IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

EMILY FITZMORRIS, ET AL.,	:	
Plaintiffs,	:	
	:	**Case No. 1:21-cv-00025**
v.	:	
	:	
NEW HAMPSHIRE DEPARTMENT OF	:	
HEALTH AND HUMAN SERVICES, ET AL.,	:	
Defendants.	:	

UNITED STATES' STATEMENT OF INTEREST
IN SUPPORT OF CLASS CERTIFICATION

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517,[1] in support of Plaintiffs' pending Motion for Class Certification (ECF Nos. 80 through 80-15). In this lawsuit, Plaintiffs allege that the State of New Hampshire ("State") administers its long-term care services system for older adults and people with disabilities in a manner that puts them at serious risk of unnecessary segregation in nursing facilities, in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*,[2] and the Supreme Court's opinion in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

As the agency charged with enforcing Title II and issuing regulations implementing the statute, 42 U.S.C. §§ 12133-34, the Department of Justice has a strong interest in ensuring that systemic violations of the ADA are remedied, including through class actions.[3] The United

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[1] Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. A submission by the United States pursuant to this provision does not constitute a motion for intervention under Rule 24 of the Federal Rules of Civil Procedure.

[2] Plaintiffs bring parallel claims under the Rehabilitation Act. These two statutes are construed in tandem. *See Kenneth R. ex rel. Tri-County CAP v. Hassan*, 293 F.R.D. 254, 259 (D.N.H. 2013).

[3] This enforcement and regulatory responsibility gives the Department of Justice a particular interest in ensuring uniform enforcement of the ADA. Accordingly, this memorandum addresses class certification for claims brought under the ADA and (to the extent the statutes are interpreted jointly) the Rehabilitation Act. The United States does not address the viability of class certification as to Plaintiffs' other claims.

States respectfully urges this Court to grant Plaintiffs' motion because Plaintiffs satisfy Fed. R. Civ. P. 23, and certification of the proposed class is an appropriate and efficient means of resolving this matter.

The case is well-suited for class treatment under Rule 23(b)(2), since Plaintiffs have alleged that the State has "refused to act on grounds that apply generally to the class" by failing to provide the services it has already found to be medically necessary, and Plaintiffs seek final injunctive and declaratory relief "respecting the class as a whole." *See* Fed. R. Civ. P. 23(b)(2). Because this case involves the State's methods of administering its service system for older adults and people with disabilities, not the merits of individual service requests, resolution of Plaintiffs' claims will turn on common answers. Plaintiffs thus satisfy the commonality requirement for class certification. Plaintiffs also have demonstrated compliance with Rule 23's numerosity, typicality, and adequacy of representation requirements. For these reasons, class certification should be granted.

Background

This suit alleges that Defendants' methods of administering the Choices for Independence Waiver ("CFI Waiver")—a Medicaid program for older adults and people with disabilities—put Plaintiffs at serious risk of unnecessary institutionalization in nursing facilities and constitute disability-based discrimination, in violation of Title II of the ADA and *Olmstead*. The proposed Plaintiff class consists of hundreds of the approximately 3,500 individuals that the State is authorized to serve through the Waiver each year. Compl. ¶ 123; ECF No. 80-1 at 9.

To admit someone to the CFI Waiver, the State must find both that the person is eligible for a nursing facility and may be safely served instead in the community with Waiver services. Compl. ¶¶ 5-6, 29-30; *cf.* Answer ¶ 5 (as to named Plaintiffs). This means that all class

members—as Waiver enrollees—can live in the community with appropriate supports, instead of in institutions. Once someone is enrolled, a case management agency assesses their specific care needs. Compl. ¶¶ 117-19. The State authorizes specific amounts of each service consistent with that assessment. N.H. Code Admin. R. He-E 801.06(a), (b). Accordingly, named Plaintiffs seek to represent a class of similarly situated individuals in the CFI Waiver who:

> during the pendency of this lawsuit, have been placed at serious risk of unjustified institutionalization because Defendants, by act or omission, fail to ensure that the CFI participants receive the community-based long-term care services through the waiver program for which they have been found eligible and assessed to need.

ECF No. 80-1 at 10. Defendants oppose certification of the proposed class. ECF No. 91.

Argument

A court may certify a class under Rule 23(b)(2) if the moving party satisfies all requirements of Rule 23(a), and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(a) requires that the class is so numerous that joinder of all members is impracticable; there is at least one question of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and the representative parties will fairly and adequately protect the interests of the class. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). Plaintiffs have met all of these requirements.

I. Class Actions Are Well-Suited for Addressing System-Wide Policies and Practices That Discriminate Against People with Disabilities

"[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of appropriate class actions under Rule 23. *Wal-Mart*, 564 U.S. at 361 (quotations omitted). This is particularly true where a public entity's policy or practice causes

unnecessary segregation of people with disabilities, in violation of the integration mandate of the ADA and the Supreme Court's decision in *Olmstead*. These actions typically call for rulings on system-wide policies and practices that affect large numbers of people with diverse needs. *See infra* at 8-11. The common answers generated by such rulings make class treatment appropriate and efficient.

Here, class certification also facilitates consideration of a state's defenses. In delineating a state's affirmative defenses in *Olmstead*, the Supreme Court considered the needs of individuals across the system. In the context of two women seeking community-based mental health services, the Court held that "the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." 527 U.S. at 604. Analysis of this defense, if raised by the State here,[4] would require looking beyond individually named Plaintiffs to the State's service system, and makes class certification especially suitable. *See Kenneth R.*, 293 F.R.D. at 262 & n.3 (noting "intimations in *Olmstead* that class certification is generally appropriate in integration mandate cases," in part due to the systemic focus of the fundamental alteration defense).

A. Plaintiffs Satisfy Rule 23(a)'s Requirements of Numerosity, Commonality, Typicality, and Adequacy of Representation

1. Numerosity: Hundreds of Putative Class Members Allegedly Need and Cannot Access Necessary Services

[4] Whether the State can meet this burden is also a common contention that would produce a common answer as to Defendants' compliance with the ADA. *See, e.g.*, *Parent/Prof'l Advoc. League v. City of Springfield*, 934 F.3d 13, 28 n.14 (1st Cir. 2019) (citing *Brown v. D.C.*, 928 F.3d 1070, 1082 (D.C. Cir. 2019), where court found commonality when "common proof will establish whether the District's plan is 'comprehensive' and 'effectively working,'" toward making out a fundamental alteration defense).

Courts evaluating numerosity under Rule 23(a)(1) look at both "the number of class members and the practicability of joining them in a single case." *Kenneth R.*, 293 F.R.D. at 265 (citation omitted). There is a "low threshold" for the requisite number of class members. *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009) ("No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.") (citation omitted).

Here, Plaintiffs estimate the class includes at least several hundred of the 3,500 individuals whom the State is authorized to serve annually in the CFI Waiver, located throughout the state. Compl. ¶ 123; ECF No. 80-1 at 17-18. A class approximately this size, geographically dispersed around the state, would render joinder impracticable, especially where the individuals involved have limited ability to bring separate claims. Defendants' assertions to the contrary do not address the impracticability of joinder. *See* ECF No. 91 at 18. Plaintiffs have demonstrated the requisite numerosity for certification.

2. Commonality: A Systemic, Discriminatory Policy and Practice in the State's Long-Term Care Services System Affects All Class Members

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." A question is common if it is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. The court focuses on whether the class-wide proceeding can "generate common *answers* apt to drive the resolution of the litigation." *Id.* (citation omitted). "Those common answers typically come in the form of a particular and sufficiently well-defined set of allegedly illegal policies [or] practices that work similar harm on the class plaintiffs." *Parent/Professional Advocacy League*, 934 F.3d at 28. In the *Olmstead*

context at issue here, such policies or practices are those that put people with disabilities at serious risk of institutionalization due to an inadequate community service system, in violation of the state's obligations under the ADA. *See Olmstead*, 527 U.S. at 597 ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability" under the ADA.).

To demonstrate commonality, Plaintiffs point to "significant proof that there exists a common policy or practice . . . that is the alleged source of the harm to [the] class members." *Kenneth R.*, 293 F.R.D. at 266 (citation omitted). Here, the State has a common policy of administering its CFI Waiver without monitoring service delivery, and a common practice of not delivering many such services. The resulting harm is the serious risk of unnecessary nursing facility placement. For instance, Plaintiffs note a State-commissioned report from Guidehouse Inc., ECF No. 80-13, that documented problems with the State's administration of the long-term care service system. The report cites interviews with State staff in late 2019 that indicated a lack of oversight and monitoring as to whether services are available to meet people's needs. ECF No. 80-13 at 14. The report also analyzed provider capacity: 31% of the State-authorized units of service were not paid, "which may be an indication of network adequacy gaps." ECF No. 80-13 at 11, 27. Further, the State admits "there is a longstanding shortage of available service providers," which "impacts delivery of CFI Waiver services." Answer, ECF No. 45 ¶¶ 34, 48.

Courts have relied on similar State reports and expert evidence to demonstrate that a "dearth of available community-based services" exists, and that such a "systemic condition is a result of the way the State manages the system and is something the State . . . can control." *Kenneth R.*, 293 F.R.D. at 267 (citation omitted); *see also Steward v. Janek*, 315 F.R.D. 472, 483-84 (W.D. Tex. 2016) (summarizing government reports of inadequate community-based services for individuals with disabilities, to support finding commonality). In sum, Plaintiffs cite

evidence of a systemic policy or practice in that the State fails to provide the services it has authorized as necessary to support Waiver participants in the community and avert a serious risk of institutionalization.

The First Circuit's decision in *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, does not disturb this conclusion. In an ADA claim in a school system, the court noted that class actions relating to special education are "usually brought" under the Individuals with Disabilities Education Act (IDEA), and used IDEA cases to frame its analysis. *Id.* at 22-23, 28-33. The court thus looked for a "uniformly applied, official policy of the school district, or an unofficial yet well-defined practice," to satisfy Rule 23(a)'s commonality requirement. *Id.* at 29. The court found plaintiffs had not "allege[d] that a particular, official [school] policy violated the ADA." *Id.* at 30. Nor had they satisfied commonality based on unofficial practice: they had not demonstrated that discretion in individualized cases would be exercised in a common manner, and determining whether failure to provide certain services violated the ADA thus "requires individualized determinations which defeat commonality." *Id.* at 30-31.

Here, Plaintiffs satisfy these commonality requirements. They have offered evidence that the State has a "uniformly applied" policy, *id.* at 29, of not monitoring the delivery of State-authorized waiver services, a practice of not delivering many such services, and that many enrollees have limited access to the services required to avert a serious risk of unnecessary institutionalization. The State asserts that contracting out delivery of case management and in-home services results in a "decentralized environment," which undercuts commonality. ECF No. 91 at 23. But regardless of the State's choice to contract out rather than perform these functions directly, Defendants retain the responsibility to ensure that Waiver enrollees receive the

community-based services necessary to avert a serious risk of institutionalization.[5] The fact that the State has selected contractors to administer these services does not weaken the State's connection to the alleged systemic failures that underpin commonality.

Defendants attempt to draw a parallel between the "failure to provide [school-based behavioral services]" in *Parent/Professional Advocacy League* and this case, but the courts in that and Defendants' other cited cases, ECF No. 91 at 20-21 & n.11, found that discretionary, individualized determinations led to the service problems at issue. Such determinations are not at issue here. Instead, Plaintiffs' exhibits, including a data analysis of widespread service gaps and the Guidehouse Report, demonstrate that the State fails—in policy and practice—to ensure Waiver enrollees receive the community-based services the State has already authorized to avoid unnecessary nursing facility placement. Plaintiffs thus present "common questions susceptible to common answers": Whether "there is a systemic deficiency in the availability of community-based services, . . . whether that deficiency follows from the State's policies and practices," and whether those "systemic conditions, if shown to exist, expose all class members to a serious risk of unnecessary institutionalization." *Kenneth R.*, 293 F.R.D. at 267.

Moreover, courts in the *Olmstead* context examine the systemic impact of State policies and practices on a putative class, rather than requiring that a single policy affect all class members. In *Kenneth R.*, for example, New Hampshire maintained that "its alleged practice of failing to provide an adequate array of community services is really a collection of separate,

[5] As this Court previously noted, Plaintiffs have plausibly alleged that the State is responsible for administering the Waiver program and that the State's own actions or omissions are responsible for the service gaps. Order Denying Mot. to Dismiss, ECF No. 41 at 9-10, 27-30; *see* 28 C.F.R. § 35.130(b)(1), (3). States must still ensure Medicaid enrollees receive necessary services and may not disclaim responsibility under the Medicaid Act simply because they contract out certain Medicaid functions or services to private entities. *See* ECF No. 41 at 27-30 (collecting authorities); *see also K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 115-16 (4th Cir. 2013) (Medicaid Act requirement that each state designate a "single state agency" to administer its Medicaid program "embodies an important accountability rationale: Congress's desire to prevent states from backsliding on their Medicaid obligations by deferring to the nonconforming actions of other agencies.").

discrete practices," meaning class members had "nothing in common" except each alleged a violation of the integration mandate. 293 F.R.D. at 267. Rather than "disparate practices and deficiencies," the court instead found plaintiffs' challenged practices "all pertain to a discrete set of community-based services—services the State itself has persuasively identified as critical to solving the crisis in" the state's system. *Id.* at 268. The court further noted that in disability cases before and after *Wal-Mart*, "the commonality requirement has been held to be met where, as here, plaintiffs challenge more than a single service deficiency and seek more than one service enhancement or improvement as part of the remedy." *Id.* No individualized inquiries are needed as to whether a specific aspect of the State's system places class members at serious risk of institutionalization; this "inquiry can properly turn on systemwide proof." *Id.* at 267 n.4.

Finally, differences among Plaintiffs' diagnoses, method of service delivery, and need for services do not defeat commonality so long as there is at least one common question of law or fact. *See Wal-Mart*, 564 U.S. at 359. As noted *supra*, these questions include whether there is a systemic deficiency in the delivery of services due to the State's policies or practices, and whether such deficiency results in a serious risk of unnecessary institutionalization for the class. That Plaintiffs here may have different service needs is similar to other certified classes since *Wal-Mart*, where courts have certified classes in civil rights cases challenging discriminatory policies and practices against persons with disabilities or other similar classes.

For instance, in finding commonality despite class members' different medical conditions, the court in *Steward v. Janek* observed: "The State may fail individual class members in unique ways, but the harm that the class members allege is the same: denial of specialized services, violation of their right to reasonably prompt care, and unnecessary institutionalization in violation of the ADA and Rehabilitation Act." 315 F.R.D. at 482. *See*

also Kenneth R., 293 F.R.D. at 268-70; *Pashby v. Cansler*, 279 F.R.D. 347, 351, 353-54 (E.D.N.C. 2011) (certifying class of plaintiffs with disabilities who challenged the State's termination of in-home personal care services and advanced a common contention that "will resolve the claims of all potential plaintiffs, irrespective of their particular factual circumstances"); *cf. Yates v. Collier*, 868 F.3d 354, 363 (5th Cir. 2017) (affirming certification of civil rights class action alleging excessive heat in prison, though "[n]o two individuals have the exact same risk" from exposure to such heat).[6]

In sum, Plaintiffs seek declaratory and injunctive relief to remedy a common injury: The risk of unnecessary segregation of people who are eligible for and would prefer to receive community-based long-term care services. The "glue" holding this class together is the contention that this common injury is caused by a common policy and practice: Defendants' failure to implement a system with sufficient providers and oversight to ensure necessary services are provided. *See generally Wal-Mart*, 564 U.S. at 352. Determining the truth of this contention would allow the Court to resolve a key element of Plaintiffs' ADA claims in "one stroke." *See generally id.* Plaintiffs have thus satisfied Rule 23's commonality requirement.

3. Typicality and Adequacy: Named Plaintiffs and Proposed Class Members All Suffer the Same Injury (Serious Risk of Unnecessary Segregation), and That Injury Stems

[6] Contrary to Defendants' arguments (ECF No. 91 at 18-19), *T.R. v. School District of Philadelphia*, No. 15-4782, 2019 WL 1745737 (E.D. Pa. Apr. 18, 2019), does not weaken this analysis. There, plaintiffs wanted the school system to support parents with limited English proficiency in having "meaningful participation" in their children's Individualized Education Program proceedings. *Id.* at *14. The court found that what plaintiffs sought—"meaningful participation"—varied across situations so as to defeat commonality. *Id.* at *14-15. Here, the putative class urges the State to actually provide the State-defined set of CFI Waiver services that, for each class member, has already been assessed as eligible and needed to avoid unnecessary institutionalization. Although the particular risks may vary across class members, and there may be additional reasons that a potential class member receives inadequate services, *see* ECF No. 91 at 25-26, the Court need not resolve these individualized questions to obtain class-wide answers as to whether the State itself creates a serious risk of unnecessary institutionalization for the class.

from the Same Discriminatory Practice (Defendants' Inadequate Community Service System)

Rule 23(a)(3) requires that the claims or defenses of the representative parties must be typical of those of the class: the same events, course of conduct, or legal theory are involved. *See Vara v. DeVos*, 2020 WL 3489679, at *15-16 (D. Mass. June 25, 2020). Here, all class members allegedly have suffered the same type and manner of injury—serious risk of unnecessary segregation in nursing facilities—due to Defendants' failure to provide the Waiver services they have already found necessary. Defendants highlight the use of different services, such as named Plaintiffs' use of consumer-directed as opposed to agency-provided personal care, and other services more commonly used by enrollees. ECF No. 91 at 22-23. But these distinctions are irrelevant regarding the central issue of the State's obligation to ensure Waiver enrollees receive enough services to avoid a serious risk of unnecessary institutionalization.

Courts consistently find in *Olmstead* cases that differences between named Plaintiffs and class members in their medical needs or preferences do not defeat typicality. *See Steward*, 315 F.R.D. at 490 ("the atypical characteristics of individual Plaintiffs [in their particular medical needs] are not relevant to the Court's assessment of typicality because they do not shed light on meaningful differences between Plaintiffs and prospective class members"); *Kenneth R.*, 293 F.R.D. at 270 (Notwithstanding the State's assertion that class members might differ in preferences about community-based services and institutionalization, the court found typicality, as all class members "have an abiding interest in securing the availability of community-based services options sufficient to preclude unnecessary institutionalization."). Defendants cite no authority to the contrary. Likewise, class members here seek a working system of community-based, long-term care services through the CFI Waiver sufficient to avert unnecessary nursing

facility admissions, and distinctions among members' particular needs are not material to the Court's evaluation of the State system under *Olmstead*.[7]

Finally, named Plaintiffs and class counsel have met the Rule 23(a)(4) adequacy requirement. Defendants do not challenge the experience or qualifications of counsel. Instead, they assert that named Plaintiffs' interests may conflict with other class members because Plaintiffs may obtain better staffing or additional services, at the expense of other putative class members. ECF No. 91 at 32. The concern that those more directly involved in the litigation will receive more services than other Waiver enrollees is misplaced: Class certification will ensure that, in addition to named Plaintiffs, other CFI Waiver participants who are at serious risk of unnecessary institutionalization will also receive relief. Moreover, such issues are "properly addressed at trial in the context of the State's fundamental alteration defense." *Kenneth R.*, 293 F.R.D. at 270. These named Plaintiffs are typical of, and will adequately represent, the class.

4. Plaintiffs Need Not Establish Ascertainability but Have Done So

Defendants cite *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015), in asserting ascertainability is necessary. ECF No. 91 at 11, 17. But *Nexium* addressed a class under Rule 23(b)(3), and the First Circuit does not require ascertainability in a class under 23(b)(2). *See Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972); William B. Rubenstein, *Newberg on Class Actions* § 3.7 (6th ed. 2022) (in the First Circuit, among others, "the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, [but not] class certification under Rule 23(b)(2)"). Since notice to class members is not required for a 23(b)(2) class, "membership of

[7] The United States does not address specific named Plaintiffs here because the relevant portion of Defendants' memorandum is redacted, ECF No. 91 at 29-31, and most of the cited exhibits were filed under seal and are thus unavailable. However, the State's comparisons here are between named Plaintiffs and everyone in the CFI Waiver program, not the putative class.

the class need not . . . be precisely delimited." *Kenneth R.*, 293 F.R.D. at 264. Consequently, ascertainability cannot defeat class certification here.

Even so, Plaintiffs' proposed class definition is "sufficiently definite to allow the court, parties, and putative class members to ascertain class membership." *Id*. at 263. As in *Kenneth R.*, the definition—those at serious risk of unnecessary institutionalization within a given time, due to the State's failure to ensure they receive needed services—permissibly limits the class to those who are "allegedly harmed or affected by the State's conduct." *Id.* at 264. The *Kenneth R.* court found this enough to certify the class: It provided "'the general demarcations' of the class of individuals who are being harmed by the alleged deficiencies in the State's provision of community services." *Id.*[8] Further, the class members—and their service needs—are known to the State. *See Steward*, 315 F.R.D. at 488 (Where the proposed class was limited to Medicaid-eligible people living in or who had been screened for nursing facilities, it did "not include unidentified potentially Medicaid-eligible individuals with whom the state has had no contact"; thus, the class was "not only ascertainable, but has already been ascertained.").

Throughout their memorandum, Defendants differentiate between the Waiver services authorized to support someone in the community, and the services required to avert the serious risk of unnecessary institutionalization. But the Court need not assess how much daylight exists between these standards or for whom. *Cf. Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 466 (2013) (cautioning against "free-ranging merits inquiries at the certification

[8] Defendants incorrectly assert *Crosby v. Social Security Administration*, 796 F.2d 576 (1st Cir. 1986), controls here due to Plaintiffs' Medicaid Act claim. ECF No. 91 at 11. But the class sought here parallels those that have been certified in other *Olmstead* cases: People at serious risk of unnecessary institutionalization. Courts have frequently certified classes with this type of definition and, as in *Kenneth R.*, found no need to identify all class members in order to find class-wide answers. Further, even under Defendants' analysis, the injunctive relief sought here for Plaintiffs' ADA claims does not include specific status reports to the Court nor notices sent to Plaintiffs, as were sought in *Crosby*. 796 F.2d at 578-79. Rather, those claims would require Defendants to exercise more oversight of, and involvement in, service provision. In any case, the Court need not determine at class certification the end point of compliance with a remedial order or settlement agreement. *Cf. Amgen Inc.*, 568 U.S. at 466.

stage"). Instead, the Court need only find that a group of individuals exists who have been placed at serious risk of unnecessary institutionalization due to gaps in the State's service system, as Plaintiffs' utilization data show. *See* Rubenstein, *supra*, § 3.7 ("the conduct complained of is the benchmark for determining whether a . . . (b)(2) class exists, making it uniquely suited to civil rights actions in which the members of the class are often incapable of specific enumeration") (quoting *Yaffe*, 454 F.2d at 1366).

B. Declaratory and Injunctive Relief under Rule 23(b)(2) Are Appropriate for Class-Wide Relief in This Matter

Plaintiffs seek declaratory and injunctive relief compelling Defendants to ensure that class members receive appropriate Waiver services and to provide more robust oversight over the system, to avoid the serious risk of unnecessary institutionalization. Compl. at 42. Such an order would resolve Plaintiffs' ADA claims, is "appropriate respecting the class as a whole," *see* Fed. R. Civ. P. 23(b)(2), and constitutes "a single injunction or declaratory judgment [that] would provide relief to each member of the class." *See Wal-Mart*, 564 U.S. at 360.

Plaintiffs here allege a uniform injury across the class: The State has not provided the services necessary to avoid the risk of nursing facility placement. This does not require the Court to adjudicate individuals' needs, which defeated certification in *Parent/Professional Advocacy League*. In fact, individuals' needs already have been determined, and Plaintiffs seek relief so that class members receive services consistent with their Waiver-required care plans. *See, e.g.*, *N.B. et al. v. Hamos*, 26 F. Supp. 3d 756, 774-75 (N.D. Ill. 2014) (finding 23(b)(2) met where medical professionals had already determined the services necessary for class members). Defendants urge more specificity as to Plaintiffs' requested relief, but that is not yet required.[9]

[9] Defendants cite *Shook v. Board of City Commissioners*, 543 F.3d 597, 604-605 (10th Cir. 2008), to assert that the injunctive relief sought must now satisfy Fed. R. Civ. P. 65(d). But the *Shook* court stated, "[o]f course, this is not to say that plaintiffs are required to come forward with an injunction that satisfies Rule 65(d) with exacting precision

Defendants' remaining cited authorities are inapposite, ECF No. 91 at 35-36, as they address situations where the services sought were not as well defined as the Waiver services here and where courts found putative class members' injuries were varied enough to defeat certification. Here, injury to all class members involves the serious risk of unnecessary institutionalization. Even in *Olmstead* cases where specific service determinations to avoid that risk had yet to be made, courts have found class-wide relief appropriate. *See, e.g.*, *Steward*, 315 F.R.D. at 492 (plaintiffs are not asking the court to "order individualized relief, but seek injunctions targeted at the deficiencies they allege exist within Defendants' Medicaid service system"); *Kenneth R.*, 293 F.R.D. at 260 (plaintiffs seek relief "requiring the State to develop and provide an adequate array of identified community-based treatment services," not "individually-tailored injunctions regarding appropriate treatment for each class member"); *Lane v. Kitzhaber*, 283 F.R.D. 587, 601 (D. Or. 2012) (certifying 23(b)(2) class where plaintiffs sought to enforce policy by ordering defendants "to take specific classwide operational actions to comply with the integration mandate"); *State Office of Prot. & Advoc. v. Conn.*, 706 F. Supp. 2d 266, 286 (D. Conn. 2010) (State defendants to individually evaluate plaintiffs, not the court).

Accordingly, it is possible—and the most efficient approach—for the Court to issue an injunction resolving Plaintiffs' claims by requiring the State to provide access to the State-authorized Waiver services necessary to avert a serious risk of unnecessary institutionalization. The relief sought—"to rectify [the State's] systemic failure to comply [with] specific statutory duties"—is "not only an appropriate structure under Rule 23(b)(2) for relief in this case, but fits the most frequent[] . . . vehicle for civil rights actions and other institutional reform cases that receive class action treatment." *Steward*, 315 F.R.D. at 492 (citations omitted).

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at the class certification stage." 543 F.3d at 605 n.4. Plaintiffs here have identified this relief sufficiently for the court to "see how it might satisfy Rule 65(d)'s constraints and thus conform with Rule 23(b)(2)'s requirement." *Id.*

Conclusion

For the reasons above, the Court should grant Plaintiffs' Motion for Class Certification.

Respectfully submitted,

Dated: December 21, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2022, I electronically filed the foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to all counsel of record.

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