

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

A.B., by and through her next friend Cassie Cordell Trueblood; D.D., by and through his next friend Andrea Crumpler; K.R. by and through his next friend Marilyn Roberts; Q.M., by and through his next friend Kathryn McCormick; all others similarly situated; and Disability Rights Washington;

Plaintiffs,

vs.

Washington State Department of Social and Health Services; Kevin Quigley, in his official capacity as Secretary of the Department of Social and Health Services; Western State Hospital; Ron Adler in his official capacity as Chief Executive Officer of Western State Hospital; Eastern State Hospital; and Dorothy Sawyer in her official capacity as Chief Executive Officer of Eastern State Hospital,

Defendants.

No. 14-cv-01178-MJP

**DECLARATION OF DAVID CARLSON IN
SUPPORT OF PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION**

CLASS ACTION

1. I am an attorney and Director of Legal advocacy at Disability Rights Washington. I am over the age of eighteen, competent to testify about the matters stated herein, and make this declaration based on my own personal knowledge.

1 2. Disability Rights Washington (DRW) is a private non-profit organization that
2 serves as the designated Protection and Advocacy System for the State of Washington for
3 citizens of this state who have physical, mental, or developmental disabilities pursuant to the
4 “Developmental Disabilities Assistance and Bill of Rights Acts” (DD), 42 U.S.C. § 15041 *et*.
5 *seq.*; the “Protection and Advocacy for Individuals with Mental Illnesses Act” (PAIMI), as
6 amended, 42 U.S.C. § 10801, *et seq.*; and the “Protection and Advocacy for Individual Rights”
7 (PAIR), 29 U.S.C. § 794e; and RCW 71A.10.080. As such, DRW is funded and mandated to
8 conduct investigations of abuse and neglect of individuals with disabilities and mental illness.
9 Under the federal protection and advocacy regulations “neglect” includes “acts or omissions such
10 as failure to: establish or carry out an appropriate individual program plan or treatment plan
11 (including a discharge plan).” 42 C.F.R. § 1386.19. DRW is also mandated to advocate on
12 behalf of its constituents when necessary to enforce their rights, and routinely advocates on
13 behalf of classes of individuals with disabilities and mental illness.

14 3. The Protection and Advocacy Systems were created by Congress to provide
15 independent advocates for people with disabilities in each state and territory. Pursuant to federal
16 law, DRW has a mandate to provide a variety of services to people with disabilities and mental
17 illness across the state. These services include: outreach to educate people with disabilities about
18 their rights; information and referral about how to enforce those rights; monitoring conditions at
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1 facilities serving people with disabilities;¹ investigating possible abuse² and neglect³ of people
 2 with disabilities; pursuing legal, administrative, and other appropriate remedies to ensure the
 3 protection of and advocacy for the rights of people with disabilities; and educating policy makers
 4 regarding the needs of people with disabilities. 42 U.S.C. § 15043.

5 4. To fulfill this mandate, Congress gave the Protection and Advocacy Systems
 6 extraordinary authority to have broad access to restricted facilities and confidential or otherwise
 7 protected records of facilities and individuals receiving services in those facilities. 42 U.S.C. §
 8 15043(H)-(J); 45 C.F.R. § 1386.22. DRW is authorized to have unannounced, unaccompanied
 9 access to facilities and the people living and working there. *Id.* DRW is authorized to access a
 10 broad array of records necessary for its investigations, including confidential health care records,
 11 peer review records for the facility, staff members' personnel files, hand written notes, drafts of
 12 documents, and emails. Once DRW requests such records, they must be provided within three
 13 days, or immediately if there is immediate threat to an individual's health and safety. 42 U.S.C.

15 ¹ The PAIMI Act gives examples of these settings as being: "hospitals, nursing homes, community facilities for
 16 individuals with mental illness, board and care homes, homeless shelters, and jails and prisons." 42 U.S.C. §
 10802(3). The act further states that protection and advocacy systems such as DRW are also directed to serve people
 who live in "their own home." 42 U.S.C. § 10802(4)(ii).

17 ² Besides physical harm or death which are clearly covered as abuse, relevant to the instant case, the interpretive
 guidance in the PAIMI regulations also state that systemic deprivation of rights may constitute abuse:

18 The Department believes that when an individual's rights as defined in the Bill of Rights for
 19 Persons with Mental Illness established by the President's Commission on Mental Health (Title II
 of the Act) are repeatedly and/or egregiously violated, this constitutes abuse. While the Bill of
 20 Rights provides useful guidance, it should not be considered full or limiting as to types of rights
 violations. It is not necessarily true, however, that every violation of a person's rights is in and of
 21 itself "abuse" as defined in the Act. The Department declines the opportunity, however, of
 defining the threshold at which a violation of an individual's rights constitutes abuse, leaving that
 decision to the systems which will have intimate knowledge of the situation based on its
 monitoring of facilities and its discussion with individuals with mental illness.

22 62 F.R. 53548, 53551.

23 ³ In pertinent part, the PAIMI acts states that neglect "includes an act or omission such as the failure to establish or
 carry out an appropriate individual program plan or treatment plan for a [sic] individual with mental illness...." 42
 U.S.C. § 10802(5).

1 § 15043(J)(ii); 45 C.F.R. § 1386.22(b).

2 5. As an example of the type of access available to DRW and utilized in this case,
 3 DRW may enter any setting serving people with mental disabilities, such as jails and psychiatric
 4 hospitals to talk with the individuals served there, interview the staff working there, and access
 5 both records of individuals with disabilities who authorize our access, records of individuals who
 6 are not competent to authorize access, and other records of the facility necessary for
 7 investigation. This includes regularly receiving copies of any behavior intervention reports
 8 which describe serious incidents, use of segregation and restraints, and medication records.

9 6. Pursuant to its federal mandates, DRW routinely conducts systemic investigations
 10 and advocates based upon the finding of those investigations. That advocacy comes in a variety
 11 of forms, including affirmative impact litigation.

12 7. Disability Rights Washington has brought systemic lawsuits addressing services
 13 that are delivered to people with mental disabilities, including lawsuits involving claims for
 14 violations of the Fourteenth Amendment and the Americans with Disabilities Act. These cases
 15 include, *T.R., et al. v Quigley et al.*, C-09-1677-TSZ (inadequate community based services for
 16 youth with serious mental illness to remain at home and avoid incarceration and hospitalization);
 17 *Boyle, et al., v. Braddock*, USDC C01-5687 JKA (inadequate assessment, delivery, and due
 18 process relating to Medicaid waiver services for youth and adults with developmental
 19 disabilities); *Marr, et al. v. Eastern State Hospital, et al.*, USDC CS-02-0067-WFN 2011 WL
 20 2260982, (inadequate treatment of individuals with dual diagnosis of developmental disabilities
 21 and mental illness); *Allen, et al., v. Western State Hospital, et al.*, USDC C99-5018 RBL (similar
 22 claims and remedies as *Marr* at Western State hospital); *Rust, et al. v. Western State Hospital, et*
 23 *al.*, USDC C00-5749 RJB; and *G.R. et al., v. State of Washington Department of Social and*

1 *Health Services et al.*, USDC C05-5420 RBL (inadequate notice by the state when it took
2 adverse actions against the Medicaid beneficiaries with developmental disabilities).

3 8. I have appeared as class counsel in each of these cases and served as lead counsel
4 at some point during the life of most of these cases.

5 9. Beyond these class actions, I have represented the interests of a number of
6 different groups of individuals with disabilities in cases that were not brought as class actions,
7 but where either brought on behalf of a group of individuals or Disability Rights Washington as
8 an associational plaintiff. *See, e.g., Disability Rights Washington v. Penrith Farms, et al.*, USDC
9 CV-09-024-JLQ, A.B., *et al.*, *v. Bremerton School District No. 100-C*, USDC C07-5682 FDB,
10 *G.R. v. State of Washington Department of Social and Health Services*, USDC C05-5420-RBL.

11 10. Since October 2012, I have been the Director of Legal Advocacy at DRW. As the
12 Director of Legal Advocacy, I direct DRW's legal and administrative advocacy, investigations of
13 abuse and neglect, monitoring of facilities, and technical assistance services supporting self-
14 advocacy efforts conducted on behalf of individuals in Washington who have physical, mental,
15 or developmental disabilities.

16 11. Prior to serving as DRW's Director of Legal Advocacy I was the Associate
17 Director of Legal Advocacy for DRW from April 2006 to October 2012, and before that, a staff
18 attorney from May 2004 to April 2006. Since joining DRW, I have exclusively practiced
19 disability law and have been involved in all of the class action lawsuits in which DRW has been
20 appointed class counsel, as well as numerous other individual and group cases with a systemic
21 impact that were not structured as class actions.

22 12. I currently am and have been admitted to practice law in the state courts of
23 Washington since 2004 after graduating Gonzaga Law School with honors and serving as the

1 Editor-in-Chief of the Gonzaga Law Review. I have been admitted to practice in the United
2 States District Court for the Eastern District of Washington since 2005; the United States District
3 Court for the Western District of Washington since 2006; and the United States Ninth Circuit
4 Court of Appeals since 2007.

5 13. The advocacy I led on behalf of DRW in response to the attenuation of growth,
6 removal of breast buds, and unlawful sterilization of a six year old girl named Ashley received
7 international print and broadcast media coverage and a national award — the Excellence in
8 Advocacy Award, National Disability Rights Network, 2007 — for advocacy relating to *WPAS*
9 *Investigative Report Regarding the “Ashley Treatment”*.

10 14. I also accepted a national award from the Impact Fund in 2014 on behalf of class
11 counsel for the litigation conducted in *T.R., et al. v Quigley et al.*.

12 15. My expertise in disability law extends beyond my role as a litigator. Since 2010,
13 I have been an adjunct Professor of Law at Seattle University teaching an upper division course
14 on Disability Law.

15 16. From 2007-2013, I served two three year terms on the Legal Committee of the
16 National Disability Rights Network (NDRN) representing all of the federally mandated
17 Protection and Advocacy Systems in the states, territories, and commonwealth within the Ninth
18 Circuit on the. As the Ninth Circuit representative on NDRN’s legal committee, I provided
19 advised on strategies for addressing issues of national significance for people with disabilities,
20 advised on ways to train and otherwise support the Protection and Advocacy Systems in carrying
21 out their legal advocacy, and made recommendations for the filing of briefs and edit final briefs
22 NDRN files in the United States Supreme Court, federal Circuit Courts, and State Supreme
23 Courts.

1 17. I have extensive experience, both locally and nationally, presenting at legal
2 symposia and conferences, and providing continuing legal education courses on numerous
3 substantive legal areas affecting people with disabilities, how to engage in systemic litigation,
4 and the ethical representation of clients with disabilities.

5 18. My publications include works on discriminatory practices in medicine affecting
6 children and adults with disabilities, and the role of affirmative impact litigation and
7 complementary advocacy modalities in contemporary social justice lawyering. These include,
8 for example, David R. Carlson, *Multimodal Advocacy for Social Justice*, 11 SEATTLE JOURNAL
9 FOR SOCIAL JUSTICE 157 (2012); David Carlson, Cindy Smith, Nachama Walker, *Devaluing*
10 *People with Disabilities: Medical Procedures that Violate Civil Rights*, NATIONAL DISABILITY
11 RIGHTS NETWORK AND DISABILITY RIGHTS WASHINGTON (2012), *available at*,
12 [http://ndrn.org/images/Documents/Resources/Publications/Reports/Devaluing_People_with_Dis](http://ndrn.org/images/Documents/Resources/Publications/Reports/Devaluing_People_with_Disabilities.pdf)
13 [abilities.pdf](http://ndrn.org/images/Documents/Resources/Publications/Reports/Devaluing_People_with_Disabilities.pdf); and David R. Carlson, Deborah A. Dorfman, *Investigative Report Regarding the*
14 *“Ashley Treatment,”* WASHINGTON PROTECTION AND ADVOCACY SYSTEM (2007), *available at*,
15 [http://www.disabilityrightswa.org/home/Full_Report_InvestigativeReportRegardingtheAshleyTr](http://www.disabilityrightswa.org/home/Full_Report_InvestigativeReportRegardingtheAshleyTreatment.pdf)
16 [eatment.pdf](http://www.disabilityrightswa.org/home/Full_Report_InvestigativeReportRegardingtheAshleyTreatment.pdf). A copy of my current resume is attached as Exhibit A.

17 19. Emily Cooper was admitted to practice law in the State of Washington in
18 November 2003 after receiving her law degree from Seattle University in May 2003. Since June
19 2006 she has been exclusively practicing disability law fulltime at Disability Rights Washington.
20 A true and accurate copy of her CV is attached as Exhibit B.

21 20. As an attorney at DRW, she has been involved in the factual development of
22 many of DRW’s systemic advocacy projects, ranging from litigation, administrative advocacy,
23 and education of legislators. Over the seven years she has worked at DRW, she has investigated

1 countless allegations of abuse or neglect of individuals with intellectual disabilities, individuals
2 with mental health conditions, and individuals with physical disabilities. She has also monitored
3 conditions at facilities and residential placements to assess whether they meet relevant legal
4 standards. To perform those functions, she often meets with and conducts interviews with
5 individuals with disabilities, guardians, health care providers, and family members. She also
6 often reviews client records, policies, protocols, and peer review or other reports.

7 21. From 2006 to 2009, I supervised Ms. Cooper's work providing technical
8 assistance to DRW constituents regarding the civil rights as well as representing DRW
9 constituents in administrative hearings and related appeals regarding state and federal benefits
10 claims.

11 22. From 2009 to 2013, I also supervised Ms. Cooper's work as the principal
12 investigator for DRW. As investigator, Ms. Cooper became DRW's lead in obtaining and
13 reviewing Defendants' competency evaluation and restoration waitlists. Ms. Cooper also
14 regularly met with Defendants to discuss issues regarding these delays.

15 23. Starting in 2012, I also supervised Ms. Cooper's comprehensive investigation into
16 competency evaluation and restoration delays. The culmination of this investigation was a 2013
17 DRW report entitled "Lost and Forgotten: conditions of confinement while waiting for
18 competency evaluation and restoration."

19 24. Ms. Cooper was also actively involved in the 2012-2013 legislation sessions
20 regarding the issue of delayed evaluation and restoration services. She prepared and provided
21 testimony to the legislature who went on to pass SB 6492 that creating targets for the Defendants
22 to complete competency evaluation or accept individual for restoration services. She also
23 prepared and provided testimony to the legislature who also passed SB 5551 that provides a

1 process for counties with the option to hire an outside competency evaluator when there are
2 significant delays and seek reimbursement from the Defendants.


3 25. From 2013 to present, Ms. Cooper has been more actively involved with engaging
4 in systemic litigation on behalf of DRW's constituents and is currently council on the instant
5 case and another systemic federal lawsuit filed in the Eastern District of Washington addressing
6 conditions at Eastern and Western State Hospitals committed there after being found Not Guilty
7 by Reason of Insanity. *Ross et al. v. Inslee et al.*, USDC 2:14-cv-00130-TOR.

8 26. Proposed class counsel have sufficient resources to fully litigate the claims
9 presented in this case. This is evidenced by the amount of investigation, case development, and
10 client contact already conducted in jails across the state and at both Eastern State Hospital and
11 Western State Hospital. Additionally, in preparing for and filing its Motions for Class
12 Certification and Temporary Restraining Order, proposed class counsel have retained a
13 nationally recognized clinical expert on the treatment needs of individuals involved in the
14 forensic mental health system.

15 27. Proposed class counsel are not aware of any conflicts between themselves and the
16 putative class members that would compromise the ability of counsel to represent the class.

17 I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true
18 and correct.

19 Dated this 3rd day of October, 2014.

20 
21 _____
David R. Carlson

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- John K McIlhenny (JohnM5@atg.wa.gov)
- Nicholas A Williamson (NicholasW1@atg.wa.gov)
- Sarah Jane Coats (sarahc@atg.wa.gov)
- Amber Lea Leaders (amberl1@atg.wa.gov)

DATED: October 3, 2014, at Seattle, Washington.

/s/Mona Rennie

Legal Assistant
Disability Rights Washington