IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, by his next friend and mother, Lilian Minor, *et al.*,	§	
Plaintiffs,	§	
v.	§	CIV. NO. 5:10-CV-1025-OG
RICK PERRY, Governor, *et al.*,	§	
Defendants.	§	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Eric Steward, Linda Arizpe, Andrew Padron, Patricia Ferrer, Benny Holmes, and Zackowitz Morgan (collectively, the "Named Plaintiffs") on behalf of themselves and thousands of similarly-situated Medicaid-eligible individuals with mental retardation and/or other related conditions in Texas who reside or are at risk of residing in nursing facilities, have filed a class action complaint seeking declaratory and injunctive relief under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794a, and the Nursing Home Reform Amendments (NHRA) to the Medicaid Act, 42 U.S.C. § 1396r(e)(7). Rule 23(c)(1) of the Federal Rules of Civil Procedure requires that the court shall determine whether the action is to be maintained as a class action "at an early practicable time" after the commencement of an action. *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007). The Named Plaintiffs respectfully submit this brief in support of Plaintiffs' Motion for Class Certification.[1]

[1] Concurrently with this memorandum, the Named Plaintiffs are also filing their Motion for Class Certification, and

II. PRELIMINARY STATEMENT

Courts commonly certify classes of disabled persons challenging the appropriateness of government action, as sought here. Without the procedural benefits provided by the class action mechanism, the Named Plaintiffs and others similarly situated would be unable to effectively seek the relief to which they are entitled. Because the members of the plaintiff class are largely unable to challenge the propriety of government action on their own, it is necessary that such relief be sought on a class-wide basis.

The propriety of a class device in cases like this is illustrated by the large number of class actions that have been certified against governmental agencies at both the state and federal levels. *See e.g.*, 7 Newberg on Class Actions § 23:1 (4th ed. 2002); List of Selected ADA Class Action Cases, attached as Exhibit 1; List of 36 Class Actions on behalf of Institutionalized Individuals, attached as Exhibit 2. Because members of this class have developmental disabilities,[2] class relief becomes even more important because such class members are less likely to be able to institute legal proceedings on their own behalf. Indeed, a nearly identical class has been certified by federal courts in Massachusetts relating to the treatment of persons with developmental disabilities in nursing homes in that state. In Massachusetts, the court found that the plaintiff class met all of the requirements of Rule 23(a), and found that a Rule 23(b)(2) class action is particularly appropriate for the kind of civil rights action seeking systematic governmental reform such as this action. For the same reasons, this Court should find that the plaintiffs have met the requirements of Rule 23(a) and should certify a Rule 23(b)(2) class as requested herein.

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this memorandum is expressly incorporated therein.

[2] The term "developmental disabilities" is used to refer to mental retardation or a related condition as those terms are defined in the federal pre-admission screening and resident review regulations of the U.S. Department of Health and Human Services, 42 C.F.R. § 483.102(b)(3).

III. STATEMENT OF FACTS

The Named Plaintiffs are all persons with developmental disabilities who live or are at risk of placement in nursing facilities throughout Texas.[3] Because of the failure to comply by Rick Perry, Governor of the State of Texas, Thomas Suehs, Executive Commissioner of the Texas Health and Human Services Commission, and Chris Traloer, Commissioner of the Texas Department of Aging and Disability Services (the "Defendants") with Title II of the ADA and its implementing regulations, Section 504 of the Rehabilitation Act and its implementing regulations, and the NHRA and their implementing regulations, the Named Plaintiffs are unnecessarily segregated in nursing facilities and are denied the necessary specialized services required to meet the federal mandate of active treatment.

There are at least 4,500 adult persons with developmental disabilities confined in nursing facilities in Texas.[4] In addition, there probably are hundreds of other individuals with developmental disabilities currently living in nursing facilities who have not been identified due to inadequacies in Texas's pre-admission screening and resident review PASARR program. Most of these individuals could live in integrated community settings with appropriate services and

[3] Named Plaintiff, Benny Holmes, recently and subsequent to the filing of the Complaint, moved out of the nursing facility where he had been residing into a small group home in the community. Even though he is now in the community, he remains at risk of readmission to a nursing facility and, therefore, continues to be an appropriate class representative.

[4] In response to a Freedom of Information Act Request, the Department of Aging and Disability Services (DADS) stated that there are at least 5,765 persons with developmental disabilities confined in nursing facilities in Texas. (*See* Response to FOIA request dated Oct. 26, 2009 at ¶ 1, attached hereto as Exhibit 3.) While DADS has subsequently reported that it believes that the 5,765 number overstates the actual population, there is no dispute that the class numbers in the thousands. The United States Department of Health and Human Services collects detailed information on a quarterly basis from all Medicaid-funded nursing facilities in the country regarding the health characteristics of their residents. Based upon the MDS Active Resident Report for the Third Quarter 2010, there are in excess of 4,500 individuals with mental retardation residing in Texas nursing facilities. (*See* MDS Active Resident Report, attached hereto as Exhibit 4.) Due to the inadequacy of DADS' current screening process, there are likely hundreds of other persons with developmental disabilities living in nursing facilities who have not been identified. Additionally, there is an even larger, but not precisely known, number of individuals with developmental disabilities who will be or should be screened before admission to a nursing facility in the future.

supports, but instead are being subjected to unnecessary and prolonged institutionalization in violation of the ADA and the NHRA. Moreover, almost all of these individuals require and are entitled to receive specialized services appropriate to their individual needs in order to promote independence and growth while they remain confined in nursing facilities. The frequency, intensity, duration, and scope of these specialized services must meet the federal standards for active treatment. Nevertheless, fewer than one percent of adult residents with developmental disabilities in nursing facilities in Texas receive any specialized services at all, much less specialized services that satisfy the criteria to constitute active treatment. *See* Ex. 3, DADS FOIA Response at ¶ 5.

This case seeks to end the harm suffered by class members who are segregated and inappropriately confined in nursing facilities and denied active treatment. Therefore, Named Plaintiffs seek to require Defendants to fulfill their obligations under Title II of the ADA, Section 504 of the Rehabilitation Act, and the NHRA by, among other things: (1) implementing an effective screening and assessment process that will accurately identify individuals with developmental disabilities, including whether they can be appropriately served in the community; (2) providing those so identified with the necessary services and supports to enable them to move to community-based settings; and (3) for those who require nursing facility care, determining their need for specialized services and providing them with those services with sufficient frequency, intensity, and duration to constitute active treatment.

IV. THE PROPOSED CLASS MEETS THE STANDARDS FOR CLASS CERTIFICATION UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

A. The Proposed Class

The proposed class consists of all Medicaid-eligible persons over twenty-one years of age with mental retardation and/or a related condition[5] in Texas who currently or will in the future reside in nursing facilities, or who are being, will be, or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq*. A nearly identical class was certified in a similar case raising similar claims under the ADA and NHRA. *See Rolland v. Cellucci,* 1999 WL 34815562 (D. Mass. Feb. 2, 1999) (certifying class consisting of "all adults with mental retardation and other developmental disabilities, who reside in nursing facilities, who resided in nursing facilities on or after October 24, 1998, or who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq*."); *Rolland v. Patrick,* 2008 WL 4104488 (D. Mass. Aug. 19, 2008) (denying motion to decertify the class). Moreover, an effort to overturn that class certification was rejected on appeal to the First Circuit. *Voss v. Rolland,* 592 F.3d 242, 247 n.9, 251 (1st Cir. 2010).

B. The Standards for Class Certification

In order for one or more members of a class to sue as representative parties on behalf of all members, the party moving for class certification must satisfy all of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure. Rule 23(a) has four distinct criteria: (1) the class must be so numerous that joinder of all members is impracticable; (2) the members of the class must share common questions of law *or* fact; (3) the claims or defenses of the named representatives must be typical of those of the class; and (4) the persons representing the class must be able to fairly and

[5] The class definition utilizes the phrase "mental retardation and/or a related condition," rather than "developmental disabilities" because this is the current terminology in the federal PASARR regulations. 42 CFR § 483.102(b)(3).

adequately represent the interests of the class. Fed. R. Civ. P. 23(a); *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 623 (5th Cir. 1999).

Once all four elements of Rule 23(a) are established, a class action may be maintained if it satisfies at least one of the three subdivisions of Rule 23(b). *In re Enron Corp. Securities*, 529 F. Supp. 2d 644, 672 n.40 (S.D. Tex. 2006) (citing *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 484 n.25 (5th Cir. 1982), *cert denied*, 463 U.S. 1207 (1983)). For the purpose of this case, the relevant subpart is Rule 23(b)(2), which requires that the defendants act or refuse to act on grounds generally applicable to the class, therefore making declaratory or injunctive relief appropriate. *James v. City of Dallas,* 254 F.3d 551, 570 (5th Cir. 2001). The Fifth Circuit has recognized that "Rule 23(b)(2) was intended to be used 'in the civil-rights field where a party is charged with discriminating unlawfully against a class.'" *James* 254 F.3d at 567 n.16 (quoting Advisory Committee's Notes to Rule 23); *see also Kincade v. General Tire and Rubber Co.*, 635 F.2d 501, 506 (5th Cir. 1981) ("(S)ubdivision (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil rights area.").

In almost every case involving persons who allege noncompliance with Title II of the ADA or the requirements of the Medicaid Act by government officials, such as the case here, courts have certified a class. This is particularly true with respect to cases involving the integration mandate of the ADA. *See* List of Selected ADA Class Action Cases, attached as Exhibit 1. In addition, in almost every case involving persons with mental disabilities who challenge the lack of appropriate services in a state or private facility, courts throughout the nation have certified classes under Rule 23. *See* Exhibit 2 (list of 36 disability cases where classes of institutionalized residents have been certified). Finally, courts traditionally certify classes in cases concerning adults and children who allege violations of their federal statutory rights under Title XIX of the Social Security Act, 42 U.S.C.

§1396(a). *See, e.g.*, *Herweg v. Ray*, 455 U.S. 265, 271 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 993 (1982); *Rosie D. v. Romney,* 410 F. Supp. 2d 18, 22 (D. Mass. 2006).

Thus, there is a virtually unbroken line of decisions granting class certification in cases challenging systemic practices of unnecessarily institutionalizing persons with disabilities in violation of federal statutory and constitutional provisions. Those conclusions and the reasoning of those cases are equally applicable here, and should result in the certification of the plaintiff class.

C. The Proposed Class Meets the Requirements of Rule 23(a)

1. *The Class Is So Numerous That Joinder of All Members Is Impractical.*

Rule 23(a)(1) of the Federal Rules of Civil Procedure has two components: assessing the number of class members and evaluating the practicability of joining them individually in the case. For the purpose of satisfying the first component, the plaintiffs need not establish the precise number or identity of class members. *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981); *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980); *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970). This is particularly true where only declaratory and injunctive relief is sought. *McCuin v. Sec'y of Health and Human Servs.*, 817 F.2d 161, 167 (1st Cir. 1987); *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975) (size of class can be speculative where only equitable relief is requested); *Rolland*, 1999 WL 34815562, at *3; *Ledet v. Fischer*, 548 F. Supp. 775, 781-82 (M.D. La. 1982).

Furthermore, in civil rights cases, the membership of a class is often "incapable of specific enumeration." *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972). In such circumstances, as in the present matter, a class action may proceed if the plaintiffs "demonstrate some evidence or reasonable estimate of the number of purported class members." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981); *see also* 7 Newberg on Class Actions § 23.2

("Courts generally have not required detailed proof of class numerousness in government benefit class actions when challenged statutes or regulations are of general applicability to a class of recipients, because those classes are often inherently very large.").

The proposed class in this case, which consists of more than 4,500 members is sufficiently numerous to make joinder impracticable. Frequently, proposed classes consisting of only a fraction of this number are certified under Rule 23(a)(1). *See Jones v. Diamond*, 519 F.2d 1090, 1100 n.18 (5th Cir. 1975) (class of 48 individuals found sufficient); *Griffin v. Burns*, 570 F.2d 1065, 1072-73 (1st Cir. 1978) (123 voters sufficient to satisfy Rule 23(a)(1)); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972) (class of approximately 212 members sufficient); *Rolland*, 1999 WL 34815562, at *1-2 (nearly identical class certified with approximately 1500 members).

While the sheer size of this class clearly makes joinder impracticable, other factors also support a finding that joinder is impracticable. Courts have given significant weight to factors such as the geographic distribution of the plaintiffs, the ability of the plaintiffs to bring their own separate actions, and the type of relief sought. *Zeidman*, 651 F.2d at 1038; *Jordan v. Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982).

In the instant case, the class representatives seek injunctive and declaratory relief on behalf of themselves and thousands of Texans with developmental disabilities who are or will be institutionalized in nursing facilities throughout the state. This geographic dispersion of class members makes joinder impracticable. *See Ibarra v. Tex. Employment Comm'n*, 598 F. Supp. 104 (E.D. Tex. 1984) (500 member class certified where class members "dispersed throughout Texas") *rev'd on other grounds*, 823 F.2d 873 (5th Cir. 1987). Importantly, the combined impact of class members' poverty and disability severely limits their access to attorneys and their resulting ability to bring individual actions for declaratory or injunctive relief, making class certification particularly

appropriate. *See Rolland*, 1999 WL 34815562, at *3 ("Considering plaintiffs' confinement, their economic resources, and their mental handicaps, it is highly unlikely that separate actions would follow if class treatment were denied." (quoting *Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986))).

Furthermore, joinder is impracticable in the instant case because the class includes not only current nursing facility residents, but also individuals who will be or should be screened prior to admission to a nursing facility in the future, whose identity cannot be presently determined. Where "[t]he alleged class also includes unnamed, unknown future" class members who will allegedly be harmed by the defendants' conduct and policies, the Fifth Circuit has held that joinder is "certainly impracticable." *Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974). *See also Phillips*, 637 F.2d at 1022 ("the requirement of Rule 23(a)(1) is clearly met, for joinder of unknown individuals is certainly impracticable." (internal quotations omitted)); *San Antonio Hispanic Police Officers' Ass'n. v. City of San Antonio*, 188 F.R.D. 433, 442 (W.D. Tex. 1999). For the above reasons, the proposed class satisfies the numerosity requirement of Rule 23(a)(1).

2. *The Members of the Class Share Common Questions of Law and Fact.*

In order for a class to be certified, Rule 23(a)(2) requires that the proposed class members have at least *one* factual *or* legal issue in common, the resolution of which will affect all or a significant number of putative class members. *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997); *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993); *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992); *City of San Antonio v. Hotels.com*, 2008 WL 2486043, at *5 (W.D. Tex. May 23, 2008) (holding that commonality requires that "there is at least *one* issue that will affect all or a significant number of putative class members" (emphasis in original)). "For this reason, '[t]he threshold of 'commonality' is not high.'" *Forbush*, 994 F.2d at

1106 (quoting *Jenkins v. Raymark Industries*, 782 F.2d 468, 472 (5th Cir. 1986)); *see also Hotels.com*, 2008 WL 2486043, at *5.

In order to satisfy the requirement of commonality, Named Plaintiffs must show that there exist "questions of law or fact common to the class." *Mullen*, 186 F.3d at 625. However, there is no requirement that "all questions of law and fact involved in the dispute be common to all members of the class." *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448-49 (N.D. Cal. 1994). Nor does Rule 23(a)(2) require all putative class members to share identical claims; rather, the rule requires only "that complainants' claims be common and not in conflict." *Hassine v. Jeffes*, 846 F.2d 169, 176-77 (3d Cir. 1988). "[T]hat some of the plaintiffs may have different claims, or claims that may require some individualized analysis, is not fatal to commonality." *James*, 254 F.3d at 570. Only where there are *no* common questions of fact or law should certification be denied. *Yaffe*, 454 F.2d at 1366.

Similarly, the requirement that there be a substantial question of law or fact common to all class members does not mean that each class member must be identically situated. *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982). Commonality is not defeated by the presence of individual differences among class members. *See Lightbourn*, 118 F.3d at 426 (class of individuals with different disabilities requiring different accommodations was certified because all were impacted by the same governmental inaction); *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) ("Rule 23(b)(2) does not require that common questions of law or fact predominate"); *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985); *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) (factual distinctions among plaintiffs not relevant where legal theories are similar). In fact, "allegations of similar discriminatory practices generally meet the commonality requirement." *Lightbourn*, 118 F.3d at 426 (citing *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993)); *see*

also Curtis v. Commissioner, Maine Dep't. of Human Servs., 159 F.R.D. 339, 341 (D.Me. 1994) (where "a question of law refers to standardized conduct of the defendant towards … the proposed class, commonality is usually met").

The commonality "requirement has been liberally construed and 'those courts that have focused on Rule 23(a)(2) have given it permissive application so that common questions have been found to exist in a broad range of contexts.'" *Rodriguez v. Carlson*, 166 F.R.D. 465, 472 (E.D. Wash. 1996) (citing *Haywood v. Barnes*, 109 F.R.D. 568, 577 (E.D.N.C. 1986)). Courts have broadly applied the rule to class actions seeking injunctive and declaratory relief to remedy the denial of a legal entitlement or the application of a governmental policy or practice that infringes that right. *See Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 193 (W.D. Tex. 1998) ("Given that the class members are affected by the general policy and that policy is the focus of this litigation, the Court finds the commonality requirement has been satisfied."); *Anderson v. Dep't of Public Welfare,* 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998) ("Commonality is easily established in cases seeking injunctive relief."). "[C]lass suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Wright, Miller, & Kane, Federal Practice and Procedure § 1763 (3d ed. 2005); *Marisol A. v. Guiliani,* 929 F. Supp. 662, 691 (S.D.N.Y. 1996). Class actions are particularly appropriate where, as here, governmental policies and practices have a broad impact upon a class of recipients, and the scope of the relief is dictated by the nature of the violation. *See Cellophane v. Amnesiac*, 442 U.S. 682 (1979).

In this case, as a direct result of Defendants' actions and inactions, plaintiffs are improperly segregated in nursing facilities when they could live in integrated community settings, and are not being accurately screened or assessed, in violation of their rights under the ADA and the NHRA. Additionally, the plaintiffs are not receiving specialized services and active treatment, as required by

42 C.F.R. § 483.126 & § 483.440(a)-(f). Any differences between class members' abilities and disabilities have no bearing on these claims or on Defendants' failure to provide class members with the required screening and necessary specialized services.[6] *See Rolland*, 2008 WL 4104488, at *4 ("[A]ny identified factual differences between the named Plaintiffs and some of the class they sought to represent did not undermine commonality and, in particular, did not preclude certification of a class of persons with mental retardation who were challenging Defendants' practices."). Nor do factual distinctions between class members impact the systemic nature of the relief requested in the Complaint, or the prosecution of this case. *Risinger*, 201 F.R.D. at 20-21.

Specifically, the questions of law and fact that are common to all class members include, but are not limited to:

(1) whether Defendants are in violation of the NHRA by:

- failing to establish a screening and assessment program that accurately determines if individuals with developmental disabilities can be appropriately placed in a community setting or should be admitted to a nursing facility;
- failing to conduct professionally acceptable assessments to determine what specialized services such individuals require; and
- failing to provide an array of specialized services to all individuals with developmental disabilities in nursing facilities who need them, in a manner that satisfies the federal standard for active treatment.;

(2) whether the Defendants are violating the ADA and § 504 of the Rehabilitation Act by:

[6] Like other Medicaid Act and ADA integration cases, this action does not require the Court to engage in individualized determinations of the appropriateness of community placement or the need for particular specialized services. Those determinations are best left to existing or new remedial processes. The failure to utilize an effective screening process and the dearth of specialized services can be established without resort to individual treatment determinations by the Court.

- failing to offer alternate community services to all individuals with developmental disabilities in nursing facilities who can live safely in a community setting with appropriate supports; and

- failing to offer community services to individuals with developmental disabilities at risk of admission to nursing facilities, in order to divert the unnecessary admission of those individuals who can be appropriately served in a community or alternative setting

The proposed class therefore satisfies the commonality requirement of Rule 23(a)(2).

3. *The Claims of the Named Plaintiffs are Typical of Those of the Class.*

The third component of Rule 23(a) requires that the proposed class representatives' claims for relief be typical of the claims of the absent class members. The test for "typicality" asks whether the class representatives "possess the same interest and suffer the same injury" as other class members, but it does not require that the claims of the named plaintiffs be identical to the claims of the other class members. *Gen. Tel. Co. of the Sw.,* 457 U.S. at 156; *see also Mullen*, 186 F.3d at 625 (the test for typicality "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent"). "[T]he critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *James*, 254 F.3d at 571 (quoting 5 Moore's Federal Practice ¶ 23.24[4] (3d ed. 2000)). Additionally, most courts agree that "[l]ike commonality, the test for typicality is not demanding." *Mullen*, 186 F.3d at 625; *James*, 254 F.3d at 571; *Hotels.com*, 2008 WL 2486093, at *6.

For example, in *Appleyard*, a class action was brought in Alabama challenging the state's Medicaid level of care admission criteria on behalf of individuals who were denied Medicaid nursing

facility benefits. 754 F.2d. at 956. The district court refused to certify the class based on its findings that the named plaintiffs could not satisfy the typicality requirement due to the "vast factual differences surrounding the medical condition of each of the named Plaintiffs." *Id.* at 957. In reversing, the Eleventh Circuit held that these factual differences were irrelevant because they had nothing to do with the injunctive and declaratory relief requested by the plaintiffs on behalf of themselves and the class. *Id*. at 958. The Eleventh Circuit concluded that "[t]he similarity of the legal theories shared by plaintiffs and the class at large is so strong as to override whatever factual differences might exist and dictate a determination that the named plaintiffs' claims are typical of those of the members of the putative class." *Id.* Similarly, the *Rolland* court considered the potential differences between the members of a class (nearly identical to the class proposed here) and found that "the fact that class members may have had somewhat different medical needs or placement preferences did not mean the typicality requirement had not been met." 2008 WL 4104488, at *5.

The Named Plaintiffs satisfy the typicality requirement of Rule 23(a)(3) because their claims and those of the unnamed class members present similar factual situations: (1) they all have mental retardation or a related condition; (2) they all need and are entitled to screening and assessment to determine if they require a nursing level of care, could have their needs met in an appropriate community setting, and could benefit from specialized services; (3) those identified as appropriate for community placement would benefit from being provided access to community-based services; and (4) those identified as needing specialized services would benefit from being provided the opportunity to receive such services in the nursing facility. The fact that class members may have different medical conditions or that they may require a slightly different service array does not justify denying class certification. *See Rolland*, 2008 WL 4104488, at *5. Instead, the requisite typicality exists because Defendants are needlessly institutionalizing class members and denying necessary

specialized services in violation of Title II of the ADA and the NHRA. *See Curtis*, 159 F.R.D. at 341 (typicality is met because "the representative Plaintiff is subject to the same statute and policy as the class members."); *Hotels.com*, 2008 WL 2486093, at *6 ("While each putative class member has its own ordinance, the claims arising thereunder, and the legal and remedial theories on which the claims are based, are the same.")

Finally, the Named Plaintiffs — each of whom is inappropriately confined to a nursing facility and/or denied active treatment — have a personal interest in this litigation which is reasonably related to the harm experienced by all class members. *See Risinger*, 201 F.R.D. at 22 (finding typicality where plaintiffs invoking same Medicaid Act provisions, allege same systemic deficiencies, and seek same relief). Thus, the Named Plaintiffs satisfy the typicality requirement of Rule 23(a)(3).

4. *The Class Representatives Fairly and Adequately Represent the Interest of the Class.*

Rule 23(a)(4) requires that the representative plaintiffs in a class action fairly and adequately protect the interests of the entire class. In order to satisfy this requirement, two criteria must be met: (1) the class representatives must not have antagonistic or conflicting interests with the unnamed members of the class, and (2) the attorneys representing the class must be qualified and competent. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Neff*, 179 F.R.D. at 194. Both elements of Rule 23(a)(4) are met in this case.

(1) Adequacy of the Named Representatives

In order for the named representatives to be deemed adequate to represent the class, their interests must coincide with those of the unnamed class members. *Neff*, 179 F.R.D. at 195; *see generally Gen. Tel. Co.*, 457 U.S. 147. Additionally, the interests of the named plaintiffs must not be

antagonistic to the unnamed class members. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985).

In the present case, although all members of the plaintiff class may not have exactly the same treatment recommendations or needs, they all have suffered, or are at risk of suffering, the same injuries as a result of the Defendants' policies and practices: segregation in a nursing facility and the denial of specialized services sufficient to provide active treatment. *See* Complaint ¶¶ 53-61, 74-100. They all seek the same remedies: a screening and assessment process that accurately identifies individuals whose needs could be appropriately met in the community and that reliably determines the need for specialized services for persons who are admitted to a nursing facility; the provision of integrated community-based services and supports for those identified as appropriate for a community placement; and the provision of specialized services that satisfy the federal standard for active treatment for those who are admitted to a nursing facility. *See generally id.* None of these claims are unique to any individual plaintiff. Rather, the claims raised and the relief sought operates equally to benefit all class members.

The Named Plaintiffs do not, therefore, have interests divergent from other class members who live in nursing facilities or who are at risk of inappropriate admission to a nursing facility. Consequently, the Named Plaintiffs can fully and adequately represent the legal rights and seek the legal remedies to which all members of the putative class are entitled as required by Rule 23(a)(4).

(2) Adequacy of Counsel

The factors that courts consider in determining the adequacy of the counsel in class actions include: the attorneys' professional skills, experience, and resources. *See N. Am. Acceptance Corp. Sec. Cases*, 593 F.2d 642, 644 (5th Cir. 1979), *cert. denied*, 444 U.S. 956 (1979); *Rodriguez*, 166 F.R.D. at 473. Plaintiffs' counsel are well qualified to handle this action and will prosecute it

vigorously on behalf the class. Advocacy, Inc. is the federally-designated Protection and Advocacy agency for persons with disabilities in Texas and is experienced in class action litigation on behalf of individuals with disabilities. The Center for Public Representation has been involved in complex class action litigation on behalf of institutionalized persons with disabilities for over thirty years and has been lead counsel in numerous institutional reform lawsuits throughout the country, including a very similar case in Massachusetts. *See Rolland*, 2010 WL 157475; *Voss v. Rolland,* 592 F.3d 247-49 (recounting history of litigation). Weil, Gotshal & Manges LLP is a leading private law firm, internationally, nationally, and in Texas, and has litigated numerous class actions and other complex cases. Finally, plaintiffs' counsel command the necessary resources to competently represent the class, and they have no other professional commitments which are antagonistic to, or which would detract from, their efforts to seek a favorable decision for the class in this case.

D. This Action Meets the Requirements of Rule 23(b)(2)

Courts have recognized that class actions certified under subsection (b)(2) of Rule 23 of the Federal Rules of Civil Procedure are particularly important in civil rights cases where injunctive relief is sought, as in the present case. *James*, 254 F.3d at 567 n.16 (recognizing that "Rule 23(b)(2) was intended to be used 'in the civil-rights field where a party is charged with discriminating unlawfully against a class'"); *Yaffe*, 454 F.2d at 1366 ((b)(2) is "uniquely suited to civil rights actions"); *Holmes v. Continental Can Co.*, 706 F.2d 1144. 1152 (11th Cir. 1983); *see also* Advisory Committee Note on Rule 23, 39 F.R.D. 69, 102 (1966). Certification of classes has been deemed "an especially appropriate vehicle for civil rights actions" seeking systemic reform. *See Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980); *see also Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982). In cases seeking only equitable relief, class certification is necessary to make sure that mandatory relief runs

to benefit all class members. *Rolland*, 2008 WL 4104488, at *6 (citing *Jane B. v. N.Y. Dept. of Social Servs.*, 177 F.R.D. 64, 72 (S.D.N.Y. 1987)).

The elements of Rule 23(b)(2) are satisfied in this case, and class certification is appropriate, specifically because it is a civil rights class action seeking declaratory and injunctive relief, which is exactly the type of litigation that the Federal Rules Advisory Committee anticipated would be certified under Rule 23(b)(2). *See* Advisory Committee Notes to Rule 23, 39 F.R.D. at 102; *Coley*, 635 F.2d at 1378. Defendants' failure to provide appropriate services in the community and/or placements in integrated settings, their failure to conduct effective screenings to prevent the unnecessary admission of persons with developmental disabilities to nursing facilities, their failure to conduct professionally-acceptable assessments to determine if individuals who are admitted need specialized services, and their failure to provide active treatment to nursing facility residents all violate federal statutory rights common to both the Named Plaintiffs and the unnamed class members. Thus, Defendants are acting or refusing to act in a manner that equally affects and is "generally applicable" to the entire class. Therefore, final injunctive and declaratory relief is appropriate, precisely because it will resolve the legality of the challenged actions and inaction for the class as a whole. In a case such as this, the "proposed class certification is eminently appropriate." *Rolland*, 2008 WL 4104488, at *6 (quoting *Rolland*, 1999 WL 34815562, at *9).

The Fifth Circuit also has recognized the importance of class certification where a defendant governmental agency may voluntarily perform a specific action sought in a lawsuit for an individual plaintiff and, consequently, moot the representative plaintiff's claim. *Zeidman*, 651 F.2d at 1051. In *Zeidman*, the Court of Appeals explained that "refusal to certify the class 'would mean that the (agency) could avoid judicial scrutiny of its procedures by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained, class certification.'" 651 F.2d at 1051 (quoting

White v. Mathews, 559 F.2d 852, 857 (2d Cir. 1977)). A similar risk exists here; Defendants could provide the Named Plaintiffs with a home and community based waiver slot and/or specialized services, thereby mooting the Named Plaintiffs' claims, while continuing to deny similar relief to the thousands of other similarly situated persons.

In this case, class certification pursuant to Rule 23(b)(2) is appropriate and necessary to ensure that any mandatory relief will extend to all individuals with developmental disabilities who are confined in, or at a risk of being admitted to, nursing facilities in Texas.

V. ADVOCACY, INC., THE CENTER FOR PUBLIC REPRESENTATION, AND WEIL, GOTSHAL & MANGES LLP SHOULD BE APPOINTED CO-CLASS COUNSEL PURSUANT TO RULE 23(G).

The Named Plaintiffs are jointly represented by Advocacy, Inc., the Center For Public Representation, and Weil, Gotshal & Manges LLP, each of which brings unique resources, experience and skills to the case, and those three law firms should be appointed as class co-counsel pursuant to Rule 23(g). Advocacy, Inc. is the federally-designated protection and advocacy organization for the state of Texas and is charged with protecting the rights of individuals with disabilities throughout Texas. It brings to this case a knowledge of and experience with the workings of Texas's service array and service delivery systems for individuals with disabilities. It is also in direct contact with the Named Plaintiffs and numerous other class members through its ongoing outreach and intake processes. Advocacy, Inc. has five regional offices and eight satellite offices throughout Texas. Garth Corbett, the lead Advocacy, Inc. attorney on this case, has over 27 years of experience representing individuals with disabilities and has litigated 2 class action cases, including *Neff.*, 179 F.R.D. at 195 (The Court had the opportunity to see counsel [Garth Corbett] in action and review the pleading and other legal memoranda submitted by counsel….The Court is confident

counsel provided adequate representation for the class."). He is not counsel in any pending class actions.

The Center for Public Representation is a Massachusetts-based public interest law firm that focuses on systemic advocacy on behalf of individuals with psychiatric and intellectual disabilities. It provides litigation support and assistance to the National Disabilities Rights Network and the protection and advocacy organizations throughout the country. It has litigated dozens of class actions on behalf of institutionalized individuals, raising claims under the Americans with Disabilities Act, the Nursing Home Reform Amendments Act, the Medicaid Act, Section 504 of the Rehabilitation Act, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Both attorneys, Mr. Schwartz and Mr. Rae, have been lead counsel in numerous class actions. Mr. Schwartz is a nationally-recognized expert concerning the rights of institutionalized individuals and has over 30 years of experience representing individuals with psychiatric and intellectual disabilities. He is currently counsel in nine ongoing class actions, including the case of *Rolland v. Patrick* that involves claims virtually identical to those at issue in this case, and has handled more than 15 additional cases involving class claims over the course of his career. Mr. Rae has over 30 years of experience representing low income individuals and has litigated in excess of 15 class actions raising claims under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Medicaid Act, the National Housing Act, the Fair Housing Act, the Food Stamp Act, and the Due Process Clause of the United States Constitution.

Weil, Gotshal & Manges, LLP ("Weil") is an international law firm with over 1,200 lawyers in 20 offices worldwide. The Dallas office has over 80 attorneys and specializes in complex litigation. Ms. Ostolaza is a partner in the firm and is co-head of the firm's 160-lawyer complex commercial litigation practice. She concentrates in the trial and supervision of complex civil

litigation. She has over 18 years of experience and has significant experience litigating class actions. She is supported in this case by several associates in the firm, each of whom also have experience with complex litigation and class actions. Weil adds expertise in the area of class actions, litigation and trial skills, and provides extensive litigation support capabilities.

There is no conflict among counsel. This is a Rule 23(b)(2) class action seeking only declaratory and injunctive relief. Any attorneys' fees for plaintiffs counsel will be awarded by the Court pursuant to federal fee-shifting statutes based upon the time reasonably expended by plaintiffs' counsel. Pursuant to Rule 23(g), plaintiffs request that this Court appoint Advocacy, Inc., Weil, Gotshal & Manges LLP, and the Center for Public Representation as co-class counsel in this case. *Hamilton v. First Am. Title Ins. Co.*, 266 F.R.D. 153, 173 (N.D. Tex. 2010) (appointing co-class counsel); *Garcia v. Tyson Foods, Inc.*, 255 F.R.D. 678, 692 (D. Kan. 2009) (same).

VI. CONCLUSION AND REQUESTED RELIEF

For the reasons set forth above, Named Plaintiffs respectfully request that the Court certify a plaintiff class consisting of all Medicaid-eligible persons over twenty-one years of age with mental retardation and/or a related condition in Texas who currently or will in the future reside in nursing facilities, or who are being, will be, or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq*. In addition, Named Plaintiffs respectfully request that this Court appoint Advocacy, Inc., Weil, Gotshal & Manges, LLP, and the Center for Public Representation as co-class counsel in this action pursuant to Rule 23(g).

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I, Garth Corbett, certify that I contacted Nancy Juren, counsel for Defendants, regarding the requested extension of page limits, and Ms. Juren indicated that Defendants do not oppose this extension.

/s/ Garth A. Corbett
Garth A. Corbett

CERTIFICATE OF SERVICE

I, Garth Corbett, hereby certify that all parties have been served through the Court's ECF system, or if such party does not accept service through the Court's ECF system, then by first class mail.

/s/ Garth A. Corbett
Garth A. Corbett