UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSIRE

Lynn E., et al. others similarly situated, Plaintiffs, v. Margaret W. Hassan, Governor, et al. Defendants.	
The United States of America Plaintiff-Intervenor v. The State of New Hampshire Defendant	Civ. No. 1:12-cv-53-SM

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR RENEWED MOTION FOR CLASS CERTIFICATION

I. Introduction

On February 9, 2012, Plaintiffs Lynn E., Kenneth R., Sharon B., Amanda D., Amanda E., and Jeff D. (collectively the "named plaintiffs"), filed a class action Complaint on behalf of themselves and all persons with serious mental illness who are institutionalized in New Hampshire Hospital (NHH) or the Glencliff Home (Glencliff) or at serious risk of institutionalization in these facilities.[1] Both NHH and Glencliff are large, public institutions operated by the State of New Hampshire that segregate persons

[1] Amanda D., Amanda E., and Jeff D. were in the community "at serious risk of institutionalization" when the case was filed in February 2012. All three of these individuals have been hospitalized at least once since the filing of the case.

with serious mental illness. This case seeks to redress the common injuries suffered by class members who are unnecessarily institutionalized at NHH and Glencliff, or at serious risk of institutionalization in these facilities, due to a lack of community services. Complaint, ¶¶ 2-4.

The named plaintiffs and the plaintiff class are qualified to receive mental health services in integrated community settings, yet New Hampshire (the "State") has failed to provide the community services they need to leave NHH and Glencliff and to avoid their unnecessary institutionalization in these facilities. The plaintiffs therefore seek declaratory and injunctive relief under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794 *et seq.*, and the Nursing Home Reform Amendments (NHRA) to the Medicaid Act, 42 U.S.C. §§ 1396r *et seq.*, as well as an order directing the State to provide community services required to avoid class members' needless institutionalization.

After conferring with the defendants in early March, the plaintiffs filed their Motion for Class Certification (Doc. 19) and Memorandum (Doc. 19-1) with supporting exhibits on March 23, 2012. Without conferring with the plaintiffs, or seeking an extension of time to respond, the defendants filed an Objection to Plaintiffs' Motion to Certify (Doc. 25) and a Motion to Strike (Doc. 24) with supporting Memorandum (Doc. 24-1). In these filings, the defendants objected to the proposed class, and requested that the Court deny the plaintiffs' Motion, or indefinitely delay defendants' time for responding to the Motion. After further briefing,[2] on June 11, 2012, the Court heard oral arguments from all parties on the various motions concerning class certification, ultimately concluding that both merits

[2] *See* Plaintiffs' Objection to Defendants' Motion to Strike, (Doc. 36), the United States' Memorandum in Support of Plaintiffs' Motion for Class Certification (Doc. 33), and the Defendants' Reply (Doc. 48-1).

and class based discovery should be allowed to proceed simultaneously. (Minute Order of June 11, 2012). As a result, the Court dismissed the plaintiffs' pending Motion for Class Certification without prejudice to refiling after class discovery was completed.

Consistent with the court-ordered discovery schedule,[3] the plaintiffs now submit their Renewed Motion for Class Certification. The plaintiffs seek relief that would require the defendants to remedy systemic deficiencies in the State mental health system that deny class members their rights under Title II of the ADA, §504 of the Rehabilitation Act, and the NHRA. In particular, the plaintiffs seek an expansion of mobile crisis services, Assertive Community Treatment (ACT), supportive housing and supported employment. An injunction requiring the defendants to develop these services in an amount sufficient to avoid class members' unnecessary institutionalization would, in a single stroke, redress all of these legal violations and would benefit the class as a whole.

In their Renewed Motion, the plaintiffs are requesting that this Court certify a class consisting of:

> all persons with serious mental illness who are institutionalized in New Hampshire Hospital or Glencliff or at serious risk of institutionalization in these facilities.

This Memorandum is submitted in support of the plaintiffs' Renewed Motion.

[3] The Court approved the parties' Joint Discovery Plan on August 16, 2012. Pursuant to the schedule incorporated into the Plan, the plaintiffs' renewed class motion is to be filed by January 29, 2013, the defendants' objection, by February 28, 2013, the plaintiffs' reply by March 14, 2013, and the defendants' sur-reply, if any, by March 28, 2013.

II. Statement of Facts

As described in detail below, all relevant provisions of Fed. R. Civ. P. 23 are satisfied, and certification is appropriate to resolve the common contentions presented by the plaintiff class and to systemically redress the common injury caused by defendants' discriminatory conduct.

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

The named plaintiffs bring the instant class action on behalf of themselves and all similarly-situated individuals with serious mental illness. All of the named plaintiffs and members of the plaintiff class have disabilities that substantially limit major life activities, including self-care, and that require ongoing services and support. Complaint, ¶¶ 2-4, 76-111. They are eligible to receive community-based mental health services and desire to receive services in integrated settings. *Id*.

The named plaintiffs and the plaintiff class suffer significant harm when needlessly institutionalized. *Id.* In NHH and Glencliff, they must relinquish most, if not all, of their personal liberty, freedom of association, and meaningful access to community life. *Id*., ¶¶ 3-4, 62, 64. Their institutionalization in NHH or Glencliff, or their serious risk of institutionalization in these facilities, is due to the defendants' failure to provide sufficient mental health services in the community. *Id*., ¶¶ 52-57, 70, 76-111.

In administering the State's mental health system, the defendants have excessively relied on institutional care and failed to develop an adequate array of community services. *Id.*, ¶¶ 6-7. As noted by the U.S. Department of Justice, these "systemic failures in the State's system place qualified individuals with disabilities at risk

of unnecessary institutionalization now and going forward." *United States' Investigation of the New Hampshire Mental Health System* (April 7, 2011), attached as Exhibit 1.

As evidenced by the defendants' own documents and data, as well as by expert reviews of class members at NHH and Glencliff and of the community service system, the lack of community services constitutes a common practice that is the common cause of class members' injuries. Complaint, ¶¶ 8, 115-133. A single injunction that requires the State to comply with the ADA, the Rehabilitation Act, and the NHRA by expanding specific community services could remedy these violations "in a single stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2441, 2551 (2011).

B. The Defendants' Own Data and Reports Demonstrate That Their Planning, Administration and Operation of the Mental Health System Result in Unnecessary Institutionalization.

Much of the evidence upon which the plaintiffs rely is contained in the defendants' own data and reports. The defendants have repeatedly acknowledged that they are failing to provide sufficient community services to the plaintiff class, thereby perpetuating their needless institutionalization at NHH and Glencliff. *See, e.g.*, NH Dep't of Health and Human Servs., New Hampshire Hosp., Bureau of Behavioral Health, and The Cmty. Behavioral Health Ass'n, *Addressing the Critical Mental Health Needs of NH's Citizens: A Strategy for Restoration* (August 2008)("Restoration I"), attached as Exhibit 2;[4] Commission to Develop a Comprehensive State Mental Health Plan, *Fulfilling the Promise: Transforming New Hampshire's Mental Health System (2007)("Fulfilling the Promise, Vol. I."); Fulfilling the Promise: Transforming New*

[4] The 2008 report, *Addressing the Critical Mental Health Needs of NH's Citizens: A Strategy for Restoration* is the product of the NH Department of Health and Human Services taskforce convened to assess the status of publicly funded mental health services and supports critical to meeting the needs of New Hampshire's citizens. The report is commonly referred to as "The 10-Year Plan".

Hampshire's Mental Health System (2008)("Fulfilling the Promise Vol. II), attached as Exhibit 3 ("Unmet needs and critical gaps are largely summed up in the primary finding of the taskforce: '…that many individuals are admitted to New Hampshire Hospital because they have not been able to access sufficient services in a timely manner (a "front door problem") and remain there, unable to be discharged, because of a lack of viable community based alternatives (a "backdoor" problem)'"); Complaint, ¶¶ 5-7, 48-69, 70.

Patterns of repeated hospitalization underscore the significant limitations in the defendants' community-based service system, and illustrate the extent to which individuals with serious mental illness are not provided the services required to prevent their unnecessary institutionalization. More than 120 adults with mental illness are confined to NHH at any given time, and many of these persons experience prolonged or repeated institutionalization. *See* Exhibit 2, *Restoration I* at 4, 6. Of the more than 1,800 adult admissions to NHH in 2010, nearly 800 were for persons who already had been at NHH at least once in the previous 180 days. *See* New Hampshire 2010 Mental Health National Outcome Measures (NOMs), CMHS, Uniform Reporting System ("2010 NOMs data"), attached as Exhibit 4; New Hampshire Hospital Annual Report, Fiscal Year 2011, attached as Exhibit 5. One in six adults discharged from NHH in 2010 were readmitted within just 30 days. *See* 2010 NOMs data; *Restoration I (*August 2008*); Addressing the Critical Mental Health Needs of NH's Citizens: A Strategy for Restoration, Report of the Listening Sessions,* (April 2009) ("Restoration II"), attached as Exhibit 6.[5] *See e.g.* Complaint, ¶¶ 26, 52-59, 62-64.

[5] The *Report of Listening Sessions,* issued in 2009, is the product of five listening sessions organized by the New Hampshire Community Behavioral Health Association in partnership with the NH Department of Health and Human Services, the NH Mental Health Council, and the National Alliance on Mental Illness. The purpose of the listening sessions was to take the 10-Year Plan "into NH communities in an effort to hear directly from those who are living with the crisis". *Id.* at 1.

In addition, the limitations in the defendants' community service system result in lengthy, often life-long, institutionalization at Glencliff.[6] Once admitted to Glencliff, few residents ever leave. Between 2005 and 2010, only 13 individuals were discharged from Glencliff, 11 of whom went to NHH or other institutions. *See* Census Data from the Glencliff Home, attached as Exhibit 7A to Affidavit of C. Adrienne Mallinson, Exhibit 7. *See also* Complaint, ¶¶ 64-65.

Despite the defendants' knowledge of the severity of the problem of unnecessary institutionalization of individuals with mental illness, the defendants have implemented virtually none of the recommendations in the Ten-Year Plan. N.H. Cmty. Behavioral Health Ass'n, *N.H. Ten-Year Mental Health Plan Progress, Four Years Out*, (Mar. 5, 2012) (attached as Exhibit 8).

C. Expert Reviews of Class Members and the Community Mental Health System Demonstrate that Hundreds, if Not Thousands of Persons Are Unnecessarily Institutionalized.

To supplement the defendants' own evidence regarding systemic deficiencies in New Hampshire's community service system, presented in conjunction with the plaintiffs' initial Motion for Class Certification, the plaintiffs asked experts to evaluate class members at NHH and Glencliff, as well as the State's community mental health system. *See* Affidavit of Dr. Thomas Simpatico, attached as Exhibit. 9; Affidavit of Judith Boardman, attached as Exhibit 10; Affidavit of Susan Curran, attached as Exhibit 11; Affidavit of Dr. Sally Rogers, attached as Exhibit 12; Affidavit of Marylou Sudders, attached as Exhibit 13. The experts' findings demonstrate that the proposed class

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[6] Glencliff is a 120 bed nursing facility, located in an isolated area of northern New Hampshire. Complaint, ¶¶ 26, 64. Most Glencliff residents have serious mental illness, and many were transferred from NHH. *Id.*, ¶¶ 67, 69.

contains hundreds, if not thousands of individuals with serious mental illness scattered throughout the State of New Hampshire, and that these individuals share common injuries that can be remedied by a single injunction. *See* Rogers Aff., ¶14; Simpatico Aff., ¶¶ 13-21; Boardman Aff., 19-27; Curran Aff., ¶¶ 18-25. As the reviews collectively demonstrate, the defendants' administration, planning and operation of the mental health service system needlessly segregates persons with serious mental illness, thereby establishing the appropriateness of, and the need for, a class wide remedy in this case. *See* Sudders Aff., ¶¶ 17-26. The conduct, outcomes and implications of each review is discussed in detail below.

1. The Client Review

The plaintiffs asked a team of mental health professionals to review a random sample of class members in order to determine whether they were institutionalized as a result of common deficiencies in New Hampshire's mental health service system. Susan Curran and Daniel Byrne reviewed a sample of persons admitted to NHH for 30 days or more (either cumulatively or consecutively) during the period between July 1, 2011 and June 30, 2012.[7] Judith Boardman reviewed a cohort of persons residing at Glencliff as of June 30, 2012.[8] Dr. Thomas Simpatico, M.D., provided clinical consultation and oversight for both facility reviews, and rendered independent clinical determinations

[7] Both of these mental health professionals have extensive experience in evaluating persons with serious mental illness in public institutions and community programs, including conducting similar reviews for federal judges in Florida and the District of Columbia. *See* Curran Aff., ¶¶ 4-5, FN1. A detailed description of the NHH component of the client review is set forth in Ms. Curran's affidavit. *Id.*, ¶¶ 7-8, 11-16.

[8] Ms. Boardman is a nurse with many years of experience evaluating and serving persons with mental illness, including those who have medical or nursing needs. Boardman Aff., ¶¶3-7. A detailed description of the Glencliff component of the client review is set forth in Ms. Boardman's affidavit. *Id.*, ¶¶ 9-10, 13-18.

about each individual in the sample.[9] Dr. Sally Rogers, a noted researcher and the assistant director of the Boston University Center for Psychosocial Rehabilitation, developed the review's sampling protocol and randomly selected the cohort of persons who were approached to participate in the review. Six named plaintiffs – four with admissions to NHH and two currently admitted to Glencliff - also were included in the review.[10]

The NHH and Glencliff experts reviewed approximately two years of facility and community mental health records, conducted in-person meetings and observations with review participants, and interviewed guardians and mental health providers. *See* Boardman Aff., ¶¶ 11-12, 14-16; Curran Aff., ¶¶ 9-10, 13-14. Following the collection, presentation and discussion of all of this information, the experts answered three central questions: 1) whether the individuals in the sample would have avoided admission to NHH or Glencliff if they had access to the services sought in this case, along with other existing services; 2) whether these individuals would have spent less time at NHH or Glencliff, or could be discharged to the community, if they had access to the services sought in this case, along with other existing services; and 3) whether these individuals would choose, or their guardians would choose for them, to live in the community if they

[9] Dr. Simpatico teaches at the University of Vermont, College of Medicine, was a former medical director at the Vermont State Hospital, and is the medical director of several community mental health programs in Vermont, including those that rely upon supportive housing and ACT teams to provide community care to persons with serious mental illness. Simpatico Aff., ¶¶ 2-3. A fuller description of Dr. Simpatico's role in both components of the client review is described in his affidavit. *Id.*, ¶¶ 5-6, 8-11.

[10] Dr. Rogers has designed similar client reviews for federal courts in Florida and Massachusetts. A detailed description of the population included in the client review, the statistical methodology for selecting the sample, and the reliability and validity of the sampling process is set forth in Dr. Rogers' affidavit. Rogers Aff., ¶¶ 10-13. Based upon her experience and the methodology employed by Dr. Rogers, the reviewers' findings for the NHH and Glencliff cohorts can accurately be extrapolated to the population of residents at both facilities for the specified time period, including those persons who are repeatedly admitted to NHH. *Id.*, ¶ 14.

were fully informed of, and had access to, the services sought in this case along with other existing services. *See* Simpatico Aff., ¶¶ 6,12; Boardman Aff., ¶¶ 10, 19; Curran Aff., ¶¶ 8, 17.

The experts noted the high degree of commonality across the individuals in the sample and, therefore, all individuals in the population, concluding that the vast majority has experienced avoidable, prolonged and unnecessary institutionalization. *See* Simpatico Aff., ¶¶ 13-17; Boardman Aff., ¶¶ 19-24; Curran Aff., ¶¶ 18-22. A common cause behind this unnecessary institutionalization was the absence of appropriate community mental health services, and specifically the services sought in this case. *See* Simpatico Aff., ¶¶ 13-16; Boardman Aff., ¶¶ 19-20, 22, 25; Curran Aff., ¶¶ 18-19, 21-22. Similarly, the reviewers concluded that the vast majority of participants could be discharged to the community if the requested remedial services were available, and that virtually all participants and their guardians would choose community living, if they were fully informed of and had access to these service options. *See* Simpatico Aff., ¶¶ 13-14, 21; Boardman Aff., ¶¶ 19, 22; Curran Aff., ¶ 18.

Specifically, the NHH reviewers concluded that 96% of the individuals in the NHH sample very likely could have avoided admission to NHH if they had access to the services sought in this case, along with other existing services. Curran Aff., ¶ 18. They further concluded that 96% very likely would have spent less time at NHH or could be discharged to the community if they had access to the services sought in this case, along with other existing services. *Id.* Finally, they found that 96% of persons would very likely choose, or their guardians would choose for them, to live in the community if they

were fully informed of, and had access to the services sought in this case, along with other existing services. *Id.*

The Glencliff reviewer found that 22 of the 22 individuals in the Glencliff sample, or 100%, very likely could have avoided admission to Glencliff if they had access to the services sought in this case, along with other existing services. Boardman Aff., ¶ 19. She concluded that 17 of the 22, or 80%, very likely would have spent less time at Glencliff or could be discharged to the community if they had access to the services sought in this case, along with other existing services. *Id.* Finally, Ms. Boardman found that 17 out of 22, or 80% of persons very likely would choose, or their guardians would choose for them, to live in the community if they were fully informed of, and had access to the services sought in this case, along with other existing services. Boardman Aff., ¶ 19.

These conclusions were almost universally affirmed by Dr. Simpatico, whose participation in and clinical oversight over the entire review led him to conclude that: (1) at NHH, 88% of persons very likely would have avoided admission, 88% very likely would have spent less time hospitalized or could be discharged, and 88% very likely would choose to live in the community if they were fully informed of and had access to the services sought in this case, along with other existing services; and (2) at Glencliff, 91% of persons very likely would have avoided admission, 91% very likely would have spent less time hospitalized or could be discharged, and 91% very likely would choose to live in the community if they were fully informed of and had access to the services sought in this case, along with other existing services. Simpatico Aff., ¶¶ 13.

These findings strongly support the contention that a class of individuals with serious mental illness is experiencing unnecessary institutionalization as a result of the defendants' administration, planning and operation of the State's mental health system. The experts also concurred that individuals with serious mental illness can be identified as being "at risk of institutionalization" where they have multiple, repeated, or prolonged hospitalizations, are frequent users of crisis or emergency services for psychiatric reasons, have criminal justice involvement as a result of their mental illness, or lack adequate community-based mental health services. *See* Sudders Aff., ¶10-11 (list of factors that indicate serious risk of institutionalization); Simpatico Aff., ¶15. These review findings make clear that the legal claims of the class could be resolved though a single injunction requiring the State to develop the requested mental health services.

2. The System Review

The plaintiffs asked former Deputy Director and Acting Director of the Division of Mental Health and Developmental Services for the State of New Hampshire, and former Commissioner of Mental Health for the Commonwealth of Massachusetts, Marylou Sudders, to conduct a review of New Hampshire's community mental health system, and specifically whether persons with serious mental illness were being needlessly institutionalized, or placed at serious risk of such institutionalization, due to a lack of community mental health services. Ms. Sudders reviewed documents and materials concerning the structure, capacity and operation of the community mental health system, data on admissions and discharges at NHH and Glencliff, and the utilization of community hospitals and emergency departments for psychiatric emergencies. *See* Sudders Aff., ¶¶ 5-8. She also met with and interviewed

knowledgeable individuals and representatives of key entities within New Hampshire's mental health system, including providers of community mental health services and supportive housing, individuals involved with the criminal justice system and university–based experts in community mental health services. *Id.*, ¶ 9.

The system review, like the defendants' own reports, found that New Hampshire's community mental health system lacks mobile crisis services, ACT teams, supportive housing, and supported employment programs needed to avoid segregation in NHH and Glencliff and that these systemic deficiencies directly contribute to the unnecessary and repeated institutionalization of class members, including those who remain at serious risk of institutionalization. *Id.*, ¶¶ 14-17. New Hampshire's historical recognition of the importance of integrated community mental health services is in stark contrast to its more recent neglect of identified, but unmet, needs of adults with serious mental illness. *Id.*, ¶¶ 13, 26. Despite the State's recognition of the need for precisely the kind of remedial services sought in this case, the system review concludes that the defendants' planning and administration of their mental health system has led to the unavailability of these needed community mental health services. *Id.*, ¶¶ 14-17. The result has been devastating for class members, leading to lengthy and repeated NHH hospitalizations, high readmission rates, discharges to inappropriate locations, homelessness, criminal justice involvement, and repeated admissions to emergency rooms that are ill-equipped to handle individuals in psychiatric crises. *Id.*, ¶¶ 18-21.

As documented in the defendants' own reports and these expert reviews, the unnecessary institutionalization of the named plaintiffs and plaintiff class members has a

common cause – the lack of community services – which can and would be remedied by the requested injunctive relief in this case.

III. The Proposed Class Meets the Standards for Class 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 all of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure as well as 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 representing the class must be able to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(1)-(4); *see also, Griffin v. Burns*, 570 F.2d 1065, 1072 (1st Cir. 1978).

Rule 23(a) has always required a rigorous analysis of whether the prerequisites of Rule 23(a) have been met. *Wal-Mart*, 131 S. Ct. at 2551, quoting, *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 161 (1982)); *M.D.*, 675 F.3d at 837. *Wal-Mart* did not alter *Falcon's* well-established standard for certifying a class,[11] nor the rigor of the analysis that the court must conduct to assess compliance with that standard. Further, neither *Falcon* nor *Wal-Mart* suggests that information set forth in the Complaint is irrelevant or inadequate. Rather, the Supreme Court affirmed *Falcon's* understanding that "*sometimes* it may be necessary for the court to probe behind the pleadings before coming to rest on

[11] As discussed in more detail in Section III(E), the Court reaffirmed that only where there are *no* common questions of fact or law should certification be denied. ("We quite agree that for purposes of Rule 23(a)(2) '[e]ven a single [common] question will do") (citations omitted). *Id.* at 2541, 2557.

the certification question."[12] *Id.* (quoting *Falcon*, 457 U.S. at 160 (emphasis added)). After *Wal-Mart*, the district court must analyze whether there are common contentions which exist "whose resolution will resolve an issue that is central to the validity of each one of the class members claims in one stroke."[13] *Wal-Mart*, 131 S. Ct. at 2551.

B. The Proposed Class

The proposed class consists of "all persons with serious mental illness who are institutionalized in New Hampshire Hospital or Glencliff or at serious risk of institutionalization in these facilities." Plaintiffs' Renewed Motion for Class Certification at 9. It is routine for courts to certify classes in cases challenging government officials' noncompliance with Title II of the ADA. *See* List of Selected ADA Class Action Cases, attached as Exhibit 14. This is particularly true in cases seeking compliance with Title II's requirement that services be provided in the most integrated setting appropriate to individuals' needs. Additionally, courts have routinely certified classes of persons with mental disabilities in cases challenging a failure to provide appropriate services in a state or private facility. *See* List of Selected Institutional Placement Class Actions, attached as Exhibit 15. This long line of decisions granting class certification in cases challenging

[12] *Wal-Mart* arguably did enhance the evidence that must be provided by the plaintiffs and require trial courts to identify a link between that evidence and common contentions capable of common answers. 131 S. Ct. at 2551-52.

[13] *Wal-Mart* involved an unprecedented nationwide class action, where it found "nothing to unite all of the plaintiffs' claims," no evidence that the same discriminatory employment practices "touched and concerned all members of the class," and members whose potential entitlement to monetary damages required an individualized analysis to determine liability. *Id.* at 2557. *Wal-Mart's* conclusion does not preclude class certification here, because of the claims asserted (the existence of a common discriminatory policy or practice), the relief sought (a single injunction), and, most importantly, the fact that in this case, unlike Wal-Mart, the claims of all class members can be resolved "in a single stroke" through the provision of the requested community services that are critical to avoiding unnecessary institutionalization. *See Connor B.*, 2011 WL 5513233 at *3, 5 (While *Wal-Mart* provides "…guidance on how existing law should be applied to expansive, nationwide class actions," it does not preclude injunctive relief designed to remedy overarching deficiencies in a state service system).

needless institutionalization and/or the denial of appropriate community services argues strongly for class certification here.

A similar class was certified in a case raising similar claims under the ADA and NHRA, and affirmed by the First Circuit. *See Rolland v. Cellucci*, 1999 WL 34815562 (D. Mass. Feb. 2, 1999);[14] *Rolland v. Patrick*, 2008 WL 410488 (D. Mass. Aug. 19, 2008) (refusing to decertify the class based upon alleged differences in the needs and conditions of persons in nursing facilities); *Voss v. Rolland*, 592 F. 3d (1st Cir. 2010) (refusing to consider a challenge to class certification in an ADA case involving persons with intellectual disabilities in nursing facilities); *Hutchinson v. Patrick*, No. 07-30084-MAP (D. Mass. Oct, 4, 2007), *approved* 636 F.3d 1 (1st Cir. 2011) (affirming fee award for class based upon district court's approval of settlement agreement under Fed. R. Civ. P. 23(e)).

Courts have certified similar classes in other ADA Title II cases brought on behalf of institutionalized persons with disabilities. *See Van Meter v. Harvey*, 272 F.R.D. 274 (D. Me. 2011); *Connecticut Office of Protection and Advocacy*, 706 F. Supp. 2d 266 (D. Conn. 2010); *Long v. Benson*, No. 08-cv-26 (N.D. Fla. Oct. 14, 2008); *Colbert v. Blagojevich*, 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008); *Chambers v. San Francisco*, No. 06-cv-6346 (N.D. Cal. July 12, 2007); *Williams v. Quinn*, 2006 WL 3332844 * 5 (N.D. Ill. Nov. 13, 2006).

ADA Title II integration cases customarily focus on the standardized conduct of the defendants and do not depend on individualized determinations of either liability or remedy. Thus, courts frequently, and barely without exception, have little difficulty certifying ADA classes, precisely because the Title II claims focus on the defendants'

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

systemic practices, not the individual plaintiffs' conditions.[15] *See* Ex. 14. Significantly, there is not a single decision where a court has declined to certify an ADA Title II case or which has applied *Wal-Mart* to an ADA Title II case and concluded that class certification is inappropriate. To the contrary, in several ADA or Rehabilitation Act post-*Wal-Mart* cases, courts have certified classes, re-certified classes, or refused to decertify classes. *Lane v. Kitzhaber,* 283 F.R.D. 587 (D. Or. 2012) (certifying a class of persons with developmental disabilities in segregated workshops, where the plaintiffs challenge the defendants' planning, funding, and administering of their employment services system and not individual placement decisions; court rejects defendants' claims that class members' different abilities, skills, needs, and preferences preclude certification); *Gray v. Golden Gate Nat'l Recreation Area*, 279 F.R.D. 501 (N.D. Cal. 2011) (certifying a class of individuals with mobility and/or vision disabilities challenging barriers at a national recreational area and concluding that commonality was met by general policies and practices of defendants that failed to address access barriers despite differing types and levels of disabilities of the class members); *Oster v. Lightbourne*, 2012 WL 685808 at *5 (N.D. Cal. March 2, 2012) (class certification granted where cuts to in-home support services affected named plaintiffs and class members in different ways.); *Pashby v. Cansler*, 279 F.R.D. 347, 353 (E.D.N.C. 2011) (a determination that the policy or rule in question is valid or invalid on its face would resolve the claims of all potential plaintiffs,

[15] A critical factor in the Court's conclusion was that the claim in *Wal-Mart,* unlike the one here, required proof of discriminatory intent, which, by its very nature and particularly when applied by thousands of employment supervisors to millions of employees, is almost impossible to prove, absent a common policy or practice. And it is precisely the presence of such a common practice or policy in most ADA integration cases that distinguishes them from *Wal-Mart,* since the Court's conclusion depended heavily on the *absence* of such a policy or practice.

regardless of their particular factual circumstances); *D.L. v. District of Columbia,* 277 F.R.D. 38 (D. D.C. 2011).[16]

ADA Title II classes routinely have been certified precisely because they raise a common question susceptible to a common solution through a single injunction: the modification of the public entity's program to provide services in the most integrated setting. Like those cases, the Complaint here seeks a single injunction that would require the defendants to make reasonable modifications to their community service system, in order to ensure that all class members have access to community services in the most integrated setting. Thus, in *Wal-Mart* terms, the Court can, "in a single stroke," ensure that class members avoid needless institutionalization at NHH and Glencliff and have the opportunity to live in the community.[17] Thus, there is a virtually unbroken line of decisions granting class certification in Title II cases challenging systemic practices of institutionalizing persons with disabilities in violation of federal statutory and constitutional

[16] Courts have also continued to certify classes in a variety of other contexts, and refused to de-certify existing class after *Wal-Mart*. *See Ault v. Walt Disney World Co.*, 2011 WL 1460181(M.D. Fla, April 4, 2011), aff'd 692 F.3d 1212 (11th Cir. 2012) (certifying ADA Title III class); *Connor B. ex. Rel. Vigurs v. Patrick*, 278 F.R.D. 30 (D. Mass. Nov, 2011) (following the *Wal-Mart* decision, court declined to de-certify class of foster children harmed by systemic deficiencies in state's foster care system); *Johnson v. General Mills*, 276 F.R.D. 519 (C.D. Cal. 2011) (unlike *Wal-Mart*, injury results from a common core of salient facts); *In re Ferrero Litigation*, 2011 WL 5557407 (S.D. Cal. Nov. 15, 2011) (plaintiffs need not prove a common class-wide injury at class certification stage; rather, they need only to demonstrate that there is a common contention that is capable of class wide resolution); *Martinez v. Gerber Childrenswear, LLC*, 2011 WL 6757875 (C.D. Cal. Dec. 15, 2011) (unlike *Dukes*, there is common control over the challenged practice); *Parkinson v. Freedom Fidelity Management, Inc.*, 2012 WL 72820 (E.D. Wash. Jan. 10, 2012) (certifying class for violations of state Consumer Protection Act and Debt Adjusting Statute, although plaintiffs suffered different statutory violations in different ways by different debt collectors); *Arthur v. Sallie Mae, Inc.*, 2012 WL 90101 * 7 (W.D. Wash. Jan. 10, 2012) (commonality only requires a single question of law or fact).

[17] As discussed in Section III(E), *infra*, individualized decisions concerning which persons want to leave NHH or Glencliff and what community services they need to leave have nothing to do with class certification, since this process is not part of the federal court proceedings. Instead, these determinations are properly made in an individualized service planning process, similar in many respects to the treatment planning process currently used by the defendants.

provisions. Those conclusions and the reasoning of those cases are equally applicable here, and should weigh heavily in the Court's analysis regarding certification of the plaintiff class.

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

In addition to the information set forth in their Complaint, which includes substantial details about the named plaintiffs and numerous references to documents, reports, data, and findings by the Department of Justice and others concerning systemic deficiencies in New Hampshire's mental health system, the plaintiffs have further supported their Renewed Motion with the affidavits of five experienced mental health professionals. *See* Exs. 1-8; Affidavits of Dr. Thomas Simpatico, Judith Boardman, Susan Curran, Dr. Sally Rogers, and Marylou Sudders (Exs. 9-13). As discussed in Section II, *infra*, this evidence is more than sufficient to allow the Court to conduct the requisite analysis of the class certification question.[18]

D. The Class Is 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" for plaintiffs, 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

[18] This evidence also directly addresses, and more than completely responds to, the defendants' concerns that in the original motion the plaintiffs had not provided sufficient information about the types of services needed by class members, their unnecessary institutionalization at the NHH and Glencliff, and their interest in living in the community. *See* Defs' Mem. in Support of Motion to Strike at 6 (Doc. 24-1).

alone are usually not determinative….'")(quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124,131-32 (1st Cir. 1985).

Here the proposed class consists of at least several hundred members, and probably many more, given the defendants' own reports about the number of persons actually institutionalized in the NHH each year. *See* Ex. 5. *See also,* Sudders Aff., ¶ 18. It is clearly sufficient to satisfy the numerosity requirement. Typically, classes consisting of only a fraction of this number are certified under Rule 23(a)(1). *See, e.g., Griffin v. Burns*, 570 F.2d 1065, 1072-73 (1st Cir. 1978) (123 voters are sufficient to satisfy Rule 23(a)(1)); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2nd Cir. 1972) (class consisting of at least 70, and possibly 212 members, sufficient); *George Lussier Enterprises, Inc. v. Subaru of New England Inc.*, No. Civ. 99-109-B, 2001 WL 920060 at *3 (D.N.H. Aug. 3, 2001) (class of approximately seventy-five present and former Subaru dealers satisfies the numerosity requirements); *Grace v. Perception Tech. Corp.*, 128 F.R.D. 165, 167 (D. Mass. 1989) (class consisting of between 300 and 1300 shareholders is sufficient).

The plaintiffs need not establish the precise number or identity of proposed class members, particularly in Rule 23(b)(2) classes. *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); s*ee also, Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975) (size of class can be speculative where only injunctive or equitable relief is requested); *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970); *Westcott v. Califano*, 460 F. Supp. 737, 744 (D. Mass. 1978); *Jane B. v. New York City*

Dept. of Social Servs., 117 F.R.D. 64, 70 (S.D.N.Y. 1987) (precise determination of proposed class not a prerequisite to maintenance of a class action).

In fact, a proposed class is "more likely to satisfy the numerosity requirement if it is difficult to identify potential class members." *In re Tyco International, LDT.*, No. MD-02-1335-PB, 2006 WL 2349338 at *1 (D.N.H. Aug. 15, 2006) (citing *Andrews*, 780 F.2d at 132); *see also*, *Advertising Special Nat. Ass'n v. Federal Trade Comm'n*, 238 F.2d 108, 119 (1st Cir. 1956) (impracticability of joinder strengthened by fact that class membership is not fixed but number changes from year to year). This is particularly true where only declaratory and injunctive relief is sought. In such matters, district courts may draw reasonable inferences from the facts presented to find the requisite numerosity and proceed on a reasonable estimate of the proposed class size. *See Doe v. Flowers*, 364 F. Supp. 953, 954 (N.D. W.Va. 1973), *aff'd. mem.*, 416 U.S. 922 (1974); *see also*, 7 Newberg on Class Actions §23:2 (4th ed. 2011) ("Courts generally have not required detailed proof of class numerousness in government benefit class actions when challenged statutes or regulations are of general applicability to a class of recipients, because those classes are often inherently very large.").

In addition to considering the number of persons within a proposed class, courts also examine the practicability of joining all the plaintiffs. In this analysis, significant weight is given to factors such as the plaintiffs' 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; *Jordan v. Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.

1982) ("The joinder of unknown individuals is inherently impractical"), *vacated on other grounds*, 459 U.S. 810 (1982); *National Ass'n. of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986).

These factors weigh strongly in favor of class certification here. The named plaintiffs are individuals with serious mental illness who are institutionalized at NHH or Glencliff or at serious risk of institutionalization in these facilities because of the defendants' failure to provide community services that are critical to class members being able to live in an integrated setting. *See* Simpatico Aff., ¶¶ 13-16; Boardman Aff., ¶¶ 19-22, 27; Curran Aff., ¶¶ 18-21; and Sudders Aff., ¶¶ 13-16, 18, 26. They request injunctive and declaratory relief on behalf of themselves and all persons in New Hampshire with serious mental illness who are similarly situated. They seek to represent the interests of at least several hundred class members, all of whom have serious mental illness and are institutionalized at NHH or Glencliff or are at serious risk of institutionalization in these facilities because of the defendants' failure to provide community services.

The disability, geographic diversity, segregation, and size of the class make joinder of all members impracticable. *See, e.g., Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986) ("Considering plaintiffs' confinement, their economic resources, and their mental handicaps, it is highly unlikely that separate actions would follow if class treatment were denied"). As was true of the plaintiffs in *Armstead*, it would be extremely difficult, and thus impracticable, for the members of the proposed class to maintain individual suits against the defendants, particularly given the persistent nature of their disabilities, their limited financial resources, and their segregation in hospital or nursing facilities. Therefore, it is highly unlikely that individual class members could institute

separate suits for declaratory and injunctive relief in this case in the event class certification is denied. *See, e.g., Van Meter*, 272 F.R.D. at 282; *Raymond v. Rowland*, 220 F.R.D. 173, 179 (D. Conn. 2004) (multiple factors indicate that disabled and impoverished nursing home residents unlikely to maintain individual actions for relief).

Moreover, the proposed class members, individuals with a serious mental illness comprise "precisely the type of group which class treatment was designed to protect." *Armstead*, 629 F. Supp. at 279. Under these circumstances "the difficulty or inconvenience of joining all members makes class litigation desirable." *Koster v. Perales*, 108 F.R.D. 46, 49 (E.D.N.Y. 1985) (quoting *Northwestern National Bank of Minneapolis v. Fox & Co.*, 102 F.R.D. 507, 511 (S.D.N.Y. 1984)); *Risinger v. Concannon*, 201 F.R.D. 16, 19 (D. Me. 2001) (difficulties associated with identifying and formally joining a geographically dispersed group of more than 391 disabled children and families made joinder impractical).

Furthermore, joinder is impracticable in the instant case because the class includes not only currently institutionalized individuals, but also individuals who are at serious risk of institutionalization in the future.[19] Where "[t]he alleged class also includes unnamed, unknown future" class members who will allegedly be harmed by the defendants' conduct and policies, courts have held that joinder is "certainly impracticable." *Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974); s*ee also Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 ("the requirement of Rule

[19] In their earlier Motion to Strike, the defendants did not challenge the sufficiency of the numbers of class members but argued that the hundreds or thousands of persons with mental illness in New Hampshire somehow could be practically joined because they all lived in the same state and were easily identifiable. This claim is simply not credible. Prosecuting hundreds of separate lawsuits on behalf of hundreds of individuals presented a serious concern to the Supreme Court in determining how States should accommodate the competing needs of institutionalized persons. *See Olmstead v. L.C.*, 527 U.S. 581, 602 (1999).

23(a)(1) is clearly met, for joinder of unknown individuals is certainly impracticable") (internal quotations omitted))

Therefore, in light of its size and the circumstances of those persons who compose it, the proposed class satisfies the requirements of Rule 23(a)(1).

E. Members of the Class Share Common Questions of Law and Fact.

Rule 23(a)(2) requires that the claims of a proposed class share common questions of law or fact. As many courts have noted, "[t]he threshold of 'commonality' is not high." *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 181-83 (3rd Cir. 2001); *Faherty v. CVS Pharmacy Inc.*, 2011 WL 81078 at *2 (D. Mass. Mar. 9, 2011) (commonality rule aimed in part at "determining whether there is a need for combined treatment and a benefit to be derived there from") (quoting *Jenkins*, 782 F.2d at 472).

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 Mortgage 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). While *Wal-Mart* held that the class members' claims must depend on a common issue of law or fact capable of being resolved "in a single stroke," *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*, 131 S. Ct. at 2556 (citations and internal quotations omitted).[20]

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 (3d 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 the case with respect to classes such as 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); *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); *Ass'n for Disabled Americans v. Amoco Oil Co.*, 211 F.R.D. 457, 463 (S.D. Fla. 2002) ("Plaintiffs' allegations of common

[20] Federal decisional law post-*Wal-Mart* recognizes that while *Wal-Mart* provides "…guidance on how existing law should be applied to expansive, nationwide class actions," it does not preclude injunctive relief designed to remedy systemic deficiencies in a state service system. *Connor B.*, 2011 WL 5513233 at * 3, 5.

discriminatory practices of ADA noncompliance, as a matter of law, satisfy the requirement that the representative plaintiffs share at least one question of fact or law with the grievances of the putative class.") (citations omitted).

Commonality may exist even where class members are not identically situated, or where their injury does not arise in exactly the same way. *See 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 Circuit, Inc.*, 158 F.R.D. 439, 448-49 (N.D. Cal. 1994) (quoting *Walthall v. Blue Shield of Calif.*, 1977 WL 34 (N.D. Cal. 1977); *see also, Curtis v. Commissioner, Maine Dep't. of Human Servs.*, 159 F.R.D. 339, 341 (D. Me. 1994) ("Where a question of law refers to standardized conduct of the defendant towards members of the proposed class, commonality is usually met"); *Marisol A. v. Giuliani*, 126 F.3d 372, 376-7 (2nd Cir. 1997) (affirming district court's certification of class of children in foster care system despite varying reasons for placement and varying injuries among class members); *Christina A. ex rel. Jennifer A. v. Bloomberg*, 197 F.R.D. 664, 667-68 (D. S.D. 2000) (the fact that prison conditions, policies and procedures "affect plaintiffs differently does not defeat the commonality of their claims."); *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 at *7 (same).

Wal-Mart does not require that every class member must be affected in an identical way by the defendants' conduct. Indeed, circuit courts, district courts in the First Circuit, and other courts considering systemic deficiencies have continued to certify classes post-*Wal-Mart*, where the focus is on the defendant's conduct, as evidenced by its policies *or* practices, even when challenged practices do not have the identical effect on all named plaintiffs and class members. *See e.g. Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909 (7th Cir. 2012) (unlike *Wal-Mart*, there is no need for proof of discriminatory intent and no need for individualized determinations of damages, even though there may be differences in how the defendants' practices affected individual class members); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith*, 672 F.3d 482 (7th Cir. 2012) (reversing denial of class certification in disparate impact case where common questions exist regarding company policies and their contributory effect on alleged employment discrimination, even if individual employee decisions may also be a factor); *Rodriguez v. Countrywide Home Loans*, __ F.3d __, 2012 WL 4041448 (5th Cir. Sept. 14, 2012) (certification affirmed in case seeking injunctive relief based upon challenge to defendant's debt collection practices); *Sullivan v. D.B. Investments*, 667 F.3d 273, 300 (3d Cir. 2011) (class certification upheld since there were common questions that generate common answers, including "answers to questions about [defendants'] alleged misconduct and the harm it caused" class members); *Connor B.*, 272 F.R.D. at 296 (that harms suffered by unnamed class members differs from that experienced by named plaintiffs does not undermine commonality or typicality); *George v. Nat'l Water Main Cleaning Co.*, 2012 WL 4468768 (D. Mass. Sept. 27, 2012) (court certifies class based upon defendants' practice of compensating employees at lower than the prevailing wage

because a common injury – unlawful compensation – flows from a common source, despite differences in worker classification, pay scales, type of work, type of contract, location, and hours worked); *Glass Dimensions, Inc. v. State Street Bank & Trust Co.*, 2012 WL 5416443 (D. Mass. Aug. 22, 2012) (court certifies ERISA class based upon common questions despite differences in the type of investment funds and rates of return); *Lyons v. Citizen Financial Group,* 2012 WL 5499878 (D. Mass. Nov. 9, 2012) (class certified in wage case since evidence is common to most, even if not all, branch managers, despite differences in wages paid or employment duties); *LaRocque v. TRS Recovery Services,* 2012 WL 2921191 (D. Me. July 17, 2012) (court certifies several damage classes in federal debt collection case based upon common overdraft procedure, despite differences among consumers and transactions); *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*., 2011 WL 3563489 (E.D. Pa. Aug. 12, 2011) (plaintiff class denied the benefit of treatment for Autism Spectrum Disorder stated common claims as well as "'common answer apt to drive the resolution of the litigation'" regardless of their different conditions, treatment needs, and abilities to benefit from ABA therapy. Id. at *3 *(citing Wal-Mart*); *In re Rail Freight Fuel Surcharge Antitrust Litigation,* 2012 WL 2870207 (D.D.C. June 21, 2012) ("[P]laintiffs' burden at the class certification stage is to demonstrate that the elements of their claim are 'capable of proof at trial through evidence that is common to the class rather than individual to its members'").

Courts also continue to certify classes in ADA cases post-*Wal-Mart,* finding that commonality may exist even where class members are not identically situated. *See, e.g.*,

Oster, 2012 WL 685808 at * 5 (rejecting defendants' challenge under *Wal-Mart* that class members do not meet the commonality because they suffer different service reductions); *Lane*, 283 F.R.D. at 598)"As in other cases certifying class actions under the ADA and Rehabilitation Act, commonality exists even where class members are not identically situated."); *Henderson v. Thomas*, 2012 WL 3777146 (M.D. Ala. Aug. 30, 2102) (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).

In a case that shares many similarities with this lawsuit, the district court in Oregon certified a class asserting claims under the integration mandate of Title II of the ADA and the Rehabilitation Act. *Lane,* 283 F.R.D. at 595. The *Lane* 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. *Lane*, 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 common question of fact was whether the plaintiffs were denied supported employment services in integrated settings for which they are qualified. *Id*.

The court in *Lane* held that the defendants' standardized conduct was the proper frame for considering whether commonality was met, regardless of whether some plaintiffs may need more or different employment services than others. *Id*. The court

recognized that even post-*Wal-Mart*: "[a]s in other cases certifying class actions under the ADA and Rehabilitation Act, commonality exists even where class members are not identically situated." *Id*. The *Lane* court specifically rejected the defendants' argument that it was necessary at the class certification stage for the named plaintiffs to prove that they and all putative class members are unnecessarily segregated and would benefit from employment services. *Id*. 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).

The court was particularly troubled by the defendants' argument that "differences with respect to the needs and preferences of persons with disabilities would always preclude the certification of a class in virtually all ADA Title II cases." *Id*. The court went on to conclude that the case could be resolved, as required by *Wal-Mart*, "in one stroke" with an injunction that requires the defendants to provide supported employment services to all qualified class members, consistent with their individual needs. *Id.* at 602. The court noted that rather than engage in an analysis of individual class member's circumstances, the type of relief sought by plaintiffs "focuses on the defendants' conduct, not on the treatment needs of each class member. It is aimed at providing class wide alternatives to segregated employment, regardless of a person's individualized support needs, by modifying the way defendants fund, plan and administer the existing employment service system." *Id.*

The parallels between *Lane* and this case are significant. As in *Lane*, the plaintiffs here are challenging the defendants' discriminatory planning, administration, operation and funding of a service system that contributes to the institutionalization and

segregation of individuals with serious mental illness. This is exactly the same common contention that the *Lane* court found satisfied commonality. In addition, while there may be, and inevitably will be, differences among *Lynn E.* class members, such differences are not germane to commonality where there are, as there were in *Lane*, common questions of fact, common legal claims, common contentions, and common answers. Just as *Lane* recognized that the court did not need to determine each class member's individual needs, the Court in this case does not need to determine what services each class member needs to live in an integrated setting.

Viewed in that context, this proposed class meets the commonality threshold as a result of multiple questions of law common to the class, all of which admit of a common answer that would resolve the claims of the plaintiff class "in one stroke" including:

(a) Whether defendants are violating the ADA and Section 504 of the Rehabilitation Act by failing to provide community mental health services needed to avoid unnecessary institutionalization at NHH and Glencliff;

(b) Whether defendants are violating the ADA and Section 504 of the Rehabilitation Act by administering their mental health system in a way that discriminates against the plaintiff class;

(c) Whether defendants are violating the ADA and Section 504 of the Rehabilitation Act by failing to serve plaintiffs and the plaintiff class in the most integrated setting appropriate to their needs;

(d) Whether the defendants have developed a comprehensive and effectively working plan for serving plaintiffs and the plaintiff class in the community instead of institutional settings;[21] and

(e) Whether the defendants are violating PASRR provisions of the Nursing Home Reform Act by failing to properly determine whether individuals referred to Glencliff could be served in more integrated settings.

Similarly, there are multiple, common contentions of fact that admit of a common answer which would resolve all of the claims of the class "in a single stroke" including:

(a) Whether the defendants' policies, procedures, and practices concerning the administration and funding of their community services system deny the plaintiff class the opportunity to receive services in the most integrated setting. There is ample evidence that the defendants fail to provide an adequate array of community services to accommodate the needs of persons with serious mental illness institutionalized in NHH or Glencliff, or at serious risk of such institutionalization. *See* Sudders Aff., ¶¶ 13-17; Simpatico Aff., ¶¶ 13-16, 18-21; Boardman Aff., ¶¶ 19-22, 24-25; and Curran Aff., ¶¶ 18-24;

(b) Whether, as a result of the defendants' policies, procedures, and practices that deny persons with serious mental illness reasonable access to, and a sufficient amount of community services, the members of the plaintiff class are unnecessarily segregated in institutions. *See* Simpatico Aff., ¶¶ 13-16, 19-21;

[21] This common question arises if defendants assert affirmative defenses under *Olmstead v. L.C. ex.rel. Zimring*, 527 U.S. 581(1999). The existence of a common question of law, which can include a common defense, makes class certification appropriate. *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 39 (1st Cir. 2003) ("[Both the factual basis for and the legal defense of waiver present common issues for all class members") (citation omitted).

Boardman Aff., ¶¶ 19-22, 24, 27; Curran Aff., ¶¶ 18-20, 22, 25; and Sudders Aff., ¶¶ 17-20, 23-26;

(c) Whether the defendants fail to administer their community service system for persons with serious mental illness in a manner that accommodates the needs of members of the plaintiff class. *See* Simpatico Aff., ¶¶ 13, 17-21; Boardman Aff., ¶¶ 19, 24-27; Curran Aff., ¶¶ 18, 22-25; and Sudders Aff., ¶¶ 24-26; and

(d) Whether the defendants fail to develop and implement a PASRR program that timely and appropriately assesses whether the needs of persons with serious mental illness seeking admission to Glencliff could be met in a more integrated community-based setting. *See* Simpatico Aff., ¶¶ 13, 16, 19-21; Boardman Aff., ¶¶ 19-20, 23-27.

These common contentions (the defendants' failure to administer a system which denies institutionalized persons or those at serious risk of institutionalization the opportunity to receive services in integrated settings) raise common facts, based upon a common legal claim (the ADA's Title II integration mandate), 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. These contentions are "capable of class wide resolution", since a "determination of its truth or falsity will resolve an issue" (whether the defendants fail to provide a sufficient supply of community services) "that is central to each one of the claims in one stroke." *Wal-Mart,* 131 S. Ct. at 2551. The common thread or "glue" which unites their common factual and legal claims is the fact that members of the plaintiff class are subject to, or at serious risk of, unnecessary institutionalization and segregation as a

result of the defendants' conduct – specifically, the defendants' failure to provide community services necessary to avoid the institutionalization of persons with serious mental illness. Whether currently institutionalized in NHH or Glencliff, or at serious risk of institutionalization in these facilities, the plaintiff class is suffering as a result of a common course of conduct by defendants, from which arises a set of common legal claims and factual contentions.[22] *See* Simpatico Aff., ¶¶ 13-21; Boardman Aff., ¶¶ 19-27; Curran Aff., ¶¶ 18-25; and Sudders Aff., ¶¶ 18-20, 24-26.

1. Neither *M.D. v. Perry* nor *Jamie S. v. Milwaukee Public Schools* Preclude Class Certification in This Case.

In their Reply Memorandum in Support of their Motion to Strike (Doc. 48-1), the defendants relied heavily on two recent court of appeal decisions, *M.D. v. Perry*, 675 F.3d 832 (5th Cir. 2012), and *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012), neither of which undermine this analysis nor alter this conclusion. In *M.D.*, the Fifth Circuit concluded that the district court failed to explain how systemic deficiencies in Texas's child welfare system that arose from three separate and unrelated legal claims allowed a common solution that would address the claims of all class members.[23] At the same time, the Fifth Circuit identified a number of practices that

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

[23] Moreover, the appeals court was understandably troubled by the lack of coherence between three quite different claims under three quite different constitutional provisions, particularly since the substantive due process one appeared to require an individualized inquiry of harm. *Id.* at 843. It suggested that the district court should consider the possibility of subclasses for each claim, since each presented a quite different contention, and different answer to the contention. *Id.* at 848. Here, of course, there are really only two claims, one involving segregation in NHH and Glencliff under two related statutes, the ADA and the Rehabilitation Act, and the other involving the failure to properly screen and divert admissions to Glencliff

would satisfy commonality requirement, such as the lack of sufficient staffing or a structural deficiency in the system. As the Fifth Circuit explained:

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

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

Here, unlike *M.D.*, the plaintiffs' Complaint focuses on a structural deficiency – the lack of specific community services required to avoid needless institutionalization at NHH and Glencliff that directly result from the defendants' planning and administration of their community services system. This deficiency can be remedied by an injunction to provide those services, which would, in a single stroke, address the claims and harms of each class member.

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

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as required by the Nursing Home Reform Amendments (NHRA) to the Medicaid Act. In no sense do the common questions in this case involve the type of "super-claim" that the Fifth Circuit found so troubling in *M.D.*

Second, and perhaps more importantly, the remedy ordered by the district court established an individualized child review process that substituted for the city's child find process and resulted in the issuance of separate injunctive orders for each child. The Seventh Circuit concluded that these separate injunctions demonstrated that the remedial order did not generate a common answer and a single injunction that applied to the class as a whole.[24] *Id.* at 498-99. Here, the Court is not involved in an inquiry into individualized relief.[25] Instead, it only will determine whether it is appropriate to issue a single injunction requiring the defendants to develop additional community services that would avoid class members' needless segregation in NHH and Glencliff and, instead, allow these individuals to live in the most integrated setting.

In short, the plaintiff class has established commonality precisely because they have identified both a common contention -- that existing community mental health services are insufficient to avoid unnecessary institutionalization -- as well as a common injury -- discriminatory segregation. *See* Simpatico Aff., ¶¶ 13-21; Boardman Aff., ¶¶ 19-27; Curran Aff., ¶¶ 18-25; and Sudders Aff., ¶¶ 13-26. The common contention, moreover, is "of such a nature that it is capable of class wide resolution..." *Wal-Mart*, 131 S. Ct. at 2551. The modifications that the plaintiffs seek to the State's community mental health system can

[24] That there is nothing in *Jamie S.* which precludes a finding of commonality or precludes class certification here is underscored by a subsequent decision of the same court of appeals that, post-*Wal-Mart*, certified a class of African-American employees who alleged racial discrimination in employment promotion and compensation practices. *McReynolds v. Merrill Lynch, Pierce, Fenner, and Smith, Inc*., 672 F.3d 482 (7th Cir. 2012) (certifying a class for liability purposes because this phase of an employment discrimination case, as opposed to the damage claims, can be resolved by a single injunction and does not require individualized remedial orders).

[25] As more fully discussed in Section IV, *infra*, neither an assessment of commonality for the purposes of class certification, nor even a determination of liability under federal law, requires this Court to evaluate the individual clinical conditions, support needs, or the residential preferences of each one of the hundreds of persons in New Hampshire who are in, or at risk being admitted to, NHH or Glencliff. Rather, this Court can determine that a violation of federal law has occurred, and remedy that common legal violation, without the type of individualized liability determinations at issue in *Wal-Mart or M.D.*

be achieved through a single injunction providing relief to the class as a whole. *Id.* at 2560. The class injuries can be redressed by the development of additional community-based services such that they may avoid being subjected to unnecessary segregation. Therefore, the plaintiffs have presented both the common questions and the "common answers apt to drive the resolution of the litigation." *Id.* at 2551. Consistent with long standing precedent in class actions alleging systemic civil rights violations, the Court should find there are questions of law and fact common to the class.

F. The Claims or Defenses of the Named Representatives Are Typical of the Class.

The third component of Rule 23(a) requires that the representatives' claims for relief 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 *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977); *Jones v. Shalala*, 64 F.3d 510, 514 (9th Cir. 1995); *California Rural Legal Assistance Inc. v. Legal Services Co.*, 917

F.2d 1171, 1175 (9th Cir. 1990), *modified*, 937 F.2d 465 (9th Cir. 1991). "[T]he critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001) (quoting 5 Moore's Federal Practice ¶ 23.24[4] (3d ed. 2000)).

Applying these principles, courts in this 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 theory." *Tyrell*, 2010 WL 174287 at *5 (quoting *Garcia-Rubiera*, 570 F.3d at 460); *In re Tyco International, Ldt.*, 2006 WL 2349338 at *6 ("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. This is sufficient to support a finding of typicality."); *Griffin v. Burns*, 570 F.2d 1065, 1073 (1st Cir. 1978) (typicality does not require court to recreate the probable actions of each class member when all members experienced the same deprivation of a fundamental right); *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); *Guckenberger v. Boston 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. Commissioner, Maine 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."); *Neff v. VIA Metropolitan Transit Authority*, 179 F.R.D. 185, 194 (W.D. Tex. 1998) (typicality standard satisfied in ADA case where named representatives are adversely affected by the same facilities, policies and practices as absent class members, regardless of the manner in which they have been injured).

As considered determinative by the district court in *Lane*, 283 F.R.D. at 598-99, the named plaintiffs satisfy the typicality requirement of Rule 23(a)(3) because they share numerous interests and characteristics with putative class members in that: (1) they all have serious mental illness; (2) they all are segregated, or at risk of segregation in an institution (either NHH or Glencliff); (3) they all are entitled to have their needs met in an appropriate community setting; and (4) it is very likely the vast majority of them could be discharged to the community with the specific services sought in this case; and 5) it is very likely that, if adequately informed, and given access to remedial services, they would choose community placement. *See* Simpatico Aff., ¶¶ 13-21; Boardman Aff., ¶¶ 19-27; and Curran Aff., ¶¶ 18-25.

Here, the named plaintiffs and the plaintiff class's claims arise from the same policies and practices of the defendants and are based on the same legal theory. The named plaintiffs suffer injuries that stem from legal violations that are typical of those experienced by the plaintiff class. *See* Simpatico Aff., ¶¶ 13-16; Boardman Aff., ¶¶ 19-22; Curran Aff., ¶¶ 18-22; and Sudders Aff., ¶¶ 16-21. The defendants, through their actions and inactions, are needlessly institutionalizing the named plaintiffs or placing them at serious

risk of institutionalization due to a lack of appropriate community-based services. *See* Sudders Aff., ¶¶ 25-26.

Like classes certified in other ADA cases, *see Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012)(difference in class member's disability or needs does not undermine typicality) and Exhibit 14, that the named plaintiffs and plaintiff class may have varying conditions, enter the mental health system in different ways, or require different combinations of the services sought in the Complaint does not defeat a finding of typicality. The fact that class members may have different medical conditions or that they may require a slightly different service array does not justify denying class certification. *See Rolland*, 2008 WL 4104488 at *5. Instead, the requisite typicality exists because the defendants are needlessly institutionalizing class members in violation of Title II of the ADA and the NHRA. *See Curtis*, 159 F.R.D. at 341 (typicality is met because "the representative Plaintiff is subject to the same statute and policy as the class members."); *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").

Typicality is established precisely because the named plaintiffs and the plaintiff class are aggrieved by the same limitations in community services, and their claims are based on the same legal theories regarding the discriminatory administration of the state mental health system. *See Connor B.*, 272 F.R.D. at 297 ("Because Plaintiffs have identified specific systemic failures that expose the entire Plaintiff class to an unreasonable risk of harm, the typicality requirement is satisfied.")

Finally, the named class members have a personal interest in this litigation and seek the same relief as the class, which is reasonably related to the harm experienced by all class members. *Risinger*, 201 F.R.D. at 22 (finding typicality where plaintiffs invoke the same legal provisions, allege the same system deficiencies and seek the same relief). Since the named plaintiffs' legal theories arise from the same course of conduct, and their common claims are broadly typical of the claims of the unnamed class, the requirements for typicality under Rule 23(a)(3) are satisfied.

G. The Class Representatives Fairly and Adequately Represent the Interest of the Class.

Rule 23(a)(4) requires that the representative plaintiffs in a class action fairly and adequately represent the interests of the entire class. In order 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); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Rodriguez v. Carlson*, 166 F.R.D. 465 at 473 (E.D. Wash. 1996); *In re Bank of Boston Corp. Securities Litigation*, 762 F. Supp. 1525, 1534 (D. Mass. 1991). Both elements of Rule 23(a)(4) are met in this case.

1. Adequacy of Counsel

Factors considered in determining the adequacy of the counsel in class actions include 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)(citations omitted); *North American Acceptance Corp. Securities Cases v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 (5th Cir. 1979).

The Disabilities Rights Center (DRC) is the federally-designated protection and advocacy organization for the state of New Hampshire and is charged with protecting the rights of individuals with disabilities throughout the State. It brings to this case more than three decades of experience litigating on behalf of individuals with disabilities, both individually and in class action cases, as well as an extensive knowledge of, and experience working within, New Hampshire's mental health service system. It also is in direct contact with the Named Plaintiffs and numerous other class members through its ongoing outreach and intake processes.

Devine Millimet & Branch (Devine Millimet) is one of the leading private law firms in New Hampshire with a practice that includes complex state and federal litigation. Devine Millimet adds expertise in the area of complex litigation and trial skills, and provides extensive litigation support capabilities. The Center for Public Representation (CPR) has been involved in complex class action litigation on behalf of institutionalized persons with disabilities for over thirty-five years and has been lead counsel in numerous class action lawsuits throughout the country. The Judge David L. Bazelon Center for Mental Health Law (Bazelon Center) is nationally recognized for its expertise in disability law, including the rights of adults with mental disabilities to live in integrated settings. Since its founding in 1972, it has served as co-counsel in many similar class action cases around the country, including playing a significant role in the *Olmstead v. L.C.* case.

The plaintiffs' resources are adequate to represent the class competently and they have no other professional commitments which are antagonistic to, or which would detract from, their efforts to seek a favorable decision for the class in this case.

2. Adequacy of the Named Representatives

In order for the named representatives to be adequate to represent the class, their interests must coincide with those of the unnamed class members. *See generally, Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982). Additionally, the interests of the named plaintiffs must not be antagonistic to the unnamed class members. *Andrews*, 780 F.2d at 130. In the present case, the interests of the named plaintiffs and those of the plaintiff class coincide. They seek to avoid unnecessary institutionalization and to receive services in the community. *See* Complaint, ¶ 78-113. As the experts found, when provided adequate information and appropriate community alternatives, the vast majority of persons reviewed also would very likely choose to receive services in the community and avoid institutionalization if they were fully informed of, and provided access to, the services sought in this case. *See* Simpatico Aff., ¶¶ 13, 21; Boardman Aff., ¶¶ 19; Curran Aff., ¶¶ 18. As noted above, this conclusion can be confidently generalized to the larger population of individuals who are institutionalized or at risk of institutionalization at NHH and Glencliff. *See* Rogers Aff., ¶¶ 11,14. Therefore, there are no meaningful differences among the plaintiff class on these fundamental issues. *See* Simpatico Aff., ¶¶ 10, 13, 21; Boardman Aff., ¶¶ 14, 19; and Curran Aff., ¶¶ 12, 18. The named plaintiffs do not have interests antagonistic to other class members. Rather, they seek to vindicate legal rights shared by all members of the putative class.

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

A class may be certified under Rule 23 (b)(2) when the prerequisites of Rule 23(a) are met and "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 ("[t]he 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."); *Hawkins ex rel v. Comm'r of the New Hampshire Dept. of Health and Human Services*, No. Civ. 99-143-JD, 2004 WL 166722 * 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 class certification is appropriate, because plaintiffs allege systemic civil rights violations and seek declaratory and injunctive relief to benefit the class 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. Rule 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.").

In New Hampshire, the defendants have administered the State's system of services for individuals with mental illness in a discriminatory manner by failing to provide the

community-based services required to avoid their unnecessary institutionalization. *See* Simpatico Aff., ¶¶ 13, 15-18; Boardman Aff., ¶¶ 19, 24-27; Curran Aff., ¶¶ 18, 21-25; and Sudders Aff., ¶¶ 24-26. The defendants are acting or refusing to act in a manner that equally affects and is generally applicable to the entire class. *Id.* Injunctive and declaratory relief is appropriate precisely because it will resolve the legality of the defendants' conduct towards the class and provide a remedy to the class as a whole. *Id.*

The Complaint seeks an injunction to alter that conduct and to compel compliance with federal law, by reasonably modifying New Hampshire's community service system for persons with serious mental illness, so that the State offers services in integrated settings. The focus on the defendants' conduct in operating their community services system, 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. At the proper level of analysis for class certification purposes, the focus is, and should be, on the adequacy of the defendants' actions and inactions in providing services in the most integrated setting for qualified persons with serious mental illness.

Differences concerning an individual's disability do not preclude certification in cases where those class members have suffered a common injury and where that injury can be redressed by a single injunction requiring the defendants to fund and operate their community service system consistent with federal law. Unlike *M.D.*, 675 F.3d at 846, and *Jamie S.*, 668 F.3d at 499-500, which explicitly sought or resulted in a judicial process that used court-created expert panels or a hybrid IEP system to determine for

each class member whether a separate injunctive order should issue, no individualized remedy is sought or needed here. Thus, the determinative factor that led both appeals courts to decline certification is absent in this case. Rather, because the Complaint seeks, and the ADA and Rehabilitation violations can be remedied by, a single injunction, certification of the proposed class is appropriate under Rule 23(b)(2).

Courts in this circuit have recognized several additional reasons why class certification is necessary and compelling in the context of civil rights actions such as this. In cases seeking only equitable relief, class certification is necessary to make sure that mandatory relief runs to benefit all of the members of the class. *See Rolland*, 1999 WL 34815562 at *9. In fact, the First Circuit explicitly rejected the requirement of demonstrating necessity for class certification where a defendant governmental agency claims it will extend equal benefits to all putative class members, even if only an individual injunction is issued. *Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985). Instead, the Court of Appeals has held that if injunctive or declaratory relief is appropriate with respect to the whole class, certification is proper. *Id.* Additionally, relief for the named plaintiffs will not automatically translate into appropriate and timely relief for class members. *Id.*; *see also*, *Van Meter*, 272 F.R.D. at 283-84; *Rolland*, 1999 WL 34815562 * 9. Even if adequate services were directed to the named plaintiffs, it would not follow that class members would be afforded similar relief, and certainly not with the level of immediacy their circumstances require.

The defendants' failure to establish community-based services sufficient to avoid unnecessary institutionalization is precisely the kind of conduct Rule 23(b)(2) class

actions were designed to address. Certification is both appropriate and necessary in order to remedy the system-wide legal violations alleged in this case.

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

The named plaintiffs are jointly represented by the DRC, Devine Millimet, the Bazelon Center and the CPR, each of which brings unique resources, experience and skills to this case. The organizational qualifications of class counsel are described above at Section IV, D(1). Together, these four law firms request appointment as class co-counsel pursuant to Rule 23(g).

Amy Messer, the lead DRC attorney on this case, has over 20 years of experience representing individuals in state and federal court, including 12 years litigating cases exclusively on behalf of individuals with disabilities. Her practice has included class action litigation in the U.S. District Court and the First Circuit Court of Appeals, as well as individual representation at all levels of the state courts in New Hampshire. Attorney Messer is supported in this case by two DRC staff attorneys experienced in the representation of individuals with serious mental illness.

Attorney Elaine Michaud is a shareholder at the law firm of Devine Millimet and serves as Chair of the firm's Litigation Department and Healthcare Practice Group Department. Attorney Michaud has 19 years of experience litigating cases involving complex healthcare issues. Attorney Daniel Will is also a shareholder at the law firm of Devine Millimet and specializes in complex litigation. Attorney Will has 18 years of state and federal litigation experience, including two years of clerking at the United States District Court and United States Court of Appeals prior to commencing practice. Attorneys Michaud and Will are supported in this case by several experienced associates.

Devine Millimet adds expertise in the area of complex litigation and trial skills, and provides extensive litigation support capabilities

Bazelon Center attorney Ira Burnim is a nationally-recognized expert concerning the rights of individuals with disabilities and has over 30 years of experience in the field of disability law. Mr. Burnim has served as lead counsel in numerous class actions involving the Americans with Disabilities Act, the Medicaid Act, Section 504 of the Rehabilitation Act, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Attorney Jennifer Mathis has over 16 years of experience practicing disability law and has served as co-counsel in numerous class actions and individual cases involving Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

CPR attorney Steven Schwartz has served as lead counsel in numerous class actions. Mr. Schwartz is a nationally-recognized expert concerning the rights of institutionalized individuals and has over 30 years of experience representing individuals with psychiatric and intellectual disabilities. Attorney Kathryn Rucker is co-counsel in two Massachusetts-based class action cases and has over 13 years of experience representing individuals with disabilities.

There is no conflict among counsel. Pursuant to Rule 23(g), plaintiffs request that this Court appoint DRC, Devine Millimet, the Bazelon Center and CPR 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 all the reasons set forth above, the named plaintiffs respectfully request that the Court certify a plaintiff class consisting of:

> all persons with serious mental illness who are institutionalized in New Hampshire Hospital or Glencliff or at serious risk of institutionalization in these facilities.

In addition, named plaintiffs respectfully request that this Court appoint the DRC, Devine Millimet, the Bazelon Center and the CPR as co-class counsel in this action pursuant to Rule 23(g).

Dated: January 29, 2013

Respectfully submitted,

Lynn E., by her guardian, Barry Ellsworth; Kenneth R., by his guardian, Tri-County CAP, Inc./GS; Sharon B., by her guardian, Office of Public Guardian, Inc.; Amanda D., by her guardian, Louise Dube; Amanda E., by her guardian, Office of Public Guardian, Inc.; and Jeffrey D.,

By their attorneys:

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2013 the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to all counsel of record.

/s/ Amy Messer

January 29, 2013