of legal liability. *See, e.g.*, Ex. 27 at 68:18-21 (“Q. Have you ever been told, for example, be careful what you put in e-mails, because they might be subject to litigation? A. Yes.”); Ex. 28 at 34780 (“Reminder: watch the contents of your emails, these can be used in court.”). Dr. Singh has advised

³ Defendants unquestionably know that their policies expose them to legal liability; many of the same practices were the subject of a lawsuit by the DOJ in the 1990s, leading to a trial and post-trial consent decree in 1998. Compl. ¶¶ 156-63.

staff not to acknowledge that referrals were denied due to “resource limitations” but instead to use the vague term “medically necessary.” Ex. 29. Correctional personnel conducting DOC’s biennial “peer reviews” of Angola consciously refrain from noting staffing shortages in the reviews. Ex. 30. Perhaps most troublingly, Dr. Singh has advised the DOC Secretary, Defendant James LeBlanc, “to not dig too deep” into suspicious deaths, Ex. 31, and Angola’s mortality reviews consistently contain only “an incomplete summary of the patient’s care [that] does not identify whether care for the patient was timely and appropriate, does not identify problems related to systems or quality and does not determine whether the patient’s death was preventable.” Med. Report at 85.

D. Defendants Discriminate Against Inmates with Disabilities⁴

Just as they have failed to provide a minimally adequate medical system, Defendants have failed in their obligations to inmates with disabilities. LSP discriminates against individuals with disabilities through its failure to comply with the RA, the Uniform Federal Accessibility Standards, and the ADA and its implementing regulations. Plaintiffs’ accessibility expert surveyed areas of the prison required for ADA Class members to access services, programs, and activities and found “that the Louisiana State Penitentiary is not accessible to inmates with disabilities.” ADA Report at 11. Many areas of the prison—including “medical dormitories” that house dozens of inmates in wheelchairs—cannot be independently accessed by mobility-impaired inmates. ADA Report at 9-11 & Attach. 2. Even Warden Vannoy acknowledges that “Angola has a lot of work to do on a physical plant to be ADA, to meet the ADA requirements.” Ex. 4 at 18-20.⁵

⁴ Several pieces of ADA-related discovery are outstanding, including the depositions of the current ADA Coordinator and his predecessor. Pursuant to the Court’s October 6, 2016 Order, Doc. No. 129, Plaintiffs will supplement the ADA section of this brief two weeks after the depositions, which are currently scheduled for October 26 and 27.

⁵ The Department of Justice recently came to a similar conclusion:

Based on this compliance review of LSP’s programs, services, activities, and facilities, the United States has concluded that LSP contains architectural and programmatic barriers to access for persons

accommodations” or “evaluations or assessments of needs in that respect.” Med. Report at 59 n.74. Defendants’ former ADA Coordinator was not even familiar with the assessment form that Defendants supposedly use routinely. Ex. 36 at 19:25-20:12. This is unsurprising, as staff receive no instructions on how to implement LSP’s disability policies. Ex. 35 at 93:16-22. Instead, Defendants simply rely on the fact that “[a]ll staff have the ability to review the policy.” *Id.* at 93:18-19.

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. Rule 23(b)(2) requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”

Diamond, 519 F.2d 1090, 1100 (5th Cir. 1975); *see also, e.g., In re Rodriguez*, 695 F.3d 360, 365 (5th Cir. 2012) (approving certification of class with approximately 125 members); William B. Rubenstein, et al., *Newberg on Class Actions* § 3.12 (5th ed. 2011) (showing of 40 or more members raises presumption of numerosity).¹⁰ Here, the Class includes approximately 6400 incarcerated individuals—a group that unquestionably exceeds the numerosity threshold. Similarly, hundreds of inmates at LSP have mobility impairments, visual impairments, cognitive impairments, or other medical impairments.¹¹ *See, e.g., Dunn*, 2016 WL 4718216, at *7 (certifying class of “at least—and probably quite substantially more than—150 prisoners with disabilities”); *Williams*, 312 F.R.D. at 252 (certifying ADA class on basis of statistic that 0.14% of Americans are deaf and defendants incarcerate approximately 50,000 inmates); *Dockery*, 2015 WL 5737608, at *15 (certifying class of 1200-1500 inmates, as well as subcla

mitigate the deficiencies in Defendants' practices.

Similarly, the ADA and RA claims present common questions that can be resolved on a classwide basis, as courts routinely find. *See, e.g., Lightbourn v. Cnty. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997), (finding “whether the Secretary violated [the RA] or the ADA by failing to direct local . . . officials to enforce these statutes” to be a common question); *see also* cases cited *supra* p. 13 & n.9. The Plaintiffs' claims present a number of common questions as to whether LSP meets its obligations under the ADA and RA, including (but not limited to): (a) whether LSP has architectural

Comput. Corp., 257 F.3d 475, 479 (5th Cir. 2001)).¹⁴ Each named plaintiff has been actively involved in the litigation, reviewing and commenting on filings, discussing the facts of the case in multiple meetings with counsel, answering Defendants' interrogatories, and sitting for depositions. Notably, even though each has suffered serious harm due to Defendants' deliberate indifference—in some cases, harm as severe as preventable amputation, avoidable paralysis, or years of cancer progression without treatment—none of them are seeking damages in this case. This demonstrates each named plaintiff's commitment to improving the conditions for *all* Class members and to zealously representing their interests in this litigation.

B. Plaintiffs' Claims Satisfy Rule 23(b)(2)

Rule 23(b)(2) authorizes class certification where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Where class members only seek injunctive relief, Rule 23(b)(2) requires that (1) “class members must have been harmed in essentially the same way” and (2) “the injunctive relief sought must be specific.” *M.D.*, 675 F.3d at 845; *see also, e.g., Dockery*, 2015 WL 5737608, at *12-13. Eighth Amendment and ADA claims are “precisely the sorts of claims that Rule 23(b)(2) was designed to facilitate.” *Hernandez*, 305 F.R.D. at 163 (quoting

relief is impossible without facility-wide relief. For example, there is no individually tailored relief that can ensure that a named plaintiff receives adequate treatment in a medical emergency; without facility-wide relief, the plaintiffs would still be treated by EMTs rather than doctors.

C. Plaintiffs' Counsel Should Be Appointed as Class Counsel Under Rule 23(g)

Finally, the Court must appoint class counsel, considering (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g). These factors strongly support appointing the Promise of Justice Initiative ("PJI"), Cohen Milstein Sellers & Toll ("CMST"), the Advocacy Center, and the American Civil Liberties Union of Louisiana ("ACLU-LA").

First, PJI, the Advocacy Center, and ACLU-LA have spent years investigating and litigating the claims in this case, interviewing hundreds of inmates. Second, counsel includes one of the country's premier class action firms. *See* Ex. 43. Third, PJI, the Advocacy Center, and ACLU-LA are dedicated to ensuring constitutional conditions for institutionalized individuals. *See* Ex. 44-46. Finally, the Court has seen firsthand the resources and acumen Plaintiffs' counsel bring to this case. PJI and its Director Mercedes Montagnes previously litigated *Ball v. LeBlanc*, succeeding at trial and then continuing to fight for their clients through the appeal and remedy phases. They and their co-counsel have already committed thousands of hours to representing the class in this case, and will continue to fight to get Class members the care they need.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court find that Plaintiffs' proposed class and subclass meet the requirements of Rule 23(a) and 23(b)(2); certify the class and subclass; and appoint the undersigned counsel as counsel for the class and subclass under Rule 23(g).

Dated: October 14, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ ECF system which will send a notice of electronic filing to all CM/ ECF participants.

/s/ Mercedes Montagnes
Mercedes Montagnes