UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUALYN THORPE, ***et al.***	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 1:10-cv-02250 (ESH)
v.	)	
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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Like thousands of other District residents with disabilities, Plaintiffs desperately want to live in the community. But Defendant's systemic, discriminatory failure to carry out the "integration mandate" of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 leaves them unnecessarily institutionalized in nursing facilities and denies their right to receive the community-based services they need to live in their own homes in the community. *See Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) (holding that a state government's failure to provide services in the most integrated setting appropriate to a disabled person's needs is "unjustified isolation of persons with disabilities" and constitutes discrimination under the ADA); *Day v. District of Columbia*, No. 10-cv-02250-ESH-AK, 2012 WL 456491 (D.D.C., Feb. 14, 2012). Plaintiffs seek class certification to support their demand that Defendant remedy its failure to implement an effective *Olmstead* integration system through which Plaintiffs and those similarly situated can transition from institutional nursing facilities to community-based services.[1]

I. FACTUAL BACKGROUND

Plaintiffs are individuals with disabilities who are institutionalized in nursing facilities. Second Amended Compl. ("Compl.") ¶ 1. Each of them has the desire and the ability to live in the general community if given access to appropriate supports and services. *Id*. All of the named Plaintiffs would prefer to receive services in the community and live with independence. Duckworth Decl. ¶¶ 17, 22, 28-29, 31, 42-43, 46, 51, 54, 68, 85-86, 89, 97-98 (attached as Exhibit A); Thorpe Decl. ¶¶ 8, 10 (attached as Exhibit B); Foreman Decl. ¶¶ 4, 9, 19 (attached as Exhibit C); McDonald Decl. ¶¶ 7-8, 14 (attached as Exhibit D); Wilkerson Decl. ¶¶ 9-11

[1] Pursuant to LCvR 7(m), Plaintiffs' counsel conferred with Defendant's counsel about this motion on April 26, 2012, and Defendant objects generally to this Motion. However, Defendant represented that it will not dispute either the numerosity of the class or the adequacy of representation by Plaintiffs' counsel.

(attached as Exhibit E); Miller Decl. ¶ 10 (attached as Exhibit F); Dupree Decl. ¶ 9 (attached as Exhibit G). Despite this, Defendant has unnecessarily kept Plaintiffs institutionalized and isolated from the community by failing to develop and implement an effective system whereby they and others like them can receive necessary services in integrated, community-based settings rather than in nursing facilities. Compl. ¶ 2. Plaintiffs seek, among other things, a court order to compel Defendant to develop a working system that takes affirmative steps toward offering Plaintiffs appropriate community supports and services. *Id*. ¶¶ 2-14.

A. District of Columbia Programs.

Through its Medicaid program, Defendant coordinates and funds medical services for District of Columbia low-income residents with disabilities. *Id.* ¶ 56. Among the benefits available to those with mental and physical disabilities are long-term care services, including inpatient care in a nursing facility and community-based services that are either provided for in the District's Medicaid State Plan or available via the Medicaid Waiver Program for People who are Elderly and/or have Physical Disabilities (the "EPD Waiver"). *Id.* ¶¶ 57-59.

Title II of the ADA and the Rehabilitation Act, along with their implementing regulations, require state and local governments to provide services to persons with disabilities "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *See* 42 U.S.C. § 12132; 29 U.S.C. § 794(a); 28 C.F.R. § 35.130(d). The most integrated, appropriate setting is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. § 35, App. B (describing requirements for integration under 28 C.F.R. § 35.130). The "unjustified isolation [of individuals with disabilities] . . . is properly regarded as discrimination based on disability." 527 U.S. at 597 (quoted in *Day*, 2012 WL 456491 at *19).

Defendant has failed to implement a sufficient community-care transition program. In

April 2011, Defendant moved to dismiss Plaintiffs' action, or, in the alternative, for summary judgment. On February 14, 2012, this Court denied Defendant's motion, concluding that the District had not demonstrated "a measurable commitment to deinstitutionalizations," nor "'actual success' or [even] 'meaningful progress'" in implementing community placement of appropriate disabled persons. *Day*, 2012 WL 456491 at *19. Far from proving that it has a "comprehensive, effectively working plan for placing qualified persons with . . . disabilities in less restrictive settings," *Olmstead*, 527 U.S. at 606, the record in fact demonstrated that the District had transitioned a mere three nursing facility residents (including two then-named-plaintiffs) *in four years*, 2012 WL 456491 at *10. On this record, this Court held that it is undisputed that the District lacks an *Olmstead* Integration Plan and has failed to "move[] individuals to the 'most integrated setting' as required by *Olmstead*." *Id.* at *22.

B. Plaintiffs' Experts.

Plaintiffs retained two expert witnesses to evaluate each named Plaintiff's ability to live in the community with available, District-funded services and supports. Dr. Kenneth Duckworth is a well-respected expert in adult, child and adolescent, and forensic psychiatry. Ex. A ¶ 6. His experience ranges from practicing as a clinical psychiatrist to serving as Medical Director for the Massachusetts Mental Health Center, Medical Director for the Massachusetts Department of Mental Health, and, for a time, Acting Commissioner for the latter agency. *Id.* ¶ 8. From 2005 to 2011, Dr. Duckworth was the Medical Director for Vinfen Corporation, a nonprofit human and mental health services organization in Massachusetts. *Id.* ¶ 10. In that role, he conducted many assessments of individuals with disabilities for the purpose of determining their support service needs and whether those needs could appropriately be met outside of the institutional setting. *Id.* ¶ 10. Since May 2011, Dr. Duckworth has worked as the Associate Director of Behavioral Health for Blue Cross and Blue Shield of Massachusetts,

where he supervises twelve doctors who make level of care and medical necessity determinations. *Id.* ¶ 11.

Mary McGinnis is a Registered Nurse with 29 years of experience in patient care in a variety of settings. McGinnis Decl. ¶ 5 (attached as Exhibit H). She currently is the Director of Nursing for Vinfen Corporation in Cambridge, Massachusetts. While at Vinfen, she has worked to successfully transition people with disabilities from nursing homes to the community as part of the litigation in *Rolland v. Cellucci*, 191 F.R.D. 3 (D. Mass. Jan. 10, 2000) (approving class settlement agreement). Ex. H. ¶ 6. She assisted Dr. Duckworth to assess each of the named Plaintiff's potential for community placement and service needs. *Id*. ¶ 3.

Dr. Duckworth and Ms. McGinnis reviewed each named Plaintiff's medical records and interviewed each of them. Ex. A ¶ 4. Dr. Duckworth concludes that each named Plaintiff could live in the community with services and supports already available to others in the District. *Id.* ¶¶ 30, 44, 53, 67, 87, 99.

C. Named Plaintiffs.

Plaintiffs are all persons with disabilities, the Defendant having determined that each meets the criteria for long-term care based on their disabilities under Defendant's Medicaid program. Compl. ¶¶ 21, 55-56. Each named Plaintiff resides in a 24-hour care nursing facility and receives care that is paid for in whole or in part by Defendant's Medicaid program. *Id*. ¶¶ 22, 26, 31, 36, 40, 45, 51; Ex. B ¶ 2; Ex. C ¶ 3; Ex. D ¶ 3; Ex. E ¶ 2; Ex. F ¶ 2; Ex. G ¶ 2. Although the named Plaintiffs have varied disabilities and medical conditions, they all meet the criteria to receive services in nursing facilities or home- and community-based settings, and they all are appropriate candidates for community placement. Compl. ¶ 23; Ex. A ¶¶ 30, 44, 53, 67, 87, 99-100. The only impediment to each named Plaintiff's transition back into the community is the Defendant's failure to provide effective transition assistance. *See generally*

Compl.

Plaintiff Jacqualyn Thorpe is a sixty-two-year-old woman and has resided at Deanwood Rehabilitation and Wellness Center since March 2008. Ex. A ¶ 47; Compl. ¶ 26. She has been diagnosed with Guillain-Barre Syndrome and hypertension, and has a history of a stroke and deep vein thrombosis. Ex. A ¶ 47; Compl. ¶ 27; Ex. B ¶ 7. She is highly social, serving as the president of the Red Hat social club at Deanwood and enjoying frequent visits from friends and family members. Ex. A ¶ 50; Compl. ¶ 28. Ms. Thorpe strongly prefers to live in the community and reports that she believes she has been ready to return to the community for over two years, although she recognizes that she needs support. Ex. A ¶ 51. She is able to use a manual wheelchair for mobility, dresses and feeds herself, no longer receives physical therapy in the nursing facility, and wants to leave the facility and return to the community. Ex. A ¶¶ 49, 51; Ex. B ¶ 8. Ms. Thorpe has been assessed as an appropriate candidate for community placement, and she could live in the community with appropriate services and supports. Ex. A ¶ 53; Compl. ¶ 29.

Plaintiff Roy Foreman is a sixty-six-year-old man and has resided at Washington Center for Aging Services since May 2006. Ex. A ¶ 33. Mr. Foreman was admitted to Washington Center for Aging Services from the Specialty Hospital of Washington, D.C., after he sustained a fall at home and suffered a spinal cord injury, resulting in paraplegia. *Id*. ¶ 34. He has also been diagnosed with decubitus ulcers and diabetes, and he reports that he became depressed after moving into his nursing facility. *Id*. ¶¶ 35-36, 40. He uses a wheelchair for mobility, but is able to feed himself and handle most of his own finances. *Id*. ¶¶ 37, 39. The staff at the nursing facility assist him with transferring in and out of bed and with a few other daily activities. *Id*. ¶ 39. Mr. Foreman has a clear, passionate, and persistent desire to live

independently in the community and realizes that he needs support and assistance with his activities of daily living to do so. *Id*. ¶¶ 43-44. Mr. Foreman could live in the community with appropriate services and supports. *Id*. ¶ 45.

Since the start of 2011, Mr. Foreman has twice been offered public housing assistance by the District of Columbia Housing Authority; both times he was forced to remain in the nursing facility because no one in the District government provided him or his nursing home social worker assistance securing the services and supports he needed to move back to the community. Ex. C ¶ 11. He lost both apartments for the simple reason that Defendant failed to secure services for him through the District's "EPD Waiver" program or the Money Follows the Person ("MFP") program, which is designed specifically to transition people from nursing facilities, among other institutions, and provides an enhanced federal funding subsidy for services provided to transition each person. *Id*. ¶¶ 12, 16. It was not until February 22, 2012, nearly a year after he first signed a lease for an accessible public housing unit, that Mr. Foreman was notified that Defendant at last had even placed him on the waiting list for an EPD waiver. *Id*. ¶ 17. He was number 441 on the waiting list at that time. *Id.* Mr. Foreman was very disappointed that he was unable to move into either new home and wants to move back to the community as soon as possible. *Id*. ¶ 18.

Plaintiff Larry McDonald is a fifty-eight-year-old Army veteran who has resided at Unique Residential Care Center since September 2006. Ex. D ¶¶ 2, 4; Ex. A ¶ 19. He was admitted to the nursing facility from the hospital after sustaining a persistent seizure that lasted three days. Ex. A ¶ 20. When he came to the facility, Mr. McDonald used a cane, but within five days he could walk without assistance. *Id.* Mr. McDonald is diagnosed with a seizure disorder and dementia, and he has a history of high blood pressure, elevated cholesterol,

pancreatitis, and stroke. Ex. A ¶ 20. He is quite active in the nursing facility and is often seen helping wheelchair riders and friends move about the facility. *Id.* ¶ 21. He grieves about the time he has spent away from his family, as several of his relatives have died during the time he has been in the nursing facility. Ex. D ¶ 8; Ex. A ¶ 26. He wants to volunteer in the community, serve as a sponsor for Alcoholics Anonymous, and to help and spend time with his remaining family. Ex. D ¶¶ 7-8; Ex. A ¶¶ 25-26. Mr. McDonald has been assessed as an appropriate candidate for community placement, and he can live in the community with some assistance. Ex. A ¶ 30. Because of his many years of homelessness and his cognitive limitations, he will need a case manager to help him develop, sustain, and manage the services he will need in the community. *Id.*

Plaintiff Curtis Wilkerson is a forty-eight-year-old man and has resided at United Medical Center since December 2009. Ex. A ¶ 55. He transferred to that facility from Fox Chase Nursing Home, where he resided for six years. Mr. Wilkerson is diagnosed with paraplegia, neurogenic bladder, Hepatitis C, anemia, and recurring bladder infections. *Id.* Although wheelchair dependent, Mr. Wilkerson is self-sufficient and very independent. *Id.* ¶ 56. He navigates the facility easily, is very social, and serves as the current president of the facility's Resident Council. *Id.* ¶¶ 56-57. He requires one person to assist him with transfers in and out of his wheelchair and with some activities of daily living. *Id.* ¶ 58. Mr. Wilkerson has been assessed as an appropriate candidate for community placement, and he can live in the community with some assistance and support. *Id.* ¶ 67. He is frustrated that as a resident of a nursing facility, he cannot attend or participate in activities that he used to enjoy, such as college football games, basketball games, church, and concerts. Ex. E ¶ 6. Mr. Wilkerson strongly prefers to leave the nursing facility and to live in the community. *Id.* ¶ 11. He has

expressed to the staff of his nursing facility that he wants to be more independent and move back to the community, but that he needs their assistance to ensure that all the services he needs are in place before he moves. *Id.*

Plaintiff Judith Miller is a sixty-year-old woman and has resided at Deanwood Rehabilitation and Wellness Center since September 2008. Ex. A ¶ 69. Ms. Miller was admitted for bilateral lower extremity weakness, altered mental status, and skin ulcers. *Id*. Her current diagnoses include skin ulcers, diabetes, "foot drop," and neurogenic bladder, with a history of deep vein thrombosis, depression, trouble swallowing, cervical cancer, and falling. *Id.* ¶¶ 73-75. Although she can walk 100 feet with a rolling walker, Ms. Miller relies primarily on a wheelchair for mobility, and she can transfer from her chair to her bed independently. *Id*. ¶¶ 80-81. An active and social resident, she is the treasurer of the Resident Council and a member of the Red Hat Society at the facility. *Id*. ¶ 84. She enjoys and is dedicated to church and attends services at the facility whenever they are available. *Id.* ¶ 86. She is also the Chair of the Food Committee at the facility and is interested in learning more about her diabetes and about weight control. *Id*. ¶ 77. Ms. Miller is eager to live in the community and finds it hard to believe that she has been at the facility for so many years. Ex. F ¶ 10; Ex. A ¶ 85. Prior to coming to the facility, Ms. Miller lived with her daughter and granddaughter, who are very supportive of her. Ex. A ¶ 71. She has four children and fifteen grandchildren. *Id*. With appropriate services and supports, Ms. Miller could live in the community, closer to her relatives. *Id*. ¶¶ 87-88.

Plaintiff Donald Dupree is a forty-seven-year-old man and has resided at Washington Nursing Facility since June 2006, when he was admitted for post-surgical recovery following removal of a brain tumor. Ex. A ¶ 90; Simhoni Decl. ¶¶ 3, 5 (attached as Exhibit I). Mr.

Dupree has a history of cerebellopointe angle (CPA) tumor, alcohol abuse, glaucoma, and schizoaffective disorder. Ex. A ¶ 90; Ex. I ¶ 5. Mr. Dupree's condition has consistently improved since he was first admitted to the facility. Ex. A ¶ 91. Following his admission and until mid-2010, Mr. Dupree was dependent on a wheelchair for mobility, but he now uses a rollator (a walker on wheels) to move around. *Id*. He no longer requires occupational therapy, speech therapy, or physical therapy services, and he ambulates around the nursing home freely. *Id.* Mr. Dupree could live independently in a community residential facility (group home) with some appropriate health and personal care supports. *Id*. ¶¶ 99-100. Mr. Dupree would welcome transitioning back to a group home, and he looks forward to being able to sing in his church choir and "hawk newspapers" as he used to. *Id*. ¶ 97. His psychiatrist through the District's Department of Mental Health ("DMH") core services agency, Community Connections, reported in March 2012 that "[i]t does seem most appropriate for this individual to transition as quickly as possible from a nursing facility, which he does not seem to need any longer and which seems rather restrictive for him, and may indeed intensify his difficulties with impulse control." *Id*. ¶ 94. His legal guardian, Dr. Orit Simhoni, concurs with this assessment and believes Mr. Dupree should return to the community. Ex. I ¶¶ 6, 9. Dr. Simhoni has contacted DMH, the Aging and Disability Resource Center, the Department of Health Care Finance, and the MFP program to seek assistance with obtaining appropriate community-based services for Mr. Dupree, but to no avail. *Id.* ¶ 9. Dr. Simhoni filed a grievance with DMH in April 2011 over Community Connections' failure to assist Mr. Dupree in leaving the nursing facility. *Id*. ¶ 10. As of November 17, 2011, there continued to be no movement on Mr. Dupree's requests to return to the community. *Id*. ¶¶ 11-12.

D. Numerosity of Class and Typicality of Claims.

There are between 500 and 2,900 individuals in the same position as the named

Plaintiffs, segregated in nursing facilities but willing and able to live in the community with appropriate support. Compl. ¶ 105. The named Plaintiffs are aware of many residents in their own nursing facilities who want to live in the community and who are confident that they could live in the community with appropriate services and supports. Ex. B ¶ 11; Ex. D ¶ 17; Ex. E ¶ 11; Ex. F ¶ 11; Ex. G ¶ 11. Moreover, greater than 500 individuals have identified themselves to Defendant as seeking to return to life in the community. Compl. ¶ 76.

II. ARGUMENT

Plaintiffs' claims are perfect for class action status. Adjudication of these claims on a class-wide basis will be the most cost-effective, efficient way to adjudicate this matter. Moreover, Plaintiffs satisfy all of the Rule 23 criteria: The class is readily defined; the claims affect (at least) several hundred individuals in the District; common elements of fact and law abound, with the District's systemic discrimination caused by a discrete set of decision-makers; Plaintiffs seek only injunctive and declaratory relief; and Plaintiffs are represented by experienced counsel.

A class action is appropriate to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (internal quotation omitted). A district court has "broad discretion in deciding whether to permit a case to proceed as a class action." *Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994) (citations omitted), *cert. denied sub. nom.*, *Dillon v. Powell*, 534 U.S. 1078 (2002). "[T]he allegations in the complaint are presumed true for purposes of a motion for class certification . . . ." *McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428, 431 (D.D.C. 2002) (citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 14 (D.D.C. 2001)). But class

certification neither requires nor permits courts to determine the merits of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."); *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 246 F.R.D. 293, 299 (D.D.C. 2007) (same).

Parties seeking class certification must satisfy all of the requirements of Federal Rule of Civil Procedure 23(a), as well as at least one subsection of Rule 23(b). These requirements are met if plaintiffs make a "specific presentation" of facts demonstrating a "reasonable basis for crediting the assertion that aggrieved individuals do exist in the broader class they propose . . . ." *Wagner v. Taylor*, 836 F.2d 578, 587 n.57 (D.C. Cir. 1987) (citation omitted). A class description is sufficient if it provides "the general outlines of the membership of the class." *Chang v. U.S.*, 217 F.R.D. 262, 269 (D.D.C. 2003); *see also* 5 James W. Moore *et al*., *Moore's Federal Practice* § 23.21[4][a] (3d ed. 2001).

Plaintiffs readily satisfy these requirements for class certification, just as similar classes across the country seeking injunctive relief under *Olmstead* have repeatedly satisfied those requirements. *See State of Conn. Office of Prot. and Advocacy for Persons with Disabilities v. Conn.*, 706 F. Supp. 2d 266, 273 (D. Conn. 2010) (granting class certification for similarly defined class with nearly identical *Olmstead* claims); *Colbert v. Blagojevich*, No. 07-CV-4737, 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008) (same); *Ligas v. Maram*, No. 05-CV-4331, 2006 WL 644474 (N.D. Ill. Mar. 7, 2006) (same); *Chambers v. City and County of San Francisco,* No. 06-CV-06346, slip op. at 9 (N.D. Cal. July 12, 2007) (same); *Pitts v. Greenstein,* No. 10-CV-635, 2011 WL 2193398 (M.D. La. June 6, 2011) (granting class certification for *Olmstead* class defined as those at risk of institutionalization); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980 (N.D.

Cal. 2010) (same); *Hampe v. Hamos*, No. 10-CV-3121, U.S. LEXIS 125858 (N.D. Ill. Nov. 22, 2010) (same); *Long v. Benson*, No. 08-CV-0026, 2008 WL 4571904 (N.D. Fla. Oct. 14, 2008) (certifying class of disabled Medicaid recipients "who could and would reside in the community with appropriate community-based services"), *vacated as moot by legislative action*, slip op. at 2 (N.D. Fla. Jan. 3, 2012). *See also M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1303 (D. Utah 2003) (granting class certification for class of Medicaid-eligible, disabled individuals "denied a meaningful choice between [community-based] services and institutionalization . . . .").

As demonstrated below, Plaintiffs meet all of the criteria for class certification and the Court should grant their motion to certify the following class consisting of:

> **All persons with disabilities who are eligible for Medicaid funded services from the District of Columbia and who (1) with appropriate supports and services could and would live in the community; and (2) now or during the pendency of this litigation are receiving services funded by the District of Columbia in a nursing facility.**

This definition is sufficiently discrete and readily ascertainable so as to satisfy the Court's need to understand the contours of class membership. *See Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 25 (D.D.C. 2006) ("All class members meeting this definition are individuals with disabilities who by definition meet readily defined eligibility criteria for [defendant's] services.").

A. Plaintiffs Satisfy the Requirements of Rule 23(a).

Rule 23(a) enables members of a class to sue as representative parties on behalf of all class members if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) that the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. Rule 23(a) should be read liberally in the context of civil rights suits. *Hassine v. Jeffes*, 846 F.2d 169, 179-80 (3d Cir. 1988); *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980); *Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975). *See also Falcon*, 457 U.S. at 157 (acknowledging the theory "that suits alleging . . . discrimination are often by their very nature class suits . . . .").

1. Numerosity: The class of 500 to 2,900 individuals is so numerous that joinder of all members is impracticable.

A class action may be maintained if "the class is so numerous that joinder of all parties is impracticable." Fed. R. Civ. P. 23(a)(1). Impracticability addresses the expense and burden, to the parties and the court, of litigating each claim individually, rendering the case difficult or inconvenient without joining all members of the class. *Meijer*, 246 F.R.D. at 306-7. Typically, a proposed class of at least 40 members satisfies the numerosity requirement. *See, e.g.*, *id.* at 306; *Disability Rights Council*, 239 F.R.D. at 25-26 ("courts in this jurisdiction have observed that a class of at least forty members is sufficiently large"); 1 Newberg on Class Actions (4th ed. 2002) § 3.5 at 247 ("as few as 40 class members should raise a presumption that joinder is impracticable"). The fact that the exact size of the class cannot be easily ascertained does not preclude class certification, so long as there is a reasonable basis for the estimate. *Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 176 (D.D.C. 1999); *Vargas v. Meese*, 119 F.R.D. 291, 293 (D.D.C. 1987) ("plaintiffs . . . need not show a precise number of class members").

Here, the proposed class consists of at least 500 people, and possibly as many as 2,900. Compl. ¶ 105. The lowest figure is based upon publicly available data for the number of individuals living in District nursing facilities who have affirmatively stated a preference to live in the community. Compl. ¶ 76. Furthermore, Defendant's counsel represented at the April 10,

2012 status hearing that Defendant's survey had, at that point, identified 100 of 118 survey respondents to meet the class definition in that they are willing to receive, and appropriate for, alternative community-based services. This indicates that 85% of the nearly 3,000 District Medicaid-funded nursing facility residents could be part of the proposed class. Joinder is thus impracticable and the numerosity requirement is satisfied.[2]

2. Commonality: There are numerous questions of law and fact common to the class resulting from Defendant's system-wide discrimination.

The second requirement for class certification under Rule 23(a) is commonality, which exists when there are questions of law or fact common to all members of the class. Fed. R. Civ. P. 23(a)(2). At the class certification stage, plaintiffs need only make a showing sufficient for "the court to infer that members of the class suffered from a common policy of discrimination . . . ." *Hartman*, 19 F.3d at 1472. Rule 23(a)(2) does not require the named plaintiffs to "have endured precisely the same injuries that have been sustained by the class members." *Bynum v. District of Columbia*, 214 F.R.D. 27, 33-34 (D.D.C. 2003). Not every question of law or fact must be common to each member of the class; plaintiffs need only present a single issue of law or fact common to all class members. *Id.* It is enough if the proposed class members suffered from a common harm. *Id*.

There are numerous questions of law and fact common to the class, including:

- Whether Defendant violates the integration mandate of Title II of the ADA and Section 504 of the Rehabilitation Act by requiring the named Plaintiffs and putative class members to be confined to nursing facilities in order to receive long-term care services, rather than providing those services in more integrated, community-based settings;

[2] As noted above, Defendant has agreed not to challenge the numerosity element of class certification.

- Whether Defendant administers its services, programs, and activities in the most integrated setting appropriate to the needs of individuals with disabilities residing in nursing facilities;

- Whether Defendant fails to offer sufficient discharge planning to enable individuals with disabilities residing in nursing facilities to be served in more integrated, community-based settings;

- Whether Defendant fails to develop, fund, and effectively utilize existing community-based programs so that individuals with disabilities residing in nursing facilities may be placed in more integrated, community-based settings;

- Whether Defendant fails to establish and implement a comprehensive, effective working plan to transition individuals with disabilities who reside in nursing facilities into more integrated, community-based settings;

- Whether Defendant fails to effectively administer and implement federal programs such as Medicaid waivers and Money Follows the Person to afford access to community-based programs by people with disabilities in nursing facilities; and

- Whether Defendant fails to effectively inform and provide Plaintiffs with meaningful choices of community-based long-term care alternatives to nursing facilities.

In sum, the District's system-wide failures cause a consistent form of discrimination against Plaintiffs by failing to provide appropriate transition systems and supports. *Accord State of Conn. Office of Prot. and Advocacy for Persons with Disabilities*, 706 F. Supp. at 287 (granting class certification for plaintiffs with *Olmstead* claims very similar to the present case); *Ligas*, 2006 WL 644474, at *5 (class certification granted where common issues included "Defendant's failure to establish and/or implement a comprehensive, effectively working plan to provide services in the most integrated setting appropriate to the proposed class's needs, segregation of the class in the [nursing facilities], failure to inform the proposed class of their right to integrated community-based services, and failure to evaluate the proposed class for readiness for community placement").

Any variations among the individual class members in the particular services that they need cannot defeat class certification. As a preliminary matter, the relief sought in this case is not based on each individual class member's medical and other needs; Plaintiffs seek District-wide change in Defendant's processes and support *systems*. Moreover, it is well-settled that variations in the personal circumstances of individual plaintiffs are not pertinent for purposes of class certification. *See, e.g.*, *Hartman*, 19 F.3d at 1472 (commonality found notwithstanding differences in job descriptions); *Disability Rights Council*, 239 F.R.D. at 25 (commonality found despite differences in disabilities and particular service needs); *Daniels v. City of N.Y.*, 198 F.R.D. 409, 417 (S.D.N.Y. 2001) (commonality found where class members' circumstances were individual but injuries were derived from "unitary course of conduct by a single system") (quoting *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)). In fact, "factual variations are not sufficient to deny class treatment to the claims that have a common thread of discrimination." *Coleman v. Pension Benefit Guar. Corp*., 196 F.R.D. 193, 198 (D.D.C. 2000) (quoting *Paxton v. Union Nat'l Bank,* 688 F.2d 552, 561 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983)) (emphasis added). *Accord Smith v. Texaco*, 263 F.3d 394, 405 (5th Cir. 2001) ("the commonality hurdle is not particularly high" because there need be only "one issue, the resolution of which will affect all or a significant number of the putative class members") (citation omitted); *Bynum*, 214 F.R.D. at 33. Here, all class members are suffering discrimination based on a systemic failure by the District of Columbia to provide transition services and supports.

Furthermore, class actions seeking only injunctive and declaratory relief "'by their very nature' present common questions of law and fact." *Moore v. Napolitano*, 269 F.R.D. 21, 28 (D.D.C. 2010) (internal quotations omitted); *Disability Rights Council*, 239 F.R.D. at 26 (quoting

7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1763 (3d ed. 2006)). *Disability Rights Council v. Washington Metro Area Transit Authority*, a recent case in this Circuit, illustrates this point. There, the plaintiffs alleged that the Washington Metro Area Transit Authority ("WMATA") systemically discriminated against them with regard to the availability of "comparable" transit services for disabled individuals, in violation of the ADA and the Rehabilitation Act. *Disability Rights Council*, 239 F.R.D. at 9. WMATA opposed class certification on the theory that plaintiffs had not alleged a broad policy of discrimination that affected the class members in the same way, so that the individual class members' injuries could not be sufficiently linked to system-wide discrimination. *Id.* at 26-27. In support of its position, WMATA pointed to cases like *Love v. Johanns*, where the court held that commonality was lacking because claims of discrimination against the USDA's loan program ultimately "turn[ed] on a series of individualized inquiries" about each plaintiff's experience. *Id.* (citing *Love v. Johanns*, 439 F.3d 723, 730 (D.C. Cir. 2006)).

The court disagreed, finding the comparison to *Love* inapt. The court explained that, although evidence pertaining to each individual's discrimination would be relevant to the dispute, the "evidence [would] be assessed in the context of a comprehensive inquiry into WMATA's systems, patterns, and practices." *Id.* at 27. Concluding that class certification was appropriate, the court determined that the disabled plaintiffs' claims were "fundamentally different" from the typical discrimination case:

> This is a universal claim, the metric for which is systemic, rather than specific; either the *system* provided to the putative class members is comparable, or it is not. Unlike the typical discrimination claim, the individualized claims are not so much that the plaintiffs have suffered targeted, personalized discrimination, but rather that they have been individually discriminated against via systems-level violations of the ADA (and, derivatively, the Rehabilitation Act and § 1983).

Id. at 26 (emphasis in original). Thus, the court granted class certification despite the distinct disabilities and needs of the individual class members. *Id*.

Here, Plaintiffs' claims ultimately concern just one central issue: Defendant's compliance with the federal statutes that require it to implement a working set of policies and practices that provide access to community-based services for persons with disabilities in nursing facilities who are able to live in the community. *See Olmstead*, 527 U.S. 581. Each of the named Plaintiffs and each member of the proposed class has been and continue to be harmed by Defendant's systemic policy failures and resulting conduct (or lack thereof). Plaintiffs request that this Court address Defendant's systems-level violations of the ADA and the Rehabilitation Act.

Given the multiple common elements of fact and law, litigation as a class is the most efficient and appropriate way to proceed.

3. Typicality: The named Plaintiffs' claims are typical of the claims of the class.

Rule 23(a)(3) requires that the claims of the class representatives be typical of the class claims. Fed. R. Civ. P. 23(a)(3). "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Falcon*, 457 U.S. at 156 (internal citations omitted). The primary purpose of the typicality requirement is to ensure that the interests of the class members will be fairly and adequately protected in their absence. *Id.* at 157. In other words, the interests of the class representatives must align with the interests of the class. *See Disability Rights Council*, 239 F.R.D. at 28 (finding typicality where the named plaintiffs' claims derive from the same legal theories as the claims of the proposed class). When analyzing whether a named plaintiff's claim is typical under Rule 23(a)(3), the courts look to whether the defendant's conduct gives rise to claims of other class members "based on the same

legal theory." *Stewart v. Rubin*, 948 F. Supp. 1077, 1088 (D.D.C. 1996), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997).

The Supreme Court has recognized that "the commonality and typicality requirements of Rule 23(a) tend to merge." *Falcon*, 457 U.S. at 157 n.13. In discrimination cases, "[t]he court must consider whether the class representatives suffered injury from a specific discriminatory [practice] in the same manner that the members of the proposed class did . . . ." *McReynolds*, 208 F.R.D. at 445. Accordingly, the typicality prong of Rule 23(a) is met when plaintiffs "[make] a convincing showing of a common policy of discriminatory treatment . . . ." *Id*. Thus plaintiffs may satisfy the typicality requirement despite differences in individual factual circumstances and in damages. *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. at 28 (typicality present despite differences in damages); *Hartman v. Duffy*, 158 F.R.D. 525, 537 (D.D.C. 1994) (commonality and typicality satisfied in sexual discrimination action despite factual differences among the plaintiffs).

Here, the named Plaintiffs, like the class members, are individuals with disabilities who are able to receive, and wish to receive, services in the community. Their claims typify the claims of the class and they seek the same relief as all class members. The named Plaintiffs' factual characteristics are consistent with the proposed class:

a. Defendant has determined that each of the named Plaintiffs is disabled. Compl. ¶¶ 21, 55.

b. The named Plaintiffs currently reside in a nursing facility where they receive care that is funded by the District. Compl. ¶¶ 22, 26, 31, 36, 40, 45, 51.

c. Each of the named Plaintiffs could live in the community with the necessary services and supports, which the Defendant could provide. Compl. ¶ 23; Ex. A ¶¶ 30, 44, 53, 67, 87, 89.

d. Each of the named Plaintiffs would rather live in the community instead of in a nursing facility. Compl. ¶ 75; Ex. A ¶¶ 28, 42, 43, 51, 54, 85, 97; Ex. B ¶ 10; Ex. C ¶¶ 4, 18; Ex. D ¶¶ 8, 14; Ex. E ¶ 10; Ex. F ¶ 10; Ex. G ¶ 9.

Similarly, the named Plaintiffs' legal claims are typical of the class's claims because they arise from the same course of systemic, discriminatory conduct by Defendant resulting in unnecessary segregation of Plaintiffs and class members in nursing facilities. Regardless of any individual differences among class members, each has experienced the same institutionalization and sustained the same type of injuries resulting from the same course of conduct by Defendant.

Accordingly, the typicality requirement of Rule 23 is satisfied.

4. Adequacy of Representation: The named Plaintiffs and their attorneys will fairly and adequately protect the interests of the class.

The fourth requirement of Rule 23(a) is that the representative parties must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To satisfy the requirements of Rule 23(a)(4), the interests of the class representatives must not be antagonistic to those of the remaining class members, and the representative parties, through their attorneys, must be prepared to vigorously prosecute the action. *Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 177 (D.D.C. 1999) (citations omitted); *Meijer*, 246 F.R.D. at 302. Consequently, the adequacy of representation requirement focuses on "concerns about the competency of class counsel and conflicts of interest." *Falcon*, 457 U.S. at 157 n.13.

The class representatives do not have any interests that are antagonistic to the interests of the class. As discussed above, the individual, named Plaintiff's circumstances and their claims and injuries are typical of those of the proposed class members. None of the named Plaintiffs seek personal monetary damages or other individualized relief to the exclusion of other class members. To the contrary, the focus of this litigation is the grant of broad injunctive relief that will benefit the entire class. No conflicts exist that could hinder the named Plaintiffs' ability to

vigorously pursue the litigation on behalf of the class. And the named Plaintiffs are prepared to fairly and adequately protect the interests of the class. Ex. B ¶ 12; Ex. C ¶ 20; Ex. D ¶ 18; Ex. E ¶ 12; Ex. F ¶ 12; Ex. G ¶ 12.

Similarly, named Plaintiffs' counsel are prepared to vigorously pursue the class's interests.[3] No conflicts exist between counsel, named Plaintiffs, and the proposed class members that would compromise their ability to represent the class. Plaintiffs' attorneys are counsel with deep experience in many public interest cases and in the litigation of complex federal actions, including class actions involving disability and health programs. They are highly qualified, and their resources are more than adequate to represent the class completely:

- AARP Foundation Litigation is an advocate in courts nationwide for the rights of people 50 and older addressing diverse legal issues. Kelly Bagby specializes in civil rights, disability rights, special education, health law, and other public interest areas, with an emphasis on litigation. Bagby Decl. ¶ 3 (attached as Exhibit J). She is presently class counsel in *Darling v. Douglas* (formerly *Cota v. Maxwell-Jolly* and *Brantley v. Maxwell-Jolly)*, No. 09-CV-0148 (N.D. Cal.), a case that resulted in a settlement agreement to protect Medi-Cal beneficiaries from unnecessary institutionalization in nursing facilities because of State cuts to their community-based services. Ex. J ¶ 3. Bruce Vignery has served as class counsel for nursing facility residents in cases that present legal issues similar to those presented in this case, including *Lee v. Dudek*, No. 08-CV-0026 (N.D. Fla.) and *Chambers v. City and Cnty. of San Francisco*, No. 06-CV-06346 (N.D. Cal.). Ex. J ¶ 5.

[3] As noted above, Defendant has agreed not to challenge the adequacy of class counsel.

- University Legal Services ("ULS") is the designated protection and advocacy program for the District of Columbia that represents people with disabilities to promote their civil rights and ensure their access to quality services and supports in the most integrated settings appropriate to their needs. Rifkin Decl. ¶¶ 1-2 (attached as Exhibit K). Marjorie Rifkin is a Managing Attorney at ULS, where she has worked since 1999. *Id.* ¶ 1. During her time at ULS and prior to coming to ULS, Ms. Rifkin has litigated many complex civil rights cases, most of which were class actions, including *Young v. District of Columbia*, Case No. 01-CV-0650 (D.D.C.), a class action resulting in a consent order that addresses the failure of the District of Columbia's Housing Authority to have sufficient numbers of accessible housing units. Ex. K ¶ 6. Jennifer Lav is a Managing Attorney at ULS who has worked on many civil rights cases in federal court, both while at ULS and while with the Alabama Disability Advocacy Program. *Id*. ¶¶ 13, 19. Victoria Thomas has extensive disability experience and a great deal of legal experience. *Id*. ¶ 25.
- Arent Fox LLP is a law firm headquartered in Washington, D.C., and has served as class counsel in many, large discrimination class action cases. Wahl Decl. ¶ 2 (attached as Exhibit L). Barbara Wahl chairs the Commercial Litigation practice group at Arent Fox, where she has been a partner since 1987. *Id*. ¶ 3. She has served as class counsel in many class action cases, including *Love v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009). Ex. L ¶ 4. Brian D. Schneider is an associate at Arent Fox with significant experience in complex civil litigation before state and federal courts. *Id.* ¶ 5. He focuses on cases affecting the health care industry. *Id*.

Plaintiffs thus are ready to pursue the class's claims, and their counsel are prepared to support

that objective. The adequacy of representation requirement is plainly met.

B. Rule 23(b)(2) is Satisfied Because Defendant Acted on Grounds Generally Applicable to the Class, Making Final Injunctive and Declaratory Relief Appropriate.

Plaintiffs easily satisfy Rule 23(b)(2)'s requirement that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final and injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is satisfied when "(1) the defendant's action or refusal to act [is] generally applicable to the class; and (2) plaintiffs must seek final injunctive relief or corresponding declaratory relief on behalf of the class." *Disability Rights Council*, 239 F.R.D. at 28 (citing 7A Wright, Miller & Kane § 1775; *Bynum*, 214 F.R.D. at 48) (internal quotations omitted). Civil rights cases against parties charged with class-based discrimination are "prime examples" of actions under Rule 23(b)(2). *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997); *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) (Rule 23(b)(2) certification is "particularly well-suited for civil rights actions where 'a party is charged with discriminating unlawfully against a class.'") (quoting Fed. R. Civ. P. 23(b)(2) Advisory Comm. Notes).

This case fits precisely within Rule 23(b)(2) because Defendant's policies and practices affect all members of the class, Plaintiffs seek only declaratory and injunctive relief, and remediation of Defendant's violations of federal law will apply to all class members.

C. The Court Should Designate Plaintiffs' Counsel as Class Counsel.

Upon certifying the class, the Court also must appoint class counsel. Fed. R. Civ. P. 23(c)(1)(B), (g). The Federal Rules list four factors the court must consider in appointing class counsel:

i. the work counsel has done in identifying or investigating potential claims in the action;

ii. counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

iii. counsel's knowledge of the applicable law; and

iv. the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv). Pursuant to these four factors, Plaintiffs' counsel qualify for appointment in this case. As demonstrated through the course of this litigation to date, Plaintiffs' counsel have committed extensive time and resources to investigating and analyzing Plaintiffs' claims. They are experienced in class actions and complex litigation, and they have extensive knowledge of discrimination and benefits law. *See* Ex. J; Ex. K; Ex. L. The Court thus should appoint Plaintiffs' counsel as class counsel in its class certification order.

III. CONCLUSION

Hundreds, if not thousands, of disabled individuals, including the named Plaintiffs and those in the proposed class, have languished in nursing facilities due to the District's discriminatory practices. Plaintiffs are anxious to move forward, together. Plaintiffs thus respectfully request that this Court:

a. Certify this case as a Rule 23(b)(2) class action; and

b. Appoint Plaintiffs' counsel to serve as class counsel.

An oral hearing is requested.

Dated: May 15, 2012

Respectfully submitted,

/s/ Brian D. Schneider

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