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

LENIL COLBERT, *et al.*, for themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 07-C-4737
v.	)	JUDGE LEFKOW
	)	MAGISTRATE JUDGE VALDEZ
ROD R. BLAGOJEVICH, *et al.*,	)	
Defendants.	)	

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

I. INTRODUCTION

Plaintiffs, on behalf of themselves and all those similarly situated, bring this action seeking declaratory and injunctive relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and the Medicaid provisions of the Social Security Act, 42 U.S.C. §§ 1396-1396v, including the Nursing Home Reform Act, 42 U.S.C. § 1396a(a)(28)(A). Plaintiffs seek this relief because they have been needlessly and systemically institutionalized and isolated in nursing facilities and denied the opportunity to live in integrated settings in their communities, in violation of federal law. As the U.S. Supreme Court held in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the unnecessary institutionalization of people with disabilities is discrimination under the ADA because "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable and unworthy of participating in community life" and because "confinement in an institution severely diminishes the everyday life activities of individuals, including family options, social contacts, economic independence, educational advancement, and cultural enrichment." *Id*. at 600.

Plaintiffs seek certification of a class consisting of all Medicaid-eligible adults with disabilities in Cook County, Illinois, who are being, or may in the future be, unnecessarily confined to nursing facilities and with appropriate supports and services may be able to live in a community setting. *See* Compl. ¶ 71. For the reasons set forth below, the Court should certify this class under Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

II. ARGUMENT: CLASS CERTIFICATION IS APPROPRIATE

A. PLAINTIFFS MEET THE REQUIREMENTS OF RULE 23(a)

Under Rule 23(a), a class is appropriate when 1) its members are so numerous that joinder of claims is impracticable, 2) there are questions of law or fact common to the class, 3) the claims of the representative parties are typical of the class claims, and 4) the representative parties and their counsel will fairly and adequately protect the interests of the class. Fed. R. Civ. Proc. 23(a). In addition, the Seventh Circuit has recognized two additional implied requirements under Rule 23(a): the class must be readily identifiable and the named plaintiffs must be part of the class. *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977-78 (7th Cir. 1977); *Gomez v. Illinois State Bd. of Educ.*, 117 F.R.D. 394, 397 (N.D. Ill. 1987).

In determining class certification, courts "recognize[] that Rule 23(a) should be liberally construed to support its policy of favoring the maintenance of class actions." *Wallace v. Chicago Hous. Auth.*, 224 F.R.D. 420, 423 (N.D. Ill. 2004) (citing *King v. Kansas City S. Indus.*, 519 F.2d 20, 25-26 (7th Cir. 1975)). Additionally, courts must accept the Plaintiffs' claims as true and do not look to the merits of the case. *Pope v. Harvard Bancshares*, 240 F.R.D. 383, 387 (N.D. Ill. 2006) (citing *Hardin v. Harshbarger*, 814 F. Supp. 703, 706 (N.D. Ill. 1993) (citing *inter alia Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974))); *see also Gomez,* 117 F.R.D. at 397.

As shown below, the proposed class easily satisfies each of these requirements. *See*

generally Ligas v. Maram, No. 05-C-4331, 2006 U.S. Dist. LEXIS 10856, *18 (N.D. Ill. Mar. 7, 2006) and *Williams v. Blagojevich,* No. 05-C-4673, 2006 U.S. Dist. LEXIS 83537 *8 (N.D. Ill. Nov. 13, 2006) (certifying plaintiff classes under claims and facts comparable to those here).

1. Joinder Would be Impracticable

Although commonly referred to as the "numerosity" requirement, "the crux of the numerosity requirement is not the number of interested persons per se, but the practicality of their joinder into a single suit." *Arenson v. Whitehall Convalescent & Nursing Home*, 164 F.R.D. 659, 663 (N.D. Ill. 1996) (quoting *Small v. Sullivan*, 820 F. Supp. 1098, 1109 (S.D. Ill. 1992)). While the number of class members is an important factor, others include "judicial economy, geographic diversity of class members, and the ability of individual class members to institute individual lawsuits …" *Id*.; *see also Riordan v. Smith Barney*, 113 F.R.D. 60, 61 (N.D. Ill. 1986) ("[T]he test for impracticability of joinder is not simply a test for the number of class members.")

Under these guidelines, this Court has certified classes with as few as 29 members. *Riordan*, 113 F.R.D. at 61; *see also Swanson v. American Consumer Industries*, 415 F.2d 1326, 1333 (7th Cir. 1969) (40 members sufficient); *Pope*, 240 F.R.D. at 387 ("where the membership class is at least 40, joinder is impracticable and the numerosity requirement is met.") Additionally, in determining the number of the members in the proposed class, "it is appropriate for the Court to make [. . .] common sense assumptions[.]" *Fields v. Maram*, No. 04-C-0174, 2004 U.S. Dist. LEXIS 16291, *13 (N.D. Ill. Aug. 16, 2004) (Minimum Data Set of the Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services ("CMS") established numerosity of class); *Murray v. E*Trade Fin. Corp.*, 240 F.R.D. 392, 396 (N.D. Ill. 2006).

The proposed class here is clearly too numerous to make joinder practicable. According

to the Illinois Department of Public Health, over 20,000 people live in nursing facilities in Cook County under the State's Medicaid program.[1] According to the Minimum Data Set (MDS) maintained by CMS,[2] over 7,400 nursing home residents in Cook County have stated they would rather live integrated in the community.[3] *See* http://www.cms.hhs.gov/states/mdsreports/res2.asp (visited Aug. 9, 2007). It is appropriate for the Court to assume that a majority of these residents receive Medicaid, commensurate with the nursing facility population as a whole. Although not all Medicaid-eligible nursing facility residents may be capable of living in the community, on motion for class certification, the Court may infer from the number of residents who have expressed an interest in being integrated in the community that the number of residents who are appropriate for community services makes joinder impracticable. *See Fields,* 2004 U.S. Dist. LEXIS 16291, *13; *Ligas*, 2006 U.S. Dist. LEXIS 10856, at *18 (noting that while "not all of

[1] The Illinois Department of Health website, www.idph.state.il.us, lists each nursing facility and the number of its residents who receive Medicaid. Plaintiffs calculated this number by adding the total number of Medicaid recipients for each facility in Cook County.

[2] The CMS website describes the Minimum Data Set as follows:

> The Minimum Data Set (MDS) is part of the federally mandated process for clinical assessment of all residents in Medicare or Medicaid certified nursing homes. This process provides a comprehensive assessment of each resident's functional capabilities and helps nursing home staff identify health problems. Resident Assessment Protocols (RAPs), are part of this process, and provide the foundation upon which a resident's individual care plan is formulated. MDS assessment forms are completed for all residents in certified nursing homes, regardless of source of payment for the individual resident. MDS assessments are required for residents on admission to the nursing facility and then periodically, within specific guidelines and time frames. In most cases, participants in the assessment process are licensed health care professionals employed by the nursing home. MDS information is transmitted electronically by nursing homes to the MDS database in their respective States. MDS information from the State databases is captured into the national MDS database at CMS.
>
> http://www.cms.hhs.gov/states/mdsreports/res3.asp (visited Aug. 28, 2007.)

[3] Given that these figures are based on facility self-reporting, *see supra* note 2, *supra,* Plaintiffs believe the actual number of residents who want to live in the community may be higher.

these individuals could live or wish to live in the community, this court may infer based on common-sense that there are enough individuals [. . .] who qualify for long-term care, could live in the community, and want to do so as to make joinder impractical."). Therefore, based on class size alone, joinder is clearly impracticable. *Wallace*, 224 F.R.D at 427 ("the numbers alone are dispositive of the impracticability of joinder.") (quoting *Thilllens, Inc. v. Community Currency Exchange Ass'n*, 97 F.R.D 668, 677 (N.D. Ill. 1983)).

Other factors indicate impracticability of joinder. First, the proposed class members are Medicaid recipients and, as such, do not have the ability or means to bring individual lawsuits. *Arenson*, 164 F.R.D. at 663 (citing *Tenants Ass'n for a Better Spaulding v. U.S. Dep't of Hous. and Urban Dev.*, 97 F.R.D. 726, 729 (N.D. Ill. 1983) ("Class members who are residents of a nursing home may also lack the ability to pursue their claims individually.")). In addition, this case includes future class members who, by their very nature, cannot be readily identified at the present time. *Gomez*, 117 F.R.D. at 399 ("[N]umerosity is met where, as here, the class includes individuals who will become members *in the future*.") (emphasis in original). Accordingly, Plaintiffs easily meet the requirements of Rule 23(a)(1).

2. <u>There are Questions of Law and Fact Common to the Class</u>

To satisfy the commonality requirement of Rule 23(a)(2), it is sufficient to have "[a] common nucleus of operative fact" between the class members' claims. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). As such, a class action will not be defeated simply because there is some variance in facts alleged among class members. *Id*. at 1017. Additionally, "[w]here a defendant's standardized conduct is at issue, this court does not require that the putative class members all suffer the same injury[.]" *Ligas*, 2006 U.S. Dist. LEXIS 10856 at *11 (citing *Rosario*, 963 F.2d at 1018); *see also Williams v. Blagojevich*, No. 05-C-4673, 2006 U.S.

Dist. LEXIS 83537, at *8 (N.D. Ill. Nov. 13, 2006).[4] Instead, the court looks at "the uniformity of the defendant's conduct toward the potential members and the plaintiff's legal theory." *Ligas*, 2006 U.S. Dist. LEXIS 10856 at *11 (citing *Rosario*, 963 F.2d at 1018).

The proposed class members are Medicaid-eligible adults with disabilities who, as a result of Defendants' system-wide practices, are or in the future may be unnecessarily and unlawfully confined to nursing facilities. As a result of this common predicament, there are questions of law and fact that are common to the class, and Defendants have committed common legal violations against members of the proposed class. These include: violations of the integration mandates of the ADA and Section 504; failing to ensure that comprehensive, appropriate assessments – including those required under the Nursing Home Reform Act and Medicaid – are conducted to determine whether class members require institutionalization; failing effectively to inform Plaintiffs and class members of community-based long-term care alternatives to nursing facilities; and failing to provide nursing facility residents with community long-term care services with reasonable promptness, as required under Medicaid. In a case raising similar claims on behalf of institutionalized residents with disabilities, this Court held that "standardized conduct toward proposed class members [. . .] has been considered sufficient to satisfy commonality." *Ligas*, 2006 U.S. Dist. LEXIS 10856 at *11. The same result should obtain here.

Additionally, the discriminatory nature of Defendants' conduct supports class certification. Discrimination is often inherently class-based. *See Robert E. v. Lane*, 530 F. Supp.

[4] *See also Lightbourn v. County of El Paso*, 118 F.3d 421, 425 (5th Cir. 1997) ("The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.") (citations omitted); *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994) (commonality met where "named plaintiffs share at least one question of fact or law with the grievances of the prospective class."); *Marisol A. v. Guiliani*, 126 F.3d 372, 375 (2d Cir. 1997) (class must "share a common question of law or fact.")

930, 944 (N.D. Ill. 1980) (case alleging civil rights violations represents a "prototypical candidate" for class certification). Thus, where it is alleged that defendants have engaged in broad discriminatory policies affecting numerous persons, "courts have held that the commonality requirement is satisfied." *Fields*, 2004 U.S. Dist. LEXIS 16291 at *21.

Defendants' policies and practices here are the very type of conduct for which class certification is appropriate. The U.S. Supreme Court has held that the unnecessary and unwanted segregation and isolation of people with disabilities in institutions constitutes disability-based discrimination under the ADA. *Olmstead*, 527 U.S. at 587. Defendants have engaged in broad discriminatory policies and practices that serve to isolate individuals with disabilities unnecessarily in nursing facilities. And "[w]here 'broad discriminatory policies and practices constitute the gravamen of a class suit, common questions of law or fact are necessarily presumed.'" *Hispanics United of DuPage County v. Vill. of Addison*, 160 F.R.D. 681, 688 (N.D. Ill. 1995) (quoting *Midwest Cmty. Council v. Chicago Park Dist.*, 87 F.R.D. 457, 460 (N.D. Ill. 1980)). *See also Fields*, 2004 U.S. Dist. LEXIS 16291 at *22; *Gomez*, 117 F.R.D. at 399 (quoting *Edmondson v. Simon*, 86 F.R.D. 375, 380 (N.D. Ill. 1980) ("Where an across-the-board or permeating policy of discrimination is alleged in a class action, commonality is satisfied.") Therefore, the proposed class easily satisfies the commonality requirement.

3. <u>The Named Plaintiffs' Claims are Typical of Those of the Class</u>

Rule 23(a)(3), known as the "typicality" requirement, is met when the named plaintiffs' claims "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members and … [are] based on the same legal theory." *In Re Sulfuric Acid Antitrust Litig.*, No. 03-C-4576, 2007 U.S. Dist. LEXIS 20380 at *12 (N.D. Ill. March 21, 2007) (quoting *De La Fuente v. Stokely-Van Camp*, 713 F.2d 225, 232 (7th Cir. 1983)). To satisfy this requirement, the proposed class members need not have suffered precisely the same injury as the

named plaintiffs. *Rosario*, 963 F.2d at 1018 (citing *De La Fuente*, 713 F.2d at 232). *See Pope*, 240 F.R.D. at 389 (quoting *Gaspar v. Linvatec*, 167 F.R.D. 51, 57 (N.D. Ill. 1996) ("Typical does not mean identical, and the typicality requirement is liberally construed.")). Therefore, in analyzing a class under Rule 23(a)(3), the courts merely "look to the defendant's conduct and the plaintiffs legal theory." *Rosario*, 963 F.2d at 1018 (citing *De La Fuente*, 713 F.2d at 233).

Here, the named plaintiffs are Medicaid-eligible adults in Cook County who reside in nursing facilities in order to receive long-term care and services, regardless of the fact that they are able to live in the community – just as are members of the proposed class. Accordingly, the named plaintiffs and the proposed class members are being subjected to the same discriminatory practice and share the same deprivation of federal rights. As such, Plaintiffs have met Rule 23(a)'s typicality requirement.

4. The Named Plaintiffs and their Counsel Will Fairly and Adequately Protect the Interests of the Class

Rule 23(a)(4) contains two requirements: first, that the named plaintiffs adequately and fairly represent the interests of the proposed class (including that the named plaintiffs' interests not be antagonistic to those of the class); and second, that the named plaintiffs' counsel adequately represent the class. As long as the above requirements are met, "[t]he adequacy threshold is a low one." *Wallace*, 224 F.R.D. at 429.

a) The Named Plaintiffs' Interests are not Antagonistic to Those of the Class

In analyzing the ability of the named plaintiffs to represent the class, courts look to whether the named plaintiffs have "sufficient interest in the outcome to ensure vigorous advocacy," *Rosario*, 963 F.2d at 1018, as well as any interests "antagonistic to the interests of the class." *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. Ill. 1986). In essence, "the interests of

the named plaintiffs must be coextensive with those of the absentee class members." *Gomez*, 117 F.R.D. at 402. Courts may deny certification based on grounds of antagonism only if that antagonism "goes to the subject matter of the litigation." *Riordan*, 113 F.R.D. at 64. Potential conflicts that are remote or speculative will not defeat class certification. *Hispanics United*, 160 F.R.D. at 689.

In this case, the named plaintiffs' interests are entirely coextensive with those of the class. The named plaintiffs, Cook County residents who have been placed in nursing facilities despite their ability to live in the community, have a genuine concern with the outcome of this class action. They share the same claims as the class members as well as a strong interest in securing declaratory and injunctive relief. This relief will benefit all members of the class. There are no conflicts or antagonism, whether actual or apparent, between the named plaintiffs and the class. The named plaintiffs will therefore adequately and vigorously protect the interests of the class.

b) Plaintiffs' Counsel are Qualified to Maintain this Action

The next requirement is that the named Plaintiffs' counsel be "qualified, experienced, and able to conduct the proposed litigation." *In Re Sulfuric Acid Antitrust Litig.*, 2007 U.S. Dist. LEXIS 20380 at *16 (citing *Rosario*, 963 F.2d at 1018). In past cases, courts, including this Court, have certified Plaintiffs' counsel to represent classes of plaintiffs in class action suits. This fact constitutes "persuasive evidence" that they will be qualified to serve as counsel in the case at bar. *Gomez*, 117 F.R.D. at 401.

Stephen F. Gold is one of the nation's most experienced disability civil rights litigators. He has represented both individuals and classes of people with disabilities in numerous civil rights cases, including: *Fields v. Maram*, No. 04-C-0174, 2004 U.S. Dist. LEXIS 16291 (N.D. Ill. Aug. 16, 2004); *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175 (10th Cir. 2003);

Barthalemy v. Louisiana Dep't of Health & Hosps., No. 00-1083, 2003 U.S. Dist. LEXIS 5238 (E.D. La. Mar. 31, 2003); *Liberty Resources v. Southeastern Pa. Transp. Auth.*, No. 01-3702, 2002 U.S. App. LEXIS 27344 (3rd Cir. Dec. 23, 2002); *National Org. on Disability v. Tartaglione*, No. 01-1923, 2001 U.S. Dist. LEXIS 16932 (E.D. Pa. Oct. 22, 2001); *ADAPT v. Philadelphia Hous. Auth.*, No. 98-4609, 2000 U.S. Dist. LEXIS 11052 (E.D. Pa. Jul. 26, 2000); *Kathleen S. v. Dep't of Pub. Welfare*, No. 97-6610, 1999 U.S. Dist. LEXIS 19498 (E.D. Pa. Dec. 23, 1999), 1998 U.S. Dist. LEXIS 2027 (E.D. Pa. Feb. 26, 1998); *Anderson v. Dep't of Pub. Welfare*, 1 F. Supp. 2d 456 (E.D. Pa. 1998); *Warrick v. Snider*, 2 F. Supp. 2d 720 (W.D. Pa. 1997); *Metts v. Houstoun*, No. 97-4123, 1997 U.S. Dist. LEXIS 16737 (E.D. Pa. 1997); *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995); *Bacal v. Southeastern Pa. Transp. Auth.*, No. 94-6497, 1995 U.S. Dist. LEXIS 6609 (E.D. Pa. May 16, 1995); *Gottlieb v. American Airlines*, No. 94-4933, 1995 U.S. Dist. LEXIS 1202 (E.D. Pa. Feb. 2, 1995); *Engle v. Gallas*, No. 93-3324, 1994 U.S. Dist. LEXIS 7935 (E.D. Pa. June 10, 1994); *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993); *Disabled in Action v. Sykes*, 833 F.2d 1113 (3d Cir. 1987); *Benton v. Bowen*, 820 F.2d 85 (3d Cir. 1987); *Clark v. Cohen*, 794 F.2d 79 (3d Cir. 1986); *Disabled in Action v. Pierce*, 789 F.2d 1016 (3d Cir. 1986); *Dennis v. Heckler*, 756 F.2d 971 (3d Cir. 1985); *L. v. Thomas*, 557 F.2d 373 (3d Cir. 1977); *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977).

Access Living has served as class counsel in *Access Living v. Chicago Trans. Auth.*, No. 00-C-0070, 2001 U.S. Dist. LEXIS 6041 (N.D. Ill. May 9, 2001), *Fields v. Maram*, No. 04-C-0174, 2004 U.S. Dist. LEXIS 16291 (N.D. Ill. Aug. 16, 2004),[5] *Ligas v. Maram*, No. 05-C-4331, 2006 U.S. Dist. LEXIS 10856 (N.D. Ill. Mar. 7, 2006), *Williams v. Blagojevich*, No. 05-C-4673,

[5] The Court in *Fields* described Access Living and Mr. Gold as "some of the most distinguished disability rights attorneys in the country, and they – as well as the attorneys who represented the Defendant – all performed in a first-rate manner." *Fields v. Maram,* No. 04-C-0174 (N.D. Ill.), slip op. at 4 (Feb. 27, 2007) (approving consent decree).

2006 U.S. Dist. LEXIS 83537 (N.D. Ill. Nov. 13, 2006), and also regularly litigates cases on behalf of individuals with disabilities. In addition, Max Lapertosa of Access Living has served as class counsel in the following disability rights cases: *Gaskin v. Pennsylvania*, No. 94-CV-4048 (E.D. Pa.) (*see* 389 F. Supp. 2d 628 (E.D. Pa. 2005) (approving consent decree)) and *Messier v. Southbury Training Sch.*, No. 94-CV-1706 (D. Conn.) (*see* 183 F.R.D. 350 (D. Conn. 1998)).

Equip for Equality is the state-designated Protection and Advocacy agency for people with disabilities. *See* 42 U.S.C. § 15043. It served as class counsel in *Access Living v. Chicago Trans. Auth.*, No. 00-C-0070, 2001 U.S. Dist. LEXIS 6041 (N.D. Ill. May 9, 2001), and serves as class counsel *Ligas v. Maram*, No. 05-C-4331, 2006 U.S. Dist. LEXIS 10856 (N.D. Ill. Mar. 7, 2006) and *Williams v. Blagojevich*, No. 05-C-4673, 2006 U.S. Dist. LEXIS 83537 (N.D. Ill. Nov. 13, 2006). Karen Ward of Equip for Equality has more than 30 years' experience in federal court litigation, has participated in more than 60 cases with reported decisions, and has served as lead counsel in numerous disability civil rights cases, including two before this Court raising similar community-integration claims to those presented here: *Fisher v. Maram*, No. 06-C-4405 (N.D. Ill.) and *Grooms v. Maram*, No. 06-C-2211 (N.D. Ill.). Laura Miller of Equip for Equality also has extensive experience and has served as class counsel in the following disability rights cases: *Corey H. v. Board of Educ.*, No. 92-C-3409 (N.D. Ill.) (see 995 F. Supp. 900 (N.D. Ill. 1998)) and *Calvin G. v. Board of Educ.*, No. 90-C-3248 (N.D. Ill.).

Benjamin Wolf of the American Civil Liberties Union of Illinois has over twenty years' experience representing institutionalized children and people with disabilities. He has served as class counsel in the following civil rights cases: *Ligas v. Maram*, No. 05-C-4331, 2006 U.S. Dist. LEXIS 10856 (N.D. Ill. Mar. 7, 2006); *Williams v. Blagojevich*, No. 05-C-4673, 2006 U.S. Dist.

LEXIS 83537 (N.D. Ill. Nov. 13, 2006); *B.H. v. McDonald*, No. 88-C-5599 (N.D. Ill.) (*see* 49 F.3d 294 (7th Cir. 1995) and 856 F. Supp. 1285 (N.D. Ill. 1994)); *K.L. v. Edgar*, No. 92-C-5722 (N.D. Ill.) (*see* 2000 U.S. Dist. LEXIS 15404 (N.D. Ill. Oct. 6, 2000)); *A.N. v. Kiley*, No. 86-C-9486 (N.D. Ill.) (*see* 1995 U.S. Dist. LEXIS 13993 (N.D. Ill. Sept. 22, 1995)); and *A.T. v. County of Cook*, No. 85-C-0325 (N.D. Ill.) (*see* 613 F. Supp. 775 (N.D. Ill. 1985)).

Finally, Ross Dixon & Bell is a national law firm with extensive experience in litigation and counseling. The firm has extensive litigation experience on behalf of *pro bono* civil rights clients, including the elderly, children and victims of religious discrimination. Partner Daniel J. Zollner has over 25 years' experience in complex litigation, and been counsel in more than 20 class action cases, including *Ball v. Nationscredit Fin. Servs. Corp.*, No. 95-C-7248 (N.D. Ill.), *Honore v. Nationscredit Fin. Servs. Corp.*, 96-C-7243 (N.D. Ill.), *Taylor v. Rollins, Inc.*, 97-C-4156 (N.D. Ill.), *Polis v. Getaways, Inc.*, 98-C-1808 (N.D. Ill.), *Bauer v. Sears Roebuck & Co.*, 98-C-6784 (N.D. Ill.), and *Sollberger v. CIB Marine Bancshares*, 05-CV-2090 (C.D. Ill.).

5. The Class is Readily Identifiable

An implied requirement under Rule 23(a) is that a class must be "readily identifiable." An identifiable class is defined as one whose "members can be ascertained by reference to objective criteria." *Gomez*, 117 F.R.D. at 397 (citing *Alliance to End Repression*, 565 F.2d at 977).

The proposed class consists of all Medicaid-eligible adults with disabilities in Cook County, Illinois, who are being, or may in the future be, unnecessarily confined to nursing facilities and with appropriate supports and services may be able to live in a community setting. This definition is appropriately based on objective, identifiable criteria. *See e.g. Fields*, 2004 U.S. Dist. LEXIS 16291 at **38-40; *Hispanics United*, 160 F.R.D. at 688 (loss of benefits from living in an integrated community does "not involve an injury requiring examination of the

individual plaintiffs' state of mind.") As such, the class is readily identifiable.

6. Plaintiffs are Members of the Proposed Class

Finally, the named plaintiffs must belong to the class they seek to represent. *Gomez*, 117 F.R.D. at 397; *see also Hendrix v. Faulkner*, 525 F. Supp. 435, 442 (N.D. Ind. 1980), *aff'd sub nom. in relevant part*, *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). The named plaintiffs in this case are Medicaid-eligible individuals with disabilities residing in Cook County who have been unnecessarily institutionalized in nursing facilities. There is no question they belong to the proposed class.

B. PLAINTIFFS MEET THE REQUIREMENTS OF RULE 23(b)(2)

In addition to satisfying Rule 23(a), Plaintiffs must meet one of the requirements of Rule 23(b) to certify a class. *See e.g. Rosario*, 963 F.2d at 1017. Plaintiffs move here under Rule 23(b)(2), which allows courts to certify a class if the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. Proc. 23(b)(2). The U.S. Supreme Court has noted that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of class actions under Rule 23(b)(2). *Amchem Products v. Windsor*, 521 U.S. 591, 613 (1997) (citing Advisory Comm.'s Notes on Fed. Rule Civ. Proc. 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.")).

Consequently, the proposed class in this case is clearly one that should be certified under Rule 23(b)(2). This is because the proposed class is comprised of Medicaid-eligible individuals with disabilities who seek declaratory and injunctive relief to remedy Defendants' class-wide civil rights violations. *See Fields*, 2004 U.S. Dist. LEXIS 16291 at *40-42; *Ligas*, 2006 U.S.

Dist. LEXIS 10856 at *18; *Williams*, 2006 U.S. Dist. LEXIS 83537 at *8. Furthermore, it is common for courts to certify classes under Rule 23(b)(2) in cases "where Medicaid recipients have sought to enforce their rights to benefits." *Fields*, 2004 U.S. Dist. LEXIS 16291 at *41 (citing *Marisol v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997)); *Baby Neal v. Casey*, 43 F.3d 48, 64 (3d Cir. 1994); *Hillburn v. Maher*, 795 F.2d 252, 255 (2d Cir. 1986); *Raymond v. Rowland*, 220 F.R.D. 173, 181 (D. Conn. 2004); *Verdow v. Sutkowy*, 209 F.R.D. 309, 313 (N.D.N.Y. 2002); *Rancourt v. Concannon*, 207 F.R.D. 14, 16 (D. Me. 2002); *Boulet v. Cellucci*, 107 F. Supp. 2d 61, 81 (D. Mass. 2000)).

III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court grant its Motion to Maintain a Class Action.

Dated August 30, 2007

RESPECTFULLY SUBMITTED,

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