IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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FRANKLIN BENJAMIN, et al., on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	
-against-	:	No. 09-cv-01182 (Jones, U.S.D.J.)
DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,	:	(Am. Complaint Filed 7/14/09)
Defendants,	:	
-and-	:	
CRAIG SPRINGSTEAD, by and through his father and guardian, BERTIN SPRINGSTEAD, et al.,	:	
Proposed Intervenors.	:	

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PROPOSED INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INTERVENTION

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Proposed Intervenors, Craig Springstead, by and through his father and guardian, Bertin Springstead, Maria Meo, by and through her mother and guardian, Grace Meo, Daniel Bastek, by and through his father and guardian, John Bastek, Michael Storm, by and through his guardian, Polly Spare, Beth Ann Lambo, by and through her father and guardian, Joseph Lambo, Richard Clarke, by and through his father and guardian, Leonard Clarke, Richard Kohler, by and through his sister and guardian, Sara Fuller, Maria Kashatus, by and through her father and guardian, Thomas Kashatus, and Wilson Sheppard, by and through his brother and next friend, Alfred Sheppard (collectively, the "Springstead Intervenors"), respectfully submit this memorandum of law in support of their motion, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to intervene in the above-captioned action.

PRELIMINARY STATEMENT AND STATEMENT OF FACTS

This case is part of a larger debate taking place in courts (and, more appropriately, legislatures) all across the country regarding the care of the developmentally disabled. The issues raised are complex, emotional, and – too often – divisive. On one side here are the Plaintiffs and their representatives, who want all persons with developmental disabilities to be placed into community care, with immediacy and without exception. On the other side are the state administrators who develop policies to fulfill great needs with scant resources, all

while trying to pacify multiple constituencies. Caught in the crossfire are those – such as the proposed intervenors – who believe that each individual is unique, and that a continuum of care – both community and institutional – should be available.

To be clear at the outset, the Springstead Intervenors[1] – residents of institutional facilities – wish to remain where they are, and seek to intervene to protect that right. At the same time, however, they respect the right of the named Plaintiffs to choose their own destiny. The Springstead Intervenors are not advocating exclusively institutional care, or exclusively community care, but rather (and only) the best care – as chosen by the individuals, their guardians, and their medical professionals.

In this action, Plaintiffs claim that the manner in which the Commonwealth of Pennsylvania provides community-based services to the developmentally disabled violates the American with Disabilities Act, the Rehabilitation Act, and runs afoul of the Supreme Court's decision in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), which recognized that people with developmental disabilities have the right to choose to live in the "most integrated setting" appropriate to their particular condition. There is more to this case, however, than the named

[1] Specifically, the Springstead Intervenors are all residents of Intermediate Care Facilities for the Mentally Retarded ("ICF/MR"), who do not wish to be forced into community care. A copy of the Springstead Intervenors' proposed Response to the Complaint, as required by Fed. R. Civ. P. 24(c), which provides more details concerning the proposed intervenors, is submitted herewith.

Plaintiffs' desire to live where they choose. Plaintiffs also seek to require the Commonwealth of Pennsylvania to provide community care to a class consisting of all current and future residents of state-run Intermediate Care Facilities for the Mentally Retarded ("ICF/MR"), who "could reside in the community with appropriate services and supports," and who "do not or would not oppose community placement." (Am. Compl. ¶ 15.) Elsewhere in the Amended Complaint, Plaintiffs make clear their view that this class includes all of the "approximately 1,272 individuals who reside in Pennsylvania's five state-operated ICFs/MR." (Id. ¶ 16.)

Plaintiffs obtained certification of this class without asking how many of these 1,272 individuals in fact desire community care. Sadly, this neglect is strategic; it is in keeping with Plaintiffs' belief – as explicitly stated in the Amended Complaint – that community care is the only appropriate option for the entire developmentally disabled population. (See Am. Compl. ¶ 65 (stating that all ICF/MR residents should and "could live in more integrated community settings"); id. ¶ 66 ("State-operated ICFs/MR are not the most integrated settings appropriate to the needs of any individual resident of those facilities.") (emphasis added).) In other words, Plaintiffs are asking this Court (via ruling) or the Commonwealth Defendants (via settlement) to assume that community care is good for all, to assume that all are somehow required by Olmstead or the ADA to choose

community care (and have in fact done so), and to shift the burden onto individuals like the Intervenors to come forward and explain why they oppose the choice that Plaintiffs have made for them. The law, however, is quite the contrary. See Olmstead, 527 U.S. at 602 ("Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it."); 28 C.F.R. § 35.130(e)(1) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation … which such individual chooses not to accept."); Baldridge ex. rel. Stockley v. Clinton, 139 F.R.D. 119, 127 (E.D. Ark. 1991) ("The law is settled: the constitution does not require that habilitation of mentally retarded persons be provided in a community setting.").

Although this action has just begun, and the case is not scheduled to go to trial until nearly a year from now, it is already clear that the Plaintiffs – the supposed and self-appointed class representatives – will litigate the case against the Intervenors' interests, but in their name. Whether it is because Plaintiffs believe that community care is good for all (see Am. Compl. ¶¶ 65-66) or because they believe that the Intervenors do not know any better (see id. ¶ 70), the Plaintiffs have already decided to pursue a community-only litigation strategy.

By failing to oppose class certification, the Defendants have likewise failed to respect the non-homogenous nature of the putative class. Accordingly, the Springstead Intervenors move to intervene in this lawsuit in order to protect their

own interests. They take no pleasure in delaying or complicating the named Plaintiffs' efforts to live where they want; they simply have the well-grounded fear that allowing this lawsuit to proceed without their participation will result in their losing that same choice.

PROCEDURAL HISTORY

Plaintiffs commenced this action by Summons and Complaint dated June 22, 2009 (Dkt. No. 1), as amended on July 14, 2009. (Dkt. No. 9.) On September 1, 2009, the Plaintiffs filed a motion for class certification, which was unopposed by the Defendants. (Dkt. Nos. 15, 16.) The next day, this Court granted that motion. (Dkt. No. 17.) On September 24, 2009, the Defendants filed a motion to dismiss the Amended Complaint (Dkt. Nos. 20, 21), which has been fully briefed and is currently pending. This motion followed.

STATEMENT OF QUESTIONS INVOLVED

Whether the Springstead Intervenors are entitled to intervene in this matter pursuant to Rule 24 of the Federal Rules of Civil Procedure, where the Intervenors' application is timely, where they have legally protectable interests that might be impaired by the resolution of this lawsuit without their involvement, and where their interests are not adequately represented by any party to the litigation.

ARGUMENT

I. THE SPRINGSTEAD INTERVENORS FULFILL THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT

To intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2), "the prospective intervenor must establish that: (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." In re Cmty. Bank of N. Va., 418 F.3d 277, 314 (3d Cir. 2005) (citation omitted); see also Kleissler v. U.S. Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998). "Rule 24(a) is to be liberally construed in favor of intervention," and any party who meets these criteria "must" be permitted to intervene. NLRB v. Frazier, 144 F.R.D. 650, 655 (D.N.J. 1992) (citations omitted); Fed. R. Civ. P. 24(a)(2); see also Amerimar Cherry Hill Assocs., L.P. v. U.S. Fidelity & Guar. Co., No. 90-3354, 1991 WL 137153, at *4 (E.D. Pa. July 22, 1991) ("Rule 24(a)(2) restricts the district court's discretion by providing that an applicant shall be permitted to intervene if he or she satisfies the requirements of the Rule.") (citing Harris v. Pernsley, 820 F.2d 592 (3d Cir. 1987)). As set out below, the Springstead Intervenors easily satisfy each of these elements.

A. The Springstead Intervenors' Application Is Timely.

The current application is timely by any measure under Rule 24(a). In considering whether an application is timely, the factors the court considers are: "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." Cmty. Bank, 418 F.3d at 314 (citation omitted); see also Hyland v. Harrison, No. Civ.A. 05-162-JJF, 2006 WL 288247, at *4 (D. Del. Feb. 7, 2006) (citation omitted). Significantly, the Third Circuit has noted that "[s]ince in situations in which intervention is of right the would-be intervenor may be seriously harmed if he is not permitted to intervene, courts should be reluctant to dismiss a request for intervention as untimely." Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 369 (3d Cir. 1995) (citing 7C Wright, Miller & Kane, Federal Practice & Procedure §1916 at 424 (1986)).

Here, Plaintiffs filed their amended complaint on July 14, 2009, the Defendants moved to dismiss the complaint on September 24, 2009, and trial is scheduled to occur in October 2010. At this early point in the proceeding, where the Defendants have yet to file a responsive pleading, no discovery has taken place, and the Court has yet to rule on the Defendants' Motion to Dismiss, neither Plaintiffs nor Defendants can plausibly argue that granting the instant application for intervention will cause any prejudice whatsoever. See, e.g., Thompson v.

Horsham Twp., No. 07-5255, 2008 WL 2389258, at *2 (E.D. Pa. June 10, 2008) (motion to intervene filed more than two months after motion to dismiss had "caused no delay and no prejudice to the parties," was filed at an "early stage of the proceedings," and was timely); Mountain Top, 72 F.3d at 370 ("[T]he stage of the proceeding is inherently tied to the question of the prejudice the delay in intervention may cause to the parties already involved.") (citation omitted). The Springstead Intervenors have filed their motion promptly and the motion is timely under Rule 24(a).

B. The Springstead Intervenors' Right to Appropriate Care is Implicated by the Present Action.

The Springstead Intervenors have a concrete, protectable interest in their own care. More generally, they also have an interest in the continued availability of institutional care. These interests are both more than sufficient to meet Rule 24's interest prong. With regard to the "interest" requirement for intervention, the Third Circuit has established that:

> [T]he polestar for evaluating a claim for intervention is always whether the proposed intervenors' interest is direct or remote. Due regard for efficient conduct of the litigation requires that intervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought.

Kleissler, 157 F.3d at 972.

Intervenors are all residents of ICFs/MR who do not wish to be forced into community care. In this case, the Plaintiffs are attempting to redefine (or, more precisely, reduce) the care options available to the Intervenors in furtherance of the belief that **all** ICF/MR residents should and "could live in more integrated community settings." (Am. Compl. ¶ 65; see id. ¶ 66 ("State-operated ICFs/MR are not the most integrated settings appropriate to the needs of any individual resident of those facilities.") (emphasis added).) More insultingly, the Plaintiffs disparage institutional care as "unnecessary," and suggest that those who oppose their ideology just do not know any better. (See Am. Compl. ¶ 70 (stating that "residents . . . or their families who might currently be opposed to discharge to the community may not be familiar with the types of community services and supports that could be provided").)

While the Intervenors support the named Plaintiffs' right to choose community care for themselves, the Springstead Intervenors no doubt have a legally protectable interest in their own care, as well as an interest in retaining a meaningful right to choose institutional options. The Intervenors also have an interest in opposing Plaintiffs' claims that ICFs/MR "are not the most integrated settings appropriate to the needs of any individual resident of those facilities." (Am. Compl. ¶ 66 (emphasis added).) See Prudential Prop. & Cas. Inc. Co. v. Leach, No. 03-6352, 2004 WL 1243763, at *1 (E.D. Pa. Jun. 7, 2004) ("an interest

in the merits of the pending claims constitutes sufficient grounds to intervene as of right"). Indeed, the Supreme Court's decision in Olmstead, which is the genesis of Plaintiffs' claims, expressly rejected Plaintiffs' one-size-fits-all mentality, and recognized the need to provide an array of care options:

> Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities.

527 U.S. at 597. The Olmstead Court also acknowledged the existence of the specific interest raised by the Springstead Intervenors in this litigation – the right to choose whether community care or institutional care is appropriate. See id. at 602 ("Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it.").

Moreover, contrary to the impression that the Plaintiffs' advocacy groups try to foster, neither Olmstead nor the ADA requires individuals to "choose"[2] community-based care. See, e.g., 28 C.F.R. § 35.130(e)(1) ("Nothing in this part

[2] As will become clearer as this case proceeds, there are likely to be significant factual issues specific to individual class members regarding how their "desire" to move into the community was expressed. As the Amended Complaint makes clear, often the expression of preferences or needs by a developmentally disabled individual takes the form of some non-verbal cue. (See, e.g. Am. Compl. ¶ 22.) While this is certainly not to suggest that named Plaintiffs and others do not, in fact, wish to choose community care, it does raise another reason not to take at face value the parties' attempt to portray ICF/MR residents as a uniform, homogeneous class.

shall be construed to require an individual with a disability to accept an accommodation … which such individual chooses not to accept."); see also Baldridge, 139 F.R.D. at 127 ("The law is settled: the constitution does not require that habilitation of mentally retarded persons be provided in a community setting.").

It is the interest of choice – the right of the individual and his or her guardian (not the Plaintiffs, not the Commonwealth) to choose the best care option in light of his or her own personal circumstances – that the Springstead Intervenors seek to protect by intervening. Because Plaintiffs' action threatens that choice, the Springstead Intervenors' interests are necessarily implicated. The fact that Plaintiffs seek Rule 23(b)(2) relief – from which there is no ability to opt-out – converts the present case from perhaps a policy disagreement into a dispute with concrete consequences. As commentators have noted, the interest requirement is:

> one of inclusion rather than exclusion. If there is a direct substantial legally protectable interest in the proceedings, it is clear that this requirement of the rule is satisfied . . . . It surely is sufficient also if the judgment will have a binding effect on the would-be intervenor.

7C Wright, Miller & Kane, Federal Practice & Procedure, Civ. 3d § 1908 (2009). Viewed under the applicable standard, it is clear that the Springstead Intervenors have an interest in this action.

C. The Springstead Intervenors' Interests Are At Risk in the Present Action

It is also beyond cavil that the Springstead Intervenors' interests in their own care and in preserving choice may be impaired by this litigation. Quite simply, the Plaintiffs and Defendants – by ignoring commonality problems and agreeing to proceed on a class basis – will no doubt conduct this litigation in the manner which best serves each of their policy interests. There is nothing wrong with that per se; that is the nature of litigation. As a practical matter, however, individuals such as the Intervenors will be caught in the middle, and those policy decisions will be just as binding on them, despite their non-participation. See, e.g., Penn. Truck Lines, Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., No. 88-6968, 1990 WL 59305, at *6 (E.D. Pa. May 4, 1990) (finding impairment element met and noting that "[a] showing that a district court judgment might 'practically disadvantage' the applicant suffices to demonstrate such a tangible threat") (citations omitted). Because neither the Plaintiffs nor the Commonwealth have seen fit to determine at the outset who "would not oppose" being forced out of ICFs/MR, those who meet the objective criteria of the class definition (such as the Intervenors) are going to be bound by any potential judgment or settlement in this case. Specifically, the Amended Complaint asks this Court to enter "appropriate declaratory relief and injunctive relief" on behalf of a class of persons who:

> (1) currently or in the future will reside in one of Pennsylvania's state-operated intermediate care facilities for persons with mental retardation; (2) could reside in the community with appropriate services and supports; and (3) do not or would not oppose community placement.

(Class Certification Order (Dkt. No. 17).)

The "do not or would not oppose" limitation – as a practical matter – does not alleviate the threat of harm. The Plaintiffs seek "appropriate" injunctive relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, "which do[es] not provide the right to opt out." In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 763 (3d Cir. 1989). Neither party, however, specifies what exactly is the "appropriate" relief for the class (all of whom have unique circumstances, varied physical and medical conditions, and different needs). Especially where, as here, the class is defined in part by the subjective (and as of yet unexpressed) preferences of the class members, there is no way for the Springstead Intervenors (who are class members by the objective standards) to protect their own interests except to intervene. See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1310 (1976) (explaining that public law litigation has brought about an increased capacity for affecting the rights of those not party to the suit, and noting that at the settlement or decree stage "if the decree is to be quasi[-]negotiated and party participation is to

be relied upon to ensure its viability, representation at the bargaining table assumes very great importance”).

Moreover, this backwards procedure (i.e., seeking relief before the class is precisely defined) is a conscious, strategic choice by Plaintiffs to force policy changes without the inconvenient matter of determining how many favor that policy. Indeed, any ambiguity regarding the Plaintiffs’ intentions is clarified where, with regard to the numerosity of the proposed class, they simply cite to the fact that “there are approximately 1,272 individuals who reside in Pennsylvania’s five state-operated ICFs/MR.” (Am. Compl. ¶ 16; see also Pl. Opp. Br. at 10 n.6 (“[T]he Plaintiffs in this case are representing a now-certified class of over 1,200 individuals.”).) In other words, Plaintiffs take the position – a position directly contrary to the Springstead Intervenors’ interests – that all persons in ICFs/MR should be in community care. Plaintiffs’ position is further clarified by the Amended Complaint, which provides that “[s]tate-operated ICFs/MR are not the most integrated settings appropriate to the needs of any individual resident of those facilities.” (Id. ¶ 66 (emphasis added).)

The outcome of this litigation could have tragic effects on those who rely upon institutional care, and the Intervenors will not sit idly by while their so-called “advocates” attempt to strike the fatal blow to ICF/MR care in this Commonwealth. Notably, this problem was foreseen when Olmstead was handed

down; Justice Kennedy's concurring opinion was prescient in recognizing that ideological goals such as those of Plaintiffs' counsel may have disastrous effects if applied in a Procrustean fashion to the entire developmentally disabled community:

> It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act . . . to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision.

Olmstead, 527 U.S. at 610 (Kennedy, J., concurring in judgment).

Indeed, other courts addressing almost precisely the same issues have recognized the risks inherent in ignoring the stark differences among the class members until the end of the litigation. For example, in Ligas v. Maram, No. 1:05-cv-04331 (N.D. Ill. March 7, 2006)[3] the district court certified a class very similar to this one, consisting of:

> [a]ll persons in Illinois with disabilities who:
>
> (1) have mental retardation and/or other developmental disabilities and who qualify for long-term care services;
>
> (2) with appropriate supports and services, could live in the community and who would not oppose community placement; and
>
> (3) either are institutionalized in private [Intermediate Care Facilities for the Developmentally Disabled] with nine or more residents or are living in a home-based

[3] A copy of the class certification order in Ligas is attached hereto as Exhibit A.

> setting and are at risk for institutionalization because of their need for services.

Id. After four years of litigation, the district court held a fairness hearing in connection with a proposed consent decree jointly supported by the plaintiffs and state defendants. As explained by the district court:

> Approximately 240 people attended the fairness hearing, and thirty-four individual class members or their legal guardians spoke at the hearing. Many more objectors were represented at the hearing by counsel. A common theme among the objectors was the concern that many developmentally disabled individuals, who are within the class definition, would be adversely affected by provisions of the Proposed Consent Decree even though the individual neither met the Olmstead criteria nor desired placement in a community-based setting.

Ligas v. Maram, No. 1:05-cv-04331 (N.D. Ill. July 7, 2009) (class decertification order).[4] Ultimately, the district court concluded that, as a practical matter, "the class definition fail[ed] to restrict the class to . . . [those who] desire[] community placement" and that "sufficient commonality does not exist among the highly specialized needs and desires of the class members and their legal guardians." Id. at 2. It is those "highly specialized" needs that may be impaired by the overly broad and rigid approach advocated by Plaintiffs. Allowing intervention now – as opposed to collateral attack later – will permit the Intervenors to protect their rights in an expeditious fashion without needlessly delaying or complicating the

[4] A copy of the class decertification order in Ligas is attached hereto as Exhibit B.

litigation. See Kleissler, 157 F.3d at 970 (noting Third Circuit's "policy preference which, as a matter of judicial economy, favors intervention over subsequent collateral attacks") (citation omitted).

D. The Springstead Intervenors' Rights Are Not Adequately Represented by Any Party In the Existing Litigation.

Finally, it is beyond dispute that neither party is adequately representing the Springstead Intervenors' interests. Under the fourth prong of the test for intervention as of right, a party seeking to intervene must demonstrate that "the existing parties cannot adequately protect the intervener's interest." Thompson, 2008 WL 2389258, at *3. This element is satisfied "if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Mountain Top, 72 F.3d at 368 (quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972)). A prospective intervenor can show inadequacy of representation where, among other things, "the interest of the applicant so diverges from those of the representative party that the representative party cannot devote proper attention to the applicant's interest." United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1186 n.15 (3d Cir. 1994) (citation omitted); Doe v. Allentown Sch. Dist., No. 06-cv-1926, 2009 WL 2058726, at *4 (E.D. Pa. July 10, 2009).

Here, not only do the Springstead Intervenors' interests diverge from those of Plaintiffs, but Plaintiffs are, in fact, openly antagonistic of the Intervenors'

wishes. Quite simply, the Springstead Intervenors do not desire the relief that is at the core of Plaintiffs' suit; rather, they seek to protect their rights to appropriate treatment, which, in many instances, will be in an institutional setting. That view is anathema to the Plaintiffs. The belief that each person with developmental disabilities should be treated as an individual is not a point that the Springstead Intervenors should have to argue with the advocate that claims to speak for them. In any event, the record to date makes clear that the Springstead Intervenors will need to speak for themselves.

Nor do the Defendants adequately represent the Springstead Intervenors' interests. As noted by the Kleissler court, "when an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden [of showing inadequate representation] is comparatively light." Kleissler, 157 F.3d at 972 (citation omitted). Indeed, governmental entities often have "numerous complex and conflicting interests" that cause personal interests to "become lost in the thicket of sometimes inconsistent governmental policies." Id. at 973-74; see also Thompson, 2008 WL 2389258, at *3 (town had "broader and different interests concerning the matters raised in [the] lawsuit than the [intervenors]"). Here, Defendants acquiesce in Plaintiffs' assertion that community placement is appropriate for all persons residing in the state-operated ICFs/MR. (Def. Mot. to

Dismiss at 6 ("defendants have the objective of community placement as soon as fiscally feasible").) The Springstead Intervenors disagree, and reject the Defendants' apparent contention that it is only a matter of time and money at issue in this case. See Olmstead, 527 U.S. at 605 (recognizing that the "most integrated setting" possible "may be in an institution"). More troubling, the Defendants decided not to oppose Plaintiffs' class certification motion, ignoring the fact that the class definition impermissibly relies upon a subjective, individualized assessment of whether the potential class member opposes community placement. Phila. Recycling & Transfer Station, Inc. v. City of Phila., No. 95-4597, 1995 WL 517644, at *2 (E.D. Pa. Aug. 29, 1995) (granting intervention, and finding that municipality did not adequately represent intervenor's interests where it might "reach some accommodation with Plaintiff that may adversely affect" the interests of the intervenor). Defendants' view of the "public welfare" squarely conflicts with the Springstead Intervenors' personal interests, and Defendants thus do not adequately represent the Springstead Intervenors.

II. IN THE ALTERNATIVE, THE SPRINGSTEAD INTERVENORS SHOULD BE ALLOWED TO INTERVENE BY PERMISSION

Alternatively, should this Court deny intervention as of right, the Springstead Intervenors respectfully request that this Court allow them to intervene permissively, pursuant to Fed. R. Civ. P. 24(b). "Permissive intervention is available upon timely application 'when an applicant's claim or defense and the

main action have a question of law or fact in common.'" Brody by and Through Sugzdinis v. Spang, 957 F.2d 1108, 1115 (3d Cir. 1992) (quoting Fed. R. Civ. P. 24(b)). Whether to grant such permission is entirely within the district court's discretion. Cont'l Cas. Co. v. SSM Group, Inc., No. 94-7789, 1995 WL 422780, at *5 (E.D. Pa. July 13, 1995) (citation omitted).

In deciding whether to grant permissive intervention, the potential commonality of the intervenors' "claim or defense" with the pending action have been broadly defined. See id. at *5 (citation omitted). That requirement is easily met here. Here, the Intervenors have an interest in many of the questions of law or fact arising from the parties' claims and defenses, including, but not limited to: (1) whether class action treatment is appropriate; (2) whether community care is appropriate for all class members; and (3) whether community care is, in fact, desired by all class members.

Finally, the court may also analyze whether allowing permissive intervention will unduly delay the litigation. See Cont'l Cas. Co., 1995 WL 422780, at *6. This action is not scheduled to go to trial until October 2010, and no discovery has taken place. Indeed, Defendants have not even filed a responsive pleading. Accordingly, the inclusion of the Intervenors would cause no delay or undue hardship. See Youtie v. Macy's Retail Holding, Inc., No. 07-3182, 2009 WL 2835156, at *6 (E.D. Pa. Aug. 31, 2009).

CONCLUSION

For the foregoing reasons, the Springstead Intervenors respectfully request that the Court grant their motion for intervention pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. In the alternative, the Springstead Intervenors respectfully request that the Court grant permission to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

Dated: Philadelphia, Pennsylvania
November 10, 2009

VAIRA & RILEY, P.C.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)(2)

I certify under penalty of perjury that Proposed Intervenors' Memorandum of Law in Support of Motion for Intervention complies with Local Rule 7.8(b)(2) because it contains 4,803 words (excluding the cover page, Table of Contents, Table of Authorities, and signature block) according to the "word count" feature of the processing system used to prepare the Memorandum of Law (Microsoft Word 2003).

/s/ John E. Riley
John E. Riley

EXHIBIT A

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

STANLEY LIGAS, by his sister and next friend, Gina Foster, et al., on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 05 C 4331
BARRY S. MARAM, in his official capacity as Director of the Illinois Department of Healthcare and Family Services, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER REGARDING CLASS CERTIFICATION

JAMES F. HOLDERMAN, District Judge:

Stanley Ligas and eight other individually named plaintiffs ("named plaintiffs") filed a renewed motion for class certification under Federal Rule of Civil Procedure 23(b)(2) against Illinois officials ("defendants")) who administer state programs that provide long-term care services for people with developmental disabilities.[1] (Dkt. No. 61.) For the reasons stated below, the renewed class certification motion under Rule 23(b)(2) is granted.

BACKGROUND

The named plaintiffs filed a complaint individually and on behalf of similarly situated individuals alleging that the defendants' failure to provide the plaintiffs with the option of long-term care services in the most integrated setting appropriate for their needs violates Title II of

[1]Plaintiffs' first motion for class certification, filed on August 8, 2005, was dismissed as moot, after parties agreed to have the court first chose to address three petitions to intervene.

Americans with Disabilities Act, *see* 42 U.S.C. § 12111 et seq., Section 504 of the Rehabilitation Act of 1973, *see* 29 U.S.C. § 794, and Title XIX of the Social Security Act, *see* 42 U.S.C. § 1396 et seq. The plaintiffs seek as injunctive relief for the defendants to give eligible developmentally disabled individuals the option of being placed in community settings with appropriate services and support rather than in institutions, such as Medicaid-certified long-term care placements serving those with developmental disabilities called intermediate care facilities ("ICF-DD"). The plaintiffs' lawsuit relies heavily on *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999), which held that developmentally disabled individuals should be placed in community settings rather than institutions when a state's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account available state resources and the needs of others with disabilities. The Supreme Court explained that a state may rely on the reasonable assessments of its own professionals in determining whether an individual meets the essential eligibility requirements for community placement. *Id.* at 602.

The named plaintiffs allege in the complaint that they satisfy Illinois's eligibility requirements for community placement: (1) they have been found eligible for Medicaid services, *see* 89 Ill. Admin. Code § 140.642(b); (2) they either qualify for or have been recommended for community placement, and six of the nine plaintiffs specifically allege that a state assigned pre-admission screening and resident review agent ("PAS agent") determined that they are capable of living in a community-based setting, *see* 59 Ill. Admin. Code § 120.140; (3) and they or their guardians have requested to be placed in community settings or Community-Integrated Living

Arrangements ("CILA"). The crux of the named plaintiffs' allegations is that all the named plaintiffs could meet, and most do meet, Illinois's eligibility requirements for living in a community setting, yet the state has refused to place the plaintiffs in such a setting.

The proposed class that the named plaintiffs additionally seek to certify would consist of: "All persons in Illinois with disabilities who (1) have mental retardation and/or other developmental disabilities and who qualify for long-term care services; (2) with appropriate supports and services, could live in the community and who would not oppose community placement; and (3) either are institutionalized in private ICF-DDs with nine or more residents or are living in a home-based setting and are at risk for institutionalization because of their need for services." (Pl. Renewed Mot. for Class Cert. at 1.)

LEGAL STANDARDS

As prerequisites for certification, the potential class must satisfy the following criteria: (1) numerosity; (2) commonality of facts and law; (3) typicality between the class claims and those of the named parties; and (4) adequacy of the representation by the named parties and class counsel. Fed. R. Civ. P. 23(a). Failure of the potential class to satisfy any one of these prerequisite elements precludes class certification. *Retired Chicago Police Assoc. v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993); *Rahim v. Sheahan*, 2001 WL 1263493, *9 (N.D. Ill. Oct. 19, 2001). In addition, because the plaintiffs are seeking to certify a class under Rule 23(b)(2), they also must establish that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). In deciding whether the party who is seeking class certification has met its burden of

demonstrating that certification is appropriate, the court should make whatever factual and legal inquiries are necessary under Rule 23. *Szabo v. Bridgeport Machines, Inc*., 249 F.3d 672, 675 (7th Cir. 2001). The decision to certify a class does not depend on the strengths or weaknesses of the asserted claims, but instead on whether the potential class satisfies the requirements under Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

ANALYSIS

A. Commonality:

The defendants first challenge the potential class's ability to satisfy the commonality requirement. The defendants argue that, as a result of the broad class definition, common issues of fact and law do not predominate. According to the defendants, their alleged conduct does not apply to the entire proposed class in that "potential class members might not be entitled to all or any of the requested relief" under the defendants' interpretation of the proposed class definition. (Defs. Resp. at 8.) The defendants also argue that the broad class definition would be inclusive of factual circumstances that vary too broadly among class members individuals with too diverse of factual circumstances. To exemplify this point, the defendants note that the proposed class would include as potential class members those who live at home "and are at risk for institutionalization because of their need for services." (Pl. Renewed Mot. for Class Cert. at 1.) Defendants argue that this class definition would encompass "*all* developmentally disabled persons living at home because all such persons conceivably would be 'at risk.'" (Defs. Resp. at 9.)

To some extent, the defendants may misunderstand the class definition. In arguing against commonality, the defendants seem to overlook the limitation on the class definition that

all members "qualify for long-term care" and "could live in the community." For example, the defendants' concern that the class would encompass all developmentally disabled living at home is resolved by the class requirement that members "could live in the community." (Pl. Renewed Mot. for Class Cert. at 1.)

Whether the proposed class satisfies the commonality requirement, however, is a close question. *See Wallace v. Chicago Housing Auth.*, 224 F.R.D. 420, 423 (N.D. Ill. 2004) (courts have broad discretion in deciding whether to certify a class and should err in favor of maintaining a class action.) A defendant's standardized conduct toward proposed class members, such as a generalized policy that affects all class members in the same way, has been considered sufficient to satisfy commonality. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998); *see Gen. Tele. Co. of the SW v. Falcon*, 457 U.S. 147, 159 n.15 (1982). Where a defendant's standardized conduct is at issue, this court does not require that the putative class members all suffer the same injury, but rather the uniformity of the defendant's conduct toward the potential members and the plaintiffs' legal theory. *See Rosario v. Livaditis*, 963 F.3d 1013, 1018 (7th Cir. 1992).

In this case, the proposed class seeks to require the defendants to enact standardized policies regarding the community placement of eligible developmentally disabled individuals. The proposed class challenges the defendants' failure to provide developmentally disabled individuals with information about the option of community placement, systematically evaluate developmentally disabled individuals that qualify for long-term services to determine whether they are eligible for community placement, place those who are eligible in the community, and maintain a wait list for community placement. The fact that the named plaintiffs and some

proposed class members may have learned about the option of community placement or already have been assessed qualified for community placement by a PAS agent relates to the level of the injury suffered and not whether the defendants' conduct was sufficient standardized. *See Rosario*, 963 F.3d at 1018. The defendants have acted, or have failed to act, uniformly toward the proposed class based on their policies and lack of policies in place, and that is what the proposed class's legal claims challenge. This court determines that the proposed class is challenging the defendants' failure to enact policies regarding community placement, and in assessing this standardized conduct, common questions of law and fact predominate.

B. Typicality:

The commonality discussion also resolves most of the defendants' challenges to class certification based on the typicality requirement. *See Falcon*, 457 U.S. at 158 n.13 ("The commonality and typicality requirements of Rule 23(a) tend to merge.") Related to their argument against commonality, the defendants contend that the breadth of the class definition results in too many legal and factual differences between the named plaintiffs and the potential class members. The defendants assert that, consequently, a showing that the named plaintiffs are entitled to relief would not necessarily prove that the potential class was also so entitled. The claims of the named plaintiffs and the proposed class, however, only must share the "same essential characteristics"; factual differences may still exist. *Retired Chicago Police Ass'n*, 7 F.3d at 597 (internal citations and quotations omitted); *see Chapman v. Worldwide Asset Mgmt, LLC*, No. 04-C-7625, 2171168, *3 (N.D. Ill. Aug. 30, 2005). That is the case here. The named plaintiffs, like the potential class members, seek to have the defendants establish a *policy* of informing individuals about community placement and of evaluating those interested in the

placement, regardless of whether they each have learned about community services or have been assessed "qualified" by a PAS agent. By definition, the class would be necessarily entitled to the same relief as the named plaintiffs if the named plaintiffs were to prove their case. The class members all qualify for long-term services, "could live in the community," and desire to do so. Part of the relief sought by the class is for the defendants to systematically evaluate those qualifying for long-term care who wish to be placed in the community. At this stage in the litigation, this court may presume based on the pleadings that a PAS agent would find qualified for community services the proposed class because by definition the class members qualify for long-term services and "could live in the community." Fed. R. Civ. P. 23(c)(1)(C); *see Morse v. Bankers Life & Cas. Co and PCS, Inc.*, No. 99-C-0193, 2000 WL 246245, *4 (N.D. Ill. Feb. 24, 2000).

One issue regarding typicality remains. Whether the three named plaintiffs', two of whom—David Childers and Tiffany McFadden—have been moved to CILAs and one of whom—Alex Tyner—now lives in a six-bed ICF-DD since the filing of the complaint, various residency circumstances destroy typicality. As a result of their moves, the three plaintiffs' claims for injunctive relief to live in a more integrated setting are moot. *In re Resource Tech. Corp.*, 430 F.3d 884, 886 (7th Cir. 2005) (case is moot when no further judicial relief is possible). The plaintiffs contend that these three plaintiffs may remain class representatives because their moves in residences occurred in December 2005, after the filing of the first motion for class certification on August 8, 2005. That motion, however, was dismissed as moot. The relevant date is the filing of the pending motion for class certification on January 10, 2005, after the three plaintiffs were moved to the CILAs and the six-bed ICF-DD in December 2005. *See*

Fields v. Maram, No. 04-C-0174, 2004 WL 1879997, *9 (N.D. Ill. Aug. 17, 2004) (certification relates back to the time that the class certification motion was filed). The three plaintiffs' claims do not relate back to the filing of the motion for class certification. Because their claims became moot prior to the filing of the motion for class certification, this court determines that David Childers, Tiffany McFadden, and Alex Tyner do not have claims typical of the class and are not adequate class representatives in this litigation. *See Gates v. Towery*, 430 F.3d 429, 430 (7th Cir. 2005). The dismissing of David Childers, Tiffany McFadden, and Alex Tyner as named plaintiffs does not, however, affect class certification. Six adequate class representatives whose claims are not moot remain. *See Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999) (suitability of new class representative must be determined independently of former proposed class representative found to be inadequate); *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th 1995) (disqualification of the named plaintiff moots question whether to certify class unless lawyers for class find another representative). The proposed class satisfies the requirements of typicality (and, for that matter, adequacy, a ground not challenged by the defendants).

C. Indefiniteness:

The defendants also express concern that the proposed class is not sufficiently definite and so this court would have to engage in individual determinations to decide class membership. The individual determinations identified by the defendants are whether an individual is at risk for institutionalization because of their need for services, qualify for long-term care services, and could live in the community with appropriate support and services. As class is sufficiently definite if its membership may be determined by an objective criteria. *See Wallace*, 224 F.R.D.

at 425. The plaintiffs represent that they "do not ask this Court to make those determinations but rather enjoin defendants to do so." (Pl. Reply at 9.) In essence, the plaintiffs are willing to have the defendants make these determinations based on reasonable assessments from their own state treatment professionals in accordance with *Olmstead*, 527 U.S. 581. Because the defendants would be evaluating based on their own criteria whether a potential class member would meet the state's requirements and thus the class definition, court could order the defendants to engage in individual determinations should any relief be granted and not do so itself. *See Fields*, 2004 WL 1879997 at *7 n.8.

D. Unchallenged Rule 23 Requirements:

The defendants appropriately do not raise objections to the other requirements of Rule 23(a), numerosity and adequacy, or of Rule 23(b)(2). With regard to the numerosity requirement, plaintiffs estimate that 6000 individuals live in ICF-DDs. Although not all of these individuals could live or wish to live in the community, this court may infer based on common sense that there are enough individuals living in ICF-DDs, as well as those living at home, who qualify for long-term care, could live in the community, and want to do so as to make joinder impractical. *See Mirfasihi v. Fleet Mortgage Corp.*, No. 01-C722, 2005 WL 1950386, *12 (N.D. Ill. Aug. 11, 2005). As for adequacy, no reason has been brought to this court's attention that would make this court question the remaining representatives' and plaintiffs' attorneys' abilities to adequately represent the class. Finally, the proposed class fits the definition for certification under Rule 23(b)(2), in that the defendants allegedly have acted or refused to act on grounds generally applicable to the class and appropriate for injunctive relief. Fed. R. Civ. P. 23(b)(2).

CONCLUSION

Accordingly, the plaintiffs' renewed motion for class certification under Federal Rule of Civil Procedure 23(b)(2) for injunctive relief (Dkt. No. 61) is granted. This court certifies as class representatives Stanley Ligas, by his sister and next friend, Gina Foster; Lorene Bierman, by her guardians, Darlene and Joseph Bierman; Isaiah Fair, by his guardian Lutricia Fair; Adam Kulig, by his guardian, Norb Kulig; Jamie McElroy, by his guardian, Patricia McElroy; and Jennifer Wilson, by her guardians, Nancy and Richard Wilson. This court appoints the plaintiffs' counsel as class counsel. The class is defined as:

> A class for injunctive relief consisting of all persons in Illinois with disabilities who (1) have mental retardation and/or other developmental disabilities and who qualify for long-term care services; (2) with appropriate supports and services, could live in the community and who would not oppose community placement; and (3) either are institutionalized in private ICF-DDs with nine or more residents or are living in a home-based setting and are at risk for institutionalization because of their need for services.

Parties are to submit a revised Form 35 on or before 3/20/06. Counsel are requested to submit a courtesy copy of the Form 35 to Chambers on the day of filing. This case is set for a report on status and entry of a scheduling order at 9:00 a.m. on 4/4/06. The status report set for 3/30/06 is vacated.

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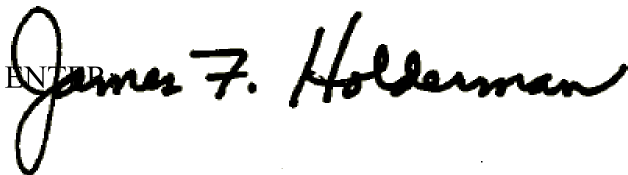

JAMES F. HOLDERMAN
United States District Judge

DATE: March 7, 2006

EXHIBIT B

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James F. Holderman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 C 4331	**DATE**	7/7/2009
CASE TITLE	Stanley Ligas, et al. vs. Barry S. Maram, et al.		

DOCKET ENTRY TEXT

For the reasons set forth in the Statement section below, the class certification order [85] is vacated and approval of the proposed consent decree is denied. Plaintiffs' counsel are to notify the class members as efficiently and inexpensively as possible of the change in status of this lawsuit. *See Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002) (requiring notice to class members when class is decertified). The case is set for a status report as to the continued litigation of the individual plaintiffs' claims on July 30, 2009, at 9:00 a.m.

■[For further details see text below.]

Notices mailed.

STATEMENT

Stanley Ligas and eight other individually named plaintiffs (the "plaintiffs") filed this lawsuit on behalf of themselves and other similarly situated individuals against the State of Illinois officials who administer state programs that provide long-term care services for people with developmental disabilities (the "defendants"). In their complaint, the plaintiffs alleged that the defendants failed to provide developmentally disabled people with long-term care services in the most integrated setting appropriate for their needs in violation of Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Title XIX of the Social Security Act. The plaintiffs' lawsuit relies heavily on *Olmstead v. L.C.*, 527 U.S. 581 (1999). In *Olmstead*, the Supreme Court held that developmentally disabled individuals should be placed in community settings when (1) the state's treatment professionals have determined that community placement is appropriate, (2) the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and (3) the placement can be reasonably accommodated considering the available state resources and the needs of other people with disabilities. *Olmstead*, 527 U.S. at 587. The plaintiffs allege that, despite their requests that they be placed in a community-based setting and the fact that the plaintiffs meet the criteria set forth in *Olmstead*, the State of Illinois has refused to place them in the least restrictive setting appropriate to their needs. The plaintiffs therefore request injunctive relief on behalf of themselves and class members, requiring the defendants to place eligible developmentally disabled individuals in community-based settings with appropriate services and support or Community-Integrated Living Arrangements ("CILAs") rather than in intermediate care facilities ("ICF-DD"). On March 7, 2006, the court granted plaintiffs' motion for class certification [85].

On November 13, 2009, the plaintiffs filed with the court a Proposed Consent Decree on behalf of the class [295], setting forth the terms of the settlement entered into between the plaintiffs and the defendants. The Proposed Consent Decree defined the class as:

All persons in Illinois 18 years of age or older who:

(a) have mental retardation and/or other Developmental Disabilities and who are eligible for Medicaid ICF/MR services;

(b) with appropriate supports and services, could live in the community; and

(c) either: (i) are, or will in the future be, institutionalized in private ICF-DDs with nine or more residents or (ii) are, or will in the future be, living in a home-based setting and are at risk of institutionalization because of their need for services.

(Proposed Consent Decree ¶ 2.) A "Notice of Proposed Class Action Settlement and Hearing" was sent to the class on March 31, 2009 [327].

On July 1, 2009, the court held a hearing to determine the fairness, adequacy and reasonableness of the Proposed Consent Decree and to consider any objections by class members to the Decree. In preparation for the hearing, class members submitted more than 2,500 written objections to the Proposed Consent Decree. Approximately 240 people attended the fairness hearing, and thirty-four individual class members or their legal guardians spoke at the hearing. Many more objectors were represented at the hearing by counsel. A common theme among the objectors was the concern that many developmentally disabled individuals, who are within the class definition, would be adversely affected by provisions of the Proposed Consent Decree even though the individual neither met the *Olmstead* criteria nor desired placement in a community-based setting.

The class definition included in the Proposed Consent Decree is considerably broader than the class contemplated by the plaintiffs' lawsuit and, because of the highly individualized needs of the developmentally disabled as demonstrated at the fairness hearing, is unlikely to be rectified by modification of the class definition. To proceed as a class action, the potential class must satisfy the following criteria: (1) numerosity; (2) commonality of facts and law; (3) typicality between the class claims and those of the named parties; and (4) adequacy of the representation by the named parties and class counsel. Fed R. Civ. P. 23(a). The court may review its class certification "any time before a decision on the merits." *Movement for Opportunity & Equal. v. Gen. Motors Corp.*, 622 F.2d 1235, 1278 (7th Cir. 1980). "If the certification of the class is later deemed to be improvident, the court may decertify" the class. *Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 896 (7th Cir. 1981).

The named plaintiffs assert that they meet the criteria set forth in *Olmstead*, but the class definition fails to restrict the class to developmentally disabled individuals that are eligible for, and desire, community placement. Indeed, many of the objections received by the court concerned class members that were neither eligible for, nor desired, community placement. And based on the objections raised at the fairness hearing, it appears that sufficient commonality does not exist among the highly specialized needs and desires of the class members and their legal guardians. Similarly, because the named plaintiffs meet the conditions set forth in *Olmstead* insofar as they have been adjudged eligible for, and desirous of, community placement, the named plaintiffs' claims are not typical of class members who may or may not satisfy the *Olmstead* criteria. It therefore became clear to the court at the fairness hearing that commonality and typicality among class members are lacking in this case. *See Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998) (explaining that commonality is closely related to typicality). Consequently, decertification of the class is appropriate.

In addition, briefing and arguments by the various parties' counsel as well as the statements of the individual objectors, both at the July 1, 2009 hearing and in writing, establish that the settlement negotiated by the plaintiffs and the defendants is considerably broader than was necessary to address the needs of the

class contemplated by the plaintiffs' lawsuit. For example, the Proposed Consent Decree attempts to establish annual evaluations for developmentally disabled individuals that are neither required by *Olmstead* or necessary to secure the rights of individual class members. (*See* Proposed Consent Decree ¶ 7.) The Decree also attempts to restructure the administrative process through which the State of Illinois receives applications and assesses eligibility for services available to developmentally disabled individuals. (*See* Proposed Consent Decree ¶ 6.) Moreover, on June 11, 2009, the court struck paragraph ten of the Proposed Consent Decree after receiving confirmation from the plaintiffs and the defendants that paragraph ten was not a "deal breaker," and plaintiffs' counsel indicated in a letter to this court dated July 2, 2009, that the plaintiffs were amenable to revision of paragraph seven of the Proposed Consent Decree consistent with the language proposed by the Misericordia Resident Objectors at the fairness hearing [415]. Such broad drafting of the Proposed Consent Decree overreaches the objective of the plaintiffs' lawsuit, which plaintiffs' counsel described as ensuring the plaintiffs' "right to choose" to reside in the most integrated setting appropriate to their needs.

Because commonality and typicality do not exist among class members, class certification is vacated and approval of the proposed consent decree is denied. The case will proceed as an individual lawsuit rather than as a class action. The plaintiffs are directed to notify class members of the change in status of this lawsuit. *See Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002) (requiring notice to class members when class is decertified).

Courtroom Deputy Initials:	