IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LENIL COLBERT, *et al.,*	)	
	)	
Plaintiffs,	)	No. 07-C-4737
	)	
v.	)	JUDGE LEFKOW
	)	MAGISTRATE JUDGE VALDEZ
ROD R. BLAGOJEVICH, *et al.,*	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF
MOTION TO MAINTAIN A CLASS ACTION

INTRODUCTION

In this action, Plaintiffs have alleged broad, systemic violations of one of their most fundamental civil rights – to not have to cede their liberty and freedom in order to receive long-term care. Defendants' illegal policies and practices that compel unnecessary segregation affect not just the named Plaintiffs, but also any other nursing home resident who likewise does not, from a treatment perspective, need to receive care and services in an institution. This case is a quintessential civil rights lawsuit appropriate for class certification.

Defendants ignore these common issues and instead try to shift the focus to the merits of Plaintiffs' claims, via an inappropriate, premature and unreliable "analysis" of Plaintiffs' selected medical records. Defs.' Jt. Mem. in Opp. to Pls.' Motion to Maintain a Class Action ("Opp.") at 2-4, 9-12. Defendants also re-argue points previously rejected by this Court, and most importantly, fail to recognize that the class definition, the class claims and the injunctive relief sought all flow directly from Defendants' common policies and practices that effectively compel Plaintiffs' and class members' unnecessary and unwanted institutionalization.

Accordingly, as set forth below, all of the elements of Rule 23 are satisfied and the proposed class should be certified.

ARGUMENT

I. CLASS CERTIFICATION DOES NOT DEPEND UPON THE MERITS OF PLAINTIFFS' CLAIMS

Plaintiffs have alleged that they and other similarly-situated nursing home residents are subject to unnecessary institutionalization by Defendants. In two cases involving people with disabilities who similarly claimed to be unnecessarily institutionalized, this Court certified a class and rejected many of the same arguments raised by Defendants here. *Ligas v. Maram*, No. 05-C-4331, 2006 U.S. Dist. LEXIS 10856 (N.D. Ill. Mar. 7, 2006) (residents of large private Intermediate Care Facilities for the Developmentally Disabled (ICFs-DD)); *Williams v. Blagojevich*, No. 05-C-4673, 2006 U.S. Dist. LEXIS 83537 (N.D. Ill. Nov. 13, 2006) (residents of Institutes for Mental Diseases (IMDs)).

Without making any attempt to distinguish *Ligas* or *Williams*,[1] Defendants challenge class certification here. Their arguments flow almost entirely from their non-expert, lay characterizations of selected portions of the named Plaintiffs' records. This is not only unreliable, but constitutes a classic merits-based challenge to class certification whose inappropriateness at this stage is well established: "[N]othing in either the language or history of Rule 23 gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle &*

[1] Defendants' only mention of these cases is an erroneous assertion that the proposed class here overlaps with those in *Ligas* and *Williams*. Opp. at 8-9. This is incorrect because, as Defendants know, each class lives in different *facilities*. The *Ligas* class is limited to residents of ICFs-DD, which are not "nursing facilities." *Compare* 2006 U.S. Dist. LEXIS 10856, at *19, *with* Compl. ¶ 71. The *Williams* class is limited to residents of IMDs, which are also distinct from nursing facilities in that they are largely ineligible for Medicaid reimbursement. *Compare* 2006 U.S. Dist. LEXIS 83537, at *15, *with* Compl. ¶ 71.

Jacquelin, 417 U.S. 156, 178 (1974); *see also Payton v. County of Kane*, 308 F.3d 673, 677 (7th Cir. 2002); *Bieneman v. City of Chicago*, 838 F.2d 962, 964 (7th Cir. 1988).

Indeed, in *Williams,* this Court rejected the same type of "review" of the plaintiffs' medical records by these Defendants in an unsuccessful attempt to defeat class certification. As here, Defendants based their argument on "selected items contained in the medical records of the plaintiffs." 2006 U.S. Dist. LEXIS 83537, at *9. The Court held:

> Defendants' memorandum is a lay interpretation of parts of records prepared by and for medical professionals. The data goes into the merits of the individual situations and cannot be evaluated by the court at this stage of the proceedings without appropriate foundational and expert testimony.

Id. at *10; *see also Ligas,* 2006 U.S. Dist. LEXIS 10856, at *14 ("At this stage in the litigation, this court may presume based on the pleadings that a PAS agent would find qualified for community services the proposed class because by definition the class members qualify for long-term services and 'could live in the community.'"); *Fields v. Maram,* No. 04-C-0174, 2004 U.S. Dist. LEXIS 16291, *22 (N.D. Ill. Aug. 16, 2004) ("While Defendant has submitted evidence it contends supports the conclusion that it does not have a policy which discriminates against disabled nursing home residents … the Court's role in deciding a motion for class certification does not involve deciding the ultimate merits of Plaintiffs' suit.")

Contrary to Defendants' contention, *Szabo v. Bridgeport Machines* does not stand for the proposition that the Court may deny class certification based on the merits of the named Plaintiffs' claims. 249 F.3d 672, 677 (7th Cir. 2001). *See Rahim v. Sheahan*, No. 99-C-0395, 2001 WL 1263493, at *10 (N.D. Ill. Oct. 19, 2001) ("We do not believe that *Szabo* directs district courts to decide class certification questions based on a preliminary assessment of the ultimate merits of the plaintiffs' claims: to base class certification on a prediction of who will win the case would be at odds with *Eisen*."); *Yon v. Positive Connections*, No. 04-C-2680, 2005

WL 628016, at *1 (N.D. Ill. Feb 2, 2005) ("*Szabo* does not permit a court to reach the merits of a matter in deciding class certification").

Importantly, *Szabo* was not decided in the context of Rule 23(b)(2), the class provision at issue here, but in the context of a Rule 23(b)(3) class action for money damages, where common issues of law and fact must *predominate*. *Szabo*, 249 F.3d at 676. The *Szabo* Court was concerned with "nagging" issues of choice of law, commonality, and manageability, as well as individualized damages, in connection with a nationwide class alleging claims for breach of warranty, fraud and negligent misrepresentation. *Id.* at 677. These factors distinguish *Szabo* from this and other cases seeking injunctive relief to remedy systemic civil rights violations. *Williams,* 2006 U.S. Dist. LEXIS 83537 at *12 (rejecting *Szabo* and holding that "plaintiffs bringing an action under Rule 23(b)(2) need only show that defendants acted on grounds generally applicable to the class for which they seek declaratory and injunctive relief")

Not only is Defendants' representation of Plaintiffs' medical records irrelevant and premature, but it is also incomplete, inaccurate and misleading. Defendants attempt to show Plaintiffs' "need" to be segregated in nursing homes by negative implication only; in other words, if there is no assessment or other information concerning community placement, Defendants contend this omission justifies Plaintiffs' continued institutionalization. *See* Opp. at 2-3, 12. To the contrary, the absence of professionally-appropriate community evaluations forms part of the basis of Plaintiffs' claims, *see* Compl. ¶ 8, and confirm that Defendants have done nothing to evaluate Plaintiffs, prepare them for discharge, or provide them with services in the community.[2]

[2] Defendants' convenient and contradictory analysis of these records is highlighted by the case of Ernest Reeves, who moved to the community after Plaintiffs moved for class certification. His records also do not indicate whether he could live in the community; in fact, on September 20, 2007, the nursing facility wrote that it "cannot determine" whether Mr. Reeves

As for the desires of the named Plaintiffs, if Defendants doubt the named Plaintiffs' allegations in the Complaint that they want to live in the community, that is an appropriate subject for fact discovery, not class certification.[3] Plaintiffs will show that they strongly oppose their own institutionalization. The evidence will also demonstrate that Plaintiffs felt pressure not to express a preference for community services, and the records nonetheless indicate that at least some of the Plaintiffs were unhappy with their confinement in a nursing facility. *See e.g.* Def. Ex. D at CGL 00016 (Kenya Lyles has "sad, pained, worried facial expressions" and is withdrawn "from activities of interest").

Defendants' review of Plaintiffs' medical records raise more questions than they answer.[4] That is precisely why the Court should not rely on such limited, unsupported, and unreliable lay evidence to make a determination of Plaintiffs' claims on the merits at class certification, before any discovery or expert opinions. Accordingly, the Court should not deny class certification based on Defendants' premature challenge to the merits of Plaintiffs' claims.

II. THE PROPOSED CLASS SHARES COMMON QUESTIONS OF LAW OR FACT

There are numerous questions of law and fact common to the class, including: 1) whether Defendants' conduct violates the integration mandates of the ADA and Section 504; 2) whether Defendants fail to ensure that comprehensive, appropriate assessments of Plaintiffs

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was likely to be discharged to a "more independent setting." Yet Defendants do not appear to be challenging Mr. Reeves' ability to live in the community.

[3] Plaintiffs have never contended that the MDS accurately reflects the true number of people who want to leave nursing homes. The MDS data is collected by nursing homes, which have a financial incentive to prevent residents from leaving. Indeed, although Plaintiffs cite the MDS data on the number of residents who want to leave, they also state that "the actual number may be far higher." Compl. ¶ 111. The fact that the named Plaintiffs' nursing homes have inaccurately recorded their desires serves to substantiate this allegation.

[4] The records further do not indicate that Plaintiffs were provided with sufficient information to make an educated decision as to whether they would prefer community services, that Plaintiffs are not suitable to obtain community services, or that that Plaintiffs were offered community services and declined them.

and class members are conducted; 3) whether Defendants fail effectively to inform Plaintiffs and class members of community-based long-term care alternatives; and 4) whether Defendants fail to provide nursing facility residents with community long-term care services with reasonable promptness. Defendants do not address any of these questions in their opposition, effectively conceding that there are common questions of law and fact.[5]

Nevertheless, Defendants make two arguments as to why there are no common questions of law or fact: first, there are individual factual variations among class members; and second, the Court would have to conduct individual inquiries to determine class membership. *See* Opp. at 9, 10. Neither is persuasive.

First, it is well settled that Plaintiffs and class members need not share the exact same disabilities, medical issues and treatment needs for there to be common questions of law or fact. *Rosario v. Lividitis*, 963 F.2d 1013, 1017 (7th Cir. 1992) ("The fact that there is some factual variation among class grievances will not defeat a class action."); *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("[F]actual differences among the claims of the putative class members do not defeat certification"); *Marisol A. v. Guiliani*, 126 F.3d 372, 375 (2d Cir. 1997); *Tonya K. v. Chicago Bd. of Educ.*, 551 F. Supp. 1107, 1111 (N.D. Ill. 1982) ("[I]t is irrelevant for commonality purposes that class members are variously disabled or need either day or residential placement"). The common questions set forth above relate not to the individual Plaintiffs' circumstances, but rather the State's systemic discrimination against Plaintiffs and the proposed class by failing to provide them with long-term care services in the most integrated setting appropriate to their needs.

[5] Defendants also do not contest that joinder is impractical or that Plaintiffs' counsel will adequately represent the class.

The Court in *Ligas* found common questions of law or fact in a similarly-defined class of disabled individuals:

> The proposed class seeks to require the defendants to enact standardized policies regarding the community placement of eligible developmentally disabled individuals. The proposed class challenges the defendants' failure to provide developmentally disabled individuals with information about the option of community placement, systematically evaluate developmentally disabled individuals that qualify for long-term services to determine whether they are eligible for community placement, place those who are eligible in the community, and maintain a wait list for community placement. The fact that the named plaintiffs and some proposed class members may have learned about the option of community placement or already have been assessed qualified for community placement by a PAS agent relates to the level of the injury suffered and not whether the defendants' conduct was sufficient standardized.

2006 U.S. Dist. LEXIS 10856, at **11-12; *see also Williams,* 2006 U.S. Dist. LEXIS 83537, at *8.[6]

Additionally, because this is a civil rights case for injunctive relief, the Court will not have to make individualized determinations as to whether a particular person is a class member.[7] This is because class membership will be determined post-relief through existing mechanisms

[6] *J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999) and *Bill M. v. Neb. Dep't of Health and Human Servs.*, No. 4:03CV3189, 2007 WL 2068187 (D. Neb. Jul. 17, 2007) are distinguishable because in each case, the plaintiffs were challenging the state's evaluation processes themselves. In *J.B.,* the plaintiffs sought to change the state's "system for evaluating and treating" children with disabilities. 186 F.3d at 1283. Thus, to know whether someone was a class member, the court would have had to determine whether the individual had been improperly assessed. *Bill M*. challenged the process for allocating community services funding, and the Court was concerned that some class members might lose funding if the process changed. 2007 WL 2068187, at *6.

By contrast, Plaintiffs here are not challenging Defendants' community placement determinations, but rather seek to enjoin them to do so. Additionally, all class members are capable of living in the community and are accordingly not receiving services in "the most integrated setting appropriate" to their needs. *See* 28 C.F.R. § 35.130(d). This is a "discrete legal question" shared by class members. *See J.B.,* 186 F.3d at 1289 ("For a common question of law to exist, the putative class must share a discrete legal question of some kind.")

[7] Defendants are forced to reach back to 1974 to find a case where this Court found that a Rule 23(a)(2) class lacked common questions of law or fact. *Metcalf v. Edelman*, 64 F.R.D. 407 (N.D. Ill. 1974), is easily distinguishable because it involved an exceedingly complex, four-part class whose membership could not be clearly identified and required separate judicial adjudications. No such issues exist here.

for determining community placement. Plaintiffs do not ask this Court to make community placement determinations, but seek to enjoin Defendants to do so in compliance with federal laws, regulations and *Olmstead*. *Ligas,* 2006 U.S. Dist. LEXIS 10856, at *17 ("In essence, the plaintiffs are willing to have the defendants make these determinations based on reasonable assessments from their own state treatment professionals in accordance with *Olmstead* … Because the defendants would be evaluating based on their own criteria whether a potential class member would meet the state's requirements and thus the class definition, [the] court could order the defendants to engage in individual determinations should any relief be granted and not do so itself."); *Fields,* 2004 U.S. Dist. LEXIS 16291, at *23 n. 8 ("[G]iven that Plaintiffs are not challenging how Defendant makes medical necessity determinations but are only seeking to ensure that such determinations are made for nursing home residents, the Court will not need to make plaintiff-by-plaintiff medical necessity inquiries and decisions in this case."); *Gomez v. Ill. State Bd. of Educ.,* 117 F.R.D. 394, 397 n. 1 (N.D. Ill. 1987); *Risinger v. Concannon*, 201 F.R.D. 16, 18 (D. Me. 2001).

II. PLAINTIFFS' CLAIMS ARE TYPICAL OF THE PROPOSED CLASS' CLAIMS

Plaintiffs' claims are typical of the class claims because they arise from the same course of discriminatory conduct by Defendants. In analyzing a class under Rule 23(a)(2), the courts "look to the defendant's conduct and the plaintiffs' legal theory." *Rosario*, 963 F.2d at 1018 (citing *De La Fuente v. Stokely-Van Camp*, 713 F.2d 225, 233 (7th Cir. 1983)). Here, Defendants' conduct with respect to Plaintiffs is typical of its conduct with respect to the class because in both cases, Defendants' policies and practices have caused the unnecessary segregation and institutionalization of Plaintiffs and class members in nursing homes. Plaintiffs'

legal theories are based on Defendants' violation of various federal laws through the same discriminatory conduct with respect to Plaintiffs and class members.

Nonetheless, focusing on the different services class members may require, Defendants argue – again based on nothing more than their non-expert, lay review of Plaintiffs' selected medical records – that the named Plaintiffs' claims are not typical of those of the class. Opp. at 12. As stated above, this is a merits-based argument that is inappropriate for class certification. But even if Defendants were correct – and they are not – it does not matter if Plaintiffs require different services or have different facts from some of the class members. *Ligas,* 2006 U.S. Dist. LEXIS 10856, *13 ("The claims of the named plaintiffs and the proposed class, however, only must share the 'same essential characteristics'; factual differences may still exist."). What does matter is that the Plaintiffs and the class members were subject to unnecessary institutionalization in nursing homes due to Defendants' illegal acts and omissions – the "same essential characteristics." This renders the Plaintiffs' claims typical of those of the class, regardless of Plaintiffs' individual circumstances.

The fact that some of the named Plaintiffs have moved into the community following the filing of Plaintiffs' motion for class certification does not defeat typicality. In *Fields,* the defendant attempted to defeat class certification by providing the named plaintiffs with the individual relief they sought – motorized wheelchairs – and then argued the named plaintiffs were no longer "typical" of the class. The Court squarely rejected this contention:

> In circumstances such as this, where a governmental defendant provides a plaintiff a benefit after the plaintiff filed suit and sought class certification, courts have held that "class certification should be seen as 'relating back' to" the outset of the suit or the filing of the motion for class certification with the effect that issues such as the named plaintiff's membership in the class are addressed in terms of the circumstances that existed at that time the complaint or the motion for class certification were filed.

2004 U.S. Dist. LEXIS 16291, at *28 (citations omitted). Accordingly, because all named Plaintiffs were indisputably institutionalized in nursing homes when Plaintiffs filed their motion for class certification on August 30, 2007, their class claims "relate back" to that date and remain typical of those of the class.

Finally, Defendants paradoxically argue that the class is too narrow, and, in the following paragraph, that the class is too broad. Opp. at 12-13. Defendants object to limiting the class to Cook County because other individuals or classes outside the county might later sue Defendants for the same violations. This is simply no reason to deny class certification. This Court has certified and is overseeing a class action case involving the state's Medicaid program whose class is limited to Cook County. *Memisovski v. Maram,* No. 92-C-1982, 2004 U.S. Dist. LEXIS 16772, *5 (N.D. Ill. Aug. 23, 2004) ("This case is a class action brought on behalf of minor children in Cook County, Illinois who are or will be eligible for the Medical Assistance Program ('Medicaid')").[8] The argument is also absurd. Applying Defendants' logic, Plaintiffs should also be precluded from filing this lawsuit on their own behalf, because other similarly-situated individuals might then file lawsuits and subject the State to inconsistent rules.[9]

Defendants' argument that the class is overbroad is based on a mischaracterization of the class definition. Defendants falsely claim the class would include "individuals who have moved to the community" and "those who may not be ready for discharge to the community." Opp. at 13. This is not the case. The proposed class, by its own terms, is limited to individuals who are

[8] *See also Corey H. v. Bd. of Educ.,* 995 F. Supp. 900, 902 (N.D. Ill. 1998) (class action by Chicago special-education students challenging statewide rules and practices of Illinois State Board of Education).

[9] Plaintiffs limited the proposed class to Cook County because 1) the evidence suggests that a greater percentage of nursing home residents in Cook County desire to live in the community, and 2) Plaintiffs' resource considerations. Although it would certainly be up to Defendants, Plaintiffs would hope that when the Court finds that Defendants have discriminated against Plaintiffs, Defendants will change their policies and procedures to cease such discrimination against all affected individuals, regardless of where they live.

or will be "unnecessarily confined to nursing facilities and with appropriate supports and services may be able to live in a community setting." Compl. ¶ 71. The named Plaintiffs accordingly share the same claims and essential characteristics as the class.[10]

III. THERE IS NO ANTAGONISM WITHIN THE CLASS

Defendants argue that Plaintiffs will not adequately represent the class due to their supposed potential antagonism with individuals who cannot or do not want to move into the community. Opp. at 14. This is without merit. Nothing in the relief sought by Plaintiffs would require anyone – class members or not – to accept community services, and the class does not include persons who "cannot" move to the community. Compl. ¶ 71. Plaintiffs seek to provide a choice to nursing home residents by requiring Defendants to provide information, assessments, and the opportunity, if appropriate, to receive long-term care services in the community – relief that would benefit all nursing home residents regardless of whether they ultimately move to the community. *See Messier v. Southbury Training Sch.*, 183 F.R.D. 350, 357 (D. Conn. 1998) ("There can be little disagreement that having the right to choose between institutionalization and community placement will benefit … present and future members of the plaintiff class.") Defendants have not alleged that any part of Plaintiffs' requested relief would force non-consenting residents to accept community placement.

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[10] Defendants made similar mischaracterizations in *Ligas,* as the Court there noted:

> To some extent, the defendants may misunderstand the class definition. In arguing against commonality, the defendants seem to overlook the limitation on the class definition that all members "qualify for long-term care" and "could live in the community." For example, the defendants' concern that the class would encompass all developmentally disabled living at home is resolved by the class requirement that members "could live in the community."

2006 U.S. Dist. LEXIS 10856, at *10.

In *Williams*, where the plaintiffs sought relief similar to that here, Defendants also argued the class should not be certified because some institutional residents might not want to move into the community. The Court rejected Defendants' demand:

> [T]he relief requested does not require that each member of the class be placed in the community. It only requires that a proper evaluation be offered and made and that appropriate support and services be available for those who qualify for and choose community placement. Therefore, it is not a requirement for class membership that the class member be willing to consent to community placement. A decision to consent to the recommended placement need not be made until after an appropriate evaluation is performed and the individual knows what type of placement is being recommended. Consent will not be made a requirement for class membership.

2006 U.S. Dist. LEXIS 83537, at *14; *see also Ligas v. Maram,* 478 F.3d 771, 774 (7th Cir. 2007) ("Nothing in the complaint, either on its face or as correctly construed by the district court, would require the state to force those who desire institutional care to move out.").

That Defendants would repeat this baseless claim, despite being fully aware that class members would not be forced into the community, betrays the emptiness of their challenge to class certification. Defendants apparently contend that if some nursing home residents do not want to move into the community, those who do should simply forego their civil rights and remain unnecessarily institutionalized. The law is overwhelmingly to the contrary. *Imasuen v. Moyer*, No. 91-C-5425, 1992 U.S. Dist. LEXIS 1449, *4 (N.D. Ill. Feb. 7, 1992) ("[T]he fact that some class members may be satisfied with an unconstitutional system and would prefer to leave violations of their rights unremedied is not dispositive under Rule 23(a)"); *Wyatt v. Poundstone*, 169 F.R.D. 155, 161 (M.D. Ala. 1995) (denying class certification where some institutional residents opposed community placement "would, in effect, preclude the use of the class action device in many of the very cases where it could be the most advantageous"); *Capitol People First v. Dep't of Dev. Servs.,* 155 Cal. App. 4th 676, 699 (Cal. Ct. App. 2007) ("Interveners have

no legitimate interest in furthering any continuing violations of the law, or in preventing other class members from seeking systemic relief to correct any violations found by the court.")

IV. DEFENDANTS HAVE ACTED AND REFUSED TO ACT ON GROUNDS GENERALLY APPLICABLE TO THE CLASS

As Plaintiffs demonstrated in their opening memorandum, Defendants have acted or refused to act on grounds generally applicable to the class because they have engaged in systemic, class-wide discrimination. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997) (citing Advisory Comm.'s Notes on Fed. R. Civ. P. 23, 28 U.S.C. App., p. 697 (1966) ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.")). Defendants do not appear to dispute that they have acted uniformly with regard to the class; in fact, by stating that "the Medicaid rules generally have to be applied the same way across the state," Opp. at 12, they effectively concede this point.

Instead, Defendants claim they have not violated the law, based again on nothing more than their selective lay review of the named Plaintiffs' medical records. Opp. at 15. As discussed above, this is the very merits-based argument that courts have rejected at class certification. *See e.g. Fields,* 2004 U.S. Dist. LEXIS 16291, at *22. It is also not informative or dispositive concerning Defendants' system for providing long-term care services. To deny class certification on this basis would be to deny the class claims before any Plaintiffs have had any opportunity to present discovery and expert testimony. *See Moss v. Lane Co*., 50 F.R.D. 122, 126 (W.D. Va. 1970), *aff'd*, 471 F.2d 853 (4th Cir. 1973) ("[T]o dismiss the class action on the basis of affidavits would be tantamount to determining that the charge of racial discrimination is untrue … [which] would be an improper determination at this stage of the suit.")

V. THE PROPOSED CLASS IS READILY IDENTIFIABLE

Defendants fundamentally misunderstand the requirement that the class definition be "sufficiently definite" or "readily identifiable." Without any legal authority, they read this requirement as authorizing Defendants to demand definitions of any term in the Complaint, regardless of whether it is in the class definition. Defendants also make the equally unsupported claim that Rule 23 requires that the class *definition* contain a lengthy description of all of the services and relief sought by Plaintiffs and the class. Opp. at 5-6. Defendants attempted this tactic in their Rule 12(e) motion last year. It was baseless then, and it is baseless now.

"A class can be properly identified so long as it is defined by objective criteria, such that it is administratively feasible for the court to determine whether a particular individual is a class member." *Fields*, 2004 U.S. Dist. LEXIS 16291, at *38 (quoting *Ludwig v. Pilkington N. Am.,* 2003 U.S. Dist. LEXIS 20240 (N.D. Ill. Nov. 4, 2003)). Accordingly, the class definition must use objective criteria to define the scope of the class "by the activities of the defendants." *Alliance to End Repression v. Rochford*, 565 F.2d 975, 978 (7th Cir. 1977). On the other hand, a class is not "definite" if membership is "contingent on the state of mind of the prospective class members." *Id.*

There is no serious dispute that Plaintiffs' proposed class meets this requirement. To be a class member, one must be Medicaid-eligible,[11] reside in a nursing home, and be capable of living in the community. Compl. ¶ 71. Accordingly, class membership depends on being subjected to unnecessarily institutionalization at the hands of Defendants, and no one can simply "decide" of their own volition to be a class member. Indeed, this Court has certified other classes of institutionalized individuals who seek community services, using similar terms.

[11] Defendants do not dispute that the named Plaintiffs are Medicaid-eligible. Answers (Docket Nos. 52, 54) ¶¶ 2, 14, 27, 35, 46, 57, 135.

Williams, 2006 U.S. Dist. LEXIS 83537, at *15 ("It is sufficient to define class members as persons who, with appropriate support and services, may be able to live in an integrated community setting. That is a sufficient definition, particularly in a case like this where defendants' conduct toward the class largely defines the class."); *Ligas,* 2006 U.S. Dist. LEXIS 10856, **16-17.

Defendants never allege that class membership turns on an individual's state of mind. Instead, they troll through the Complaint, claiming not to understand numerous terms, most of which do not appear in the class definition and which Defendants commonly use in other contexts, such as "long term care,"[12] "disability," "Medicaid-eligible,"[13] and "housing." Opp. at 6-8. Defendants cite no authority whatsoever for their contention that Plaintiffs must define these terms to Defendants' satisfaction, or that the class definition must include this information, before the Court may certify the class.[14]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant Plaintiffs' Motion to Maintain a Class Action.

Dated April 28, 2008

RESPECTFULLY SUBMITTED,

s/ Max Lapertosa
One of the Attorneys for Plaintiffs

(Full listing of Plaintiffs' counsel on following page)

[12] Defendants' professed ignorance of this term is particularly disingenuous, given that two of their agencies have a "Bureau of Long-Term Care."

[13] Defendants' only objection to "disability" and "Medicaid-eligible" is that their inclusion would result in overlap with the *Ligas* and *Williams* classes. Opp. at 8. As stated above, this is incorrect. *See supra* note 1.

[14] Further undermining Defendants' claim for this information is the fact that, after asserting a right to extensive class discovery, they unilaterally refused to provide *any* class discovery to Plaintiffs, on grounds that such discovery is premature. *See e.g.* Agency Defs.' Answers to Pl.'s First Set of Interrogatories, attached hereto as Ex. "A".

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