UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN SIMMONS; 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 CAOUETTE, 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-PBS

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

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I. Introduction

The Plaintiffs submit this Amended Memorandum of Law in Support of their Motion for Class Certification. As described in detail below, the Individual Plaintiffs have satisfied all relevant provisions of Fed. R. Civ. P. 23. Thus, certification of the Plaintiff Class and PASRR Subclass are appropriate to resolve the common contentions and to systemically redress the common injury caused by the Defendants' discriminatory conduct.

II. Statement of Facts

A. Common Injuries, Common Contentions, and the Appropriateness of a Single, Injunctive Remedy for the Plaintiff Class.

The Individual Plaintiffs and Plaintiff Class members have disabilities that substantially limit major life activities, including self-care, and require ongoing services and support. Compl. ¶¶ 78, 124-173. They are qualified for, and desire to receive, community-based services in integrated settings that provide more independence and increased opportunities to participate in activities routinely available to persons without disabilities. *Id.* ¶¶ 179, 195. Their institutionalization in nursing facilities is due to the Defendants' administration, planning, and operation of their long-term care system that: (1) fails to develop an adequate array of community residential services; (2) employs eligibility criteria for residential services that screen out qualified individuals with disabilities; (3) uses eligibility procedures that result in qualified individuals not being able to apply for residential services; and (4) fails to develop an informed choice process that allows qualified individuals to decide whether to remain in segregated facilities. *Id.* ¶¶ 113-120; Initial Affidavit of Randy Webster ¶ 30 (Webster Aff.), attached to Pls.' Motion as Ex. 2 (EOHHS' administration of its home and community-based (HCBS) waiver programs, and the arbitrary cap on service recipients, denies people with disabilities the opportunity to leave nursing facilities and receive services in community residential settings).

As evidenced by their own documents and data, as well as by expert reviews of the Defendants' community service system and the Individual Plaintiffs, the Defendants' failure to provide sufficient community residential services constitutes a common practice that is the common cause of the Plaintiff Class members' injuries. Compl. ¶¶ 10-12, 123; Webster Aff. ¶ 28; Initial Affidavit of Barbara Pilarcik, R.N. ¶ 14 (Pilarcik Aff.), attached to Pls.' Motion as Ex. 3 (all Individual Plaintiffs are appropriate for, and want to move to, a community residential setting). A single injunction that requires the Defendants to comply with the ADA, Section 504, and the PASRR requirements of the NHRA by expanding specific community residential services could remedy these violations "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

B. The Defendants' Own Data and Reports Demonstrate That Their Planning, Administration, and Operation of the Long-Term Care System Result in Unnecessary Institutionalization.

The Defendants' own data and reports provide significant evidence in support of class certification. *See* Initial Affidavit of Karen Detmers (Detmers Aff.), attached to Pls.' Motion as Ex. 1 (App. A: EOHHS data on the Moving Forward Plan (MFP) waiver; App. B: UMass PASRR data; App. C: MDS data on nursing facility residents). Specifically, EOHHS' report on the only cross-disability HCBS waiver program that provides residential services to people with disabilities who want to leave nursing facilities – the Moving Forward Plan/Residential Habilitation Services waiver (MFP-RS) – shows that 852 people were rejected during waiver years 2016-2020 because the waiver was full. Detmers Aff. ¶ 1(a)-(j) and App. A; Webster Aff. ¶ 27. EOHHS' report on the federally mandated PASRR program shows that 383 people who had a serious mental illness were admitted to nursing facilities during fiscal year 2021. Of these,

only 11 were determined to need specialized services for their mental illness while in the nursing facility. Detmers Aff. ¶ 2(f) & (j) and App. B, at 1-2.

Finally, federal MDS data for the third quarter of fiscal year 2022 shows that, of the 30,333 residents in nursing facilities, 11,402 were appropriate for discharge to the community, but only 6,025 had active discharge plans. Detmers Aff. ¶ 3(d) & (e) and App. C, at 6, 8. This data conclusively demonstrates that the Plaintiffs have satisfied the numerosity component of Rule 23(a)(1), the existence of common questions of law and fact, and the appropriateness of a single injunction to remedy violations of federal law, as required by Rule 23(a)(2) and 23(b)(2).

C. Expert Reviews of the Individual Plaintiffs and of Defendants' Home and Community-Based Waiver Programs Demonstrate that Hundreds, if Not Thousands, of Persons Are Unnecessarily Institutionalized.

To supplement the evidence from the Defendants' own data and reports regarding systemic deficiencies in the Commonwealth's long-term care system, the Plaintiffs' experts reviewed and evaluated the Individual Plaintiffs, as well as the Defendants' HCBS waiver programs. Pilarcik Aff. ¶¶ 10-13; Webster Aff. ¶¶ 6-10. These HCBS programs are the primary vehicle for providing residential services and supports to allow people with disabilities to live in integrated settings in the community. Webster Aff. ¶ 7. Federal data collected by the Centers for Medicare and Medicaid Services (CMS) demonstrates that the Plaintiff Class contains hundreds, if not thousands, of individuals with disabilities in nursing facilities, and that these individuals share common injuries that can be remedied by a single injunction. Detmers Aff. ¶ 3(d) & (e) and App. C, at 6, 8; Pilarcik Aff. ¶ 92. As the expert reviews collectively demonstrate, the Defendants' administration, planning, and operation of the long-term care system needlessly segregates persons with disabilities in nursing facilities, thereby establishing the appropriateness of, and the need for, a class wide remedy in this case. *See* Webster Aff. ¶ 30; Pilarcik Aff. ¶ 92.

1. Systemic Review of HCBS Services

Plaintiffs' expert Randall Webster conducted a review of the Defendants' HCBS waiver programs to determine if the administration and capacity of these programs resulted in people with disabilities being needlessly institutionalized due to a lack of community residential services and supports.[1]

The HCBS waiver review, like the Defendants' own data reports, *see* Detmers Aff., App. A, found that the Commonwealth has developed and operated a long-term care system which lacks sufficient community residential and support services to avoid segregation in nursing facilities and that these systemic deficiencies directly contribute to the unnecessary institutionalization of Plaintiff Class members. Webster Aff. ¶¶ 27-29. The review identified several common practices and causes for this unnecessary institutionalization, including restrictive eligibility criteria; a secretive and unfair eligibility determination process; a long, but undisclosed, waiting list; and a lack of timely and meaningful information to people with disabilities about community living opportunities and supports. *Id.* ¶ 30. The review found that the Defendants' planning and administration of the HCBS waiver programs has caused these needed community residential and support services to be unavailable. *Id.* ¶¶ 13-18.

2. Review of the Individual Plaintiffs

Barbara Pilarcik, R.N., has extensive experience in assessing individuals with disabilities and complex medical conditions in nursing facilities. Pilarcik Aff. ¶¶ 2-9. She conducted a

[1] Mr. Webster, the former Deputy Director of the Massachusetts Department of Disability Services (DDS), previously coordinated the transition of thousands of individuals with intellectual and developmental disabilities (IDD) and acquired brain injuries (ABI) from nursing facilities to community residential programs as part of the implementation of the settlement agreements in *Rolland v. Cellucci*, C.A. No. 98-30208-KPN (D. Mass.), and *Hutchinson v. Patrick*, C.A. No. 07-30084-MAP (D. Mass.). Webster Aff. ¶¶ 2-4. Mr. Webster reviewed documents and materials concerning the structure, capacity, and operation of the Defendants' waiver programs and the utilization of waiver services. Webster Aff. ¶ 5.

review of each Individual Plaintiff to determine whether they were unnecessarily institutionalized and could be appropriately served in the community.[2]

Ms. Pilarcik noted the high degree of commonality across the Individual Plaintiffs' circumstances, concluding that they have experienced avoidable, prolonged, and unnecessary institutionalization. Pilarcik Aff. ¶¶ 21, 34, 46, 56, 65, 76, 90. A common cause of this unnecessary institutionalization is the lack of appropriate community residential services and supports. *Id.* Similarly, she concluded that all of the Individual Plaintiffs could move to the community if the needed residential services and supports were available and that all the Individual Plaintiffs and their guardians would choose community living, if they were fully informed of and had access to these service options. *Id.* ¶ 14.

The experts' findings strongly support the contention that Plaintiff Class members experience unnecessary institutionalization in nursing facilities as a result of the Defendants' administration, planning, and operation of the Commonwealth's long-term care system. *Id.* ¶ 92. As documented in the Defendants' own reports and these expert reviews, the unnecessary institutionalization of the Individual Plaintiffs and Plaintiff Class members has several common causes, including: (1) the planning and administration of the Commonwealth's long-term care community service system; (2) the lack of community residential and support services; and (3) the lack of an informed choice process for people with disabilities in nursing facilities – all of

[2] Ms. Pilarcik reviewed approximately two years of facility and health records, conducted in-person meetings and observations with each of the Individual Plaintiffs, and interviewed guardians and family members. Pilarcik Aff. ¶¶ 2-9. Ms. Pilarcik then answered six central questions: (1) whether the individual could be served in the community with appropriate supports; (2) whether the individual needs residential services to live in an integrated setting in the community; (3) whether the individual wants to leave the nursing facility and live in the community; (4) whether the individual was provided information and experiences to make an informed choice about leaving the nursing facility prior to the filing of this case; (5) for those individuals who were rejected for an MFP waiver, whether the individual could live in the community with appropriate residential services; and (6) for those individuals with mental illness, whether the individual was properly evaluated consistent with PASRR requirements and is receiving needed specialized services. *Id.* ¶ 1.

which can and would be remedied by the requested injunctive relief in this case.[3] Webster Aff. ¶ 30.

III. The Proposed Class Meets the Standards for Certification Under Rule 23(a) of the Federal Rules of Civil Procedure.

A. The Requirements of Fed. R. Civ. P. 23(a).

The party moving for class certification must satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure and of at least one of the subdivisions of Rule 23(b). *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003). 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 seeking to represent the class must be able to fairly and adequately represent the interests of class members. Fed. R. Civ. P. 23(a)(1)-(4); *see also Griffin v. Burns*, 570 F.2d 1065, 1072 (1st Cir. 1978). Rule 23(a) requires a rigorous analysis of whether each element has been met. *Wal-Mart*, 564 U.S. at 350 (quoting *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 161 (1982)); *M.D. v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012).

B. The Proposed Class

In order to remedy the Defendants' ongoing violations of the ADA and Section 504, the Plaintiffs seek certification of the following class:

[3] In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), the Supreme Court held that plaintiffs need not provide affirmative proof of the merits of their claims in order to obtain class certification. The Court rejected the argument that proof of a certain element of the plaintiffs' claim (materiality) was required at the class certification stage, noting that "the pivotal inquiry is whether proof of materiality is needed to ensure that the *questions* of law or fact common to the class" meet the requirements of Rule 23(b). *Id.* at 468 (emphasis in the original).

> All Medicaid-eligible adults in Massachusetts with mental illness and/or physical disabilities, including older adults, who, now or in the future: (1) reside in a nursing facility for at least 60 days, notwithstanding any temporary hospitalizations, and (2) have not been provided community residential services and supports in integrated settings in the community.

(the "Plaintiff Class"). In addition, the Plaintiffs seek certification of the following sub-class related to their claims under the Medicaid Act:

> All Medicaid-eligible adults with serious mental illness who, now or in the future, have been admitted to, or who were screened for admission to, nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112.

(the "PASRR Subclass").

Courts commonly certify classes in cases like this that challenge government officials' noncompliance with Title II of the ADA. *See* Attachment A, List of Selected ADA Class Action Cases (Attach. A). This is particularly true in cases involving Title II's requirement that services be provided in the most integrated setting appropriate to individuals' needs. *See Olmstead v. L.C.*, 527 U.S. 581 (1999); 28 C.F.R. § 35.130(d). Additionally, courts have certified classes of persons with disabilities in cases challenging a failure to provide appropriate services in a state or private facility. *See* Attachment B, List of Selected Institutional Placement Class Actions (Attach. B). This long line of decisions granting class certification in cases challenging unnecessary institutionalization and/or the denial of appropriate community services weighs strongly in favor of class certification here.

Classes have been certified in cases brought in this District raising similar claims under the ADA and NHRA. *See Rolland v. Cellucci*, No. 98-30208-KPN, 1999 WL 34815562 (D. Mass. Feb. 2, 1999); *Rolland v. Patrick*, No. 98-30208-KPN, 2008 WL 4104488 (D. Mass. Aug. 19, 2008) (refusing to decertify the class based upon alleged differences in the needs and conditions

of persons in nursing facilities), *aff'd sub nom. Voss v. Rolland*, 592 F. 3d 242 (1st Cir. 2010); *Hutchinson v. Patrick*, No. 07-30084-MAP (D. Mass. Oct. 4, 2007).

Courts also have certified similar classes in other ADA Title II cases brought on behalf of persons with disabilities in nursing facilities and other institutions. ADA Title II integration cases focus on the standardized conduct of the defendants and do not depend on individualized determinations of either liability or remedy. Thus, courts frequently have no difficulty certifying classes, precisely because the claims focus on the defendants' systemic practices, not the individual plaintiffs' conditions. *See Ball v. Kasich*, 307 F. Supp. 3d 701 (S.D. Ohio 2018); *Steward v. Janek*, 315 F.R.D. 472 (W.D. Tex. 2016); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297 (W.D. Wash. 2015); *Thorpe v. D.C.*, 303 F.R.D. 120 (D.D.C. 2014); *Kenneth R. ex rel. Tri-Cnty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254 (D.N.H. 2013); *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012); *Oster v. Lightbourne*, No. 09-4668, 2012 WL 685808, at *5 (N.D. Cal. Mar. 2, 2012); *Pashby v. Cansler*, 279 F.R.D. 347, 353 (E.D.N.C. 2011); *D.L. v. District of Columbia*, 277 F.R.D. 38 (D.D.C. 2011); *Van Meter v. Harvey*, 272 F.R.D. 274 (D. Me. 2011); *Conn. Off. of Prot. & Advoc. v. Connecticut*, 706 F. Supp. 2d 266 (D. Conn. 2010); *Long v. Benson*, No. 08-cv-26 (N.D. Fla. Oct. 14, 2008); *Colbert v. Blagojevich*, No. 07 C 4737, 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008); *Williams v. Quinn*, No. 05 C 4673, 2006 WL 3332844 (N.D. Ill. Nov. 13, 2006).[4] *See also* Attach. A.

ADA Title II classes routinely have been certified because they raise a common question susceptible to a common solution through a single injunction: the modification of the public

[4] Courts have also continued to certify classes in a variety of other contexts involving ADA claims after *Wal-Mart*. *See, e.g.*, *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 15-cv-30023-KAR, 2019 WL 6699449 (D. Mass. Dec. 9, 2019) (certifying a settlement class of deaf or hard of hearing individuals who were unable to access content posted online by Harvard because of a common practice of insufficient accessibility features); *D.D. by Next Friend B.N. v. Mich. Dep't of Health & Hum. Servs.*, 1:18-cv-11795, 2022 WL 16680727, at *2 (E.D. Mich. 2022) (certifying Medicaid and ADA class of children); *Ault v. Walt Disney World Co.*, 2011 WL 1460181(M.D. Fla. Apr. 4, 2011), *aff'd*, 692 F.3d 1212 (11th Cir. 2012) (certifying ADA Title III class).

entity's program to provide services in the most integrated setting. The 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 necessary information about and access to community services in the most integrated setting. In *Wal-Mart* terms, the court can, "in one stroke," ensure that class members avoid needless institutionalization in nursing facilities and have the opportunity to live in the community. This long line of decisions granting class certification in Title II and Section 504 cases challenging systemic practices of institutionalizing persons with disabilities strongly supports certifying the Plaintiff Class and the PASRR Subclass.

C. The Class and Subclass Are So Numerous That Joinder of All Members Is Impractical.

Rule 23(a)(1) has two components: the number of class members and the practicality of joining them individually in the case. Fed. R. Civ. P. 23(a)(1). The first presents a relatively "low threshold" and does not impose a precise numerical requirement for purposes of certification. *Conner B. v. Patrick*, 272 F.R.D. 288, 292 (D. Mass. 2011) (quoting *Garcia-Rubiera v. Calderon*, 570 F. 3d 443, 460 (1st Cir. 2009)); *see also DeRosa v. Mass. Bay Commuter Rail Co.*, 694 F. Supp. 2d 87, 98 (D. Mass. 2010) (certifying a class of approximately 110 members); *Tyrell v. Toumpas*, No. 09-CV-243-JD, 2010 WL 174287, at *4 (D.N.H. Jan. 14, 2010) ("Unless the class is very small, 'numbers alone are usually not determinative….'" (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131-32 (1st Cir. 1985))).

Here, the Plaintiff Class consists of at least hundreds of members, and probably many more, given the Defendants' own reports indicating that 852 Medicaid-eligible persons were rejected from EOHHS' Moving Forward Program waiver simply because of insufficient capacity. *See* Detmers Aff. ¶ 3 and App. A ¶ 8, and App. C, at 6 (MDS data indicating that 11,402 people with disabilities

in nursing facilities are appropriate for discharge to the community). The PASRR data also demonstrate that, in the third quarter of fiscal year 2022, there were 1,197 people identified as having a serious mental illness in nursing facilities who would be part of the PASRR Subclass. *Id.* App. C, at 1. This is clearly sufficient to satisfy the numerosity requirement. Classes consisting of only a fraction of this number are regularly certified under Rule 23(a)(1). *See Griffin v. Burns*, 570 F.2d 1065, 1072-73 (1st Cir. 1978) (class of 123 voters).

In addition to considering the number of persons within a proposed class, courts also examine the practicability of joining the class members as plaintiffs. Significant weight is given to factors such as the proposed class members' ability to bring their own separate actions, their geographical diversity, and the likely presence of unidentified, future class members. *Van Meter*, 272 F.R.D. at 282 (class contained present and future nursing home residents whose chronic disabilities and segregation made the maintenance of separate actions impractical); *Rolland*, 1999 WL 3415562, at *3-5; *Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986) ("Considering plaintiffs' confinement, their economic resources, and their [disabilities], it is highly unlikely that separate actions would follow if class treatment were denied.").

Furthermore, joinder is impracticable because the Plaintiff Class and PASRR Subclass include not only currently institutionalized individuals, but also individuals who will be institutionalized in nursing facilities in the future. *See Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (in civil rights actions members of the class are often "incapable of specific enumeration" (quoting Committee's Notes to Revised Rule 23, 3B Moore's Federal Practice 23.0 [10-2] (2d ed. 1969))). Therefore, in light of their size and the circumstances of their current and future members, the Plaintiff Class and the PASRR Subclass satisfy the requirements of Rule 23(a)(1).

D. There are Questions of Law and Fact Common to the Class and to the Subclass.

Rule 23(a)(2) requires that the claims of a proposed class share common questions of law or fact. Rule 23(a)(2) requires only *one* common factual or legal issue, the resolution of which will affect all or a significant number of putative class members. *See Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (commonality found when class of individuals with different disabilities and accommodation needs were impacted by the same governmental inaction); *see also Mulligan v. Choice Mortg. Corp. USA*, No. Civ. 96-596-B, 1998 WL 544431, at *3 (D.N.H. Aug. 11, 1998) ("Because the class need share only a single legal or factual issue at this stage of the analysis, the commonality prerequisite ordinarily is easily established."); *Conner B. v. Patrick*, 272 F.R.D. 288, 293 (D. Mass. 2011) ("Commonality is easily satisfied in part because 'there need be only a single issue common to all members of the class.'" (quoting *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D. 253, 263-64 (D. Mass. 2008))); 1 Newberg on Class Actions § 3:20 (5th ed. 2011). *Wal-Mart* re-affirmed that not every issue of law or fact need be common to the entire class, since "even a single common question will do." *Wal-Mart*, 564 U.S. at 359 (citations, alterations, and internal quotations omitted).

Courts have easily identified commonality in class actions that seek injunctive and declaratory relief. *See, e.g., Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3rd Cir. 1994) ("Injunctive actions 'by their very nature often present common questions satisfying Rule 23(a)(2).'"); *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."). This is particularly true with classes like the one in this action, which challenge governmental policies and practices that discriminate under federal law in a manner common to the class. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 700-703 (1979) (affirming class treatment where relief sought involved members'

entitlement to request a hearing prior to recoupment of Social Security benefits); *Barrows v. Becerra*, 24 F.4th 116, 131 (2d Cir. 2022) (affirming class certification in case challenging HHS policy denying Medicare beneficiaries the right to appeal determinations of their hospitalization status); *Van Meter*, 272 F.R.D. at 282 (finding commonality where the state agency's "course of conduct" presents questions common to all class members, implicates a common set of federal statutes, and the class seeks relief from systemic barriers to proper treatment); *Colon v. Wagner*, 462 F. Supp. 2d 162, 174 (D. Mass. 2006) (certifying class of shelter benefit recipients alleging the constitutional inadequacy of statewide termination notices).

Commonality may exist even where class members are not identically situated, or where their injury does not arise in exactly the same way. *See Barrows*, 24 F.4th at 131-32 (finding commonality met notwithstanding that the injury arising from the challenged policy "may manifest differently depending on a beneficiary's medical situation," and holding that "different class members can benefit differently from an injunction" in a 23(b)(2) class (quoting *Berni v. Barilla S.p.A.*, 964 F.3d 141, 147 n.28 (2d Cir. 2020))); *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) ("Factual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist." (citations omitted)). Moreover, where there are common discriminatory practices alleged, "the actions of the defendant need not affect each member of the class in the same manner." *Arnold v. United Artists Theatre Cir., Inc.*, 158 F.R.D. 439, 448-49 (N.D. Cal. 1994) (quoting *Walthall v. Blue Shield of Calif.*, No. C-75-2652, 1977 WL 34 (N.D. Cal. 1977)); *see also Curtis v. Comm'r, 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 members of the proposed class, commonality is usually met."); *Boulet v. Cellucci*, 107 F. Supp. 2d 61, 81 (D. Mass. 2000) (class of persons with intellectual disabilities waiting for

community support services shared a common legal theory despite differences in medical and support needs of each individual); *Rolland,* 1999 WL 34815562, at *7 (same).

Wal-Mart does not require that a defendant's conduct affect every class member in an identical way. Indeed, circuit courts, district courts in the First Circuit, and other courts considering systemic deficiencies have continued to certify classes post-*Wal-Mart.*[5] In such cases, courts properly focused on the defendant's conduct, as evidenced by its policies or practices, even when those challenged practices did not have the identical effect on all individual plaintiffs and class members. *See D.L. v. District of Columbia*, 277 F.R.D. 38, 46 (D.D.C. 2011) ("The reasons for [the] common injury do not also have to be common to all members of the class."); *Churchill v. Cigna Corp.*, No. 10-6911, 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 answers apt to drive the resolution of the litigation'" regardless of class members' different conditions, treatment needs, and abilities to benefit from ABA therapy); *Connor B.*, 272 F.R.D. at 296 (stating that harms suffered by unnamed class members differ from those experienced by individual plaintiffs does not undermine commonality or typicality).

After *Wal-Mart*, courts also continue to certify classes in ADA cases, finding that commonality may exist even where class members are not identically situated. *See, e.g., Steward,* 315 F.R.D. at 487-489; *Kenneth R.*, 293 F.R.D. at 267; *Oster,* 2012 WL 685808, at *5 (rejecting defendants' challenge under *Wal-Mart* that class members do not meet the

[5] Courts in this District have held 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 systemic deficiencies in a state service system. *Connor B.*, 2011 WL 5513233, at * 3, 5. The Plaintiffs here need only demonstrate that there is a common question susceptible to a common answer and that the Defendants' actions or inactions impact all class members. Courts have traditionally applied this test liberally, especially in civil rights cases challenging governmental actions such as a public entity's failure to provide services in the most integrated setting. *See* Attachs. A & B.

commonality requirement because they incur different service reductions); *Lane*, 283 F.R.D. at 598; *Henderson v. Thomas*, 289 F.R.D. 506, 512 (M.D. Ala. 2012) (class certification granted where class of prisoners with HIV alleged that the Alabama Department of Corrections' policy of segregating inmates with HIV from the general prison population violated Title II of the ADA).

The *Lane*, *Steward*, and *Kenneth R.* cases, like the instant matter, all involved claims under the integration mandate of Title II of the ADA, and thus they are particularly relevant to the class certification analysis here. In *Lane*, the court recognized that "commonality only requires a single common question of law *or* fact" and held that there was both a common question of law and fact. 283 F.R.D. at 598 (emphasis in original). After carefully analyzing the evidence, the common contentions, and the enhanced requirements imposed by *Wal-Mart*, the court held that a common question of law was "whether the defendants have failed to plan, administer, operate, and fund a system that provides employment services that allow individuals with disabilities to work in the most integrated setting." *Id*. The court further held that the defendants' standardized conduct was the proper frame for considering whether commonality was met, regardless of whether some plaintiffs may have needed more or different employment services than others. *Id*. The court saw no need to engage in an analysis of individual class members' circumstances, since the type of relief sought by the plaintiffs "focuses on the defendants' conduct, not on the treatment needs of each class member." *Id.* The *Lane* court specifically rejected the defendants' argument that it was necessary at the class certification stage for the individual plaintiffs to prove that they and all putative class members were unnecessarily segregated and would benefit from employment services. *Id*. As the court explained "[t]hat is, in effect, *the answer to the common question and not the common question* of whether they are

being denied supported employment services for which they are qualified." *Id*. (emphasis added).

Similarly, in *Steward*, the court recognized that the plaintiffs' discrimination claims "raise[d] a common question of whether [the defendants'] scheme of administering the HCS waiver program waiting list violates Title II of the ADA and the Rehabilitation Act." 315 F.R.D. at 493. It also held that deficiencies in the defendants' PASRR program drove "its violations of the *Olmstead* integration mandate by failing to identify candidates for community-based care and divert them from unnecessary institutionalization" – a common question that also connected to the plaintiffs' ADA and Rehabilitation Act claims. *Id.* at 482. It rejected the State's argument that because the PASRR process involves identifying medical conditions in different individuals, the plaintiffs' claims were not capable of class wide assessment:

> The State may fail individual class members in unique ways, but the harm that the class members allege is the same: denial of specialized services, violation of their right to reasonably prompt care, and unnecessary institutionalization in violation of the ADA and Rehabilitation Act. Moreover, although the State's failures may be unique to each individual class member, the failures can also be quantified and remedied by the Court in ways that are common across the class.

Id.

Finally, in *Kenneth R.*, the court determined that common questions capable of resolution through common answers existed, such as "whether there is a systemic deficiency in the availability of community-based services, and whether that deficiency follows from the State's policies and practices." 293 F.R.D. at 267. The court also dismissed the defendants' objections that commonality did not exist because of the dissimilarities in class members' current or future needs or preferences for community-based services. The defendants' objections, the court concluded, were not relevant to class certification, but properly addressed at trial as part of their fundamental alteration defense. *Id.* at 269-270.

The parallels between *Lane*, *Steward*, and *Kenneth R.* and this case are significant. As in each of those cases, the Individual Plaintiffs here are challenging the discriminatory planning, administration, operation, and funding of a service system that contributes to the unnecessary institutionalization and segregation of individuals with disabilities. This is the same common contention that the *Lane*, *Steward*, and *Kenneth R.* courts found satisfied commonality. In addition, while there inevitably will be differences among Plaintiff Class and PASRR Subclass members here, such differences are not germane to commonality where there are common questions of fact, common legal claims, common contentions, and common answers. As the courts in *Lane*, *Steward*, and *Kenneth R.* recognized, this Court does not have to determine each class member's individual needs or what services each class member requires to live in an integrated setting.[6]

Viewed in that context, the Plaintiff Class meets the commonality requirement given the multiple common questions of law or fact whose answers will resolve the class claims "in one stroke," including, among others:

> a. Whether the Defendants plan, fund, and administer their long-term care system, including various community services programs, in a manner that results in unnecessary institutionalization of individuals with disabilities and requires them to live in nursing facilities in order to receive residential services and supports, in violation of the ADA and Section 504;
>
> b. Whether the Defendants utilize eligibility criteria and methods of administration that have the effect of excluding individuals with disabilities from accessing the community residential services and supports they need to reside in integrated, community residential settings, in violation of the ADA and Section 504;
>
> c. Whether the Defendants fail to provide individuals with disabilities with information, in a culturally competent manner, sufficient to allow them to make an informed choice of whether to enter and/or remain in a nursing facility, including failing

[6] Individualized decisions concerning which persons want to leave nursing facilities and what community services they need have nothing to do with class certification, since that 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.

to provide nursing facility residents with reasonable accommodations in the choice process, in violation of the Medicaid Act and the ADA.

d. Whether the Defendants' residential services and support services for persons with disabilities are inadequate or insufficient to allow persons with disabilities in nursing facilities to transition to integrated residential settings in the community in a timely manner, in violation of the ADA and the Medicaid Act; and

e. Whether the Defendants fail to provide persons with disabilities in nursing facilities with medically necessary case management that plans, coordinates, and assists in obtaining appropriate community residential services and supports.

In addition, the PASRR Subclass shares common legal and factual claims, including:

Whether the Defendants: (i) fail to establish a Level II evaluation program that accurately determines if persons with serious mental illness (SMI) can be appropriately served in a more integrated community residential setting; (ii) fail to conduct professionally acceptable assessments to determine the specialized services these individuals require; and (iii) fail to provide an array of specialized services to persons with SMI in nursing facilities who need them, in violation of the PASRR provisions of the Medicaid Act.

These common contentions involving the Defendants' failure to administer a long-term care system that allows institutionalized persons with disabilities the opportunity to receive services in integrated settings raise common facts, based upon common legal claims that are applicable to all class members. They are susceptible to common answers, based upon common proof about the Defendants' conduct, as evidenced by the Defendants' policies, procedures, and, most importantly, their practices. The common thread or glue which unites these common factual and legal claims is the Defendants' failure to provide community residential services and supports to avoid the unnecessary institutionalization of people with disabilities in nursing facilities, including people with serious mental illness. Here, the Defendants' decisions to limit their residential services programs, create restrictive eligibility policies and practices, and fail to create an informed choice process are the direct causes of the Plaintiffs' unnecessary

institutionalization.[7] *See* Webster Aff. ¶ 30. These contentions are "capable of class wide resolution," since a "determination of [their] truth or falsity will resolve an issue" – whether the Defendants fail to provide a sufficient supply of community residential services – "that is central to each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. Therefore, the Plaintiff Class and the PASRR Subclass meet the commonality requirement of Rule 23(a)(2).

E. The Claims of the Individual Plaintiffs Are Typical of the Class.

Rule 23(a) also requires that the claims of those seeking to represent the Plaintiff Class and the PASRR Subclass – in this case the Individual Plaintiffs – be typical of the claims of the absent class members. Fed. R. Civ. P. 23(a)(3). The typicality requirement does not demand a showing of complete identity between the legal claims of a representative and each class member, but only "a showing of sufficient interrelationship between the claims of the representative and those of the class so that adjudication of the individual claims will necessarily involve the decision of common questions affecting the class." 1 Newberg on Class Actions, § 3:29 (5th ed. Nov. 2011); *see also McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 310 (D. Mass. 2004) (in determining typicality, the central inquiry is whether class representatives' claims "have the same essential characteristics as the claims of other members of the plaintiff class" (citations omitted)). For this reason, typicality is achieved when the class representatives generally "possess the same interest and suffer the same injury" as unnamed class members. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

Applying these principles, courts in the First Circuit have held that the typicality requirement is met when the plaintiffs' claims "arise from the same event or practice or course of conduct that gives rise to the claims of other class members" and are "based on the same legal

[7] Thus, unlike the plaintiffs in *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 31 (1st Cir. 2019), the Plaintiffs have identified a uniform policy or practice that is "a common driver" of the alleged violation.

theory." *Tyrell*, 2010 WL 174287, at *5 (quoting *Garcia-Rubiera*, 570 F.3d at 460); *In re Tyco Int'l, Ltd.*, No. MD-02-1335-PB, 2006 WL 2349338, at *6 (D. N.H. Aug. 15, 2006) ("Because the proposed class representatives and the members of the class are aggrieved by the same conduct and rely on the same legal theories, there is substantial identity between their claims with respect to most of the relevant issues."); *Rolland*, 1999 WL 34815562, at *7 (certification is appropriate where the plaintiffs' claims are "broadly typical" of the class of nursing home residents who have not been provided appropriate services or placement in the community); *Kenneth R.*, 293 F.R.D. at 271 (concluding that the plaintiffs' experiences and claims were typical because "due to a shortage of the types of community-based services sought, each of the named plaintiffs … continues to experience unnecessary institutionalization"); *Guckenberger v. Bos. Univ.*, 957 F. Supp. 306, 326 (D. Mass. 1997) (despite different disabilities and accommodation needs, plaintiffs are typical of a class of students with learning disabilities because they are subject to the same allegedly discriminatory policy and practice); *Curtis v. Comm'r, Me. Dep't. of Human Servs.*, 159 F.R.D. 339, 341 (D. Me. 1994) ("The typicality requirement is satisfied because . . . the representative Plaintiff is subject to the same statute and policy as the class members.").

The Individual Plaintiffs satisfy the typicality requirement of Rule 23(a)(3) because they share numerous interests and characteristics with Plaintiff Class and PASRR Subclass members, including: (1) they all have disabilities; (2) they all are segregated in institutions; (3) they all are entitled to live in an integrated community setting; (4) many could be discharged to the community with the specific residential services sought in this case; and 5) if adequately informed about and given access to remedial services, many would choose community placement. *Lane*, 283 F.R.D. at 598-99; *see* Pilarcik Aff. ¶ 14; Webster Aff. ¶ 30. For those with mental illness, they all are

entitled to an appropriate PASRR evaluation that determines if they could be served in an alternative placement and need specialized services. Pilarcik Aff. ¶ 14(f).

Here, the claims of the Individual Plaintiffs and the claims of the Plaintiff Class and the PASRR Subclass arise from the same policies and practices of the Defendants and result in similar injuries. Webster Aff. ¶ 30; Pilarcik Aff. ¶¶ 14, 92. The Defendants, through their actions and inactions, needlessly institutionalize the Individual Plaintiffs and the Plaintiff Class and fail to provide an informed choice process that offers information and opportunities to decide whether to remain in a segregated nursing facility. Webster Aff. ¶ 30; Pilarcik Aff. ¶¶ 14, 92.

As with classes certified in other ADA cases, although the Individual Plaintiffs and Plaintiff Class members may have varying conditions, enter the long-term care system for disparate reasons or require different levels of residential services and supports, those facts do not defeat a finding of typicality. *See Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012) (difference in class members' disability or needs does not undermine typicality); *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) ("[T]ypicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances."); *Kenneth R.*, 293 F.R.D. at 269 (concluding that "the claims of people with different treatment preferences 'can productively be litigated at once'" (quoting *Wal-Mart*, 564 U.S. at 350)); *Rolland*, 2008 WL 4104488, at *5. *See also* Attach. A.

Typicality is established in this case precisely because the Individual Plaintiffs, the Plaintiff Class and the PASRR Subclass are aggrieved by the Defendants' administration, policies, and practices of its long-term care system, the operation of its HCBS waivers, and the limitations on community residential services and supports for people with disabilities in nursing facilities. Their claims are based on the same legal theories regarding the discriminatory administration of the

Commonwealth's long-term care system and PASRR screening program. They have a personal interest in this litigation and seek the same relief as the Plaintiff Class and the PASRR Subclass, which is reasonably related to the harm experienced by all class members. *Risinger v. Concannon*, 201 F.R.D. 16, 22 (D. Me. 2001) (finding typicality where plaintiffs invoke the same legal provisions, allege the same system deficiencies, and seek the same relief). Since the Individual Plaintiffs' legal theories arise from the same course of conduct and their common claims are broadly typical of the claims of the Plaintiff Class and the PASRR Subclass, the typicality requirement of Rule 23(a)(3) is satisfied.

F. The Class Representatives Fairly and Adequately Represent the Interests of the Class.

Rule 23(a)(4) requires that the representative plaintiffs fairly and adequately represent the interests of the entire class. To satisfy this requirement, two criteria must be met: (1) the attorneys representing the class must be qualified and competent; and (2) the class representatives must not have antagonistic or conflicting interests with the unnamed members of the class. *See, e.g.*, *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985); *In re Bank of Bos. Corp. Secs. Litig.*, 762 F. Supp. 1525, 1534 (D. Mass. 1991). Both elements of Rule 23(a)(4) are met in this case.

1. Adequacy of Counsel

The primary factors considered in determining the adequacy of counsel are the attorneys' professional skills, experience, and resources. *See, e.g., Andrews*, 780 F.2d at 130 (counsel should be qualified, experienced, and able to vigorously conduct the proposed litigation). The Plaintiffs' counsel collectively have decades of experience in cases of this type, as well as the requisite skills and resources to properly litigate the Plaintiffs' claims.

The Center for Public Representation (CPR) has been involved in complex class action litigation on behalf of institutionalized persons with disabilities for over 45 years and has been lead counsel in numerous class action lawsuits, both in the District of Massachusetts and in federal courts throughout the country, including the *Rolland, Hutchinson, Kenneth R.,* and *Steward* cases, *supra*. Justice in Aging (JIA) is nationally recognized for its expertise in the rights of older adults and the law relating to nursing facilities. Since its founding in 1972, JIA has served as counsel in many similar class action cases around the country. Greater Boston Legal Services (GBLS) has represented thousands of persons with disabilities, including nursing facility residents, and litigated numerous class action lawsuits involving the rights of those persons to be free from discrimination. Foley Hoag LLP is a law firm nationally recognized for its skill in many different practice areas, including federal litigation.

The Plaintiffs' counsel have resources adequate to represent the Plaintiff Class and the PASRR Subclass and have no professional or personal interests antagonistic to the interests of the Plaintiff Class or PASRR Subclass.

2. Adequacy of the Named Class Representatives

The Individual Plaintiffs will adequately represent the interests of the Plaintiff Class and the PASRR Subclass. Not only are the Individual Plaintiffs' interests in this case not antagonistic to or in conflict with the interests of Plaintiff Class members and PASRR Subclass members, but those interests coincide almost completely. *See generally, Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982); *Andrews,* 780 F.2d at 130.

The Individual Plaintiffs seek to end their unnecessary institutionalization and to receive appropriate, integrated services in the community. *See* Compl. ¶ 1; Section VII (Prayers for Relief). As one of Plaintiffs' experts found, when provided adequate information about and access to

appropriate community alternatives, the vast majority of persons reviewed also would very likely choose to avoid institutionalization and receive services in the community. Webster Aff. ¶ 26. This conclusion can be confidently generalized to the larger population of individuals who are institutionalized or at risk of institutionalization in nursing facilities. *Id.* ¶ 30; Pilarcik Aff. ¶ 92. Therefore, there are no meaningful differences between the Individual Plaintiffs and the Plaintiff Class and the PASRR Subclass on these fundamental issues. Instead, the Individual Plaintiffs seek to vindicate legal rights shared by all members of the Plaintiff Class and the PASRR Subclass.

IV. The Defendants Have Acted or Refused to Act on Grounds Generally Applicable to the Class, Making Final Injunctive or Declaratory Relief Appropriate.

In addition to meeting the requirements of Rule 23(a), the Individual Plaintiffs must also show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

Courts have long recognized that certification under subsection (b)(2) of Rule 23 is particularly important in, and an appropriate vehicle for, civil rights actions. *See, e.g.*, *Yaffe*, 454 F.2d at 1366 ("The conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists, making it uniquely suited to civil rights actions."); *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) ("[A] class action may be maintained under Fed. R. Civ. P. 23(b)(2), which is an especially appropriate vehicle for civil rights actions."); *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 2019 WL 6699449, at *2 ("[C]ivil rights actions like this one, where a party charges that another has engaged in unlawful behavior toward a defined group, are 'prime examples' of Rule 23(b)(2) classes." (quoting *Reid v. Donelan*, 297 F.R.D. 185, 193 (D. Mass. 2014))); *Hawkins v. Comm'r of the N.H. Dept. of Health & Human Servs.*, No. Civ. 99-143-JD, 2004 WL 166722, at *4 (D. N.H. Jan. 23, 2004) ("Classes certified under Rule 23(b)(2) 'frequently serve as the vehicle

for civil rights actions and other institutional reform cases,' including cases alleging deficiencies in government administered programs such as Medicaid." (quoting *Baby Neal*, 43 F.3d at 58-9) (other citations omitted)).

Here, the elements of Rule 23(b)(2) are satisfied, and thus class certification is appropriate, because the Individual Plaintiffs allege systemic civil rights violations and seek declaratory and injunctive relief to benefit the Plaintiff Class and the PASRR Subclass as a whole. This is exactly the type of litigation that the Federal Rules Advisory Committee anticipated would proceed under Rule 23(b)(2). *See* Fed. R. Civ. P. 23(b)(2), Advisory Committee Notes, 1966 amendments ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.").

The Defendants have administered their system of long-term care services for individuals with disabilities in a discriminatory manner by failing to administer their HCBS programs in a fair and effective manner that accommodates the needs of individuals with disabilities and complex medical needs, by failing to provide the community residential services and supports required to avoid unnecessary institutionalization, and by failing to provide an effective choice process that allows people with disabilities to understand and make an informed choice about where to live. *See* Pilarcik Aff. ¶¶ 14, 92; Webster Aff. ¶ 30; Detmers Aff. ¶¶ 3, 8, App. A, and App. B, at 6. The Defendants also have administered their PASRR Program in a discriminatory manner by failing to accurately screen nursing facility applicants for mental illness, assess whether their needs could be met in an alternative, less restrictive setting, and provide specialized services to those who need them. Pilarcik Aff. ¶¶ 14(f), 34, 46, 77, 91. Thus, the Defendants are acting or refusing to act in a manner that equally affects and is generally applicable to the entire Plaintiff Class and

entire PASRR Subclass. Injunctive and declaratory relief is appropriate precisely because it will resolve the legality of the Defendants' conduct towards the Plaintiff Class and PASRR Subclass and provide a remedy to each Class as a whole. *See* Webster Aff. ¶ 30.

The focus on the Defendants' conduct, and the resulting systemic claims of unnecessary segregation, 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. The proper analysis for class certification purposes in this case involves the adequacy of the Defendants' actions and inactions in ensuring that services are provided in the most integrated setting, and that these persons are offered a meaningful choice where to live.

Significantly, the First Circuit and district courts in this Circuit have considered and rejected the argument that differences among class members preclude certification under Rule 23(b)(2). In *Rolland v. Patrick*, No. 98-30208-KPN, 2008 WL 4104488 (D. Mass. Aug. 19, 2008), the court dismissed an effort by certain class members, acting through their guardians, to decertify the class, based upon arguments that differences between the needs and preferences of class members undermined typicality and precluded systemic relief. *See id*., at *21-22. The First Circuit affirmed, holding that any professed differences in needs, services, and the appropriateness of continued institutionalization were more properly addressed in the Commonwealth's individual service planning process, with the opportunity for administrative appeals.[8] *Voss*, 592 F.3d at 253-254.

[8] A similar clinical treatment planning process is mandated by federal law for all persons in nursing facilities. EOHHS' waiver programs require an additional clinical evaluation of the individual's needs and preferences, as well as a transition planning process to determine the precise type, amount, intensity, and duration of support services. All of these clinical determinations are subject to an administrative appeal process. It is through these processes, not in any finding by this Court, that individual transition decisions are made.

Other courts in this district have reached similar conclusions in response to arguments that differences in the needs, services, preferences, and appropriateness of institutionalization render class certification inappropriate under Rule 23(b)(2). For instance, in *Hutchinson v. Patrick*, No. 07-30084-MAP (D. Mass. Sept. 26, 2007), the Commonwealth claimed that a class comprised of nursing facility residents with acquired brain injury (ABI) and those at risk of institutionalization in a nursing facility was not cohesive under Rule 23(b)(2) because it included: (1) persons who actually needed acute care in a nursing facility; (2) persons who might prefer to remain in a nursing facility; (3) individuals who needed a wide range of different services to live in the community; and (4) those with traumatic brain injury (TBI) who already were receiving some community services under a waiver program. The district court flatly dismissed all of the arguments, holding that these differences were not controlling, since the case challenged the Commonwealth's policies, practices, and funding decisions that resulted in the lack of community services sufficient to prevent unnecessary institutionalization. *Hutchinson, supra.* These deficiencies, the court concluded, affected the class as a whole.

Similarly, another district court rejected the defendants' argument opposing a broad Medicaid class that included youth with a wide range of different mental disabilities, who lived in a wide range of different settings, and who sought a range of different home-based services. Because the class challenged the State's practice of failing to provide medically necessary home-based services, which applied generally to the class, the court had little difficulty certifying the class. *Rosie D. v. Romney*, No. 01-30199-MAP (D. Mass. April 1, 2002); *see also Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012); *Conner B. v. Patrick*, 272 F.R.D. 288 (D. Mass. 2011); *Bryson v. Stephen*, No. 99-CV-558-SM (D. N.H. June 26, 2000); *Rolland v. Cellucci*, No. 98-30208-KPN, 1999 WL 34815562 (D. Mass. Feb. 2, 1999); List of Cases in Attachs. A & B.

This analytical approach is particularly appropriate after *Wal-Mart.* Title II integration cases routinely seek to alter the public entity's service system for *all* class members. *See Wal-Mart,* 564 U.S. at 338. That each class member who is institutionalized, or who needs to be screened for mental illness as part of the nursing facility admission process, may require different services, in different amounts, at different times, or even have different preferences, does not render certification inappropriate, since the injunction requested "would provide relief to *each member* of the class." *Id*. at 360. The determination of liability or the granting of relief does not require a judicial determination of the individual needs of a class member. Rather, after the court has granted relief to the class, the treatment needs of individual class members are addressed through a clinical assessment and service planning process, usually described in state policy or regulation and subject to administrative fair hearing procedures. This approach has been adopted in virtually every ADA, Rehabilitation Act, and Medicaid Act class action case seeking community services. *See Lane,* 283 F.R.D. at 601; *see also* Attach. A.

Finally, Rule 23(b)(2) requires that the defendant act in a manner generally applicable to the class, not that every class member suffer the same injury at the same time. *Walters v. Reno,* 145 F.3d 1032 (9th Cir. 1998) (citing 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1775 (2d ed. 1986)). As the Ninth Circuit has noted:

> It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate.

Walters, 145 F.3d. at 1047. *See also Baby Neal,* 43 F.3d at 56 ("[C]lass members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are *subject* to the same harm will suffice" (emphasis in original)).

In this case, the Defendants' failures to establish community residential services and supports sufficient to avoid unnecessary institutionalization, to provide a meaningful informed choice process, and to ensure a functioning PASRR system are precisely the conduct Rule 23(b)(2) class actions were designed to address. Accordingly, the Individual Plaintiffs meet the requirements of Rule 23(b)(2), and the Plaintiff Class and the PASRR Subclass should be certified.

V. Class Counsel Should Be Appointed Pursuant to Rule 23(g).

The Individual Plaintiffs are jointly represented by CPR, JIA, GBLS, and Foley Hoag, each of which brings unique resources, experience, and skills to this case. As discussed in Section IV(D)(1), above, each firm representing the Individual Plaintiffs and Plaintiff Class is highly qualified to litigate a case of this type and is committed to dedicating the expertise and resources necessary to achieve a successful outcome for the Plaintiff Class and the PASRR Subclass.

There is no conflict among counsel. Pursuant to Rule 23(g), the Individual Plaintiffs request that this Court appoint CPR, JIA, GBLS, and Foley Hoag as co-class counsel in this action. *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 Request for Relief

For the reasons set forth above, the Individual Plaintiffs respectfully request that the Court certify a Plaintiff Class and PASRR Subclass as set forth in their Motion.

May 3, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2023, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing.

/s/ Andrew London