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

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

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

I. INTRODUCTION

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

Telecom, Inc., 487 F.3d 261, 267 (5th Cir. 2007). The Named Plaintiffs respectfully submit this brief in support of Plaintiffs' Motion for Class Certification.[1]

II. PRELIMINARY STATEMENT

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

The propriety of a class device in cases like this is illustrated by the large number of class actions that have been certified against governmental agencies at both the state and federal levels. *See e.g.*, 7 Newberg on Class Actions § 23:1 (4th ed. 2002); List of Selected ADA Class Action Cases, attached as Exhibit 1 to this Memorandum (hereafter ADA Case List); List of 36 Class Actions on behalf of Institutionalized Individuals, attached as Exhibit 2 to this Memorandum. Because members of this class have developmental disabilities,[2] class relief becomes even more important because such class members are less likely to be able to institute

[1] The plaintiffs filed their original Motion for Class Certification, with an accompanying Memorandum, on January 19, 2011. *See* Dkt. ## 13 and 14. The Court subsequently granted the Defendants' Motion to Abate the Plaintiffs' Motion for Class Certification (Dkt # 20) and stayed all further proceedings, *See* Order of September 27, 2011 (Dkt. # 58). This Memorandum includes an analysis of recent decisions of the United States Supreme Court, the Fifth Circuit Court of Appeals, and lower courts on class certification that have been issued since the original motion was filed, It also incorporates additional documents in support of the Amended Motion. Concurrently with this Memorandum, the Named Plaintiffs are also filing their Amended Motion for Class Certification, together with extensive documentary evidence as described in the Declaration of Garth Corbett which is expressly incorporated herein.

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

legal proceedings on their own behalf. Indeed, a nearly identical class has been certified by federal courts in Massachusetts relating to the treatment of persons with developmental disabilities in nursing facilities in that state. *Rolland v. Cellucci*, 1999 WL 34815562 (D. Mass. Feb. 2, 1999) (certifying class comprised of "all adults with mental retardation or other developmental disabilities in Massachusetts who reside in nursing facilities on or after October 29, 1998, or who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq.*);[3] *Rolland v. Patrick,* 2008 WL 410488 (D. Mass. Aug. 19, 2008) (refusing to decertify the class based upon alleged differences in the needs and conditions of persons in nursing facilities); *Voss v. Rolland*, 592 F.3d (1st Cir. 2010) (refusing to consider a challenge to class certification in an ADA case involving persons with intellectual disabilities in nursing facilities). In Massachusetts, the district court found that the plaintiff class met all of the requirements of Rule 23(a), and found that a Rule 23(b)(2) class action is particularly appropriate for the kind of civil rights action seeking systematic governmental reform such as this action. *Rolland v. Cellucci, supra.* For the same reasons, this Court should find that the plaintiffs have met the requirements of Rule 23(a) and should certify a Rule 23(b)(2) class as requested herein.[4]

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[3] Discretionary review was denied pursuant to Fed. R. Civ. P. 23(f) by the United States Court of Appeals for the First Circuit, Docket 99-8089 (March 2, 1999).

[4] *See* section IV(A), *infra* for a compilation of other ADA class action cases involving nursing facilities. *See also* Ex. 1 for a list of other ADA Title II class action cases.

III. STATEMENT OF FACTS

The Named Plaintiffs are all persons with developmental disabilities who live in, or are at risk of placement in, nursing facilities throughout Texas.[5] Because of the Defendants'[6] failure to comply with Title II of the ADA and its implementing regulations, Section 504 of the Rehabilitation Act and its implementing regulations, and the NHRA and their implementing regulations, the Named Plaintiffs are segregated in nursing facilities, are denied access to publicly-funded services in the most integrated settings, and are not provided the necessary specialized services required to meet the federal standard of active treatment. This systemic failure constitutes a standardized course of conduct that results in common injury to all members of the plaintiff class.

There are at least 4,500 adult persons with developmental disabilities confined in nursing facilities in Texas.[7] In addition, there are probably hundreds of other individuals with

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

[6] The Defendants include Rick Perry, Governor of the State of Texas, Thomas Suehs, Executive Commissioner of the Texas Health and Human Services Commission, and Chris Traylor, Commissioner of the Texas Department of Aging and Disability Services.

[7] In response to a Freedom of Information Act Request, the Department of Aging and Disability Services (DADS) stated that there are at least 5,765 persons with developmental disabilities confined in nursing facilities in Texas who had a preadmission screen in the past several years. *See* Corbett Decl., Ex. 1 (Response to FOIA request dated Oct. 26, 2009 at ¶ 1) While DADS has subsequently reported that it believes that the 5,765 number overstates the actual population, there is no dispute that the class numbers in the thousands.

The United States Department of Health and Human Services' Center for Medicare and Medicaid Services (CMS) collects detailed information on a quarterly basis from all Medicaid-funded nursing facilities in the country regarding the health characteristics of their residents. This resident information is aggregated and reported on CMS' website in its Minimum Data Set (MDS), http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MDSPubQIandResRep/activeresreport.html. Based upon the MDS Active Resident Report for the Third Quarter 2010, there are in excess of 4,500 individuals with mental retardation residing in Texas nursing facilities. *See* Corbett Decl., Ex. 2 (MDS Active Resident Report for persons with developmental disabilities). More recent data, based upon an updated version of the MDS, 3.0, is not yet available on CMS' website.

Moreover, due to the inadequacy of DADS' current screening process, there are likely hundreds of other persons with developmental disabilities currently living in nursing facilities who have not been identified due to inadequacies in Texas's pre-admission screening and resident review PASARR program. *See* Corbett Decl., Ex. 3 (Report of the Office of Inspector General, Preadmission Screening and Resident Review for Younger Nursing Facility Residents with Mental Retardation, OEI-07-05-00230 (January 2007)). Most of these individuals could live in integrated community settings with appropriate services and supports, but instead are being subjected to prolonged institutionalization in violation of the ADA and the NHRA. Moreover, almost all of these individuals require and are entitled to receive specialized services appropriate to their individual needs in order to promote independence and growth while they remain confined in nursing facilities. The frequency, intensity, duration, and scope of these specialized services must meet the federal standards for active treatment. Nevertheless, fewer than one percent of adult residents with developmental disabilities in nursing facilities in Texas receive any specialized services at all, much less specialized services that satisfy the criteria to constitute active treatment. *See* Corbett Decl., Ex. 1, DADS FOIA Response at ¶ 5.

This case seeks to end the common harm suffered by class members who are segregated in nursing facilities, who are not provided the community and waiver services necessary to allow them to live in integrated settings, and who also are denied active treatment while they reside in nursing facilities. Therefore, the Named Plaintiffs seek to require Defendants to fulfill their obligations under Title II of the ADA, Section 504 of the Rehabilitation Act, and the NHRA by, among other things: (1) providing qualified persons with developmental disabilities in nursing

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developmental disabilities living in nursing facilities who have not been identified. Additionally, there is an even larger, but not precisely known, number of individuals with developmental disabilities who will be or should be screened before admission to a nursing facility in the future.

facilities with the necessary services and supports to enable them to live in integrated community settings; (2) modifying Texas's developmental disability community service system to accommodate the needs of persons in nursing facilities; (3) implementing an effective screening and assessment process that will accurately identify individuals with developmental disabilities, including whether they can be appropriately served in the community; and (4) for those who require nursing facility care, determining their need for specialized services and providing them with those services with sufficient frequency, intensity, and duration to constitute active treatment.

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

A. The Proposed Class

The proposed class consists of all Medicaid-eligible persons over twenty-one years of age with mental retardation and/or a related condition[8] in Texas who currently or will in the future reside in nursing facilities, or who are being, will be, or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112, *et seq*. A nearly identical class was certified in a similar case raising similar claims under the ADA and NHRA. *See Rolland v. Cellucci, supra; Rolland v. Patrick, supra*. Courts have certified similar classes in other ADA Title II cases brought on behalf of nursing facility residents. *See Van Meter v. Harvey,* 272 F.R.D. 274 (D. Me. 2011); *Hutchinson v. Patrick,* No. 07-30084-MAP (D. Mass. Oct, 4, 2007), *approved* 636 F.3d 1 (1st Cir. 2011) (affirming fee award for class based upon district court's approval of settlement agreement under Fed. R. Civ. P. 23(e)); *Connecticut Office of Protection and Advocacy,*

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

706 F. Supp. 2d 266 (D. Conn. 2010); *Long v. Benson,* No. 08-cv-26 (N.D. Fl. Oct. 14, 2008); *Colbert v. Blagojevich,* 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008); *Chambers v. San Francisco,* No. 06-cv-6346 (N.D. cal July 12, 2007); *Williams v. Quinn,* 2006 WL 3332844 * 5 (N.D. Ill. Nov. 13, 2006).

B. The Standards for Class Certification

In order for one or more members of a class to sue as representative parties on behalf of all members, the party moving for class certification must satisfy all of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure. Rule 23(a) has four distinct criteria: (1) the class must be so numerous that joinder of all members is impracticable; (2) the members of the class must share common questions of law *or* fact; (3) the claims or defenses of the named representatives must be typical of those of the class; and (4) the persons representing the class must be able to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a); *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 623 (5th Cir. 1999).

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

Advisory Committee's Notes to Rule 23); *see also Kincade v. General Tire and Rubber Co.*, 635 F.2d 501, 506 (5th Cir. 1981) ("(S)ubdivision (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil rights area").

In almost every case involving persons who allege noncompliance with Title II of the ADA or the requirements of the Medicaid Act by government officials, such as the case here, courts have certified a class. This is particularly true with respect to cases involving the integration mandate of the ADA. *See* Ex. 1 (ADA Case List). In addition, in almost every case involving persons with mental disabilities who challenge the lack of appropriate services in a state or private facility, courts throughout the nation have certified classes under Rule 23. *See* Exhibit 2 (Institutional Case List). Finally, courts traditionally certify classes in cases concerning adults and children who allege violations of their federal statutory rights under Title XIX of the Social Security Act, 42 U.S.C. §1396(a). *See, e.g.*, *Herweg v. Ray*, 455 U.S. 265, 271 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 993 (1982); *Rosie D. v. Romney,* 410 F. Supp. 2d 18, 22 (D. Mass. 2006).

ADA Title II integration cases customarily focus on the standardized conduct of the defendants and do not depend on individualized determinations of either liability or remedy. Thus, courts frequently, and barely without exception, have little difficulty certifying ADA classes, precisely because the Title II claims focus on the defendants' systemic practices, not the individual plaintiffs' conditions. *See* Ex. 1 (ADA Case List). Significantly, there is not a single decision where a court has declined to certify an ADA Title II case or which has applied *Wal-Mart v Dukes,* 131 S. Ct. 2541 (2011), to an ADA Title II case and concluded that class certification is inappropriate. To the contrary, in several ADA or Rehabilitation Act post-*Wal-Mart* cases, courts have certified classes, re-certified classes, or refused to decertify classes.

Oster v. Lightbourne, 2012 WL 685808 at * 6 (N.D. Cal. Mar. 2, 2012) (certifying a class of persons whose services will be "limited, cut, or terminated" under California's home-care program, based upon violations of the ADA, the Rehabilitation Act, and the Medicaid Act); *Pashby v. Cansler,* 2011 WL 6130819 (E.D.N.C. Dec. 8, 2011); *Gray v. Golden Gate Nat'l Recreational Area,* 2011 WL 5573466 (N.D. Cal. Nov. 15, 2011) (certifying class and subsequently refusing to decertify the class based upon the Ninth Circuit's decision in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011)); *D.L. v. District of Columbia,* 277 F.R.D. 38 (D.D.C. 2011).[9]

ADA Title II classes routinely have been certified precisely because they raise a common question susceptible to a common solution through a single injunction: the modification of the public entity's program to provide services in the most integrated setting. Like those cases, the Amended Complaint here seeks a single injunction that would require the defendants to make reasonable modifications to their community service system, in order to ensure that all class members have access to community services in the most integrated setting. Thus, in *Wal-Mart* terms, the Court can, "in a single stroke," ensure that eligible class members have the

[9] Courts have also continued to certify classes in a variety of other contexts, and refused to de-certify existing class after *Wal-Mart*. *See Morrow v. Washington*, 277 F.R.D. 172, 192-194 (E.D. Tex., 2011) (certifying a class of motorists who alleged they had been targeted by police because of they were members of racial or ethnic minority groups was appropriate under theory that city had acted, or refused to act, on grounds that applied generally to class, making injunctive or declaratory relief appropriate with respect to class as a whole)*; Connor B. ex. Rel. Vigurs v. Patrick*, 278 F.R.D. 30 (D. Mass. Nov, 2011)(following the *Wal-Mart* decision, court declined to de-certify class of foster children harmed by systemic deficiencies in state's foster care system); *Johnson v. General Mills*, 276 F.R.D. 519 (C.D. Cal. 2011) (unlike *Wal-Mart*, injury results from a common core of salient facts); *In re Ferrero Litigation*, 2011 WL 5557407 (S.D. Cal. Nov. 15, 2011) (plaintiffs need not prove a common class-wide injury at class certification stage; rather, they need only to demonstrate that there is a common contention that is capable of class wide resolution); *Martinez v. Gerber Childrenswear, LLC*, 2011 WL 6757875 (C.D. Cal. Dec. 15, 2011) (unlike *Dukes,* there is common control over the challenged practice); *Parkinson v. Freedom Fidelity Management, Inc.*, 2012 WL 72820 (E.D. Wash. Jan. 10, 2012) (certifying class for violations of state Consumer Protection Act and Debt Adjusting Statute, although plaintiffs suffered different statutory violations in different ways by different debt collectors); *Arthur v. Sallie Mae, Inc.*, 2012 WL 90101 * 7 (W.D. Wash. Jan. 10, 2012) (commonality only requires a single question of law or fact).

opportunity to leave nursing facilities and live in the community.[10] Thus, there is a virtually unbroken line of decisions granting class certification in Title II cases challenging systemic practices of institutionalizing persons with disabilities in violation of federal statutory and constitutional provisions. Those conclusions and the reasoning of those cases are equally applicable here, and should weigh heavily in the Court's analysis regarding certification of the plaintiff class.

C. The Plaintiffs Have Presented Sufficient Evidence to Support Their Motion.

Well before *Wal-Mart,* courts were required to conduct a "rigorous analysis" of the evidence submitted in support of a class certification motion. *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 157, 160 (1982). That test, and the quantum of evidence needed to satisfy that test, has not been enlarged nor made more demanding by *Wal-Mart.* 131 S. Ct. at 2551-52. Further, neither *Falcon* nor *Wal-Mart* ever suggests that information set forth in the Complaint was irrelevant or inadequate. Rather, the Supreme Court affirmed *Falcon's* understanding that "*sometimes* it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* (quoting *Falcon,* 457 U.S. at 160 (emphasis added)).

In addition to the information set forth in their Amended Complaint, which includes substantial details about the Named Plaintiffs and numerous references to documents, reports, and data, the Plaintiffs have supported their Motion with a declaration from Mike Bright concerning the needs of persons with developmental disabilities in nursing facilities, the ability and preference of many of these individuals to live in integrated settings with appropriate

[10] As discussed in Section IV(C)(2), *infra,* individualized decisions concerning which persons want to leave nursing facilities and what community services they need to leave has nothing to do with class certification, since this process is not part of the federal court proceedings. Instead, these determinations are properly made in an individualized service planning process, similar in many respects to the treatment planning process currently used by the Defendants.

supports, and the obstacles to community placement confronting the plaintiff class. Declaration of Mike Bright, ¶¶ 9-13.

The Plaintiffs also have submitted the declaration of Garth Corbett, which contains considerable evidence from the Defendants' own reports, state and federal databases, and federal reports. These documents demonstrate that the Defendants maintain a community service system that (1) unduly relies on segregated nursing facilities, (2) does not offer integrated community living and support opportunities to all nursing facility residents with developmental disabilities that could benefit from and want them, (3) does not comply with federal requirements for screening, assessing, and serving persons with developmental disabilities in nursing facilities, and (4) has failed to shift from a segregated to an integrated system, despite numerous promises to do so over the past two decades. *See* Corbett Decl., Ex. 1-10. For example, DADS has acknowledged in its 2012 Legislative Appropriation Request (LAR) that hundreds of persons with developmental disabilities should and could be diverted from admission to nursing facilities. *See* Corbett Decl., Ex. 6, 2012 LAR, p. 20. And DADS' Advisory Committee on Promoting Independence has recently recommended that substantial efforts be made to accommodate the needs of persons with developmental disabilities in nursing facilities and facilitate their transition to the community. *See* Corbett Decl., Ex. 5, 2012 Promoting Independence Advisory Committee Stakeholder Report at 13. The state Developmental Disability Council acknowledges that there are many individuals who are segregated in institutions and who could safely live in the community. Corbett Decl., Ex. 4, 2010 Biennial Report at 10-13. Despite these acknowledgements and recommendations, nursing facility residents with developmental disabilities have no access to Texas' largest community service program, the Home and Community Services (HCS) waiver. *See* Corbett Decl., Ex. 8, Description and eligibility criteria for Texas's waiver programs at 2; *see also* Bright Decl., ¶ 10.

Moreover, and perhaps most significantly, the United States Department of Justice, the agency charged by Congress with the enforcement of the ADA conducted an investigation of precisely the issues raised in this case and concluded that "Texas is in violation of the Americans with Disabilities Act and the Rehabilitation Act as it relates to issues pending in the *Steward v. Perry* litigation." *See* Corbett Decl, Ex. 10, DOJ Findings Letter, dated June 15, 2011. This conclusion is based upon DOJ's determination that the State of Texas unnecessarily institutionalizes individuals with developmental disabilities in nursing facilities and places individuals who live in the community at risk of placement in nursing facilities." *Id.*

Finally, the Plaintiffs have submitted a declaration and detailed expert report from Karen Green McGowan R.N.. Ms. McGowan reviewed the conditions, needs, strengths, and preferences of three of the Named Plaintiffs and concluded that all are able to live in the community, prefer to do so, but nevertheless remain confined in nursing facilities where they currently receive inadequate care that places their very safety at imminent risk. *See* Declaration of Karen Green McGowan.[11]

Taken together, the Court now has a considerable quantum and scope of evidence, which is more than sufficient to allow it to undertake a "rigorous analysis" of the relevant facts, claims, and defenses. Since *Wal-Mart* has not altered *Falcon's* longstanding requirement concerning the evidence needed to certify a class, nor the scope of analysis which the court must conduct to

[11] In addition to the facts that the Plaintiffs presented in the Amended Complaint, the Defendants already had considerable – if not voluminous – data and documents about these individuals, in the form of assessments, worksheets, eligibility applications and determinations, and lengthy Individual Service Plans dating back years, if not decades.

evaluate that evidence, the plaintiffs' Complaint, exhibits, documents, reports, records, and declarations are plainly sufficient for the Court to perform its task and certify a class in this case.

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

1. *The Class is so Numerous that Joinder of All Members is Impractical.*

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

Furthermore, in civil rights cases, the membership of a class is often "incapable of specific enumeration." *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972). In such circumstances, as in the present matter, a class action may proceed if the plaintiffs "demonstrate some evidence or reasonable estimate of the number of purported class members." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981); *see also* 7 Newberg on Class Actions § 23.2 ("Courts generally have not required detailed proof of class numerousness in government benefit class actions when challenged statutes or regulations are of general applicability to a class of recipients, because those classes are often inherently very large").

The proposed class in this case, which consists of more than 4,500 members is sufficiently numerous to make joinder impracticable. Frequently, proposed classes consisting of only a fraction of this number are certified under Rule 23(a)(1). *See Jones v. Diamond*, 519 F.2d 1090, 1100 n.18 (5th Cir. 1975) (class of 48 individuals found sufficient); *Morrow v. Washington*, 277 F.R.D. 172, 190-191 (E.D. Tex. 2011) (putative class of 136 individuals satisfied the numerosity requirement); *Griffin v. Burns*, 570 F.2d 1065, 1072-73 (1st Cir. 1978) (123 voters sufficient to satisfy Rule 23(a)(1)); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972) (class of approximately 212 members sufficient); *Rolland*, 1999 WL 34815562 at *1-2 (nearly identical class certified with approximately 1500 members).

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

In the instant case, the class representatives seek injunctive and declaratory relief on behalf of themselves and thousands of Texans with developmental disabilities who are or will be institutionalized in nursing facilities throughout the state. This geographic dispersion of class members makes joinder impracticable. *See Ibarra v. Tex. Employment Comm'n*, 598 F. Supp. 104 (E.D. Tex. 1984) (500 member class certified where class members "dispersed throughout Texas") *rev'd on other grounds*, 823 F.2d 873 (5th Cir. 1987). Importantly, the combined impact of class members' poverty and disabilities severely limits their access to attorneys and their resulting ability to bring individual actions for declaratory or injunctive relief, making class certification particularly appropriate. *See Rolland*, 1999 WL 34815562 at *3 ("Considering plaintiffs' confinement, their economic resources, and their mental handicaps, it is highly unlikely that separate actions would follow if class treatment were denied." (quoting *Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986)).

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

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

In order for a class to be certified, Rule 23(a)(2) requires that the proposed class members have at least *one* factual *or* legal issue in common, the resolution of which will affect all or a significant number of putative class members. *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997); *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993); *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992); *City of San Antonio v. Hotels.com*, 2008 WL 2486043 at *5 (W.D. Tex. May 23, 2008) (holding that commonality requires that "there is at least *one* issue that will affect all or a significant number of putative class members" (emphasis in original)). "For this reason, '[t]he threshold of 'commonality' is not high.'" *Forbush*, 994 F.2d at 1106 (quoting *Jenkins v. Raymark Industries*, 782 F.2d 468, 472 (5th Cir. 1986)); *see also Hotels.com*, 2008 WL 2486043 at *5.

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

Similarly, the requirement that there be a substantial question of law or fact common to all class members does not mean that each class member must be identically situated. *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982). Commonality is not defeated by the presence of individual differences among class members. *See Lightbourn*, 118 F.3d at 426 (class of individuals with different disabilities requiring different accommodations was certified because all were impacted by the same governmental inaction); *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) ("Rule 23(b)(2) does not require that common questions of law or fact predominate"); *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985); *Milonas v. Williams*, 691

F.2d 931, 938 (10th Cir. 1982) (factual distinctions among plaintiffs not relevant where legal theories are similar). In fact, "allegations of similar discriminatory practices generally meet the commonality requirement." *Lightbourn*, 118 F.3d at 426 (citing *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993)); *see also Curtis v. Commissioner, Maine Dep't. of Human Servs.*, 159 F.R.D. 339, 341 (D.Me. 1994) (where "a question of law refers to standardized conduct of the defendant towards . . . the proposed class, commonality is usually met"). The commonality "requirement has been liberally construed and 'those courts that have focused on Rule 23(a)(2) have given it permissive application so that common questions have been found to exist in a broad range of contexts.'" *Rodriguez v. Carlson*, 166 F.R.D. 465, 472 (E.D. Wash. 1996) (citing *Haywood v. Barnes*, 109 F.R.D. 568, 577 (E.D.N.C. 1986)). Courts have broadly applied the rule to class actions seeking injunctive and declaratory relief to remedy the denial of a legal entitlement or the application of a governmental policy or practice that infringes that right. *See Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 193 (W.D. Tex. 1998) ("Given that the class members are affected by the general policy and that policy is the focus of this litigation, the Court finds the commonality requirement has been satisfied."); *Morrow*, 277 F.R.D. at 193 (plaintiffs offered significant proof that police department operated a general policy of discrimination in conducting traffic stops.); *Anderson v. Dep't of Public Welfare,* 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998) ("Commonality is easily established in cases seeking injunctive relief."). "[C]lass suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Wright, Miller, & Kane, Federal Practice and Procedure § 1763 (3d ed. 2005); *Marisol A. v. Guiliani,* 929 F. Supp. 662, 691 (S.D.N.Y. 1996). Class actions are particularly appropriate where, as here, governmental policies and practices have a broad impact upon a class of recipients, and the scope of the relief is dictated by the nature of the violation. *See Califano v. Yamaski*, 442 U.S. 682 (1979); Morrow, 277 F.R.D. at 193, *quoting* Wal-Mart, 131 S.Ct. at 2557 ("As Wal-Mart emphasized '[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) classes are meant to capture).

In the recent decision of *Wal-Mart v. Dukes*, 131 S. Ct. 2541, the Supreme Court overturned the certification of a nationwide class of 1.5 million women who sought damages and equitable relief against Wal-Mart to redress alleged discriminatory practices by local Wal-Mart managers from 3,400 stores "exercising their discretion over pay and promotions." *Id.* at 2547. Though the Supreme Court determined that the proposed *Wal-Mart* class lacked commonality, the Court confirmed that its analysis does not alter the long-standing precedent that only where there are *no* common questions of fact or law should certification be denied. ("We quite agree that for purposes of Rule 23(a)(2) '[e]ven a single [common] question will do") (citations omitted). *Id.* at 2541, 2557. Instead, the Court's decision under 23(a)(2) focuses on whether the claims depend upon a "common contention…of such a nature that it is capable of class wide resolution". *Id*. at 2551. *Wal-Mart* does not suggest that class certification is inappropriate here. Since unlike *Wal-Mart*, the claims of all class members can be resolved "in a single stroke" through the provision of the requested community services that are critical to avoiding unnecessary institutionalization.

Federal decisional law post-*Wal-Mart* recognizes that while *Wal-Mart* provides "guidance on how existing law should be applied to expansive, nationwide class actions," it does not preclude injunctive relief designed to remedy overarching deficiencies in a state service system. *Connor B.*, 2011 WL 5513233 at *3, 5. Nor does it prevent certification of cases seeking injunctive and compensatory relief when common questions exist regarding the impact of a defendant's policies on alleged discrimination and those questions are most efficiently resolved on a class-wide basis. *See McReynolds v. Merrill Lynch*, *Pierce, Fenner & Smith, Inc*., 672 F.3d 482, 488-492 (7th Cir. 2012) (reversing denial of class certification in disparate impact case where common questions exist regarding company policies and their contributory effect on alleged employment discrimination, even if individual employee decisions may also be a factor).

Viewed in its proper context, the multi-million person class in *Wal-Mart* and the class proposed in this action bear no relation to one another in commonality or other terms. In this action, the plaintiff class seeks only injunctive relief. In this action, the plaintiff class has demonstrated the common thread or "glue" which unites their common factual and legal claims: all members of the plaintiff class are subject to, or at serious risk of,[12] segregation as a result of the Defendants' standardized conduct – specifically, the Defendants' planning, administering, operating, and funding of their community service system which denies all persons with developmental disabilities in nursing facilities the community services necessary to avoid their segregation and to allow them to live in the most integrated setting. As a result, the plaintiff class is suffering as a result of a

[12] Numerous courts have recognized the rights of those 'at risk' of institutionalization to state claims under the ADA's integration mandate. *See, e.g., M.R. v. Dreyfus*, 663 F.3d 1100, 1116-17 (9th Cir. 2011)("An ADA plaintiff need not show that institutionalization is 'inevitable' or that she has 'no choice' but to submit to institutional care in order to state a violation of the integration mandate. Rather, a plaintiff need only show that the challenged state action creates a serious risk of institutionalization."); *Radaszewski ex. rel. Radaszewski v. Maram*, 383 F.3d 599, 614-17 (7th Cir. 2004); *M.A.C. v. Betit,* 284 F. Supp. 2d 1298, 1309 (D. Utah 2003); *Fisher v. Okla. Health Care Auth.,* 335 F.3d 1175, 1177-78, 1182 (10th Cir. 2003) ("Olmstead does not imply that disabled persons who, by reason of a challenge to that state policy, stand imperiled with segregation, may not bring a challenge to that state policy under the ADA's integration regulation without first submitting to institutionalization."); *Makin ex.rel. Russel v. Hawaii,* 114 F. Supp.2d 1017, 1033 (D. Haw. 1999).

common course of conduct by defendants, from which arises a set of common claims and contentions.[13]

In short, the Named Plaintiffs have established commonality precisely because they identify both a common contention – that the Defendants' planning, administration, and funding of their community services system denies persons with developmental disabilities in nursing facilities the ability to live in the most integrated setting – as well as a common injury – discriminatory segregation. The common contention, moreover, is "of such a nature that it is capable of class wide resolution." 131 S. Ct. at 2551. Here, as in most ADA Title II cases, the challenge is directed to the public entity's failure to administer and fund a service system that provides services which allow persons with disabilities to live in the most integrated setting. This failure is the common contention that is susceptible to a common answer, through a single injunction that would require the entity to remedy this deficiency and accommodate the needs of all persons with disabilities who are in segregated settings. The class' injuries in this case can be redressed by a modification to the Defendants' service system that would afford persons with developmental disabilities in nursing facilities access to community services, such that they may avoid segregation. This modification can be achieved through a single injunction providing relief to the class as a whole. *Id.* at 2560. Therefore, the Plaintiffs have presented both the common questions and the "common answers apt to drive the resolution of the litigation." *Id.* at 2551. Consistent with long standing

[13] *See* Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, at *http://www.ada.gov/olmstead/q&a_olmstead.htm* ("[T]he ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent . . . a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.").

precedent in class actions alleging systemic civil rights violations, the Court should find there are questions of law and fact common to the class.

Neither an assessment of commonality for the purposes of class certification, nor even a determination of liability under federal law, require this Court to evaluate the individual clinical conditions, support needs, or the residential preferences of each one of the thousands of persons with developmental disabilities in Texas who are in, or at risk being admitted to, nursing facilities. Rather, this Court can determine that a violation of federal law has occurred, and remedy that common legal violation, without the type of individualized liability determinations at issue in *Wal-Mart*. It is both unnecessary and unrealistic for the Plaintiffs to prove that each individual class member's support needs or preferences are identical. This is not the standard of proof required for class certification before or after *Wal-Mart*.

Class action cases interpreting *Wal-Mart* have concurred with this assessment, finding the commonality may exist even where class members are not identically situated. *See, e.g., Oster,* 2012 WL 685808 at * 5 (rejecting defendants' challenge under *Wal-Mart* that class members do not meet the commonality because they suffer different service reductions); *Churchill v. Cigna Corp*., 2011 WL 3563489 (E.D. Pa. Aug. 12, 2011) (plaintiff class denied the benefit of treatment for Autism Spectrum Disorder stated common claims as well as "'common answer apt to drive the resolution of the litigation'" regardless of their different conditions, treatment needs, and abilities to benefit from ABA therapy. *Id.* at *3 *(citing Wal-Mart*); *Connor B.,* 272 F.R.D. at 296 (that harms suffered by unnamed class members differs from that experienced by named plaintiffs does not undermine commonality or typicality); *D.L. v. District of Columbia,* 2011 WL 5559927 at *7 (D.D.C., Nov. 16, 2011) (the reasons for class members' common injury – denial of a Free and Appropriate Public Education (FAPE) – do not have to be common to all members of the class.).

Nor do two recent court of appeal decisions, *M.D. v. Perry,* 675 F.3d 832 (5th Cir. 2012), and *Jamie S. v. Milwaukee Public Schools,* 668 F.3d 481 (7th Cir. 2012), question this analysis or alter this conclusion. In *M.D.*, the Fifth Circuit concluded that the district court failed to explain how systemic deficiencies in Texas's child welfare system that arose from three separate and unrelated constitutional claims gave rise to a common solution that would address the claims of all class members.[14] At the same time, the Fifth Circuit identified a number of practices that could well satisfy commonality, such as the lack of sufficient staffing or a statewide deficiency in its child welfare system. As the Fifth Circuit explained:

> Rather, the class claims could conceivably be based upon an allegation that the State engages in a pattern or practice of agency action or inaction – including a failure to correct a structural deficiency within the agency….

M.D., 675 F.3d at 847.

Here, the defendants' failure to plan, administer, and fund their community services system in a manner that provides the integrated residential and other services they have deemed necessary to avoid segregation leads logically and ineluctably to an injunction to provide those services, which would, in a single stroke, address the claims and harms of each class member. As long as the district court is not involved in individualized determinations of liability and

[14] Moreover, the appeals court was understandably troubled by the lack of coherence between three quite different claims under three quite different constitutional provisions, particularly since the substantive due process one appeared to require an individualized inquiry of harm. *Id.* at 843. It suggested that the district court should consider the possibility of subclasses for each claim, since each presented a quite different contention, and different answer to the contention. *Id.* at 848. Here, of course, there are really only two claims, one involving segregation in nursing facilities made under two related statutes, the ADA and the Rehabilitation Act, and the other involving admission to and treatment in nursing facilities, made under the Nursing Home Reform Amendments and other related provisions of the Medicaid Act. In no sense do the common questions in this case involve the type of "super-claim" that the Fifth Circuit found so troubling in *M.D.*

remedy, which is plainly not requested here, and can issue a single injunction that can remedy the structural deficiency, as is the case here, *M.D.* actually supports class certification. *See id.*

Similarly, *Jamie S.* is even less relevant. The Seventh Circuit was understandably troubled by the combination of two factors that simply are not present here. First, the Individuals with Disabilities Education Act (IDEA) requires, on its face, individualized determinations of each child's education needs and precludes judicial relief without the exhaustion of all administrative remedies. The class action case in *Jamie S.* sought to circumvent that requirement by challenging a systemic deficiency in Milwaukee's child find practices. The Seventh Circuit found that the class definition was fatally flawed and could not be invoked to accomplish such circumvention. *Jamie S.*, 668 F.3d. at 493-96. Neither the ADA nor the Rehabilitation Act impose such exhaustion limitations nor demand such individualized determinations.

Second, and perhaps more importantly, the remedy ordered by the district court established an individualized child review process that substituted for the city's child find process and resulted in the issuance of separate injunctive orders for each child. The Seventh Circuit concluded that these separate injunctions demonstrated that the remedial order did not generate a common answer and a single injunction that applied to the class as a whole.[15] *Id.* at 498-99. Here, the Court is not involved in an inquiry into individualized relief. Instead, it only will determine whether it is appropriate to issue a single injunction requiring the Defendants to end their segregation of persons with developmental disabilities in nursing facilities, and instead,

[15] That there is nothing in *Jamie S.* which precludes a finding of commonality or precludes class certification when there is *no* judicially-mandated process for affording individualized relief is best demonstrated by a subsequent decision of the same court of appeals that, post-*Wal-Mart*, certified a class of African-American employees who alleged racial discrimination in employment promotion and compensation practices. *McReynolds v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (certifying a class for liability purposes because this phase of an employment discrimination case, as opposed to the damage claims, can be resolved by a single injunction and does not require individualized remedial orders).

to provide community support services that would allow these individuals to live in the most integrated setting.

Here, there are several questions of law and fact that are common to all class members including, but not limited to:

(1) whether the Defendants are violating the ADA and Section 504 of the Rehabilitation Act by: (a) failing to offer alternate community services to individuals with developmental disabilities in nursing facilities who can live in a community setting with appropriate supports; (b) failing to offer community services to individuals with developmental disabilities at risk of admission to nursing facilities, in order to divert the unnecessary admission of those individuals who can be appropriately served in a community setting; and (c) failing to administer their community service system for persons with developmental disabilities in a manner that accommodates persons in nursing facilities who qualify for and do not oppose community living; and

(2) whether Defendants are in violation of the NHRA and the Medicaid Act by: (a) failing to establish a screening and assessment program that accurately determines if individuals with developmental disabilities can be appropriately placed in a community setting or should be admitted to a nursing facility; (b) failing to conduct professionally acceptable assessments to determine what specialized services such individuals require; and (c) failing to promptly provide an array of specialized services to all individuals with developmental disabilities in nursing facilities who need them, in a manner that satisfies the federal standard for active treatment.

In this case, as a direct result of the Defendants' actions and inactions, the Plaintiffs are segregated in nursing facilities when they could live in integrated community settings, and are not being accurately screened or assessed, in violation of their rights under the ADA and the NHRA. Additionally, the plaintiffs are not receiving specialized services and active treatment, as required by 42 C.F.R. § 483.126 & § 483.440(a)-(f). This standardized conduct is the common problem that is susceptible to a common answer: an injunction requiring the Defendants to modify the community service system for persons with developmental disabilities to accommodate the needs of nursing facilities residents, and to modify their PASARR screening, assessment, and treatment program to ensure that persons are not inappropriately admitted to nursing facilities, and, if so admitted, receive needed specialized services. Any differences between class members' abilities and disabilities have no bearing on these claims or on the Defendants' failure to provide class members with the required screening and necessary specialized services.[16] *See Rolland*, 2008 WL 4104488 at *4 ("[A]ny identified factual differences between the named Plaintiffs and some of the class they sought to represent did not undermine commonality and, in particular, did not preclude certification of a class of persons with mental retardation who were challenging Defendants' practices."). Nor do factual distinctions between class members impact the systemic nature of the relief requested in the Amended Complaint or the prosecution of this case. *Risinger*, 201 F.R.D. at 20-21. Therefore, the proposed class satisfies the commonality requirement of Rule 23(a)(2).

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

The third component of Rule 23(a) requires that the proposed class representatives' claims for relief be typical of the claims of the absent class members. The test for "typicality" asks whether the class representatives "possess the same interest and suffer the same injury" as other class

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

members, but it does not require that the claims of the named plaintiffs be identical to the claims of the other class members. *Gen. Tel. Co.,* 457 U.S. at 156; *see also Mullen*, 186 F.3d at 625 (the test for typicality "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent"). "[T]he critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *James*, 254 F.3d at 571 (quoting 5 Moore's Federal Practice ¶ 23.24[4] (3d ed. 2000)). Additionally, most courts agree that "[l]ike commonality, the test for typicality is not demanding." *Mullen*, 186 F.3d at 625; *James*, 254 F.3d at 571; Morrow, 277 F.R.D. at 194; *Hotels.com*, 2008 WL 2486043 at *6.

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

The Named Plaintiffs satisfy the typicality requirement of Rule 23(a)(3) because their claims, and those of the unnamed class members, present similar factual situations: (1) they all have mental retardation or a related condition; (2) they all are confined, or at risk of confinement in a nursing facility; (3) virtually all would benefit from living in the community; (4) most are qualified for the Defendants' community service system; (5) most would prefer, or at least would not oppose community placement; (6) they all are entitled to screening and assessment to determine if they require a nursing level of care, could have their needs met in an appropriate community setting, and could benefit from specialized services; and (7) those identified as needing specialized services would benefit from being provided such services in the nursing facility. The fact that class members may have different medical conditions or that they may require a slightly different service array does not justify denying class certification. *See Rolland*, 2008 WL 4104488 at *5. Instead, the requisite typicality exists because the Defendants are needlessly institutionalizing class members and denying necessary specialized services in violation of Title II of the ADA and the NHRA. *See Curtis*, 159 F.R.D. at 341 (typicality is met because "the representative Plaintiff is subject to the same statute and policy as the class members."); *Hotels.com*, 2008 WL 2486043 at *6 ("While each putative class member has its own ordinance, the claims arising thereunder, and the legal and remedial theories on which the claims are based, are the same").

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

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

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

(1) Adequacy of the Named Representatives

In order for the named representatives to be deemed adequate to represent the class, their interests must coincide with those of the unnamed class members. *Neff*, 179 F.R.D. at 195; *see generally Gen. Tel. Co.*, 457 U.S. 147. Additionally, the interests of the Named Plaintiffs must not be antagonistic to the unnamed class members. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985).

In the present case, although all members of the plaintiff class may not have exactly the same treatment recommendations or needs, they all have suffered, or are at risk of suffering, the same injuries as a result of the Defendants' policies and practices: segregation in a nursing facility and the denial of specialized services sufficient to provide active treatment. *See* Amended Complaint ¶¶ 53-61, 74-103. They all seek the same remedies: the provision of integrated community services and supports for those who are qualified for the Defendants' community service system; accommodations that would allow them to transition to the community; a screening and assessment process that accurately identifies individuals whose needs could be appropriately met in the community and that reliably determines the need for specialized services for persons who are admitted to a nursing facility; and the provision of specialized services that satisfy the federal standard for active treatment for those who are admitted to a nursing facility. *See generally id.* None of these claims are unique to any individual plaintiff. Rather, the claims raised and the relief sought operate equally to benefit all class members.

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

(2) Adequacy of Counsel

The factors that courts consider in determining the adequacy of the counsel in class actions include: the attorneys' professional skills, experience, and resources. *See N. Am. Acceptance Corp. Sec. Cases*, 593 F.2d 642, 644 (5th Cir. 1979), *cert. denied*, 444 U.S. 956 (1979); *Rodriguez*, 166 F.R.D. at 473. Plaintiffs' counsel are well qualified to handle this action and will prosecute it vigorously on behalf the class. Disability Rights Texas (formerly Advocacy, Inc.) is the federally-designated Protection and Advocacy agency for persons with disabilities in Texas and is experienced in class action litigation on behalf of individuals with disabilities. The Center for Public Representation has been involved in complex class action litigation on behalf of institutionalized persons with disabilities for over thirty years and has been lead counsel in numerous institutional reform lawsuits throughout the country, including a very similar case in

Massachusetts. *See Rolland*, 2010 WL 157475; *Voss v. Rolland,* 592 F.3d 247-49 (recounting history of litigation). Weil, Gotshal & Manges LLP is a leading private law firm, internationally, nationally, and in Texas, and has litigated numerous class actions and other complex cases. Finally, plaintiffs' counsel command the necessary resources to competently represent the class, and they have no other professional commitments which are antagonistic to, or which would detract from, their efforts to seek a favorable decision for the class in this case.

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

Courts have recognized that class actions certified under subsection (b)(2) of Rule 23 of the Federal Rules of Civil Procedure are particularly important in civil rights cases where injunctive relief is sought, as in the present case. *James*, 254 F.3d at 567 n.16 (recognizing that "Rule 23(b)(2) was intended to be used 'in the civil-rights field where a party is charged with discriminating unlawfully against a class'"); *Morrow*, 277 F.R.D. at 197; *Yaffe*, 454 F.2d at 1366 ((b)(2) is "uniquely suited to civil rights actions"); *Holmes v. Continental Can Co.*, 706 F.2d 1144. 1152 (11th Cir. 1983); *see also* Advisory Committee Note on Rule 23, 39 F.R.D. 69, 102 (1966). Certification of classes has been deemed "an especially appropriate vehicle for civil rights actions" seeking systemic reform. *See Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980); *see also Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982). In cases seeking only equitable relief, class certification is necessary to make sure that mandatory relief runs to benefit all class members. *Rolland*, 2008 WL 4104488 at *6 (citing *Jane B. v. N.Y. Dept. of Social Servs.*, 177 F.R.D. 64, 72 (S.D.N.Y. 1987)).

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

The Fifth Circuit also has recognized the importance of class certification where a defendant governmental agency may voluntarily perform a specific action sought in a lawsuit for an individual plaintiff and, consequently, moot the representative plaintiff's claim. *Zeidman*, 651 F.2d at 1051. In *Zeidman*, the Court of Appeals explained that "refusal to certify the class 'would mean that the (agency) could avoid judicial scrutiny of its procedures by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained, class certification.'" 651 F.2d at 1051 (quoting *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977)). A similar risk exists here: the Defendants could provide the Named Plaintiffs with a home and community-based waiver slot and/or specialized services, thereby mooting the Named Plaintiffs' claims, while continuing to deny similar relief to the thousands of other similarly-situated persons.

This case, like most civil rights cases, primarily focuses on the Defendants' conduct not the Plaintiffs' needs. The Plaintiffs challenge how the Defendants fund, plan and administer their existing community service system. The Plaintiffs claim that the Defendants have engaged in a pattern of standardized conduct, the result of which is a failure to make sufficient community support services available to persons with developmental disabilities, leading to segregation in nursing facilities. This pattern and practice of standardized conduct by the Defendants towards the putative class of persons currently segregated or at risk of institutionalization in nursing facilities is appropriate for, and susceptible to, a single injunction.

The Amended Complaint seeks an injunction to alter that conduct and to compel compliance with federal law, by reasonably modifying Texas's community service system for persons with developmental disabilities, so that Texas offers services in integrated settings for all qualified persons with developmental disabilities. The focus on the Defendants' conduct in operating their community services system, and the resulting systemic claims of discrimination, are what have led virtually every court that has considered class certification in ADA, Rehabilitation Act, and Medicaid Act cases to certify a class, despite the obvious difference in the abilities, disabilities, and needs of class members. At the proper level of analysis for class certification purposes, the focus is, and should be, on the adequacy of the Defendants' actions and inactions in providing services in the most integrated setting for qualified persons with developmental disabilities.

Differences concerning an individual's disability do not preclude certification in cases where those class members have suffered a common injury and where that injury can be redressed by a single injunction requiring the Defendants to fund and operate their community service system consistent with federal law. Unlike *M.D.*, 675 F.3d at 846, and *Jamie S.*, 668 F.3d at 499-500, which explicitly sought or resulted in a judicial process that used court-created expert panels or a hybrid IEP system to determine for each class member whether a separate injunctive order should issue, no individualized remedy is sought or needed here. Thus, the determinative factor that led both appeals courts to decline certification are absent in this case. Rather, because the Amended Complaint seeks, and the ADA and Rehabilitation violations can be remedied by, a single injunction, certification of the proposed class is appropriate under Rule 23(b)(2).

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

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

The Named Plaintiffs are jointly represented by Disability Rights Texas, the Center for Public Representation, and Weil, Gotshal & Manges LLP, each of which brings unique resources, experience and skills to the case, and those three law firms should be appointed as class co-counsel pursuant to Rule 23(g). Disability Rights Texas. is the federally-designated protection and advocacy organization for the state of Texas and is charged with protecting the rights of individuals with disabilities throughout Texas. It brings to this case a knowledge of and experience with the workings of Texas's service array and service delivery systems for individuals with disabilities. It is also in direct contact with the Named Plaintiffs and numerous other class members through its ongoing outreach and intake processes. Disability Rights Texas has seven regional offices throughout Texas. Garth Corbett, the lead Disability Rights Texas attorney on this case, has over 28 years of experience representing individuals with disabilities and has litigated 2 class action cases, including *Neff.*, 179 F.R.D. at 195 ("The Court had the opportunity to see counsel [Garth Corbett] in action and review the pleading and other legal memoranda submitted by counsel….The Court is confident counsel provided adequate representation for the class."). He is not counsel in any pending class actions.

The Center for Public Representation is a Massachusetts-based public interest law firm that focuses on systemic advocacy on behalf of individuals with psychiatric and intellectual disabilities. It provides litigation support and assistance to the National Disabilities Rights Network and the protection and advocacy organizations throughout the country. It has litigated dozens of class actions on behalf of institutionalized individuals, raising claims under the Americans with Disabilities Act, the Nursing Home Reform Amendments Act, the Medicaid Act, Section 504 of the Rehabilitation Act, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Mr. Schwartz and Ms. Dorfman, the two lead Center for Public Representation attorneys, have been lead counsel in numerous class actions. Mr. Schwartz is a nationally-recognized expert concerning the rights of institutionalized individuals and has almost 40 years of experience representing individuals with psychiatric and intellectual disabilities. He is currently counsel in nine ongoing class actions, including the case of *Rolland v. Patrick* that involves claims virtually identical to those at issue in this case, and has handled more than 15 additional cases involving class claims over the course of his career. Ms. Dorfman has 20 years of experience representing individuals with disabilities and has litigated in excess of six class actions and more than five other large systemic reform cases raising claims under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Medicaid Act, and the Due Process Clause of the United States Constitution. Ms. Toner is co-counsel on a large ADA class action in Oregon on behalf of over 2,000 individuals with developmental disabilities, and assists on several other class action cases involving persons with disabilities.

Weil, Gotshal & Manges, LLP ("Weil") is an international law firm with over 1,200 lawyers in 20 offices worldwide. The Dallas office has over 80 attorneys and specializes in complex litigation. Ms. Ostolaza is a partner in the firm and is co-head of the firm's 160-lawyer complex commercial litigation practice. She concentrates in the trial and supervision of complex civil litigation. She has over 18 years of experience and has significant experience litigating class actions. She is supported in this case by several associates in the firm, each of whom also have experience with complex litigation and class actions. Weil adds expertise in the area of class actions, litigation and trial skills, and provides extensive litigation support capabilities.

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

VI. CONCLUSION AND REQUESTED RELIEF

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Garth A. Corbett
Garth A. Corbett