

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

DAVID MARSTERS, )  
by his next friend, Nancy Pomerleau; )  
LORRAINE SIMPSON, by her guardian, Sara Spooner; )  
SHERRI CURRIN, by her guardian, Sara Spooner; )  
CAROLE CHOJNACKI, by her guardian, Sara Spooner; )  
RICHARD CAOUILLE, by his guardian, Sara Spooner; )  
DONALD GRANT, by his guardian, Sara Spooner, )  
on behalf of themselves )  
and other similarly situated persons; and )  
MASSACHUSETTS SENIOR ACTION COUNCIL, )

Plaintiffs, )

v. )

MAURA HEALEY, in her official capacity )  
as Governor of the Commonwealth of Massachusetts; )  
KATE WALSH, in her official capacity )  
as Secretary, Executive Office of Health and )  
Human Services; )  
MATTHEW GORZKOWICZ, in his official capacity )  
as Secretary of the Executive Office of Administration )  
and Finance; )  
ELIZABETH CHEN, in her official capacity as )  
Secretary, Executive Office of Elder Affairs; )  
and MICHAEL LEVINE, in his official capacity )  
as Assistant Secretary of MassHealth, )

Defendants. )

CIVIL ACTION NO.  
1:22-cv-11715

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO  
DISMISS**

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## **INTRODUCTION**

The Plaintiffs hereby oppose Defendants’ Partial Motion to Dismiss, ECF# 98.<sup>1</sup> The Plaintiffs reside or have very recently resided in segregated nursing facilities in Massachusetts but need residential services to live in integrated settings in the community. Based on their experiences as persons with disabilities, they allege that Defendants’ administration of the long-term care system, lack of informed choice about community options, inaccurate eligibility evaluations, and denial of specialized services causes unnecessary institutionalization. Plaintiffs face ongoing unnecessary institutionalization at this moment and, when and if they are able to leave a nursing facility, remain at risk of re-institutionalization in the future. Plaintiffs have standing to pursue their claims under the Americans with Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act, and the Nursing Home Reform Amendments of the Medicaid Act because they have adequately alleged the three required elements of standing: (1) an injury in fact; that (2) is traceable to Defendants’ actions and inactions; and (3) can be redressed by a favorable order of this Court. Defendants seek to dismiss Plaintiffs’ claims using arguments untethered to these requirements and instead rely on bits and pieces of inapposite case law involving administrative exhaustion, issue preclusion, and abstention, but ignore longstanding precedents under the ADA and Medicaid Act. Indeed, Defendants fail to identify a single case where a court has found that institutionalized persons with disabilities lack standing to pursue an ADA/Section 504 claim. Plaintiffs’ allegations meet the requirements to demonstrate standing at this stage of the litigation, and their claims should be permitted to proceed.

## **ARGUMENT**

### **I. Standard of Review**

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<sup>1</sup> This memorandum cites Defendants’ memorandum, ECF # 109, as the “Motion” throughout.

Defendants move under Fed. R. Civ. P. 12(b)(1) and 12(c) for dismissal of all individual Plaintiffs' claims. "Rule 12(b)(1) requires the court 'to accept as true all well-pleaded factual averments in the plaintiff's complaint and indulge all reasonable inferences therefrom in his favor.'" *Bharathan v. United States*, No. cv-1:20-11265-NMG, 2021 U.S. Dist. LEXIS 126710, at \*2 (D. Mass. May 21, 2021) (quoting *Katz v. Pershing, LLC*, 672 F.3d 64, 70 (1st Cir. 2012)); *Perez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir. 2008). The court must "assess whether the plaintiff has propounded an adequate basis for subject matter jurisdiction." *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001). "The plaintiff must plead facts to show subject matter jurisdiction; the plausibility standard that applies under Rule 12(b)(6) also applies to jurisdictional determinations at the pleadings stage." *Bharathan*, 2021 U.S. Dist. LEXIS 126710 at \*2 (citing *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731-32 (1st Cir. 2016)).

In adjudicating a motion under Fed. R. Civ. P. 12(b)(1), the Court must decide "whether the relevant facts, which would determine the court's jurisdiction, also implicate elements of the plaintiff's cause of action." *Torres-Negrón v. J&N Records, LLC*, 504 F.3d 151, 163 (1st Cir. 2007). If they do, the court should grant the motion "only if the material jurisdictional facts are not in dispute." *Id.* Similarly, "[t]here is no resolution of contested facts in connection with a Rule 12(c) motion: a court may enter judgment on the pleadings only if the properly considered facts conclusively establish the movant's point." *R.G. Fin. Corp. v. Vergara-Nunez*, 446 F.3d 178, 182 (1st Cir. 2006). "[A]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v.*

*Defenders of Wildlife*, 504 U.S. 555, 561 (1992).<sup>2</sup>

In this case, the relevant jurisdictional facts are intertwined with the merits of Plaintiffs' claims. Plaintiffs allege that Defendants' administration of their long-term care system violates the ADA, the Rehabilitation Act, and the Medicaid Act,<sup>3</sup> and the relief they seek arises from those statutes. *See, e.g., Lyman v. Baker*, 954 F.3d 351, 361 (1st Cir. 2020). Where "a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief," the plaintiffs' standing is intertwined with the merits of their claims, meaning that those claims should be dismissed only if the facts material to standing are not in dispute. *McLellan Highway Corp. v. United States*, 95 F. Supp. 2d 1, 6 (D. Mass. 2000) (citing *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139-40 (9th Cir. 1983)). Similarly, a plaintiff must support its argument for standing in "the manner and [with the] degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan*, 504 U.S. at 561 (internal quotations and citations omitted). As explained below, Plaintiffs have alleged sufficient facts demonstrating their standing at this stage of the litigation. While the Court, when faced with a Rule 12(b)(1) motion, may look beyond the pleadings to affidavits and depositions without converting the motion to a Rule 56 motion, *Gonzalez v. United States*, 284

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<sup>2</sup> Where the defendants mount a facial challenge to jurisdiction, the court "accepts the plaintiff's version of jurisdictionally significant facts as true and addresses their sufficiency, thus requiring the court to assess whether the plaintiff has propounded an adequate basis for subject-matter jurisdiction." *Valentin*, 254 F.3d at 363. Where defendants mount a factual challenge, "controverting the accuracy (rather than the sufficiency) of the jurisdictional facts asserted by the plaintiff," the court can consider proffered "materials of evidentiary quality in support of that position." *Id.* The "key considerations" where there is a factual challenge to subject matter jurisdiction are "whether the parties have had a full and fair opportunity to present relevant facts and arguments, and whether either party seasonably requested an evidentiary hearing." *Id.* at 364.

<sup>3</sup> *See* Complaint, ECF#1, ¶¶ 174-214.

F.3d 281, 288 (1st Cir. 2002), plaintiffs first must have “a full and fair opportunity to present relevant facts and arguments.” *Valentin*, 254 F.3d at 364; *see also In re NeuroGrafix Patent Litig.*, 5 F. Supp. 3d 146, 150 (D. Mass. 2014). Here, Plaintiffs have not had the opportunity fully to develop the record as to facts relevant to jurisdiction as they are intertwined with their claims on the merits,<sup>4</sup> but Plaintiffs have shown that facts relating to standing remain in dispute. Accordingly, regardless of whether the Court uses the standard of accepting as true the well-pleaded allegations in the Complaint, considers additional facts and contentions developed by the parties to date, or both, the Motion should be denied.

Alternatively, the Court should deny the Motion and address the issue of standing after the record has been further developed. “While at the pleadings stage, general factual allegations of injury may suffice, and at summary judgment, such allegations must be supported by affidavits which will be taken to be true, where standing remains a controverted issue at trial, the specific facts establishing standing must be supported adequately by the evidence adduced at trial.” *Strahan v. Sec’y, Mass. Exec. Off. of Energy & Env’t Affs.*, No. 1:19-CV-10639-IT, 2021 U.S. Dist. LEXIS 259688 at \*14 (D. Mass. Nov. 30, 2021) (internal quotations omitted).

## **II. Plaintiffs have alleged an injury-in-fact.**

### **a. Unnecessary institutionalization is an injury-in-fact.**

“[U]njustified isolation of persons with disabilities is a form of discrimination.” *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 600 (1999). Accordingly, courts have held that experiencing discrimination on the basis of disability constitutes an injury-in-fact under both the ADA and Rehabilitation Act.<sup>5</sup> “[L]acking necessary supports and services that could enable

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<sup>4</sup> Fact discovery does not close until October 2, 2024. *See* ECF# 77.

<sup>5</sup> *See Davis v. Shah*, 821 F.3d 231, 259 (2d Cir. 2016) (noting the “general[] equivalen[ce]” of the ADA and the Rehabilitation Act with respect to the requirements imposed on public entities).

[plaintiffs] to live independently in the community [...] satisfies the injury-in-fact requirement.” *M.G. v. N.Y. State Office of Mental Health*, 572 F. Supp. 3d 1, 11 (S.D.N.Y. 2021) (internal quotations and citations omitted). Courts have routinely denied motions to dismiss for lack of standing in cases brought by individuals who are institutionalized or even at risk of being institutionalized by state defendants,<sup>6</sup> and frequently granted affirmative relief to institutionalized persons under the ADA and the Rehabilitation Act.<sup>7</sup> Indeed, as recently as last month, the Commonwealth vigorously argued to the U.S. Supreme Court in an amicus brief that “[a]llegations that a plaintiff has personally suffered the harm of unlawful discrimination are sufficient to show injury-in-fact” under the ADA.<sup>8</sup> Plaintiffs agree.

**b. The Plaintiffs allege that they have been unnecessarily institutionalized and/or face the risk of unnecessary institutionalization.**

Faced with the manifold allegations of unnecessary institutionalization throughout the Complaint, *see* ¶¶ 113-123, Defendants either ignore what the Plaintiffs have pleaded or

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<sup>6</sup> *See, e.g., Ball v. Kasich*, 244 F. Supp. 3d 662, 681 (S.D. Oh.); *A.R. v. Dudek*, No. 12-60460-civ, 2014 U.S. Dist. LEXIS 187277 \*28–30 (S.D. Fl. Nov. 13, 2014); *Disability Rights Cal. v. Cty. of Alameda*, No. 20-cv-05256, 2021 U.S. Dist. LEXIS 11553 \*16 - 21 (N.D. Ca. Jan. 21, 2021); *Kenneth R. v. Hassan*, 283 F.R.D. 254, 260 n. 2 (D.N.H. 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1106 (9th Cir. 2011); *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003); *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 991-92 (D. Minn. 2016).

<sup>7</sup> *See, e.g., Rolland v. Cellucci*, 191 F.R.D. 3 (D. Mass 2000); *Rolland v. Patrick*, 562 F. Supp. 2d 176 (D. Mass. 2008); *Hutchinson v. Patrick*, 636 F.3d 1 (1st Cir. 2011) *aff’g* 683 F. Supp. 2d 121 (D. Mass. 2010). Although those cases may not specifically address standing if defendants did not bring a motion under Fed. R. Civ. P. 12(b)(1), those cases nonetheless stand for the proposition that the plaintiffs had standing; as Defendants argue, standing is a constitutional requirement, not a prudential one, Motion, p. 17, so in issuing final judgments in those cases, those courts necessarily had determined that the plaintiffs had standing.

<sup>8</sup> Brief for Massachusetts, Connecticut, The District of Columbia, Illinois, Maryland, New Jersey, New York, Oregon, and Washington as *Amici Curiae* in Support of Respondent, *Acheson Hotels, LLC v. Deborah Laufer*, at 19, No. 22-429 (U.S. filed August 9, 2023), attached as Exhibit A to the Declaration of Jeremy W. Meisinger.

mischaracterize those allegations as mere “impl[ications].” Motion, p. 12-13.<sup>9</sup> Defendants accuse Plaintiffs of failing to offer “specific information [...] regarding the harm, if any, that has befallen each individual plaintiff,” Motion, p. 14 (citation omitted), while simultaneously refusing to engage any of the allegations in the Complaint except those made with respect to David Marsters. Motion, p. 13.

Contrary to Defendants’ claims, Plaintiffs could not be clearer about whether and how they have been harmed. Each of the Plaintiffs either is or until very recently was unnecessarily institutionalized, and, with appropriate accommodations, could be served in the community. For example, Plaintiff Marsters is “confine[d] [...] on a locked unit” at the Hillcrest Commons facility, where he was placed by Defendants, leading to “significant frustration and anxiety” as well as “a decline in his mental health.” Compl., ¶ 138. He has “thrived” in the limited opportunities he has had to leave the facility, Compl., ¶ 142, and “wants to live in the community and return to the West Springfield area.” Compl., ¶ 143. Mr. Marsters “could be safely served in the community,” where he would benefit from the provision of specialized services in relation to his mental health. *See* Initial Aff. of Barbara Pilarcik, ECF# 70-3 (“Pilarcik Aff.”) at ¶¶ 45-47. He is not served in the community because of “restrictive eligibility criteria” imposed by Defendants and on the basis of improper evaluations of his health performed at Defendants’ behest, which ignored key information about his condition. *See* Suppl. Aff. of Barbara Pilarcik, ECF# 119 (“Pilarcik Suppl. Aff.”) at ¶¶ 13-17. Mr. Marsters continues to be injured by the

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<sup>9</sup> For example, Defendants attempt to pick apart the allegation that David Marsters receives “no ancillary services or specialized PASSR services,” and pose a series of rhetorical questions about “why Marsters needed ‘ancillary’ or ‘specialized’ services” or “under what legal authority he was entitled to receive them.” Motion, p. 13. But two paragraphs above the allegation Defendants quote, Plaintiffs explain that Mr. Marsters “has mood and schizoaffective disorders” that led to multiple hospitalizations, yet the Defendants’ PASSR program nonetheless determined that he needed no specialized services for those issues. Compl., ¶ 140.

discriminatory administration of Defendants' long-term care program.

Ms. Simpson likewise was not "provide[d] adequate case management and oversight" nor "adequate support" to "be maintained in the community safely." Spooner Dep., 218-220, Jun. 15.<sup>10</sup> She "desperately wants to live independently in the community, cook her own food again, and be close to her family." Compl. ¶¶ 147-151. She is not allowed to leave her nursing facility, which does not offer organized trips. Spooner Dep., 35-36, Jun. 8 and 221-222, Jun. 15. She requires numerous services she is not currently receiving including "day programming support, individualized psychotherapies," Spooner Dep., 221, Jun. 15, and "mental health services or active treatment." Complaint, ¶¶ 147-151. She can receive these services in the community because she does not require physical assistance for daily living. Spooner Dep., 39-40, Jun. 8. After the suit was filed, Defendants eventually deemed Ms. Simpson eligible for the MFP-RS waiver and have assigned her a "transition case manager." Motion, p. 18.

Ms. Currin resides in a nursing facility in Marlborough, which she would like to leave "as soon as possible." Spooner Dep., 26-28, Jun. 8. She had not "received necessary counseling, nor received a DMH case worker before this lawsuit was filed, despite four PASRR evaluations finding she had serious mental illness and could be better served in the community." Spooner Dep., 324-327, Jun. 8.<sup>11</sup> She has not received specialized services for her mental illness, and would like to live in the community in a "shared living environment or a residential group home." Spooner Dep. 30, Jun. 8. She is a good candidate as "she's young, she's still able to engage in [activities], she's very social, [and] she has goals and dreams." Spooner Dep., 281,

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<sup>10</sup> "Spooner Dep." refers to the excerpts of the Deposition of Sara Y. Spooner, dated June 8, 2023 and June 15, 2023, attached to the Declaration of Jeremy W. Meisinger as Exhibit B.

<sup>11</sup> Specifically, this answer appears in the Deposition Errata Sheet for Sara Y. Spooner, referencing page 324, attached at Exhibit B to the Declaration of Jeremy W. Meisinger.

June 8. Defendants eventually determined she is “clinically eligible for the MFP-RS waiver program” but also determined she may become financially ineligible. Motion, p. 7 n. 14.

Mr. Caouette “has continuously expressed his desire to live in the community” rather than a nursing facility. Compl., ¶¶ 163–168, Spooner Dep., 71, Jun. 8. His guardian noted that, when institutionalized, “there were no services offered to him. There was no case management [...] [h]e wasn’t screened as eligible for any additional services,” Spooner Dep., 120, Jun. 15, in part due to “restrictions regarding the MFP Waiver application [that] are unnecessarily restrictive and discriminatory toward individuals who have major illness.” Spooner Dep., 120-125, Jun. 15. He is locked in a facility 24 hours per day, except when his guardian visits, Spooner Dep., 110, Jun. 15, and would “benefit from increased therapeutic supports.” Spooner Dep., 124-126.

Mr. Grant experienced “[r]epeated denials from the MFP Waiver Program,” and “was never provided with any sort of support around his major mental illness until after he became a plaintiff in [this] lawsuit.” Spooner Dep., 185-186, Jun. 15. He has “expressed frustration with [his] continued nursing facility placement.” Spooner Dep., 44-45, Jun. 8. Not only does he miss “being independent and living in the community,” Compl., ¶ 173, but the MFP-RS Waiver “should be able to support his transition into the community.” Spooner Dep., 172, Jun. 15. This is “what he wants” as “he’s too young to be in a nursing home.” Spooner Dep., 172, Jun. 15. He has been denied waiver services on multiple occasions, which denials were “clearly contrary to the views” of those who interact with him and which stated no evidentiary basis. Pilarcik Aff., ¶ 89. Mr. Grant is not currently receiving necessary mental health services in his facility and could be served safely in the community if properly supported. Pilarcik Aff., ¶¶ 89-91.

Ms. Chojnacki “moved to a specialized D[epartment of] M[ental] H[ealth] group home in May 2023,” Motion, p. 18, after spending thirteen months in a nursing facility, which caused

“her emotional distress and frustration” that “could have been avoided” had Defendants provided her with proper services in the first instance. Spooner Dep., 217-224, Jun. 8. She did not receive “sufficient information about community options and services prior to the filing of this litigation” or case management until only very shortly prior to her moving to the group home. Pilarcik Aff., ¶ 34. Ms. Chojnacki experiences a “cycle” of severe mental health symptoms “due to lack of support” over several years, and thus “has been placed at serious or even imminent risk of institutionalization” on multiple occasions. Pilarcik Suppl. Aff., ¶ 30.

**c. Standing does not require that an institutionalized person be eligible for, apply to, or be accepted by any particular waiver program.**

Defendants make several arguments in support of their claim that Plaintiffs lack standing, all of which fail to address directly the core standing requirements of injury in fact, traceability, and redressability. First, Defendants argue that various Plaintiffs cannot have standing if they either had not yet applied for a particular waiver or had not yet been denied for a particular waiver. Motion, p. 14-15. This argument has been rejected in other nursing facility *Olmstead* cases. *See, e.g., State of Connecticut Office of Protection and Advocacy v. Connecticut*, 706 F. Supp. 2d 266, 284 (D. Conn. 2010). Moreover, it is well established that standing in the ADA context does not require a plaintiff to engage in “futile gestures” within a discriminatory program; although in this case many of the Plaintiffs have filed applications seeking certain relief, they were not required to do so in order to have standing.<sup>12</sup>

Second, Defendants argue that no standing exists if the Commonwealth finds the Plaintiff ineligible for a particular program, arguing that unsuccessful or unsought administrative appeals

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<sup>12</sup> *See, e.g., International Board of Teamsters v. United States*, 431 U.S. 324, 366-67 (1977); *Disabled Ams. for Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 405 F.3d 60, 64 (1st Cir. 2005); *Equal Rights Center v. Uber Technologies*, 525 F. Supp. 3d 62, 76 (D.D.C. 2021); *Frame v. City of Arlington*, 657 F.3d 215, 235 (5th Cir. 2011).

on the part of the Plaintiffs require the Court to agree with MassHealth's eligibility determinations in the context of adjudicating Plaintiffs' ADA claims. Motion, p. 15-16 n. 28. Defendants are wrong for several reasons. Most obviously, it is well established that, absent a statutory requirement, a plaintiff need not exhaust a state administrative process prior to filing a civil rights claim. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982). In addition, courts have repeatedly permitted plaintiffs to bring *Olmstead* claims even in the absence of determinations by state officials that a more integrated setting is appropriate for a particular plaintiff.<sup>13</sup> The Department of Justice takes the same position: "[T]he ADA and its regulations do not require an individual to have had a state treating professional make such a determination."<sup>14</sup> The Department explains that this result is necessary to prevent states from "circumvent[ing]" their responsibilities to inform disabled individuals about available options and/or recommending those options," as indeed the Plaintiffs have alleged Defendants fail to do. Compl., ¶ 115. In accordance with DOJ's guidance, Plaintiffs have filed expert affidavits from qualified professionals arguing that community placement is appropriate for the Plaintiffs. *See generally* Pilarcik Aff. ¶¶ 14, 21, 32, 45, 56, 65, 77, 90, and Pilarcik Suppl. Aff., ¶¶ 17, 22, 30. Finally, Defendants' argument fails to recognize their obligation under the ADA to modify eligibility criteria for their programs if it is reasonable to do so.

Third, Defendants argue that Plaintiffs cannot be entitled to "new programs or services for the disabled which it has not previously provided to any group." Motion, p. 16 n. 30 (citation

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<sup>13</sup> *See, e.g., Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 540 (E.D. Pa. 2001); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280 (E.D.N.Y. 2008).

<sup>14</sup> 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.*, Department of Justice (Feb. 25, 2020), available at: [https://archive.ada.gov/olmstead/q&a\\_olmstead.htm](https://archive.ada.gov/olmstead/q&a_olmstead.htm), attached to the Declaration of Jeremy W. Meisinger as Exhibit C.

omitted).<sup>15</sup> But as is evident in the Complaint, ¶¶ 115-117, Plaintiffs are not asking for new programs or services, but rather reasonable modifications to existing programs. Plaintiffs have further pointed out that “the Commonwealth knows how to provide appropriate remedies for its illegal segregation of people with disabilities” because it already does so for individuals with intellectual/developmental disabilities and acquired brain injuries. Compl., ¶¶ 9, 108-112. Thus, Defendants’ argument is both wrong and irrelevant to standing.

**d. Defendants’ view of standing fails on its own terms.**

In addition to failing to cite a single ADA, Rehabilitation Act, or Medicaid decision denying standing, even taken on its own terms, Defendants’ position on standing is wrong. Under Defendants’ view, no real or hypothetical plaintiff would ever have standing to bring an ADA or similar claim. Defendants argue, focusing exclusively on the MFP waiver, that the Plaintiffs stand in different procedural postures with respect to particular waiver programs. Motion, p. 10. But those differences are irrelevant to Defendants’ analysis, because Defendants take the position that no administrative procedural posture affords standing to challenge Defendants’ operation of their long-term care program. If plaintiffs have not yet applied for a specific waiver, Defendants argue that they have no standing.<sup>16</sup> If they do apply but have not yet been denied, they too lack standing.<sup>17</sup> If they apply and are found ineligible, they also do not have standing.<sup>18</sup> If they apply and are eligible but Defendants lack the will or capacity to serve

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<sup>15</sup> Defendants appear to be making not a standing argument but rather a “fundamental alteration” argument. They do not use that term, however, presumably because whether plaintiffs seek a “fundamental alteration” is well-established as “a factual issue” unsuitable for resolution by a motion to dismiss. *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 153 (2d Cir. 2013).

<sup>16</sup> Motion, p. 10 (arguing Currin and Simpson “are not harmed by deprivation of a service for which they did not apply”).

<sup>17</sup> *Id.* (arguing Chojnacki lacks standing because she had applied for a waiver but not had not yet been denied as of the filing of the Complaint).

<sup>18</sup> *Id.* (arguing Caouette, Grant, and Marsters lack standing due to ineligibility determinations).

them, they do not have standing.<sup>19</sup> If they do not appeal any of these determinations, they lack standing.<sup>20</sup> If they do appeal, they do not have standing while the appeal is pending.<sup>21</sup> If the appeal is denied, they lack standing because it was denied.<sup>22</sup> If the appeal is allowed, they would lack standing because their claim is moot.<sup>23</sup>

As the adage goes, “that which proves too much, proves nothing.” Defendants do not address the actual requirements of standing and ask this Court to hold that, notwithstanding the *Olmstead* decision and nearly 25 years of subsequent case law, the institutionalized Plaintiffs in this case lack standing to challenge their own institutionalization. Defendants seek to fashion out of whole cloth (and without case law support) a view of standing in which none of Defendants’ decisions in establishing and implementing their long-term care system can ever be challenged. If Plaintiffs require reasonable accommodations to be served in the community, Defendants argue that they are not required to provide them regardless of whether those accommodations are plainly reasonable.<sup>24</sup> If Defendants apply their eligibility criteria incorrectly, that does not matter because a court is required to agree with Defendants’ determinations, doubly so if the Plaintiffs fail to appeal them (or fail to succeed in those appeals).<sup>25</sup>

In short, Defendants are not describing the requirements of constitutional standing; they

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<sup>19</sup> *Id.* at 15 -16 (arguing “Grant, and perhaps others” cannot be served through a “currently exist[ing]” program).

<sup>20</sup> *Id.* at 16 (arguing Grant and Caouette “did not appeal” administrative decisions on their waiver applications).

<sup>21</sup> *Id.* at 16-17 (arguing that the Court must abstain from hearing the claims of Marsters, Caouette, and Currin because they have filed appeals or filed new applications).

<sup>22</sup> *Id.* at 16 (arguing administrative decisions should be entitled to “preclusive effect”).

<sup>23</sup> *Id.* at 18-19 (arguing that a plaintiff immediately lacks standing if the plaintiff is determined to be eligible for a community placement, whether or not they actually receive one).

<sup>24</sup> *Id.* at 14 n. 24 (“That services *should* be available, however, does not allege a redressable injury”) (emphasis in original).

<sup>25</sup> *Id.* at 16 (arguing that MassHealth’s determinations and unsuccessful appeals thereof are entitled to “preclusive effect”).

are describing impunity to administer their long-term care system notwithstanding the requirements of Federal law. The Court should reject Defendants' unsupported arguments.

**III. Plaintiffs' injuries are traceable to Defendants' action and inaction and are redressable by a favorable order of this Court.**

Beyond citing case law noting the traceability and redressability elements of standing, Motion, p. 12, Defendants make no affirmative argument as to either element. To be clear, however, Defendants include the Governor and the Executive Office of Health and Human Services ("EOHHS"), which is the entity responsible for the long-term care system as delivered by various EOHHS divisions, and is the "single state agency" for all Medicaid purposes.<sup>26</sup> Thus, the Defendants include those agencies responsible for administering the Commonwealth's long-term care system and for the policies and practices that have caused the Plaintiffs' unnecessary institutionalization, denied them meaningful choice, and resulted in inaccurate eligibility determinations and denial of specialized services within that system. Plaintiffs' experts have confirmed that these problems are traceable to the Defendants' practices.<sup>27</sup> A favorable order from this Court requiring Defendants to comply with the ADA and other statutes cited in the Complaint, and to order the specific relief requested, *see* Compl., § VII, ¶ 2, would redress Plaintiffs' injuries. This Court has issued orders in past cases that accorded similar relief to persons living with intellectual or developmental disabilities, with the result that the vast majority of such persons live in integrated settings in the community.<sup>28</sup> The Court can (and

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<sup>26</sup> Compl. ¶ 29. *See also* 42 CFR 431.10.

<sup>27</sup> *See* Initial Aff. of Randall Webster, ECF# 70-2 ("Webster Aff.") at ¶¶ 15-18 (describing the way that Defendants allocate preferential treatment for waiver capacity), 19-23 (describing subjective and inconsistent eligibility criteria for waiver programs), 24-26 (noting that the Defendants do not offer adequate information about available services), 27-29 (describing capacity limitations in waiver programs).

<sup>28</sup> *See* Compl. ¶ 108.

should)<sup>29</sup> issue a similar order in this case.

#### **IV. The Plaintiffs' claims are not moot.**

In arguing that three Plaintiffs' claims are moot, Defendants misapprehend the nature of the injuries alleged. First, Defendants mistakenly assume that the only relief sought is acceptance into a waiver program, but Plaintiffs' claims challenge the administration of the long-term care system, as well as Defendants' eligibility criteria and failure to provide reasonable accommodations. *Cf. Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 441 (6th Cir. 2020). Second, "mootness does not result from a defendant's voluntary cessation of his allegedly illegal conduct unless it is clear that the behavior is unlikely to recur."<sup>30</sup>

With respect to Plaintiff Simpson, Defendants do not argue that Ms. Simpson has not suffered an injury, but only that she has been "deemed clinically eligible for the MFP-RS waiver" and is "actively working with a transition case manager to find a suitable community-based residence." Motion, p. 18. Although Ms. Simpson is unnecessarily institutionalized at this very moment, Defendants argue that the assignment of a "case manager" in May 2023<sup>31</sup> immediately deprives her of standing to challenge her institutionalization. But Ms. Simpson was institutionalized following a hospitalization in April 2021, after which she abruptly stopped receiving support services from the Department of Mental Health.<sup>32</sup> The assignment of a case manager neither addresses nor moots Ms. Simpson's claims under Federal law.

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<sup>29</sup> See Suppl. Aff. of Randall Webster, ECF# 118 ("Webster Suppl. Aff.") at ¶ 9-32 (explaining that the orders issued in *Rolland*, 191 F.R.D. 3, *Rolland*, 562 F. Supp. 2d 176, and *Hutchinson*, 683 F. Supp. 2d 121, had the effect of the addressing the problems that Plaintiffs have identified in this case).

<sup>30</sup> *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013), overruled in part by *Stinnie v. Holcomb*, 37 F. 4th 977, 981-82 (4th Cir. 2022) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)); *Steward v. Abbott*, 189 F. Supp. 3d 620, 629-30 (W.D. Tex. 2016).

<sup>31</sup> See Aff. of Amy Bernstein, ECF# 110 ("Bernstein Aff.") at ¶ 117.

<sup>32</sup> See Compl. ¶ 146-51.

With respect to Carole Chojnacki, Defendants argue her claim is moot because she “no longer resid[e]s in a nursing facility,” having “moved to a specialized DMH group home in May 2023.” Motion, p. 18. But, as Defendants’ affiant acknowledges, after receiving DMH supportive services for three decades, Defendants in 2021 abruptly discontinued those services and Ms. Chojnacki was placed in a nursing facility, where she then waited thirteen months for an evaluation that determined both that she should stay in a nursing facility but also transition out of one.<sup>33</sup> Though Ms. Chojnacki moved to a specialized DMH group home, there is ample evidence, based upon Ms. Chojnacki’s longstanding clinical history, that she remains at serious risk of re-institutionalization. *Cf. Carpenter-Barker v. Ohio Dep’t of Medicaid*, 752 F. App’x 215, 222–23 (6th Cir. 2018); *Steward*, 189 F. Supp. 3d at 630. As to Plaintiff Grant, Defendants do not make a mootness argument; they instead argue that Defendants have deemed Mr. Grant to be ineligible for services so he cannot have any claim to those services. *See* Motion, p. 18. But Defendants have not offered him a meaningful choice of community options to which he is eligible, including group living arrangements from the Department of Mental Health. Moreover, Defendants cite no case for the proposition that a defendant may render a plaintiff’s claims moot by disagreeing with them, especially when any alleged disagreement may be the product of his disability or the vestiges of his institutionalization. Moreover, Defendants misunderstand that Mr. Grant is not asking the Court to overturn a single evaluation or the results of the many appeals he has filed,<sup>34</sup> but rather to issue a broader order remedying the discrimination he has suffered within the system Defendants have built and maintain. *See Waskul*, 979 F.3d at 441.

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<sup>33</sup> Aff. of Beth Lucas, ECF# 112, (“Lucas Aff.”) at ¶ 34. The evaluation concluded that a nursing facility was “most appropriate” for her but also that “community-based services may be a more appropriate way to meet [her] needs.”

<sup>34</sup> Defendant’s affiant describes a lengthy process of waiver applications and appeals going back nearly five years. *See Bernstein Aff.* ¶ 173-218.

**V. Plaintiffs’ claims relate back to the filing of the Motion for Class Certification, and the Court should not reward Defendants’ efforts to “pick off” the Plaintiffs.**

Even if any of the Plaintiffs’ claims were moot, those claims should not be dismissed or impact the certification of a class. Plaintiffs’ individual claims relate back to the filing of their Motion for Class Certification, ECF# 70, in April 2023. Courts have recognized that “class claims are not necessarily moot ‘where a named plaintiff’s individual claim becomes moot before the district court has an opportunity to rule on the certification motion, and the issue would otherwise evade review.’” *S. Orange Chiropractic Ctr., LLC. v. Cayan LLC*, No. CV-15-13069-PBS, 2016 U.S. Dist. LEXIS 49067, at 15 (D. Mass. Apr. 12, 2016) (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75-76 (2013)).<sup>35</sup> Applying the relation-back doctrine is justified in this case through two applicable exceptions to the mootness doctrine: (1) the “picking off” exception and (2) the “inherently transitory” exception. Courts have noted that attempting to “pick off” “would-be class representatives” cuts against the purpose of class action lawsuits seeking systemic relief.<sup>36</sup> Plaintiffs credibly allege that Defendants have sought to pick off and moot the claims of the Plaintiffs. The guardian of five of the Plaintiffs described how an EOHHS representative reached out to for the first time after the Complaint was filed, proposing a special priority process for all waiver applications for her clients, followed by weekly monitoring meetings. Spooner Dep., 89, Jun. 8. Defendants themselves argue that “facts have changed substantially since the Complaint was filed,” Motion, p. 18, but fail to note why. As one example, the Level II PASSR determination that led to Ms. Chojnacki leaving her nursing

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<sup>35</sup> See also *Richardson v. Bledsoe*, 829 F.3d 273, 278-79 (3d Cir. 2019); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011).

<sup>36</sup> See, e.g., *Richardson*, 829 F. 3d at 280; *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 54 (1st Cir. 2015) (“allowing the claims of putative class representatives to be ‘picked off’ would frustrate the objectives of class actions”).

facility occurred about two weeks after this case was filed. Lucas Aff., ¶ 35. Mr. Grant likewise received a Level II PASSR determination only about a month later. *Id.*, ¶ 42-43. Mr. Simpson received a Level II PASRR determination on the exact same day as Mr. Grant. *Id.*, ¶ 30. Mr. Marsters received a determination two days later, *id.*, ¶ 27, as did Ms. Currin three days after that. *Id.*, ¶ 33. Plaintiffs' expert has argued that Defendants' sudden burst of attention was caused by the filing of this lawsuit,<sup>37</sup> as has the guardian of five of the Plaintiffs.<sup>38</sup> Similarly, the Supreme Court has held that it is appropriate to apply the "relation back" doctrine when the claims raised are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Genesis Healthcare Corp.*, 569 U.S. 66, 76 (2013) (internal quotations omitted).<sup>39</sup> The "inherently transitory" exception applies where an individual claim may arguably become moot prior to deciding a class certification motion but some class members would retain live claims going forward.<sup>40</sup> Here, the parties agree that an individual's status within system can change rapidly. If, as Defendants argue, such changes lead to claims becoming moot, such claims are "inherently transitory" as illustrated by the facts of this case.

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<sup>37</sup> Pilarcik Aff. ¶ 14(e) ("Prior to this litigation, six of the seven Individual Plaintiffs were not provided information and experiences to make an informed choice about leaving the nursing facility."); ¶ 30 ("After the filing of this lawsuit, Ms. Chojnacki was referred to the HCBS MFP-RS waiver, and she was deemed clinically eligible on December 15, 2022"); ¶ 45 (noting of Mr. Marsters that "[w]ith the exception of the day program, it appears that most of the recommendations and activity for community services have occurred after the filing of this litigation"); ¶ 77 ("despite recommendations that a community placement is the most appropriate living arrangement for Ms. Currin, no activity occurred until after the filing of the litigation.").

<sup>38</sup> See Spooner Dep. 82-90, Jun. 8. State Ombudsman Marylouise Gamache and Sara Spooner met weekly from November 2022 until February 2023. Ms. Gamache recommended Ms. Spooner refer "all of [the Plaintiffs] to either DMH or MFP Residential or the ABI Residential Waiver." Asked if the Commonwealth's outreach was in direct response to the Complaint, Ms. Gamache responded, "Yes."

<sup>39</sup> See also *Brito v. Garland*, 22 F.4th 240, 247 (1st Cir. 2021).

<sup>40</sup> See *J.D. v. Azar*, 925 F.3d 1291, 1311 (D.C. Cir. 2019).

**VI. The Plaintiffs' claims are not precluded, unripe, or subject to abstention.**

Plaintiffs' claims are not "precluded" because an overturning of "MassHealth's prior administratives [sic] decision," Motion, p. 19-20, is not what Plaintiffs seek; they seek adjudication of their claims that Defendants' long-term care system is discriminatory and violates Federal law. MassHealth did not purport to decide those issues and has no power to decide them. Moreover, administrative exhaustion is not a prerequisite to suit in this context.<sup>41</sup> Ripeness likewise does not apply here, as Plaintiffs have been and continue to be injured by unnecessary institutionalization. Nor does *Burford* abstention; as Defendants argue, *Burford* abstention may counsel a Federal court to "decline to interfere" "when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar."<sup>42</sup> Since the *Olmstead* decision, numerous Federal courts (including this Court) have decided ADA, Rehabilitation Act, and Medicaid Act claims asserted by persons claiming to be unnecessarily institutionalized without the need to abstain.

**CONCLUSION**

For the reasons discussed above, the Court should deny the Motion.

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<sup>41</sup> See, e.g., *Patsy*, 457 U.S. at 516 (1982); *Roach v. Morse*, 440 F.3d 53, 56-58 (2d Cir. 2006) (Sotomayor, J.) (section 1983 claim not barred by failure to exhaust administrative remedies under the Medicaid Act); *Romano v. Greenstein*, 721 F.3d 373, 376 (5th Cir. 2013); *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162, 1167 n. 3 (10th Cir. 2004).

<sup>42</sup> Motion, p. 17 n. 32 (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989)).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 11, 2023, a copy of the foregoing document was served through the electronic filing system on counsel for Defendants in the above captioned-matter.

/s/ *Jeremy Meisinger*

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