IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PHYLLIS BALL, *et al.*,	:	**Case No.: 2:16-cv-282**
Plaintiffs,	:	**Chief Judge Sargus**
v.	:	**Magistrate Judge Deavers**
JOHN KASICH, *et al.*,	:	**ORAL ARGUMENT REQUESTED**
Defendants.	:	
and	:	
GUARDIANS OF HENRY LAHRMANN, *et al.*; OHIO ASSOCIATION OF COUNTY BOARDS,	:	
Defendant-Intervenors.	:	

PLAINTIFFS' REPLY AND SUPPLEMENTAL EVIDENCE IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Ohio's service system for people with intellectual and developmental disabilities leaves thousands of Ohioans who prefer to live in the community unnecessarily institutionalized in large ICFs, or at serious risk of unnecessary institutionalization in these facilities, in violation of federal law. Plaintiffs contend that, as a result of Defendants' administrative, planning, policy, and funding decisions, Ohio has failed to provide the home and community-based services necessary to avoid class members' unnecessary segregation. The State has not paid for or implemented a sufficient number of waivers within its home and community-based service system to meet class members' demonstrated need. It has employed a funding and rate structure that incentivizes unnecessary institutionalization. It has adopted counseling processes that do not provide a real choice between institutionalization and home and community-based services. Defendants continue to license, maintain, and fund a system of large, segregated ICFs providing restrictive facility-based residential, employment, and day services. The size of Ohio's ICF system makes it a national outlier. These discrete actions and inactions by the State harm a large group of people with intellectual and developmental disabilities and subject them to unnecessary segregation.

Evidence developed since the filing of the class certification motion more than a year ago demonstrates that these systemic problems remain. Any progress the State has made during the past few years reflects—as Defendants' own internal documents acknowledge—little more than an effort to "position the state for [this] litigation." *See infra* at 8. Indeed, as shown in Plaintiffs' response to Defendants' Motions to Dismiss (Doc. 34 at 24-26, 28-30), the periods during which Ohio has made progress in providing community services have overlapped precisely with those periods in which litigation has been brought or threatened against the State. *See also* Doc. 273 at 22-24 (discussing changes made pursuant to the Martin case), *id.* at 24-26 (discussing recent

changes made after the issuance of Plaintiffs' demand letter and subsequent class action complaint). The State's systemic failures, which have violated the rights of hundreds, if not thousands, of Ohioans, will not be reliably or meaningfully redressed without an order of this Court. These failures result in a common harm and are an appropriate subject for class action treatment. And the injunction that will address the harm will simply remove the systemic barriers to appropriate integration that the State has erected. It will not dictate the placement of, or make individualized decisions regarding, any particular class member.

In August 2016, the Individual Plaintiffs moved for class certification under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. In light of developments since that time—including evidence developed in discovery on this motion, and this Court's grant of intervention to a group of guardians who oppose community-based services for their loved ones—Plaintiffs submit the following modified class definition:

> All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are qualified for home and community-based services, but (a) are institutionalized in an Intermediate Care Facility with eight or more beds, and, after receiving options counseling, express that they are interested in, or may be interested in, integrated community-based services; or (b) are at serious risk of institutionalization in an Intermediate Care Facility with eight or more beds and have, by placing themselves on a waiting list for community-based services, expressed an interest in receiving integrated services while continuing to live in the community.

Class members at serious risk of institutionalization in large ICFs include people with intellectual and developmental disabilities who are qualified for home and community-based services and who now, or in the future: (1) apply for or are referred for admission to an ICF; (2) are on waiting lists for Medicaid home and community-based services and have either an aging caregiver, intensive needs, or an emergency, as defined by Ohio's current or future waiting list

rule, or (3) have another immediate need which creates a substantial risk of harm, as determined by Ohio's current or future waiting list rule.

Plaintiffs' class definition, as refined herein, makes clear that the relief sought for these alleged violations is focused on those who are qualified for home and community-based services and who have *affirmatively* expressed an interest in community services. For the proposed class members who live in the community now but are at serious risk of institutionalization, the decision to place oneself on a waiting list constitutes a sufficient expression of interest. For the proposed class members currently in large ICFs, a statement to an options counselor that one is or may be interested in integrated alternatives constitutes such an expression. Consistent with the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, this definition focuses on individuals for whom community services are appropriate, and excludes those who are opposed to more integrated services options and wish to remain in an ICF. *See* 527 U.S. 581 (1999). As a result of the State's recent, limited foray into options counseling—a process that remains woefully inadequate—hundreds of individuals have already expressed interest in community living, and hundreds more have said they may be interested but want more information. *See infra* at Section II (A)(2).

Thousands of ICF residents have yet to receive even the State's inadequate options counseling regarding alternatives to institutional care. And each year hundreds of individuals are referred to, or apply for, ICF admission, while others remain on waiting lists with unmet needs. These individuals are at serious risk of institutionalization.

As set forth in greater detail below, Plaintiffs' proposed class satisfies all of the requirements of Rule 23. The deficiencies that Plaintiffs seek to remedy arise out of a standard course of conduct by the State that can be addressed by this Court based on common questions

and common proof. Plaintiffs seek declaratory and injunctive relief that will specifically modify the State's systemic practices, expand access to integrated residential, employment, and day services for those who want them, and offer meaningful choice between institutional and community-based services. Such relief is capable of remedying ongoing federal-law violations in a single stroke, by creating expanded service options and an informed choice process that benefits the class as a whole. Subsequent implementation of that remedial order can be accomplished through the State's existing process of individualized, person-centered service planning.

At this stage, what matters is that Plaintiffs' claims are capable of class-wide resolution through a single injunctive order. Plaintiffs look forward to providing that they are *entitled* to the relief they seek at the merits stage of this case.

II. STATEMENT OF FACTS

Thousands of adults with intellectual and developmental disabilities languish in segregated large ICFs across Ohio. In its nascent options counseling process, the State has surveyed a fraction of these individuals. Despite the inadequacies of the State's procedures, most of the individuals contacted by options counselors have either chosen community-based services or expressed interest in learning more about those services. Many more would respond similarly if the State provided them an adequate opportunity to make an informed choice. And thousands of people throughout Ohio are at serious risk of institutionalization and have expressed an interest in community-based services.

The Defendants and the Guardian-Intervenors suggest that the State's reliance on large ICFs results from individual clinical decisions. That is incorrect. The reliance on large ICFs instead results from State-level funding, administrative, and operational decisions and policies that cause integrated, community-based services to be unavailable to a vast number of people

who desire them and could benefit from them. The systemic failures, first identified in Plaintiffs' original motion, include: (1) a financing structure that incentivizes institutionalization and does not fund waiver placements for a sufficient number of individuals to meet the demonstrated need; (2) a lack of sufficient diversionary and informed-choice services that would avoid unnecessary institutionalization; and (3) an unavailability of integrated employment and day services to many individuals who would qualify for and choose them. Events since the filing of our motion only underscore the continuing problem and its systemic nature.

A. Hundreds, if Not Thousands, of People with Intellectual and Developmental Disabilities in Ohio Remain Segregated in Large ICFs, Even Though They Qualify for Community-Based Services and Have Chosen or Expressed Interest in Learning More About Such Alternatives to Institutional Care.

1. A Significant Number of People Remain Segregated in Large ICFs Throughout Ohio.

Thousands of adults live in large ICFs across Ohio. In total, Defendants' own figures show that there are 6,169 public and private ICF beds, and 5,901 residents of these facilities, across Ohio. Doc. 273 at 14, 17; *see also* Doc. 42 at 11. Although Ohio has gradually reduced the size of its state-operated ICFs ("developmental centers"), Defendants continue to license, fund, and sustain a substantial network of private ICF beds. For at least twenty years, the number of individuals in private ICFs has remained relatively stagnant: The total number in SFY 1995 was 5,788; by SFY 2015, the number had actually increased to 5,877. Email from Clayton Weidner, Ohio Dep't of Developmental Disabilities, to Joshua Anderson, Ohio Dep't of Developmental Disabilities at 1-2 (July 23, 2014), attached as Exhibit 1.[1]

[1] Discovery documents provided by Defendants were produced in black and white. Excel spreadsheet were only Bates stamped on the first page of the document. Plaintiffs created color copies and applied a Bates stamp to the first page when necessary. Page references for the exhibits refer to the CM/ECF applied page number, not the page number at the bottom of the page, if applicable.

The substantial majority of ICFs in Ohio continue to be large ICFs (those with eight or more beds). As of late September 2016, the State licensed 299 large ICFs with a total of 4,886 beds. Ohio Dep't of Developmental Disabilities Spreadsheet – Facility Data, attached as Exhibit 2. Though facilities larger than eight beds have been slowly decreasing over the last five years, the number of private ICFs with exactly eight beds has been increasing over this same period, from 155 in FY 2013 (with 1,240 beds) to 165 in FY 2017 (with 1,320 beds). Ohio Dep't of Developmental Disabilities Spreadsheet – Pivot Tables, attached as Exhibit 3. Like ICFs with nine or more beds, eight-bed ICFs are considered institutional, rather than home and community-based, settings under federal law. *See infra* at 11.

From a national perspective, the State's dependence on ICFs continues to be exceptional, as Defendants have acknowledged. *See* Doc. 42 at 15, 16-17; *see also Ohio Community Transition Study*, The Ohio Colleges of Medicine Government Resource Center, Feb. 29, 2016, at 7, attached as Exhibit 4 (according to DODD, "Ohio ranks sixth in the country for the number of individuals living in non-state operated ICF-IIDs, and second for the number of individuals living in large ICF-IIDs"); s*ee also* Ohio Dep't of Developmental Disabilities, *Modernizing the ICF Program Policy Document* (updated Jan. 12, 2017) at 1, attached as Exhibit 5 (the Ohio Department of Developmental Disabilities recognized in April 2015 that "per capita, Ohio ranks 6th in the country for the number of individuals living in non-state operated ICFs . . . and 2nd for the number of individuals living in large ICFs"). Plaintiffs' August 2016 motion for class certification cited a study showing that, "[i]n 2013, Ohio ranked sixth in the nation for the highest number of publicly- and privately-operated ICFs and third for the number of people served in private ICFs." Doc. 42 at 15. The most recent data from this same source shows that, as of 2014, Ohio remains sixth in the nation for the highest number of publicly- and privately-

operated ICFs but is second for the number of people in private ICFs. Sheryl Larson et al., Residential Information Systems Project, *In-Home and Residential Long-Term Supports and Services for Persons with Intellectual or Developmental Disabilities: Status and Trends Through 2014* (Table 2.4 at 81 and Table 2.5 at 83) (2017), attached as Exhibit 6.

Ohio also continues to be an outlier nationally in its reliance on segregated, facility-based settings for employment and day services. *See* Doc. 42 at 15. Plaintiffs' August 2016 motion also cited a study showing that, "[i]n FY 2013, Ohio ranked third highest in the nation for the percentage of residents with intellectual and developmental disabilities receiving employment services in segregated, facility-based work settings," that Ohio was one of only five states to relegate at least half of its residents with intellectual and developmental disabilities to segregated, facility-based employment settings," and that national data shows only 21 percent of people with intellectual and developmental disabilities in Ohio received integrated employment services. *Id.* at 15-16. The most recent figures from this same source show that little has changed. In FY 2014, Ohio ranked fifth nationally for the percentage of residents with intellectual and developmental disabilities in segregated, facility-based employment settings and was one of now seven states to relegate at least half of its residents with intellectual and developmental disabilities to these settings. John Butterworth et al., Inst. for Cmty. Inclusion, Univ. of Mass. Bos., *StateData: The National Report on Employment Services and Outcomes* at (Table 5 at 22) (2015), attached as Exhibit 7. Twenty-three percent were receiving integrated employment services. *Id.* As before, this number likely overstates the level of integration in Ohio's system, because the study's definition of "integrated" includes group employment or enclaves of workers with disabilities—settings in which workers with and without disabilities are not fully integrated. *Id.* at 18.

Defendants claim that the State has made progress in reducing its reliance on ICFs. Doc. 273 at 21-27. But any modest State action along these lines has been a response to actual or threatened litigation. By their own admissions, Defendants' time-limited initiatives in the SFY 2016-17 state budget responded to the July 1, 2015 demand letter sent by Disability Rights Ohio and its partners. *See* Ohio Dep't of Developmental Disabilities, *Why the slow take up of waivers* at 1, attached as Exhibit 8 (the Ohio Department of Developmental Disabilities stated that the SFY 2016-17 state budget initiatives were at least partly to "position the state for the litigation that we assumed might come"); s*ee also* Doc. 34 at 23-25, 28-30 (discussion of Defendants' improvements to the service system resulting from the Martin case and, later, Plaintiffs' 2015 demand letter).

Documents obtained in discovery demonstrate that, although Ohio has "been working to reduce the number of individuals" in State-operated developmental centers, it has made no similar progress regarding private ICFs. Patrick Stephan, Ohio Dep't of Developmental Disabilities, Ohio Health and Human Services Cabinet, Project Management Template, ICFMR Transition Workgroup, at 2 (May 31, 2012), attached as Exhibit 9. In part, this is because the State has applied different admission and discharge standards to its developmental centers than it applies to private ICFs. In State-operated developmental centers, "[a] person is only admitted after the [Ohio] Department of Developmental Disabilities has considered all other options and decided that admission is the least restrictive option given an individual's circumstances." Doc. 273 at 16. Before admission to a developmental center, the county board "must develop a discharge plan to assist a person in moving back to the community" to ensure a "realistic plan exists for returning an individual to the community once that individual is stable." *Id*. The State

claims that, as a result, it has helped hundreds of people avoid admissions to developmental centers since 2014. *Id.* at 17.

However, Defendants have not implemented comparable practices at private ICFs. The appropriateness of admission to a private ICF is subject to no oversight or scrutiny by Defendants, nor is there any requirement to explore, or plan for the future provision of, community-based services. As a result, they continue to house thousands of individuals who are reported to have only a mild and moderate intellectual disability. *See* Ohio Dep't of Developmental Disabilities, *"How many people living in ICFs have a mild ID level recorded?"* attached as Exhibit 10. And the State has determined that hundreds, if not thousands, of ICF residents have adaptive needs that are typical and behaviors that are not significant. Ohio Dep't of Developmental Disabilities, *State of Ohio's Comparison of individuals that reside in ICF-IID facilities by RAC score and facility size*, attached as Exhibit 11. Private ICFs serve very few clients with chronic medical conditions at the highest level of acuity. Doc. 42 at 14.

2. The State Has Surveyed a Fraction of the Residents of its Large ICFs, and Most Chose Community-Based Services or Expressed an Interest in Learning More About Them.

In response to Plaintiffs' 2015 demand letter, Defendants have developed a limited program of options counseling. *See* Doc. 42 at 14. According to figures the State released on August 8, 2017, options counselors have contacted 2,859 ICF residents. Ohio Dep't of Developmental Disabilities, *2017 Fourth Quarter Scorecard* at 3, attached as Exhibit 12. Of these, 2,561 agreed to participate. *Id*. Fifty-four percent of the residents surveyed have either chosen home and community-based waiver services (689 people, or twenty-seven percent of the participants) or indicated that they may be interested in community-based services but need more

information (698 people, another twenty-seven percent of the participants). *Id.*[2] These numbers likely understate the degree of interest in community services, because the State's current process offers residents only generic information about community-based alternatives and does not provide individuals an opportunity to explore particular community-based settings or specifically plan for their transition. *See infra* at 24.

The State has still not offered options counseling to thousands of other people currently in ICFs, including many of the more than 1,300 people in eight-bed ICFs. *See* Exhibit 12 at 3; *see also* Doc. 273 at 15 (though Advocacy and Protective Services, Inc. surveyed people in ICFs with eight or more beds, the State directed its contractor, CareStar, Inc., to survey only those in ICFs with nine or more beds). Based on past experience, one can reasonably expect that again at least a majority of the remaining ICF residents would choose or express an interest in home and community-based waiver services.

3. Defendants Recognize That Segregation in ICFs is Harmful and Restrictive and That Integration in the Community Offers Substantial Benefits.

As Plaintiffs showed in their August 2016 motion, large ICFs are segregated residential settings that restrict residents' independence and autonomy and limit their interactions with non-disabled peers. Doc. 42 at 11-12. Defendants' reliance on facility-based settings for employment and day services compounds that experience of discriminatory segregation. *Id.* at 12. Defendants have admitted that segregation has harmful, negative consequences for people with intellectual and developmental disabilities. *See id.* at 12-13.

[2] The figures in DODD's *2017 Fourth Quarter Scorecard* differ from those cited by the Defendants in their brief opposing class certification filed 11 days later. *See* Exhibit 12; *see also* Doc. 273 at 16 (stating that ~17% chose not to participate in counseling, ~45% expressed no interest in a waiver, ~10% expressed that they may be interested in a waiver, and ~27% requested an exit waiver). Even the figures in Defendants' pleadings demonstrate a large number of individuals who have requested, or expressed interest in, community services. Any factual dispute regarding the differences between these numbers need not be resolved on this motion.

Contrary to Defendants' and Guardian-Intervenors' arguments that ICFs do not necessarily indicate institutionalization (Doc. 273 at 66-67, Doc. 278 at 10), federal Medicaid law explicitly recognizes that ICFs (including eight-bed facilities) are not "[h]ome and community-based settings." 42 C.F.R. 441.301(c)(5)(iii). They are instead "institutional setting[s]" that have "the effect of isolating [people with disabilities] from the broader community . . . ." 42 C.F.R. §§ 441.301(c)(5)(iii), (v); *see also* 42 U.S.C. § 1396d(d) (ICFs, regardless of size, are "institution[s]").

The experiences of the Individual Plaintiffs and other members of the proposed class bear this out. Doc. 1 at ¶¶ 20, 21, 23, 25, 28-30, 35-38, 43, 48-50. For example, proposed class members Chuck Junior and Pat Callahan both live in eight-bed ICFs and describe the segregation from the community and limited opportunities they have at the ICF and their related day programs. *See* Declaration of Chuck Junior at ¶ 9, attached as Exhibit 13 ("At the ICF I rarely get to go anywhere."); Declaration of Pat Callahan at ¶ 9, attached as Exhibit 14 ("Sometimes the ICF takes me places, but it is usually not to a place of my choosing and it is in a large group.").

Conversely, there is an inherent value in integrated, community-based services for people with intellectual and developmental disabilities. *See* Doc. 42 at 13. A 2016 report commissioned by the Defendants demonstrates high rates of satisfaction, greater independence, better outcomes, and improved quality of life for people who move from ICFs to community-based settings. Exhibit 4. Over 90 percent of respondents reported that their lives were "better since moving from an institution" and that "they were happy with where they lived now." *Id.* at 5; *see also id.* at 12-13. Individuals "felt they had more control over their activities since they moved to a community setting." *Id.* at 13. Many of them also reported an improved quality of life, including that they had "learned more self-care skills since moving" and had experienced

"increased social contact relating to more friends and general contact with others." *Id.* at 13. And "[t]hese findings were consistent with several studies that found benefits in adaptive skills, quality of life, social skills, and freedom [of] choice for individuals with [intellectual and developmental disabilities] when they moved to the community from an institution." *Id.* at 21; s*ee also* Ohio Dep't of Developmental Disabilities, *The Future of Ohio's Developmental Centers* Draft, A Four Year Plan (2015 – 2018) at 21 (Sept. 2, 2014), attached as Exhibit 15 (the Ohio Department of Developmental Disabilities has conceded the positive impact of deinstitutionalization of people with intellectual and developmental disabilities, noting that "[t]hese benefits occur in the areas of social skill development, language and communication skills development, self-care and domestic skill development") (citation omitted). As the Ohio Department of Developmental Disabilities has recognized, "[p]arents and family members who opposed moving from the institution were positive once it happened and that satisfaction remained stable over a ten[-]year period." *Id.* (citation omitted).

Earlier this year, Defendants again admitted that people want to live, work, and spend their time in integrated, community-based settings instead of being segregated from their communities. "[W]e now know that people with developmental disabilities desire to participate more fully in community life. Through studies, surveys, and conversation we better understand that Ohioans impacted by developmental disabilities want to engage in everyday life activities, maintain strong family relationships, make social contacts, explore work options, find cultural enrichment, and achieve economic independence." Office of Health Transformation, *Provide Choices in Ohio's Developmental Disabilities System* at 1 (January 30, 2017), attached as Exhibit 16; s*ee also* Doc. 42 at 13.

Hundreds, if not thousands, of ICF residents are qualified for, and could be safely served by, community-based services. *See* Doc. 42 at 14. And the point holds not just for those individuals with less demanding needs who remain institutionalized. Rather, as the State's own documents recognize, community-based service providers "serve individuals with very diverse and demanding needs, both medically and behaviorally." *See* Exhibit 15 at 17. The Ohio Department of Developmental Disabilities specifically rejected the misconception that community-based settings are not as a safe as ICFs. In its developmental center closure materials, the agency stated that "[a]n individual will receive the level of support and supervision he or she needs, regardless of the setting." Ohio Dep't of Developmental Disabilities, *Intermediate Care Facilities (ICF)* at 1, attached as Exhibit 17.

The Individual Plaintiffs' experiences demonstrate that even individuals with complex needs requiring 24-hour assistance can thrive in the community with appropriate supports. *See* Declaration of Phyllis Burba at ¶¶ 9-18, attached as Exhibit 18(describing the 24-hour assistance Plaintiff Phyllis Ball receives under her new home and community-based waiver); Declaration of Cathy Mason Jordan at ¶¶ 3-21, attached as Exhibit 19 (describing the 24-hour assistance Plaintiff Caryl Mason receives with her new home and community based waiver). Although both Ms. Mason and Ms. Ball require 24-hour care, they still benefit from and enjoy engaging in their communities. Declaration of Phyllis Burba at ¶ 18 (describing how her daughter loves to go on community outings, including shopping, the local fair, and the zoo); Declaration of Cathy Mason Jordan at ¶ 12,16 (describing her sister's volunteer work assisting with laundry and her new freedom to engage in chosen activities including movies, going for ice-cream, and walks in the park).

The life of Joseph Lavalle also illustrates the point. *See* Declaration of Kim Kelly, attached as Exhibit 20. He is a 29-year-old young man with developmental disabilities who lives with his mother in central Ohio. *Id.* at ¶ 1. Lavalle is non-verbal and medically fragile, and he has extensive, complex needs. *Id.* at ¶¶ 3-7 (describing his 24-hour care including monitoring his g-tube and his breathing). But with the help of aides, nurses, his mother and assistive devices such as a specialized wheelchair and a ceiling lift system, he is successfully supported in his own family's home. *Id.* at ¶¶ 3-9. Even with these many needs, Mr. Lavalle is very active in his community. *Id.* at ¶¶ 8-10. He goes swimming, camping, kayaking, sailing, horseback-riding, and boating. *Id.* at ¶ 8. He also enjoys going to the library, the movie theater, amusement parks, festivals, concerts, and church. *Id.* at ¶ 8. His quality of life is much higher living in the community. *Id.* at ¶ 10. He has independence, autonomy, and the freedom to choose community activities, what he eats and when, and the movies he watches. *Id.* at ¶ 10. And he maintains close relationships with family and friends. *Id.* at ¶ 10.

B. Hundreds, if Not Thousands, of People With Intellectual and Developmental Disabilities Have Expressed an Interest in Community-Based Services But are at Serious Risk of Institutionalization in ICFs.

According to Defendants' own figures, an average of 384 people have been admitted to both private and public ICFs every year since 2014. Doc. 273 at 21. This figure is likely only a subset of the group who are referred to, or submit applications for, ICF placement each year. And there are many more who are at serious risk of institutionalization but who have not sought or been referred for admission to a large ICF. As this Court held in its opinion denying Defendants' motion to dismiss, an individual need not be at the doorstep of an institution to be legally considered at serious risk of institutionalization. Doc. 90 at 22-26 (despite not having sought admission to an ICF, Plaintiff Ross Hamilton "has sufficiently alleged that he is currently

harmed and faces a serious risk of institutionalization as a result of the State's ongoing failure to provide adequate community-based waiver services").

Most Ohioans with intellectual and developmental disabilities who live in the community express their interest in and need for community-based services through a request for help from their county board of developmental disabilities. If sufficient resources are not available to meet his or her needs, the person is placed on a waiting list for community-based services. *See* Ohio Admin. Code 5123:2-1-08(D)(1)-(2).[3] The waiting lists include several discrete subgroups whose county boards have identified them as having unmet needs and have therefore prioritized them for receipt of community-based waiver services. Ohio Admin. Code 5123:2-1-08(D)(9)-(10). For instance, hundreds are listed as having "emergency status." Ohio Admin. Code 5123:2-1-08(D)(9). Ohio law defines "emergency status" as "a situation that creates for the individual a risk of substantial self-harm or substantial harm to others if action is not taken within thirty calendar days"; individuals on that status are entitled to the highest priority for services. Ohio Admin. Code 5123:2-1-08(B)(5); Ohio Admin. Code 5123:2-1-08(D)(9).[4] Defendants admit that people who meet the emergency status criteria are in situations "where one might anticipate ICF placement absent an alternative." *See* Doc. 273 at 65.

Class-based discovery has revealed that hundreds of individuals who have been determined to be in an emergency situation are still waiting for enrollment in a waiver. As of October 2016, 336 people with intellectual and developmental disabilities, mostly adults, had "emergency status" but were still on waiting lists. Ohio Dep't of Developmental Disabilities,

[3] Defendants note that the Ohio General Assembly enacted on June 30, 2017 Amended Substitute House Bill No. 49, which revised the state's waiting list statute, and directed the Ohio Department of Developmental Disabilities to promulgate administrative rules implementing this new statute. Doc. 273 at 20; R.C. § 5126.042(D).

[4] Examples of emergency situations include evictions from one's home, the loss of a caretaker ("including serious illness of the caretaker … or inability of the caretaker to perform effectively for the individual"); abuse, neglect, or exploitation or health and safety conditions posing a serious risk of immediate harm or death; and changes in the individual's emotional or physical condition that cannot be accommodated by his or her present caretaker. Ohio Admin. Code 5123:2-1-08(B)(5).

Emergency Status and Still on the Waiting List (Oct. 4, 2016), attached as Exhibit 21.[5] A considerable number were listed as still living in a parent or relative's home, though some were in ICFs. *Id.*

Defendants' current waiting list also prioritizes a group of individuals who, in the words of the State's own administrative rule, are at "significant risk of institutionalization" because of the intensity of their behavioral, medical, or mental health needs. *See* Ohio Admin. Code 5123:2-1-08(D)(10)(c)(ii); s*ee supra* at 15 n.3. At the same level of priority under the State's waiting list categories are people who rely on aging caregivers (age 60 or older). *See* Ohio Admin. Code 5123:2-1-08(D)(10)(c)(i). Defendants claim that a 2013 waiting list study "confirms that most people on . . . waiting lists have few or no unmet needs." Doc. 273 at 21. But they have also publicly cited, and relied upon, this same study in concluding that "more than 22,000 people with immediate needs [are] on waiting lists" for community-based services, about "8,000 of whom [rely on] aging caregiver[s], and 1,000 of whom will lose the support of their primary caregiver" within a twelve-month period. Doc. 42 at 14. In 2015, Defendant Martin relied on this study and stated that "1,032 per year will lose support of their primary caregiver. Of those, 616 per year will be living with an aging caregiver." John L. Martin, Director, Ohio Dep't of Developmental Disabilities, *Presentation at the Arc of Ohio Quarterly Meeting: DODD FY 16/17 Budget* at 6, 12 (Mar. 26, 2015), attached as Exhibit 22.

The stories of two members of Plaintiffs' proposed class exemplify the ways in which insufficient access to community-based services can pose a serious risk of institutionalization. *See* Declaration of Cheryl Stauffer at ¶¶ 2-4, 12-13, 26, attached as Exhibit 23 (David "Nat" Stauffer is 52 years old, is blind and deaf and has behavioral needs, and requires 24-hour care,

[5] This evidence contradicts the Defendants' claim that there are no waiting lists for people hoping to avoid admission to a large ICF. Doc. 273 at 21.

and his brother and sister-in-law are unable to meet his intensive needs on their own, particularly because Nat's parents both passed away in recent years); Declaration of Aaron Isom at ¶¶ 1-5, attached as Exhibit 24 (Jessica is 24 years old, has autism, a mild intellectual disability, and several mental health diagnoses and medical conditions, and needs help with her day-to-day needs and also constant supervision because of her disabilities and because of the immense fear and trauma she experiences as a survivor of severe physical abuse and neglect).

The declarants have sought community-based services to meet their needs but were placed on waiting lists. *See* Declaration of Cheryl Stauffer at ¶¶ 7-8 (Nat receives limited services through Defendants' service system and is currently number 68 on the waiting list for the Individual Options waiver program); Declaration of Aaron Isom at ¶ 11 (Jessica has been on the waiting list for the Individual Options waiver since 2010).

These declarations also attest to the financial, emotional, and physical strains that can make it extremely difficult, if not impossible, for family members to take the place of trained, paid providers. *See* Declaration of Cheryl Stauffer at ¶¶ 14-15, 19, 23-24 (Nat's brother and sister-in-law incur significant out-of-pocket expenses to pay for support for him and describe this as a financial hardship, and struggle to balance the demands of their own jobs and lives); Declaration of Aaron Isom at ¶¶ 6-11 (Jessica's father, her sole means of family support, is overwhelmed trying to meet her intensive needs and cannot at the same time work and support both of them financially and, as a result, actually lost his long-term job recently).

Finally, the declarants each must confront the possibility of institutionalization despite their strong preference to remain in their communities. *See* Declaration of Cheryl Stauffer at ¶¶ 11, 13, 21, 26 (Nat's service and support administrator at the county board has suggested that

Nat be placed out-of-home in an ICF or nursing facility); Declaration of Aaron Isom at ¶¶ 12, 14 (Jessica's father has explored admission to several large ICFs).

These stories represent families across the state who are struggling in similar ways. Notably, a parent-led advocacy organization, the Coalition for Community Living, supports the prosecution of this case. Coalition members "understand how important this issue is because we have family members living with us with significant developmental disabilities and complex medical needs who are at risk of institutionalization if the current system of delivery does not improve." *See* Letter from Mary Hall and Kim Kelly, Coalition for Community Living to Michael Kirkman, Disability Rights Ohio (June 4, 2016), attached as Exhibit 25.

C. The Unnecessary Institutionalization, and Serious Risk of Unnecessary Institutionalization, Results From the Defendants' Systemic Failures, Not Individual Clinical Decisions.

1. The State Has Failed to Develop and Fund Integrated, Community-Based Residential, Employment, and Day Services Sufficiently to Meet Class Members' Demonstrated Need.

Despite the demonstrated need, the State has failed to develop sufficient community-based residential, employment, and day services to avoid class members' unnecessary segregation. Defendants claim that exit waivers are available for any person in an ICF who wants to transition into the community (Doc. 273 at 16), but the recent initiatives allocated only 800 exit waivers in the SFY 2016-17 budget biennium and a much smaller number in the current SFY 2018-19 budget biennium. Affidavit of Clay Weidner, Doc. 273-4 at ¶¶ 3-5 (the State allocated only 400 new state-funded waivers in the 2018-19 biennial budget for people currently in ICFs *and* for those seeking admission to an ICF with nine or more beds). And although the State has formally assigned exit waivers to 800 ICF residents, DODD's 2017 Fourth Quarter Scorecard reveals that only 206 of these residents have actually been enrolled in those waivers. Exhibit 12 at 3. That is because the State has not allocated the resources necessary to provide

timely transition and discharge planning for those seeking to leave ICFs. *See* Linda Walters Dep. at 76-78.

And even taking the 800 waivers at face value, that number is insufficient to cover the 1,387 people in ICFs who have already chosen or expressed an interest in learning more about alternatives to institutional care. Much less can it cover those who will express an interest in community services once the State provides appropriate options counseling to the remaining thousands of ICF residents. And the State has announced no long-term plan beyond these initiatives. Nor has it made the necessary long-term investments in structural changes to the service system. Defendants have not recruited a sufficient number of capable providers, and they have not taken appropriate steps to address the shortage of workers in community-based settings. *See* American Network of Community Options and Resources, *Addressing the Disability Services Workforce Crisis of the 21st Century*, Electronic Version (ANCOR, White Paper, 2017) at 7, attached as Exhibit 26 (assessing the serious problems in workforce retention and recruitment across the country in service systems for people with intellectual and developmental disabilities and noting that, in Ohio, recent rate increases for community-based providers are not enough to compensate for past cuts).

Guardian-Intervenors misleadingly assert that there is higher demand for ICFs than for community-based services, because "the state's own data shows there are currently more vacant waiver placements (160) in Ohio than vacant ICF beds (130)." Doc. 278 at 3. But a "vacant waiver placement" simply means that there is a licensed waiver setting with an open bed. It does not mean that the State has made waiver funding (a "waiver slot") available to enable an individual to fill that bed. As a result, the "vacant waiver placements" are unusable for many class members. As demonstrated above, the State has not funded a sufficient number of waiver

slots to meet the needs of the class. In fact, a State official in 2015 specifically instructed that no one "imply there is a guarantee of a state-funded waiver" for individuals in ICFs. Email from Lori Horvath, Ohio Dep't of Developmental Disabilities, to Nisi Pozderac, Transitional Living Centers, Inc. (Sept.. 1, 2015), attached as Exhibit 27.

Moreover, according to the State's administrative rules, virtually no one in an ICF has a service and support administrator (the equivalent of a case manager) at a county board of developmental disabilities, unless he or she affirmatively requests assistance to move from the ICF to a community-based setting. Ohio Admin. Code 5123:2-1-11(D)(1)(c). As a result, ICF residents who are open to moving to the community lack sufficient connection with the county boards, whose extensive knowledge and experience with local resources would enable them to make an informed choice to leave the institution.

The testimony of Individual Plaintiffs and other members of the proposed class illustrates the impact of these systemic problems. The failure to develop sufficient transitional assistance services has delayed the transition of Plaintiff Richard Walters from an ICF into the community, even after he was assigned an exit waiver. *See* Linda Walters Dep. at 76-78.

Other individuals have expressed an interest in home and community based options, but remain listed as a "maybe" after counseling because of barriers to further pursuit of community services. These include the unavailability of accessible housing or resources to support medical or behavioral needs. *See* Advocacy & Protective Services, Inc. (APSI), *APSI Update on Exit Waiver Process* at 1-2 (Oct. 2017), attached as Exhibit 28 (identifying factors for why an individual was placed on the "maybe" or "no" list, including a "Need for accessible housing in a community with few accessible housing resources," a "Lack of community resources to support current medical needs, especially nursing," and a "Need for intensive behavioral supports in a

community with limited provider capacity."). The stories of proposed class members Susan Harris, Betty Bay, and Chuck Junior exemplify these concerns. *See* Declaration of TaRell Derry at ¶ 7, attached as Exhibit 29 (guardian APSI placed Ms. Harris on the maybe list, noting a need for medical care including for her PEG Tube); Declaration of TaRell Derry at ¶ 8, attached as Exhibit 30 (guardian APSI placed Ms. Bay on the maybe list noting that while it believed her needs could be met in a less restrictive setting, she would need extra assistance with physical care); and Declaration of Sally Berger at ¶ 8, attached as Exhibit 31 (guardian APSI placed Mr. Junior on the maybe list noting that he would need 24-hour care and ongoing medical assistance).

Finally, Defendants' recent initiatives relating to employment and day programs (s*ee* Doc. 273 at 13-14) have had little impact on individuals who are not already enrolled in a waiver program. Doc. 42 at 20-23. The State's first and only integrated employment initiative for people in ICFs proposes minimal funding, is a limited and short-term commitment, and fails to address the needs of thousands of residents of ICFs who attend segregated, facility-based employment and day programs. *Id.* at 21-22. Indeed, the State has chosen to provide little or no vocational rehabilitation services to people in ICFs or those on waiting lists for waiver programs. Doc. 42 at 22; s*ee also* Ohio Dep't of Developmental Disabilities, DODD-OOD Data Match, at 1 (Sept. 29, 2016), attached as Exhibit 32 ("[a]ccording to the September 29, 2016 DODD-OOD Data Match, there are 218 individuals with an open or closed VR case with OOD" who also reported as living in either a developmental center or an ICF, and this includes data for individuals whose case was closed since FY 2012).

2. The State Continues to Allocate Resources in a Way That Incentivizes Admissions to ICFs.

The State's funding decisions continue to incentivize institutionalization and exacerbate the unmet need for community-based services. Defendants pay for the non-federal share of ICF services, but have provided State-level funding for waiver services only when confronted with actual or threatened litigation. *See supra* at 8. In most cases, the State continues to shift the financial responsibility for the non-federal share of home and community-based waiver services to fiscally-stretched county boards of developmental disabilities. Doc. 68 at 10-11. This policy gives the county boards a perverse incentive to refer individuals to institutions, because an ICF placement does not require the county board to spend local taxes as it would if it enrolled an individual in a waiver. *See* Doc. 42 at 18-19.

Class-based discovery confirms that the incentives created by the State's funding structures remain a major unresolved problem. The Ohio Department of Developmental Disabilities has recognized the State's financial incentives for institutional placement. As demand for home and community-based services has grown over the years, waiting lists have as well, and county boards have funded a significant part of the expansion. Memorandum from Ohio Dep't of Developmental Disabilities on Context of DODD budget (SFY 2016-17 State Budget Initiatives) at 1, attached as Exhibit 33. But DODD has recognized that the reliance on local funds to pay for waiver services "has created an incentive for counties to encourage folks to enter private institutions as it saves them the cost of providing match for waivers. This 'institutional bias' creates exposure for Ohio." *Id.*

The State has also acknowledged that a "lack of adequate local funds" is a factor leading to long waiting lists across Ohio, as some counties only offer new enrollment in waiver programs in rare circumstances. Ohio Dep't of Developmental Disabilities, *The adequacy of Home and*

Community- Based Waivers Services (authorized under section 1915 © of the Social Security Act (42 U.S.C. 1396 N (C), at 1, attached as Exhibit 34. And because of the "many restrictions and requirements tied to waiver services," county boards "may be reluctant to expand their waiver programs for fear of losing local control" and may instead fund their own local, non-Medicaid programs. *Id.* at 2. Because the Individual Options waiver has no monetary cap, county boards "may be cautious to offer new waivers without knowing what their contribution will be in future years." *Id.* at 2.

Finally, for several years, the State has acknowledged the need for a flat rate ICF reimbursement methodology for less profoundly disabled and less resource-intensive residents, in order to encourage facilities to "actively consider the opportunity for those individuals with less profound needs to receive home and community-based services instead of receiving services in an institution." Ohio Governor's Office of Health Transformation, *Enhance Community Developmental Disabilities Services*, Jan. 31, 2013, at 2, attached as Exhibit 35. Such a rate change would not only produce important cost savings for the State, but would "encourage agencies to convert these individuals to the waiver program, which is better suited to meet their needs, and to focus the ICF program on service those with the most complex needs." Exhibit 17 at 1. However, the State has continued to propose only very limited, prospective rate adjustments, despite the admittedly outdated nature of the current reimbursement system and the fact that it " . . . no longer support[s] the direction of the system to help people more fully participate in their communities." Exhibit 5 at 2.[6] As a result, ICFs still have an incentive to continue to serve individuals whose adaptive and behavioral needs could be met in more

[6] The Ohio Department of Developmental Disabilities, discussing the FY 2018-19 biennial budget, recently stated in July 2017 that "[t]he ICF reimbursement system is more than 20 years old and in need of restructuring." *See* Ohio Dep't of Developmental Disabilities, *DODD Outlines FY18-19 Budget Initiatives*, http://dodd.ohio.gov/Communications/Lists/Posts/Post.aspx?ID=707 (last visited Oct. 20, 2017). However, efforts to further "modernize" the system remain at the level of stakeholder workgroups. *Id.*

integrated settings. Email from Joshua Anderson, Ohio Dep't of Developmental Disabilities, to Melissa Stills, Ohio Dep't of Medicaid (Sept. 07, 2016) at 1, attached as Exhibit 36 ("The current methodology is 20+ years old and is in need of updating to incentivize what we want to see in the system (Smaller and more community like ICFs that serve the most medically fragile and behaviorally challenged))."

3. The State Continues to Use a Fundamentally Flawed Process to Inform People With Intellectual and Developmental Disabilities of Alternatives to Institutionalization.

Because of the inadequacies in the State's options counseling process, the number of people in ICFs who would make an informed choice of home and community-based services is very likely substantially understated by the State's public figures. A one-time phone call or face-to-face conversation with a person in an ICF and his or her family often will not suffice, as the Defendants have acknowledged. *See* Exhibit 8. According to DODD, "this is a big decision to consider for people who have lived in the ICF for a long time. Some people simply can't decide after one options counseling session if they want a waiver. They need more time to talk with peers who use waiver services or to see what a waiver home make look like." *Id.* at 1. And virtually no one has been referred to peer-to-peer or family counseling options, and there is no evidence that the state has arranged for people who may be interested in alternatives to institutional care to visit community-based settings or to meet with people who have made the transition from an ICF to a community-based setting and their families. *See* CareStar, *Options Counseling Monthly Activity Report September, 2016*, at 5, attached as Exhibit 37.

Furthermore, the State provides information to people and families about home and community-based services using materials that describe community-based services only generically. *See* CareStar, *Community Options Visit Form* (Aug. 2016), attached as Exhibit 38. And, unlike the State's policies regarding developmental centers, the counseling process for

private ICFs provides no options for individualized transition planning. S*ee supra* at 8-9. Nor do the Defendants' options counseling forms document the reason for a person's opposition to waiver services, which is important to determine further evaluation of his or her concerns and needs and to develop systemic responses by the Defendants. *See* Exhibit 38.

In addition, the State's pre-admissions counseling process fails to provide an informed choice to those who now live in the community but who are at serious risk of institutionalization. That process applies only when people apply for admission to a large ICF with nine or more beds. Ohio Dep't of Developmental Disabilities, *Pre-Admission Counseling*, at 1 (May 2017), attached as Exhibit 39. It thus excludes eight-bed ICFs (and many members of the proposed class.) Crucially, the State begins the pre-admissions counseling process only when the individual is essentially on the doorstep of the institution already: The facility must have a current vacancy (or anticipate one within six months), it must have accepted the individual for new admission, and the individual him- or herself must have agreed to the next opportunity for admission. *Id.* at 1. The State has recognized in the options counseling process context that informed choice requires multiple conversations, time to consider various options and alternatives to institutional care, exploration of available providers, and so forth, all of which takes time. *See supra* at 24-25. But for its pre-admissions counseling process, the State allows a person only five business days to decide whether to accept a diversion waiver. Exhibit 39 at 1; R.C. § 5124.68(B). This process differs markedly from Defendants' policies regarding admissions to its developmental centers. *See supra* at 8-9.

These structural deficiencies cause the unnecessary institutionalization of proposed class members. It is unsurprising that the State has seen little success in diverting people from ICF admissions and that so few people have chosen community-based services under these

circumstances. *See* Doc. 273 at 27; Exhibit 12 at 3; *see also* Email from Lori Stanfa, Senior Policy Analyst, Ohio Ass'n of County Boards, to Superintendents, Ohio Ass'n of County Boards (Dec. 11, 2015), attached as Exhibit 40 (noting at the time that only 2 of 32 people who underwent pre-admissions counseling chose waiver services, a representative of OACBDD-Intervenor stated that "[w]hile there are likely many reasons for this, DODD is concerned that the process may not be well understood and/or there is confusion about the implementation").

III. ARGUMENT

Defendants' systemic policies, and related structural deficiencies within the service system, impose statewide barriers to the integration of the Plaintiff class. The unnecessary segregation that results raises common factual and legal questions that are based on this common course of conduct by the State. These questions can be answered 'yes' or 'no' for the class as a whole, based on a core set of facts that impact all class members, making class treatment, and single injunctive relief, appropriate. In addition, Plaintiffs have developed a modified class definition that includes only those individuals who *affirmatively* express an interest in receiving community-based services. This modification resolves any potential conflict among class members and Guardian-Intervenors who are opposed to integrated services or wish to remain in an ICF. Defendants raise several arguments against class certification. Each lacks merit.

A. Defendants Improperly Seek to Litigate the Merits on a Class Action Motion.

Throughout their Opposition, Defendants distort the burden that applies at class certification. Doc. 273. In particular, they blur the line between satisfaction of Rule 23 criteria (the proper question at this stage) and the State's liability on the merits (a question that is not relevant until later in the litigation). Defendants improperly seek to introduce merits inquiries into both their argument that Rule 23(b)(2) is not satisfied and their argument that the proposed class lacks common questions. For instance, Defendants repeatedly argue that class certification

is improper because: 1) their system is already providing timely access to community services; and 2) the plaintiffs' request for further expansion of integrated alternatives cannot be reasonably accommodated given the continuing need for investment in institutional settings. *Id.* at 10-27.[7] They assert that the definition of the at-risk portion of the class includes many people "outside *Olmstead*'s parameters" (*id.* at 64), presumably people who are not segregated and "have no *Olmstead* claim." *Id.* at 65-66. Defendants also suggest that Plaintiffs must affirmatively demonstrate not only that each and every individual class member has suffered precisely the same injury, but that each *Olmstead* factor (appropriateness, opposition, and reasonable accommodation) is met for each and every class member in order to satisfy threshold criteria for commonality. *Id.* at 57.

The Supreme Court has squarely rejected efforts to introduce these sorts of merits questions into the class certification decision. In *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, the Court held that Rule 23 "grants courts no license to engage in free-ranging merits inquiries at the certification stage." 568 U.S. 455, 466 (2013). Rather, plaintiffs need show only "that the *questions* of law or fact common to the class" meet the requirements of Rule 23(b); "they need not, at that threshold, prove that the predominating question will be answered in their favor." *Id*. at 467-68 (emphasis in original). A contrary view, the Court explained, "would waste judicial resources" by "necessitat[ing] a mini-trial" at the time of a class certification motion. *Id.* at 477. "Such preliminary adjudications would entail considerable expenditures of judicial time and resources, costs scarcely anticipated by Federal Rule of Civil Procedure 23(c)(1)(A), which instructs that the decision whether to certify a class action be made '[a]t an early practicable time.'" *Id.* The Sixth Circuit has applied the same principle. *See In re*

[7] *See, e.g*, Doc. 273 at 9 ("Ohio's system is *already* centered on providing people with community-based services."); *id.* at 11 ("Ohio is committed to providing *options* to people with developmental disabilities."); *id.* at 36 ("Plaintiffs simply ignore the numerous steps Ohio has taken to expand access . . . .").

Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig., 722 F.3d 838, 851–52 (6th Cir. 2013) ("[D]istrict courts may not 'turn the class certification proceedings into a dress rehearsal for the trial on the merits.'") (quoting *Messner v. Northshore Univ. Health System*, 669 F.3d 802, 811 (7th Cir. 2012)); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015), cert. denied, 136 S. Ct. 1493 (2016) (stating that "'[m]erits questions may be considered to the extent—*but only to the extent*—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied'") (emphasis in original) (quoting *Amgen*, 568 U.S. at 466); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir.2006) (agreeing with the proposition that "whether class members will ultimately be successful in their claims is not a proper basis for reviewing a certification of a class action").

Other federal courts addressing *Olmstead* claims have relied on *Amgen* to hold that plaintiffs at the class certification stage need not prove that they and all putative class members are unnecessarily segregated and would benefit from the proposed remedial services. *Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 263 (D.N.H. 2013); *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012). The court in *Lane* found that such an inquiry would, in effect, constitute "the answer to the common question." 283 F.R.D. at 598. At this stage, the court recognized, plaintiffs need only show that there are common contentions whose answer "will resolve an issue that is central to the validity of each one of the class members claims in one stroke." *Id.* at 594 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). On remand from the Fifth Circuit, the court in *M.D. v. Perry* made a similar observation in a closely related context:

> [t]o prevail on the merits with this claim, Plaintiffs will have to prove a causal connection between the State's caseworker workload and an unconstitutional risk of harm. At class certification, though, they do not need to prove that they are

> entitled to relief based on their claims; they need only make out a claim on behalf of the class. They have done so here."

294 F.R.D. 7, 44 (S.D. Tex. 2013).[8] Defendants argue that plaintiffs cannot prove a class-wide violation of law, but that is a matter for the merits, rather than for class certification.

Indeed, in at least one respect Defendants' merits-based arguments actually bolster the case for class certification. Defendants attest to their "long term commitment" to the ICF system and the "integral" role that it plays (Doc. 42-6 at 11), suggesting that Plaintiffs' proposed expansion of community services cannot "be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead*, 527 U.S. at 587; Doc. 273 at 44. But, as *Olmstead* makes clear, evaluation of this question inherently focuses on statewide questions regarding the availability of and claims on the state's resources, and not the situations of individual class members. *See Olmstead*, 527 U.S. at 597 ("In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.").

If, as Defendants argue, the reasonable accommodation and fundamental alteration issues are relevant to the resolution of this case, they provide additional issues that may be resolved on a class-wide basis: whether Plaintiffs' requested accommodation (expansion of integrated service options sufficient to avoid unnecessary institutionalization of the proposed class) will result in a fundamental alteration of the Ohio service system; and whether Defendants have "comprehensive, effectively working" *Olmstead* plan with measureable goals and timeframes.

[8] Defendants rely heavily on the Fifth Circuit's 2012 decision to vacate class certification in *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012). *See* Doc. 273 at 40, 47, 55 n. 7, 57, 69. But they fail to note that, on remand from that decision, the district court followed the Fifth Circuit's ruling and once again certified a plaintiff class. The district court's second class certification order was not overturned on appeal.

Olmstead, 527 U.S. at 605 (plurality opinion). These inquiries are inherently class wide, and they cannot be resolved without merits-based discovery and a fully developed record.

B. Plaintiffs' Modified Class Definition Is Objectively Measurable and Appropriately Drawn.

1. Plaintiffs' Class Definition is Tailored to the *Olmstead* Claims at Issue.

Since the passage of the ADA in 1990, courts have repeatedly certified class actions challenging government officials' noncompliance with Title II of the ADA. *See* Doc. 42-23. In particular, courts have routinely granted class certification in cases seeking to enforce the ADA's Integration Mandate on behalf of those who are unnecessarily institutionalized or facing serious risk of unnecessary institutionalization. They have done so both before and after the Supreme Court's decision in *Wal-Mart*. *See* Doc. 42 at 25 n. 10.[9] Such cases include those that are strikingly similar to this one, in which plaintiffs are unnecessarily institutionalized, or face a serious risk of institutionalization, and seek compliance with Title II's requirement that services be provided in the most integrated setting appropriate for their needs. *See, e.g.*, *Kenneth R. v. Hassan*, 293 F.R.D. 254 (D.N.H. 2013); *Lane*, 283 F.R.D. 587 (D. Or. 2012); *Steward v. Janek*, 315 F.R.D. 472 (W.D. Tex. 2016), petition for appeal denied, No. 16-90019 (5th Cir. Aug. 5, 2016); s*ee also* Doc. 42 at 26 n.11.

In keeping with this established body of case law, the elements of an ADA *Olmstead* claim, and the continued evolution of this litigation, Plaintiffs seek to certify a class consisting of:

> All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are qualified for home and community-based services, but

[9] *See, e.g.*, *Cole v. Brad Livingston*, No. 4:14-cv-1698, 2016 WL 3258345 (S.D. Tex. June 14, 2016); *Holmes v. Godinez*, 311 F.R.D. 177 (N.D. Ill. 2015); *Hernandez v. County of Monterey*, 305 F.R.D. 132 (N.D. Cal. 2015); *Oster v. Lightbourne*, No. C09-4668 CW, 2012 WL 685808 (N.D. Cal. Mar. 2, 2012); *Pashby v. Cansler*, 279 F.R.D. 347 (E.D.N.C. 2011), *aff'd*, *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013).

> (a) are institutionalized in an Intermediate Care Facility with eight or more beds, and, after receiving options counseling, express that they are interested in, or may be interested in, integrated community-based services; or (b) are at serious risk of institutionalization in an Intermediate Care Facility with eight or more beds and have, by placing themselves on a waiting list for community-based services, expressed an interest in receiving integrated services while continuing to live in the community.

Class members at serious risk of institutionalization in large ICFs include people with intellectual and developmental disabilities who are qualified for home and community-based services[10] and who now, or in the future: (1) apply for or are referred for admission to an ICF; (2) are on waiting lists for Medicaid home and community-based services and have either an aging caregiver, intensive needs, or an emergency, as defined by Ohio's current or future waiting list rule, or (3) have another immediate need which creates a substantial risk of harm, as determined by Ohio's current or future waiting list rule. [11]

The proposed class definition is tailored to the *Olmstead* factors, in which the Supreme Court described the category of individuals with disabilities for whom a state must provide community-based services.[12] Consistent with the original intent of the Plaintiffs' Motion for Class Certification, the proposed class includes only those who qualify for, and express an interest in, integrated community services. For those in ICFs, class members will express their interest by choosing community services, or stating that they may be interested in exploring

[10] Ohio regulations define eligibility for the home and community-based waiver programs, and involve an individualized determination of the person's needs and the extent to which his or her health and welfare needs can be met "through waiver services at or below the federally-approved cost limitation, and through a combination of informal and formal supports including, but not limited to, waiver services, Medicaid state plan services, private health insurance plan benefits, non-waiver services, and/or natural supports." Ohio Admin. Code 5123:2-9-01(D). When the class definition uses the term "qualified," we refer simply to the determination that is made in this process.
[11] At this time this litigation was filed, Defendants' waiting list regulations (Ohio Admin. Code 5123:2-1-08) specifically acknowledged the extent to which certain factors may increase individuals' risk of institutionalization and, therefore, the urgency of providing home and community-based services. These priority categories are adopted by Plaintiffs as reasonable proxies for those at serious risk of institutionalization. *Id.* at 5123:2-1-08(D)(10)(c).
[12] "[U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when [1] the State's treatment professionals determine that such placement is appropriate, [2] the affected persons do not oppose such treatment, and [3] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. *Olmstead*, 527 U.S. at 607.

community services, during the options counseling process. For those at serious risk of institutionalization, class members will express their interest by making a request for services and being placed on the waiting list. Both groups of class members share a common injury – discriminatory segregation. They also share common interest in expanded options for, and reasonable access to, integrated residential, employment and day services, as well as an informed choice process which affords meaningful opportunities to consider and to explore alternatives to institutional care.

Defendants contend that the at-risk portion of the class definition is overbroad, because it encompasses people who have no at-risk claim under *Olmstead*. Doc. 273 at 64-65. That is a merits question, not a class certification question. *See supra* Section III (A). In any event, Defendants have an unduly narrow view of the proper scope of *Olmstead* at-risk claims. As both the Department of Justice and numerous courts have made clear, an individual need not be on the doorstep of an institution to make out such a claim.[13] Nor must an individual demonstrate an "absolute" risk of admission or an ongoing "emergency" in order to present a claim under the Integration Mandate. Doc. 273 at 65-66. As this Court recognized in denying Defendants' Motion to Dismiss, all that is necessary is a "serious risk" of institutionalization. Doc. 90 at 22-26. The proposed at-risk definition targets individuals in precisely that category.

[13] Civil Rights Div., U.S. Dep't of Justice, *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.* (June 22, 2011), *available* at https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Aug. 4, 2016). *See Steimel v. Wernert*, 823 F.3d 902, 911–12 (7th Cir. 2016); *Steward v. Janek*, 315 F.R.D. 472 (W.D. Tex. 2016); *Davis v. Shah*, 821 F.3d 231, 262-63 (2d Cir. 2016); *M.A. v. Norwood*, 133 F. Supp. 3d 1093, 1107 (N.D. Ill. 2015); *Pashby*, 709 F.3d at 321-22; *Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 271-72 (D.N.H. 2013); *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012); *M.R. v. Dreyfus*, 663 F.3d 1100, 1117–18 (9th Cir. 2011), *opinion amended and superseded on denial of reh'g*, 697 F.3d 706 (9th Cir. 2012); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003); *Makin ex rel. Russell v. Hawaii*, 114 F. Supp.2d 1017, 1033 (D. Hawaii 1999).

2. Plaintiffs' Class Definition is Objectively Measurable, and Does Not Require this Court to Engage in Individualized, Clinical Determinations.

The proposed class definition is neither vague nor overbroad. As noted above, class membership is determined based on an affirmative expression of interest or possible interest in integrated community-based services. Defendants already maintain information on the outcome of their options counseling sessions, including the names of individuals who may be interested in integrated services, but who want additional information. As a result, the class is plainly ascertainable and objectively measurable. Those who choose ICF admission, or wish to remain at an ICF, are neither included in the class, nor bound by its outcome. They need not take any affirmative steps to avoid or 'opt-out' of class membership.

The proposed definition uses objective criteria to focus class membership on those individuals who have experienced a common injury and who are qualified to state a claim under *Olmstead*, 527 U.S. at 581. At the same time, the proposed class definition recognizes the fluid nature of the class and the presence of future class members. It allows for the possibility that individuals may, through future counseling efforts, express an interest in exploring community alternatives, as their needs and preferences change. Finally, Plaintiffs' proposed definition sets out clear and objectively measurable proxies for individual class members at serious risk of institutionalization, including actual referral or application to an ICF. In this respect, it closely parallels the class definition approved in *Kenneth R.*, 293 F.R.D. at 271-72.

Defendants' vagueness argument relies on the denial of class certification in *A.R. v. Dudek*, No. 12-60460-CIV, 2016 WL 3766139 (S.D. Fla. Feb. 29, 2016) and *Steimel v. Wernert*, 823 F. 3d 902, 917-18 (7th Cir. 2016). *See* Doc. 273 at 64, 69. Yet the class definitions in those cases were quite different from the one proposed here. In *A.R.*, plaintiffs and the Department of Justice sought both monetary damages and injunctive relief, and proposed a definition which

"offer[ed] no objective measure by which to gauge the persons included within the class." 2016 WL 3766139, at *1.

Similarly, in *Steimel*, the Seventh Circuit affirmed the denial of certification to a class defined as including those individuals "who require more services each year than are available through" a particular waiver program. 823 F.3d at 917. The court concluded that the use of the word "require" left the class definition "too vague." *Id.* at 917-918. "The question is in what ways do the potential class members 'require' more services than available under the FS waiver? Are they medically required? Required for regular community interaction? Required so as not to violate the integration mandate?" *Id.*

Unlike in *A.R.* and *Steimel*, Plaintiffs here do not rely on such ambiguous terms to define class membership. The proposed class definition includes the term "qualified" to refer to eligibility criteria that Defendants themselves have established for home and community-based services. *See* Ohio Admin. Code 5123:2-9-01(D). It adopts the State's own terminology and process for measuring the outcome of options counseling. It uses the State's own waiting list of individuals who express an interest in community services. Finally, Plaintiffs' definition incorporates Ohio's own waiting list priority factors—factors which demonstrate a heightened need for services, and a concomitant risk of unnecessary institutionalization should those needs go unaddressed.

Defendants suggest that any determination of serious risk would require the Court to make its own individualized determination of class membership. Doc. 273 at 66-67. To the contrary, both in our original motion and in this reply memorandum, we take an objective, focused approach to identifying at-risk class members. We do not attempt to sweep in the more than 48,000 individuals who have requested placement on that waiting list. *Id*. at 20. Nor do we

seek to include all 22,000 persons estimated to have an unmet need. Rather, our proposed definition focuses on individuals who are assessed by the County Boards and placed into specific priority categories, including those individuals with an intensity of need that places them "significant risk of institutionalization." *See* Ohio Admin. Code 5123:2-1-08(D)(10)(c).

Quite simply, Plaintiffs' class definition incorporates the State's existing priority framework. Nothing about this approach would make administration of relief "impossible." Doc. 273 at 53. To the contrary, the modified definition relies on objective criteria, which are implemented through individual assessments and procedures already occurring within Defendants' service system or which will be implemented as part of Ohio's revised waiting list rule. *See supra* Section II (B). As Defendants' Opposition attests, the State has recently revised its waiting-list statute and it is in the process of developing new administrative rules to govern its future operation. Doc. 273 at 20. As part of this transition, the State will re-assess each person on waiting lists, including the extent to which their unmet needs are likely to result in substantial harm if not immediately addressed. As a result, there is no conceivable need for this Court to make individualized assessments of the needs and risks faced by those on the current waiting list or those who may request services in the future. The State has already pledged to do so. *Id.* ("Waiting lists, moving forward, will be limited to 'individuals *who are assessed as needing* home and community-based services[.]'") (emphasis in original) (quoting Ohio Rev. Code § 5126.042)).

Defendants argue that the class cannot be certified unless its membership is "ascertainab[le]"—that is, that it is possible for the Court to "identify all absent members." Doc. 273 at 52-53. As Defendants acknowledge, however, the Sixth Circuit recently held that ascertainability is not necessary in 23(b)(2) cases. *See Cole v. City of Memphis*, 839 F.3d 530,

542 (6th Cir. 2016), cert. denied sub nom. *City of Memphis, Tenn. v. Cole*, 137 S. Ct. 2220, 198 L. Ed. 2d 659 (2017) (holding that ascertainability is not an additional requirement for certification of a (b)(2) class because the focus of these cases " . . . is more heavily placed on the nature of the remedy sought, and because a remedy obtained by one member will naturally affect the others, the identities of individual class members are less critical in a (b)(2) action than in an (b)(3) action.")(citation omitted). That holding is, of course, binding on this Court.

Defendants suggest that the Court should make an exception to the Sixth Circuit's rule "given the nature of Plaintiffs' *Olmstead* claims." Doc. 273 at 52. But there is nothing in *Olmstead* cases in general, or in this *Olmstead* case in particular, that warrants such an exception, particularly when – as here – the class includes future, unnamed class members. Rule 23(b)(2) has long been understood as the preferred vehicle for injunctive civil rights cases precisely because it is not possible to identify all affected class members individually. As the 1966 Advisory Committee that drafted the modern Rule 23 explained, the paradigm cases for (b)(2) treatment 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." Fed. Rule Civ. P. 23(b)(2) advisory committee's note to 1966 amendments. There is no basis for applying an extraordinary requirement of ascertainability here. The proposed class definition is precise and objectively measurable. That is more than sufficient.

C. The Class Satisfies Rule 23(b)(2).

Under Rule 23(b)(2), class certification is appropriate when "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); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847-48 (5th Cir. 2012) (requirements of Rule 23(b)(2) are met where plaintiffs show that the "[s]tate engages in a

pattern or practice of agency action or inaction—including a failure to correct a structural deficiency within the agency . . . with respect to the class"). The proposed class satisfies this standard.

1. The Class is Cohesive.

As discussed in the Statement of Facts, the State has engaged in a series of discrete, statewide actions and inactions[14] that lead to the unnecessary segregation of members of the proposed class. For instance, Defendants continue to fund, license and maintain a system of large ICFs, and segregated sheltered workshops, that serve thousands of individuals with intellectual and developmental disabilities. These include many individuals with mild to moderate forms of disability. *See supra* at 9. Ohio's recent success in transitioning a subset of clients from state-operated ICFs demonstrates that there are additional individuals in these institutional settings who are qualified for, and can be safely and effectively served with, home and community-based services. *See supra* at 8-9. This includes people with diverse and complex needs, like the Individual Plaintiffs. *See supra* at 13-14. In addition, waiting lists maintained by the State contain hundreds, if not thousands, of individuals who have been prioritized for community services by their County Boards or found to meet emergency status criteria. Yet these individuals are without needed community services, placing them at serious risk of unnecessary institutionalization.

These facts result not from improper clinical decisions in individual cases, but from specific state policy decisions: (1) to develop and fund significantly fewer home and community-based waivers than are necessary to meet class members' demonstrated need; (2) to fund services through rules that incentivize county boards to refer people unnecessarily to ICFs, and that

[14] Failure to act can constitute a policy or practice that can be properly litigated as a class action. *See generally Lightfoot v. District of Columbia*, 273 F.R.D. 314, 321 (D.D.C.2011); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir.2012).

incentivize ICFs to seek out and retain residents whose needs could be safely and effectively met in the community; and (3) to set up options and pre-admissions counseling programs that provide untimely and insufficient information to permit a real choice between institutional and home and community-based services. Plaintiffs seek a single injunction that would eliminate these systemic drivers of discriminatory segregation. That order would redress the injury to the class as a whole. Once the Court issues such an injunction, and thereby removes the statewide barriers to integration, class members can engage in transition planning and make decisions regarding services and supports using the state's existing, person-centered service planning process. It is that process, and not the Court's order, that will determine individuals' placements.

As detailed in Plaintiffs' Motion (Doc. 42 at 25-26, 35-36), numerous courts have certified injunctive classes in *Olmstead* cases seeking just this sort of relief. *See, e.g.*, *Steward*, 315 F.R.D. at 492 (class treatment of an *Olmstead* action was appropriate because the plaintiffs did not "ask[ ] the [c]ourt to order individualized relief," but instead sought "injunctions targeted at the deficiencies that they allege exists within [d]efendants' Medicaid service system"); *Lane*, 283 F.R.D. at 602 (certifying an *Olmstead* class seeking supported employment services because, rather than requiring an analysis of individual class members' circumstances, the type of relief sought by plaintiffs "focuses on the defendants' conduct, not on the treatment needs of each class member"); *Van Meter v. Harvey*, 272 F.R.D. 274, 282 (D. Me. 2011) (certifying class of nursing home residents who sought an order requiring state to "develop a system of evaluation and implementation of corresponding services that complies with federal standards," because plaintiffs sought "relief from systemic barriers to proper treatment").

Defendants contend that the proposed class lacks "cohesiveness," because different class members have different preferences and service needs. As a result, they contend, ICFs may be

an appropriate placement for many in the class. Doc. 273 at 40-46. To the extent that this argument requires the Court to evaluate the strength of class members' *Olmstead* claims, it is inappropriate for the class certification stage. In any event, it is unavailing.

The Sixth Circuit has held that a 23(b)(2) class action is appropriate even if not all class members are aggrieved by the defendant's conduct. *Gooch v. Life Inv'rs. Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012). Instead, "[i]t is sufficient if class members complain of a pattern or practice this is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Id.* (citation omitted). The proposed class fully satisfies that standard.

As for differences in preferences, the modified class definition should resolve any issue. That definition is limited to those who have affirmatively expressed an interest in community services. *See supra* at 2-3. It does not include those individuals represented by the Guardian-Intervenors. The injunction we seek would not force any individual into a community setting to which that individual objected. All it would do is remove statewide barriers to appropriate integration for those who want it. Indeed, courts have found the cohesiveness element satisfied in *Olmstead* cases even when class definitions did *not* take especial care to include only those who had affirmatively expressed interest in community services. In *Kenneth R.*, the court granted certification despite the state's argument that different class members had different preferences regarding community versus institutional services. 293 F.R.D. at 269. The court observed that the argument "likely overstates the willingness of individuals with serious mental illness to accept needless institutionalization over services in the community." *Id.* Even so, the court explained that preference differences did not defeat a (b)(2) class action:

> the existence of preference differences among class members does not change the fact that the [s]tate's practices with regard to

> community services have been shown, by substantial proof, to affect all class members. And, because preferences can change, class members who today might prefer institutionalization, can reasonably be thought to also have an interest in the availability of community-based treatment options should their preferences change tomorrow.

Id. (internal citations and parentheticals omitted). Here, the class definition includes only those who have affirmatively expressed interest in community services, making the case for class certification even stronger.

Nothing in the Plaintiffs' proposed definition, or the requested injunctive relief, would undermine the cohesiveness of the class. Plaintiffs seek an injunction that would remove specific systemic barriers to integration. At that point, individual class members can make their own service and provider decisions using the State's existing process for person-centered treatment planning. To the extent that an individual disagreed with the placement determined through that process, he or she would be able to seek redress through Ohio's administrative fair hearing process, with judicial review in state court. *See* 42 U.S.C. § 1396a(a)(3); Ohio Admin. Code 5101:6-1 *et seq.*; Ohio Rev. Code §§ 5101.35, 119.01 *et seq.*

In analogous circumstances, courts have certified classes despite acknowledged differences in the severity of class members' disabilities, their need for institutionalization, and the amount of community services they would need. In *Rolland v. Cellucci*, for example, the court concluded that class certification remained appropriate notwithstanding such differences, because the plaintiffs' litigation focused on statewide practices. No. CIV A 98-30208-KPN, 1999 WL 34815562, at *4 (D. Mass. Feb. 2, 1999). On appeal of the resulting settlement agreement the First Circuit affirmed and held that differences in service needs, and the appropriateness of continued institutionalization, were more properly addressed in the State's

individual service planning process. *Voss v. Rolland*, 592 F.3d 242, 253 (1st Cir. 2011). *See also* Kenneth R., 293 F.R.D. at 270-71; *Lane*, 283 F.R.D. at 601-02.

This case is decisively unlike the three Sixth Circuit cohesiveness cases on which Defendants rely. Doc. 273 at 36-38. Two of these cases involved (b)(2) classes in which the plaintiffs also sought money damages. *See Reeb v. Ohio Dept. of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006); *Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002). The court explained that "the request for compensatory damages 'undermines the assumption of homogeneity' of the class because each individual member has a stake in the outcome of the litigation but would not have the opportunity to opt out in order to protect that interest." *Reeb*, 435 F.3d at 650 (citing *Coleman*, 296 F.3d at 449). The third case, *Romberio v. UNUMProvident*, 385 F.App'x 423, 429-433 (6th Cir. 2009), involved a breach of fiduciary duty claim that required individualized adjudication for each class member. Here, Plaintiffs seek no money damages, and request only a single class-wide injunction that is designed to benefit the class as a whole by removing systemic barriers to integration.

2. Nothing in the Class Certification Request Contravenes Rule 65(d).

Defendants suggest that the Plaintiffs' requested relief is simply an "obey the law" injunction that would violate Fed. R. Civ. P. 65, but that characterization is incorrect. Doc. 273 at 46. Plaintiffs are not seeking a "generic, 'do better' injunction," as Defendants contend. Doc. 273 at 46. Nor do Plaintiffs attempt to "aggregate several amorphous claims of systemic or widespread conduct into one 'super-claim.'" *Stukenberg*, 675 F.3d at 844 (citation omitted); Doc. 273 at 40, 47. Rather, the proposed single injunction is focused on redressing specific systemic failures which contribute to discriminatory segregation of the Plaintiff class. The relief sought would require the Defendants to increase the number of people who can receive integrated residential, employment and day services, end the fiscal policies that incentivize

institutionalization, and make particularized improvements to the informed choice process to include actionable information, transition planning and transitional assistance. This is far more than what the plaintiffs presented in *Shook v. Bd. of Cty. Commissioners of Cty. of El Paso* —the case on which Defendants principally rely. *See* 543 F.3d 597, 606 (10th Cir. 2008) ("plaintiffs have eschewed any effort to give content to what it would mean to provide adequate mental health staff, adequate screening, or an adequate system for delivering medication"). It is also more than is required, or can reasonably be expected as a practical matter, in the early stages of a challenge to the Defendants' system-wide practices. *Ashker v. Governor of State of California*, No. C 09-5796 CW, 2014 WL 2465191, at *7 (N.D. Cal. June 2, 2014) ("Indeed, in many class actions challenging the constitutionality of a system-wide policy or practice, it would be difficult for a plaintiff to determine precisely the appropriate scope of injunctive relief at the class certification stage. Defendant's Rule 65(d) argument therefore does not justify denying class certification here.").

In any event, nothing in Rule 23 *or* Rule 65 requires plaintiffs to satisfy the Rule 65(d) standard for *the entry of an injunction* in a motion for *class certification*. By its terms, Rule 23(b)(2) requires only that a plaintiff show that "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). This is a logical approach to class certification. A specific injunctive order would not be appropriate until this Court has determined the scope of liability on the merits. *See Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (U.S. 1971) ("As with any equity case, the nature of the violation determines the scope of the remedy.").

The Sixth Circuit has never held that a plaintiff must meet the specificity standard of Rule 65(d) to satisfy the requirements for class certification under Rule 23(b)(2). And courts elsewhere have specifically rejected that argument. *See, e.g.*, *Ashker*, 2014 WL 2465191 at *7 ("Defendants contend that certification is inappropriate because Plaintiffs' requested injunctive relief exceeds the boundaries of Rule 65(d). Defendants have not cited any authority to support this argument and numerous courts have expressly held that plaintiffs are not required to satisfy Rule 65(d) in order to obtain class certification.") (internal citation omitted).

Even under the Tenth Circuit's decision in *Shook*—the principal case on which Defendants rely—plaintiffs are not "required to come forward with an injunction that satisfies Rule 65(d) with exacting precision at the class certification stage." *Shook*, 543 F.3d at 605 n.4 (citation omitted). Rather, the "complaint need only be specific enough to satisfy our notice pleading standards." *Id.*; *but cf.* Doc. 273 at 46-47 (asserting that the Complaint in this case fails to describe the injunctive relief it seeks with necessary specificity). In a subsequent concurrence, one Tenth Circuit justice cautioned that the language from *Shook* (on which Defendants rely) should not be read too broadly, because "[i]t is up to the district court to construct an appropriate order after hearing the evidence and neither Rule 23(b)(2) or Rule 65(d) impose any 'specificity requirement' on the moving party other than as above noted." *Vallario v. Vandehey*, 554 F.3d 1259, 1270–71 (10th Cir. 2009) (Kelly, J., concurring in the result). Plaintiffs' requested relief is fully sufficient to satisfy all applicable requirements at the class certification stage.

D. The Proposed Class Satisfies the Numerosity Requirement.

Defendants suggest that "[n]umerosity cannot be accurately gauged." Doc. 273 at 61. But there is no requirement that the precise number of potential class members be determined, provided that there is evidence of at least the minimum number necessary to satisfy numerosity. Indeed, the Sixth Circuit has held that "[l]awsuits alleging class-wide discrimination are

particularly well suited for 23(b)(2) treatment" precisely because such cases usually involve members who are "incapable of specific enumeration." *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525–26 (6th Cir. 1976) (internal citation omitted) (quoting Fed. Rule Civ. P. 23(b)(2) advisory committee's note to 1966 amendments). For this reason, only a "reasonable estimate or some evidence of the number of class members" is required. *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 480 (S.D. Ohio 2004) (internal citation and quotation marks omitted); s*ee also In re Tyco Int'l, Ltd.*, No. MD-02-1335-PB, 2006 WL 2349338, at *1 (D.N.H. Aug. 15, 2006) (stating that a proposed class is "more likely to satisfy the numerosity requirement if it is difficult to identify potential class members") (citing *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 132 (1st Cir. 1985)).

Defendants also suggest that overbreadth within a class definition can "throw off the count" of alleged class members, and thus be fatal to numerosity. Doc. 273 at 62. However, in support of this principle they rely on a case in which evidence suggested the proposed class may have been as small as 30 individuals. *See C.F. v. Lashway*, No. C16-1205RSM, 2017 WL 2574010, at *5 (W.D. Wash. June 14, 2017). By contrast, the proposed class here contains hundreds, if not thousands, of individuals – a figure plainly adequate to satisfy the numerosity requirement of Rule 23(a)(1).

During the last biennium, Defendants repeatedly relied publicly on a waiting list report stating that 3,020 persons who had expressed a preference to receive integrated, community-based services remained in ICFs. *See* Doc. 42 at 13-14. Although Defendants claim to have offered close to 800 waiver slots to this group over the last two years, that figure is clearly insufficient to avoid the continued segregation of hundreds, if not thousands of individuals who have been waiting for an option to return to the community. *See supra* at 19. In addition,

Defendant DODD's own annual report states that almost 700 individuals in ICFs have said that they 'may be' interested in integrated services, and are requesting more information. *See supra* at 9-10. The vast majority of these 700 individuals remain unnecessarily institutionalized, with no process in place for further community exploration or individualized transition planning and not enough integrated residential, employment and day services to allow they to actually live and work in their chosen communities.

In addition, there are thousands of large ICF residents who have yet to receive options counseling. Over the last biennium, fifty-four percent of counseling participants (1,387 individuals) said "yes" or "maybe" when presented with general information on integrated alternatives. *See supra* Section II (A)(2). Therefore, it is reasonable to expect that at least half of the remaining ICF residents will express an interest, or potential interest, in integrated services. Indeed, Plaintiffs believe the fifty-four percent figure understates the number of individuals who would express interest in community services if the state provided adequate options counseling.

Finally, thousands of proposed class members are at serious risk of institutionalization, including the more than 350 individuals whose applications for admission to an ICF with 9 or more beds are accepted each year. *See supra* Section II (B). In addition to individuals on the doorstep of the ICF program, there are many more who have been referred to, or applied for admission to, an ICF. Finally, Defendants have repeatedly and publicly acknowledged that of the 22,000 people with current, unmet needs on waiting lists, 8,000 rely on aging caregivers, with 1,000 expected to lose those caregivers within the next 12 months. *Id.* Still another subset of individuals meet waiting list priority criteria based on the intensity of their needs, or their satisfaction of the State's emergency criteria. Without prompt access to integrated community-

based services, these individuals are at serious risk of institutionalization. *See supra* Section II (B).

In addition to the sheer number of proposed class members, a variety of factors make their joinder impractical. As discussed in Plaintiffs' Motion for Class Certification (Doc. 42 at 30-31), the presence of future class members, their geographic diversity, their limited ability to bring separate actions, and judicial economy are all factors given significant weight in determining the practicability of joinder. *See Card v. City of Cleveland*, 270 F.R.D. 280, 290 (N.D. Ohio 2010). Given the size, location and fluidity of the proposed class, as well as the personal circumstances and systemic claims of its members, joinder is impractical and the requirements of Rule 23(a)(1) are satisfied.

E. The Class Satisfies the Commonality Requirement.

As discussed in detail in Plaintiffs' Motion for Class Certification (Doc. 42 at 32-35), this case raises numerous questions of law and fact that are common to the class. Yet "even a single [common] question will do." *Wal-Mart*, 564 U.S. at 359 (internal quotation marks omitted).

Plaintiffs contend that Ohio's policies and practices create systemic, statewide barriers to serving qualified individuals with developmental disabilities who want to live and work in the most integrated setting. These policies and practices include: (1) providing fewer community-service slots than are necessary to meet the demonstrated need; (2) maintaining a fiscal structure that encourages unnecessary institutionalization; (3) providing diversionary services too late to prevent unnecessary institutionalization; and (4) failing to provide sufficient, individualized information about community-based alternatives to institutionalization.

The existence of these systemic, statewide barriers raises numerous questions of fact common to the class, the answer to which will resolve the claims of all class members. These state-wide deficiencies also raise common questions of law, including (1) whether these

administration, operational and funding decisions result in the unnecessary segregation of qualified individuals with disabilities, in violation of the ADA and Section 504 of the Rehabilitation Act; (2) whether requested modifications to Defendants' funding and administration of the developmental disability service system needed to accommodate the plaintiff class are reasonable; (3) whether providing community-based services in integrated settings to those who are qualified for and express and interest in these services would constitute a fundamental alternation of Defendants' service system; (4) whether Defendants have an effectively working *Olmstead* plan; and (5) whether the lack of individualized information regarding feasible alternatives to institutionalization violates freedom of choice provisions in the Social Security Act. These common contentions are both "capable of classwide resolution" and apt to "generate common answers" because they can be answered yes or no for the class as a whole. *Wal-Mart*, 564 U.S. at 350 (internal quotation marks omitted; emphasis in original).

In contesting commonality, Defendants first attempt to liken Plaintiffs' common questions to the abstract claims of system failure confronted by the court in *Lashway*, 2017 WL 2574010. There, plaintiffs sought to certify a class of individuals with developmental disabilities who qualified for community-based services, but were deprived of due process protections and timely access to services as a result of defendants' "systemic mismanagement" of the services. *Id*. However, the court found that plaintiffs had failed to identify which of defendants' actions, omissions, practices or policies they sought to challenge. *Id.* at *5 n.1. Nor did plaintiffs' demonstrate the presence of common questions that would "generate common answers apt to drive the resolution of the litigation." *Id.* at *6. Rather, several of these questions asked only if a violation of law had occurred. *Id.* ("Do Defendants' policies and practices result in unnecessary institutionalization or risk of institutionalization?").

Unlike *Lashway*, Plaintiffs here have identified specific policies and practices that aggrieve the class as a whole and contribute to their discriminatory segregation. *See supra* at 5, 8-9; *see supra* Sections III (C)(1) and (3). These contentions are central to the Plaintiffs' case. The requested relief focuses on specific actions and inactions that lead to unnecessary institutionalization across the class. These are not simply errors or omissions in unrelated individual cases. Rather they reflect specific State policies, practices, and funding decisions that have resulted in, or otherwise contributed to, the class-wide harm alleged in this case. *See supra* at 5, 8-9; *see supra* Sections III (C)(1) and (3).

Defendants also rely on *Sprague v. Gen. Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), to argue that Plaintiffs' common contentions depend on individual and not systemic proof. But this case is entirely unlike *Sprague*. There, plaintiffs' estoppel claim was not susceptible to a common answer because it "require[d] proof of what statements were made to a particular person, how the person interpreted those statements, and whether the person justifiably relied on the statements to his detriment." *Id.* at 398. So too with plaintiff's bilateral contact theory, which relied on individual "side deal[s]" with each retiree. *Id.*

Here, resolution of the Plaintiffs' common questions does not require individualized proof. *See supra* Section III (B)(2). Those questions will be tried and answered through proof of systemic policies and practices that affect all class members similarly, and that do not depend on what specific services individuals may need. In this respect, Plaintiffs' common contentions are more akin to those identified in *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015). In *Rikos*, the Sixth Circuit certified a class of nutritional supplement customers who stated a common question regarding the nature of the product: whether the probiotic was "snake oil" that did not "yield benefits to anyone," despite evidence that "some class members were not injured

because they kept buying" the product. *Id.* at 506-507. Here Plaintiffs are all consumers of the State service system, and they present common questions regarding whether identified structural deficiencies in that system present barriers to their receipt of integrated services, and result in their avoidable or prolonged placement in ICFs.

ADA *Olmstead* cases typically involve challenges to a state's administration, planning and operation of the disability system. As such, numerous courts have held class treatment of such cases to be particularly appropriate. *See, e.g.*, *Lane*, 283 F.R.D. at 602*; Kenneth R.*, 293 F.R.D. at 271-72; *Steward*, 315 F.R.D. 472 (W.D. Tex. 2016). Here, as in those cases, a single injunctive remedy is capable of resolving class claims in a single stroke. That this case involves residential, employment, and day services together, does not turn the Plaintiffs' request for class-wide relief into a "plethora of discrete claims." Doc. 273 at 57. Each specific barrier to integration is a systemic obstacle, created by the State. These obstacles are analytically distinct, but they work together to deny the same class of people the opportunity to live and spend their days in integrated settings.

Contrary to Defendants' argument (Doc. 273 at 57), this case does not raise the sort of "super-claim" in which the Fifth Circuit held that commonality would not be satisfied. *See Stukenberg*, 675 F.3d at 846. A "super-claim," as used by the Fifth Circuit, refers not the kind of multiple discrete and specific systemic deficiencies that Plaintiffs have identified here, but rather to an "attempt[]" by plaintiffs to "aggregate several amorphous claims of systemic or widespread conduct" that challenges virtually every aspect of a defendants' operation. *Id.* at 844. The Fifth Circuit recognized that a class could challenge multiple "structural deficienc[ies]" such as inadequate staffing. *Id.* at 847-48. Such challenges do not constitute a "super-claim," because a single injunction can resolve the legality of the defendants' behavior and redress the "class as a

whole." *Id.* at 846, 848.[15] It is precisely these sorts of "structural deficiencies" that Plaintiffs challenge here.

In a reprise of their Rule 23(b)(2) cohesiveness argument, Defendants also contend that a court cannot find commonality if the individualized needs or preferences of class members differ. Doc. 273 at 58. But the Sixth Circuit has held that a class action is appropriate even if not all class members have been injured in precisely the same way, or injured at all, so long as they were subject to the same systemic conduct. *See In re Whirlpool Corp.*, 722 F.3d at 855 (affirming finding of commonality in products liability case, and explaining that, "[t]he existence [in the class] of currently satisfied [product] owners . . . did not preclude the district court from certifying the [ ] class" where the question of the product's defectiveness was common to all class members.); s*ee also Rikos*, 799 F.3d at 505 ("The Supreme Court in [*Wal-Mart*] did not hold that named class plaintiffs must prove at the class-certification stage that all or most class members were in fact injured to meet this requirement."). Rather, "named plaintiffs must show that there is a common question that will yield a common answer for the class (to be resolved later at the merits stage), and that that common answer relates to the actual theory of liability in the case." *Rikos*, 799 F.3d at 505.

In accordance with this rule, courts have consistently certified classes that include persons institutionalized or at serious risk of being institutionalized in a segregated facility or program, without requiring that individual class member needs or preferences be incorporated into the class definition. Individual inquiries into class members' circumstances, preferences and abilities are not required to establish commonality, precisely because commonality is focused on

[15] Significantly, on remand the district court ultimately found class certification appropriate, based on modification to both the class and the common legal and factual claims presented. *See, e.g., M.D. v. Perry*, 294 F.R.D. at 67 (certifying a general class of "all children now, or in the future, in the Permanent Managing Conservatorship of the State of Texas" and three sub classes for licensed foster care, group home foster care, and Basic Care GRO).

the standardized conduct of the defendants, and the impact of that conduct on the class as a whole.

In *Kenneth R.*, the court certified a class of individuals with serious mental illness who claimed that the State's pattern and practice of under-funding community services and its over-reliance on institutional treatment had created a systemic deficiency in the array of available community services. 293 F.R.D. at 260. That deficiency, in turn, had (1) contributed to the unnecessary institutionalization of people with serious mental illnesses; and (2) contributed to the placement of people with serious mental illnesses at serious risk of unnecessary institutionalization. *Id*. Although defendants presented evidence that class members had different preferences regarding appropriate placement, the court concluded that "the existence of preference differences among class members does not change the fact that the State's practices with regard to community services have been shown, by substantial proof, to affect all class members." *Id.* at 269.

Similarly, in *Lane*, defendants contended that class certification was inappropriate unless each and every putative class member was unnecessarily segregated and would benefit from employment services. 283 F.R.D. 587 (D. Or. 2012). As in *Kenneth R.*, the *Lane* court rejected the argument that "differences with respect to the needs and preferences of persons with disabilities" preclude a class action. 283 F.R.D. at 598. The *Lane* court recognized that not all class members were identical in all respects —"[f]or example, not all of the named plaintiffs work in sheltered workshops; some have worked in (or declined the opportunity to work in) integrated settings; and appropriate vocational training will differ for each individual"—but it noted that "commonality only requires a single common question of law or fact." *Id.* at 597-98 (footnotes omitted; emphasis in original). "As in other cases certifying class actions under the

ADA and Rehabilitation Act," the court concluded, "commonality exists even where class members are not identically situated." *Id.* at 598. As discussed in Plaintiffs' motion, other ADA class actions have applied this same analysis in finding class certification appropriate. *See* Doc. 42 at 40 n.15.

Here, Plaintiffs have gone a step beyond these cases to further clarify that the proposed class focuses on individuals who qualify for home and community-based services, *and* who have expressed that they are or may be interested in those services. *See supra* at 2-3, 34, 39. The proposed class thus does not include any individual who objects to receiving services in the community or wishes to remain in an ICF. As a result, the primary conflict identified by Defendants and Guardian-Intervenors – differing preferences for or against ICF placement – is resolved. Plaintiffs do not seek the closure of all large ICFs. Nor does this litigation intend to impose any particular relief or obligation on individual ICF residents who oppose integrated services. Rather, Plaintiffs' present common questions which, if answered 'yes,' would remove systemic, state-imposed barriers to integration. Once those barriers are removed, class members' decisions regarding service needs, goals, and preferences can be made in the normal course, though the State's existing person-centered service-planning process.

Defendants nonetheless seek to shift this Court's analysis away from the State's systemic deficiencies to the Individual Plaintiffs themselves. For instance, Defendants suggest that not all of the Individual Plaintiffs prefer to receive services in the community and that this fact undermines commonality. Doc. 273 at 58. That is incorrect. The deposition transcripts make clear that the Individual Plaintiffs do have an interest in and prefer home and community-based services, but that the State's system did not always provide the information or services necessary for them to access that option. Cathy Mason Jordan Dep. at 104-107 (recounting her attempts to

find out about community options but instead being told 1) the ICF and board would have to release Ms. Mason from the ICF; 2) living at home with a family member would provide less funding for services than an ICF; and 3) focusing on other ICF options); Phyllis Burba Dep. at 14-16 (discussing how eventually she could no longer care for her daughter herself because of her husband's declining health and she "didn't know where to start" in getting help). In offering a contrary interpretation of these depositions, Defendants have unjustifiably added words to, and deleted words from, the testimony the Plaintiffs actually offered. Phyllis Burba Dep. at 50 (answering question about if she ever declined a waiver by stating: "Maybe just once. And I've declined it because she was okay where she was at at [*sic*] the time."); Cathy Mason Jordan Dep. at 89-91, 58-61 (declining to change to a day program for which she was told "there was not a lot of enrichment activities going on there"); *see also* Declaration of Phyllis Burba at ¶¶ 2-7, Exhibit 18 and Declaration of Cathy Mason Jordan at ¶ 2, Exhibit 19. Even if an Individual Plaintiff had refused a discrete service in the past —whatever the reason—that single action does not undermine commonality on behalf of the proposed class as a whole.

Defendants suggest that multiple courts have "recognized problems" with the certification of *Olmstead* class actions , as well as other cases seeking systems-level reforms. Doc. 273 at 69. Yet they cite no support for this sweeping generalization, other than decisions that can be readily distinguished from the present case, and are not binding on this Court. Defendants also fails to acknowledge that class certification was ultimately granted in several of these cases. *See, e.g., Benjamin v. Dep't of Pub. Welfare of Com. of Pennsylvania*, 2014 WL 4793736, at *3 (M.D. Pa. Sept. 25, 2014) (approving settlement class encompassing "[a]ll individuals who have resided or will reside in a state ICF/ID at any time from the Effective Date of the Settlement Agreement until the termination of the Settlement Agreement."); *see also M.D.*

v. Perry, 294 F.R.D. at 66–67 (granting certification of a class and several subclasses of children in foster care alleging systemic violations of their constitutional rights). Even in *Ligas v. Maram*, the court ultimately found class treatment appropriate in the context of a jointly proposed settlement agreement in which class members were qualified for Medicaid services in the community and had affirmatively expressed interest in those services.[16]

In cases similar to this one—cases brought under the ADA, the Rehabilitation Act, and the Social Security Act to challenge state practices that lead to unnecessary segregation in residential and day services—multiple federal courts within the last three years have found commonality and granted class certification motions. *See* Doc. 42 at 35-41; s*ee also Murphy v. Piper*, Civil No. 16-2623 (DWF/BRT), 2017 WL 4355970 (D. Minn. Sept. 29, 2017) (granting class certification where plaintiffs alleged deficiencies in the criteria and procedures for the provision of integrated housing options for Medicaid waiver recipients which led to violations of the ADA and the Social Security Act). The same conclusion is appropriate here.

F. Individual Plaintiffs' Claims are Typical of the Class Because All Claims Arise from Defendants Administration of the Developmental Disability System.

Defendants' central argument against typicality is that the proposed class "includes many who prefer ICFs." Doc. 273 at 60. While individuals opposed to integrated services were always excluded from the original class definition, Plaintiffs' modified definition makes clear that the class contains only those who are, or may be, interested in integrated services. Additionally, class members must be qualified for home and community-based services, under the State's own eligibility criteria. Ohio Admin. Code 5123:2-9-01(D). As a result, there is no

[16] Following denials of intervention at the district court and Seventh Circuit, and an extensive fairness hearing at which thousands of objections were received, a limited intervention was granted for purposes of: (1) participating in the court's consideration of the Joint Motion for Settlement Class Certification, Preliminary Approval of Consent Decree, and Approval of Notice Plan and (2) filing objections to and participating in any fairness hearing on the proposed consent decree. *Ligas v. Maram*, 2010 WL 1418583 at *6 (N.D. Ill. April 7, 2010).

risk that the class "encompasses many individuals who have no claim at all to the relief requested." *Romberio*, 385 F. App'x at 425, 431.

Defendants also would have this Court hold that typicality also requires the Individual Plaintiffs' claims to be identical to those of the unnamed plaintiffs. That is not the law, and not the way in which Rule 23(A)(3) has been interpreted in ADA cases. *See* Doc. 42-23; s*ee also Hendricks v. Total Quality Logistics, LLC*, 292 F.R.D. 529, 542 (S.D. Ohio 2013) ("Typical does not mean identical . . . .") (internal citations omitted). Rather, all that is required is a showing that "sufficient relationship" so that "the court may properly attribute a collective nature to the challenged conduct." *Newberg on Class Actions*, § 3:29 (5th ed. Nov. 2011).

Specifically, Defendants suggest typicality is precluded because of the Individual Plaintiffs: (1) have different living preferences; (2) have different medical and behavioral needs; (3) live at different ICFs or in different community settings: (4) receive different services administered by different providers; (5) have different employment abilities. Doc. 273 at 59. Yet this argument is both irrelevant and unavailing "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." *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010).

Nor is Defendants reliance on *Romberio* persuasive. 385 F. App'x at 432. Unlike the named plaintiffs in *Romberio*, who challenged a "group of loosely defined practices that were not applied uniformly to a discrete, easily defined class of individuals" (*id.* at 425, 430–31), the Individual Plaintiffs here have challenged "a single common course of conduct." *Cowit v. CitiMortgage, Inc.*, No. 1:12-CV-869, 2013 WL 940466, at *3 (S.D. Ohio Mar. 8, 2013) (distinguishing *Romberio*). They seek the removal of structural barriers within the Ohio service system which result in their unnecessary segregation, timely access to the integrated services

necessary to avoid their unnecessary institutionalization, and the information and transition planning required to make an informed choice between an ICF level of care and options for integrated services in the community.

Typicality exists where "by pursuing their own interests, the class representatives also advocate the interests of the class members." *In re Whirlpool Corp.*, 722 F.3d at 852-53. There is no evidence that the Individual Plaintiffs' various providers, or their respective medical, behavioral or service needs, result in interests that diverge from those of the proposed class. To the contrary, the Individual Plaintiffs, like all class members, are qualified for and have expressed interest in integrated community-based services. Doc. 1 at ¶¶ 24, 32, 39-40, 51, 65, 206, 213. Defendants' mischaracterize the applicable standard for demonstrating typicality by suggesting that the Individual Plaintiffs must show complete and total identity with class members – including every aspect of their clinical and service needs. Such a demand for homogeneity could not be satisfied in any class action, particularly one that raises ADA claims on behalf of persons with disabilities.

Other circuit courts in their cases have explained that typicality "may be satisfied even if some factual differences exist between the claims of the named representatives and the claims of the class at large" and that "a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 n.14 (11th Cir. 2000) (internal quotation marks omitted); s*ee also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001) ("If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences.") (citation omitted); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (finding that the "typicality

requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members").

Here the Individual Plaintiffs' claims "arise from the same event or practice or course of conduct" and are "based on the same legal theory." *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996)) (quotation marks and bracket omitted). As discussed in Sections II and III (E), *supra*, the proposed class is made up of individuals whose access to community-based services is affected by the same structural deficiencies identified by the Individual Plaintiffs. The same systemic barriers contribute to their collective experience of unnecessary segregation. As a result, Plaintiffs have both factual and legal claims that are typical of the proposed class. Where all proposed class members are subject to the same alleged actions and inactions of Defendants, difference in their needs or strengths do not defeat typicality. *See Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006) (where named plaintiff and class members' claims arise from the same practice, are impacted by the same systemic defect, and are based on the same legal theory, typicality is satisfied despite "different factual circumstances").

Moreover, in cases where plaintiffs allege that "defendants engaged in a common scheme" toward both themselves and unnamed members of the class "there is a strong assumption that the claims of the representative parties will be typical of the absent members." *Willis v. Big Lots, Inc.*, 242 F. Supp. 3d 634, 645 (S.D. Ohio 2017) (quoting *In re Catfish Antitrust Litig.*, 826 F.Supp. 1019, 1035 (N.D. Miss. 1993)); s*ee also Hernandez v. County of Monterey*, 305 F.R.D. 132 (N.D. Cal. 2015) ("The test of typicality is … 'whether the action is based on conduct which is not unique to the named plaintiffs and whether other class members have been injured by the same course of conduct . . . .").

In *Steward* the court considered very similar facts, found typicality satisfied, and certified a similar class of individuals with disabilities who were institutionalized or at risk of institutionalization. 315 F.R.D. 472 (W.D. Tex. 2016). Dismissing defendants' argument that "the outcome for each [p]laintiff depend[ed] upon that [p]laintiffs' individual medical condition" (*id.* at 489)(internal citations omitted), the court reasoned that those individual determinations were not necessary because "[p]laintiffs seek that the [c]ourt order particular changes to the system by which [d]efendants make those determinations and allocate community-based Medicaid services." *Id.* at 490. The court held:

> the atypical characteristics of individual [p]laintiffs are not relevant to the [c]ourt's assessment of typicality because they do not shed light on meaningful differences between [p]laintiffs and prospective class members. Plaintiffs have shown that they share the interests of the proposed class members in ensuring that [d]efendants use a system that complies with federal law to identify those who have IDD.

Id.

Individual Plaintiffs have demonstrated a "sufficient relationship" with unnamed members of the class, including those who may have more complex needs. For example, Plaintiffs Ball and Mason both require 24-hour care and are non-verbal. Declaration of Phyllis Burba at ¶ 9, Exhibit 18; Declaration of Cathy Mason Jordan at ¶¶ 3-4, Exhibit 19. Both Plaintiffs also require assistance with a range of daily activities from bathing, to dressing, to eating. Declaration of Phyllis Burba at ¶¶ 10-13, 16-17; Declaration of Cathy Mason Jordan at ¶ 6-8. Nat Stauffer, who is at serious risk of institutionalization, also has needs similar to Plaintiffs Mason and Ball. Declaration of Cheryl Stauffer at ¶ 3, Exhibit 23.

Regardless of their individual circumstances, or the extent of their personal care needs, the Individual Plaintiffs and the Plaintiff class are subject to the same discriminatory segregation in Defendants' administration, planning, funding, and operation of their system for people with

intellectual and developmental disabilities. They face the same limitations in accessing integrated residential, employment, and day services, and they share a common interest in expanding community-based alternatives and avoiding unnecessary institutionalization. The Individual Plaintiffs seek declaratory and injunctive relief that is reasonably related to the harm experienced by the Plaintiff class and which will inure to the benefit of all class members. Finally, the Individual Plaintiffs' legal claims arise from the same policies and practices of Defendants and are based on the same legal theory, satisfying Rule 23 standards of typicality.

G. There is No Antagonism Between the Individual Plaintiffs and the Class They Seek to Represent.

Defendants have failed to show that Individual Plaintiffs' interests are "antagonistic" to those of the unnamed class members. *See generally In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013). As a general matter, the standard overlaps significantly with the commonality and typicality requirements. The interests of the Individual Plaintiff must coincide with those of the unnamed class members (*see generally Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982)), but "[i]nternal, minor differences in the status and alleged injuries of class members" do not foreclose a finding of adequacy. *Prater v. Ohio Educ. Ass'n*, No. C2 04 1077, 2008 WL 2566364, at *8 (S.D. Ohio June 26, 2008). "Instead, class representatives are adequate when it appear[s] that [they] will vigorously prosecute the interests of the class . . . which usually will be the case if the representatives are part of the class and possess the same interest and suffer the same injury as the class members." *Id.* (internal quotations omitted).

Here, the Individual Plaintiffs are part of the class and have vigorously pursued the interests of the class since filing this class action complaint on March 31, 2016. As the revised class definition makes clear, only those individuals who express interest in more integrated community based-services are included in the class. As a result, there is no conflict between the

interests of the Individual Plaintiffs and those of the unnamed class members.[17] Moreover, unnamed class members have suffered a common injury and share a common interest with the Individual Plaintiffs – avoiding unnecessary institutionalization and having reasonable access to alternative, community-based services.

Defendants reliance on *Colley v. Procter & Gamble Co.*, No. 1:16-CV-918, 2016 WL 5791658 (S.D. Ohio Oct. 4, 2016) is unpersuasive both because it is a damage class subject to different requirements under Rule 23, and because not all the named plaintiffs were affected by the defendants' actions. *See* Doc. 273 at 61. The *Colley* class action was brought by individuals who allegedly suffered physical damage after applying Old Spice deodorant. The complaint covered thirteen separate products and included photographs showing the alleged injuries, which included "different types of reactions, with different symptoms, and different degrees of severity." *Colley*, 2016 WL 5791658, at *1. Further, the *Colley* plaintiffs sought monetary damages for personal injury, which the court noted "are by their nature fact intensive and state-law specific." *Id.* at *4. The court concluded that "[c]lass actions involving personal injury claims generally do not meet the adequacy requirement." *Id.* at *10. The Individual Plaintiffs have not brought a personal injury class action; nor do they seek damages as a remedy. They have not alleged different degrees of harm under a variety of state laws. Rather, Plaintiffs have complained of concerted actions by the State which result in the unnecessary institutionalization of persons with intellectual and developmental disabilities—persons who are both qualified for, and interested in, community-based services.

The Individual Plaintiffs seek to resolve specific structural deficiencies and systemic barriers which limit their access to integrated services and contribute to their segregation. As

[17] To the extent Guardian-Intervenors have asserted that Individual Plaintiffs' interests are antagonistic to the interests of their respective wards, this problem has been vitiated by the revised class definition.

discussed in pages 39 and 52, *supra*, the requested relief will not obligate class members to select more integrated service options. Rather, it will ensure reasonable access to integrated residential, employment and day service options, as well as an adequate and timely information regarding alternatives to an ICF. Together, this relief will allow class members to make an informed and meaningful choice about their service options.

IV. CONCLUSION AND REQUEST FOR RELIEF

For all the reasons set forth above, the Individual Plaintiffs respectfully request that the Court, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2), certify a class consisting of:

> All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are qualified for home and community-based services, but (a) are institutionalized in an Intermediate Care Facility with eight or more beds, and, after receiving options counseling, express that they are interested in, or may be interested in, integrated community-based services; or (b) are at serious risk of institutionalization in an Intermediate Care Facility with eight or more beds and have, by placing themselves on a waiting list for community-based services, expressed an interest in receiving integrated services while continuing to live in the community.

In addition, the Individual Plaintiffs respectfully request that this Court appoint Disability Rights Ohio, Sidley Austin, LLP, Attorney Samuel Bagenstos, and the Center for Public Representation as co-class counsel in this action pursuant to Rule 23(g).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs' Reply and Supplemental Evidence in Support of Motion for Class Certification was filed electronically on October 20, 2017. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

s/Kerstin Sjoberg-Witt
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