Hon. Orlando Garcia

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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| ERIC STEWARD, *et al.*,<br>Plaintiffs, v.<br>RICK PERRY, *et al.*,<br>Defendants. | Case No. 5:10-cv-1025-OG |

**STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION**

## I. INTRODUCTION

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517,[1] in support of Plaintiffs' pending Amended Motion for Class Certification. Pls.' Am. Mot., July 9, 2012, ECF No. 94. The United States urges the Court to grant Plaintiffs' Motion because: 1) the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), does not preclude class certification of *Olmstead* cases; and 2) class actions are an efficient, effective, and appropriate means for resolving civil rights matters, especially those that seek to vindicate the rights of persons with disabilities pursuant to the integration mandate of the Americans with Disabilities Act ("ADA"), as interpreted by the Supreme Court's opinion in *Olmstead v. L.C.*, 527 U.S. 581 (1999). [2]

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

[2] The Department of Justice has authority to enforce Title II of the ADA, and to issue regulations implementing the statute, 42 U.S.C. §§ 12133-34, and thus has a particular interest in

This suit alleges that the Defendants unnecessarily institutionalize individuals with developmental disabilities[3] in nursing facilities, in violation of Title II of the ADA. The proposed Plaintiff class consists of approximately 4,500 adults with developmental disabilities who are currently confined to nursing facilities and thousands more who are at risk of nursing facility placement. Pls.' Am. Compl. ("Compl.") ¶ 26, Oct. 4, 2011, ECF No. 63. With appropriate supports, the Plaintiffs can live in the community instead of in institutions. *Id.* at ¶¶ 1, 54, 84. However, the State effectively denies them access to its existing community-based services and supports through policies and practices that place insurmountable barriers to people with developmental disabilities transitioning from nursing facilities, including decade-long waitlists, and by failing to inform them of community-based options. *Id.* at ¶¶ 56, 57, 59, 100. The State also effectively restricts access to community-based services to individuals with developmental disabilities who live in state-supported living centers and private intermediate care facilities for individuals with intellectual disabilities ("ICF-IIDs"). *Id.* at ¶ 56. Nursing facilities are institutions: they house large numbers of unrelated persons and most individuals within them rarely have the opportunity to leave the facility. Nursing facilities are hospital-like settings, affording residents little to no privacy. *Id.* at ¶¶ 104-11.

Plaintiffs seek certification of a class on behalf of "all Medicaid-eligible persons over twenty-one years of age with mental retardation and/or a related condition (collectively referred to as persons with developmental disabilities) in Texas who currently or will in the future reside

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ensuring uniform enforcement of the ADA. Accordingly, this memorandum addresses exclusively class certification for claims brought under the ADA.

[3] Throughout this brief, the United States will use the term "developmental disabilities" to refer to individuals with intellectual disabilities or related conditions consistent with Plaintiffs' use of the term in their class definition. Pls.' Am. Compl. ¶ 1, Oct. 4, 2011, ECF No. 25.

in nursing facilities, or who are being, will be, or should be screened for admission to nursing facilities pursuant to 42 U.S.C. §§ 1396r(e)(7) and 42 C.F.R. § 483.112 *et. seq*." *Id*. at ¶ 26. Plaintiffs identified the State's policy and practice of failing to provide community-based services to individuals with developmental disabilities in nursing facilities, including effectively restricting access to community-based services to other groups of individuals with developmental disabilities and failing to provide the putative class members with information regarding community-based options, as the common cause of Plaintiffs' injuries; they further alleged that Defendants have acted on grounds generally applicable to a class of individuals such that injunctive relief is appropriate. *Id.* at ¶¶ 27, 30, 56, 57, 59, 100. Defendants argue, *inter alia*, that class certification is inappropriate because the elements of an *Olmstead* claim necessarily are individualized in nature, and thus, the proposed class lacks the commonality required by Federal Rule of Civil Procedure 23(a)(2), and that injunctive relief is not appropriate to the class as a whole as required by Federal Rule of Civil Procedure 23(b)(2). Defs.' Resp. Opp'n ("Defs.' Resp.") at 17-20, 33-38 Aug. 31, 2012, ECF No. 125. For the reasons stated below, Defendants' arguments fall short.

## II. ARGUMENT

### A. The Plaintiffs in *Wal-Mart v. Dukes* Failed to Identify a Common Contention Capable of Class-wide Resolution

In *Wal-Mart*, the Court refined the commonality analysis under Rule 23(a)(2),[4] but it also reaffirmed that class certification is appropriate in civil rights cases seeking injunctive relief, like

[4] Rule 23(a) requires that all classes meet four criteria: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(1)-(4).

this one, where plaintiffs identify a common contention of law or fact that is capable of class-wide resolution. *See Wal-Mart*, 131 S. Ct. at 2557-58. *Wal-Mart*, an employment discrimination case brought under Title VII of the 1964 Civil Rights Act, involved "one of the most expansive class actions ever." *Id*. at 2547. The plaintiffs in *Wal-Mart* sought to certify a nationwide class of one and a half million former and current Wal-Mart employees who, plaintiffs contended, received unequal pay and promotions based on sex. The challenged employment decisions were "committed to local managers' broad discretion, which is exercised in a largely subjective manner." *Id.* (internal quotations omitted). The *Wal-Mart* plaintiffs were unable to identify any specific policy or practice that caused these allegedly discriminatory decisions and could point only to an alleged "corporate culture" that condoned discrimination at the store level. *See id.* at 2553.

The Court found the plaintiffs' claim lacked commonality given the absence of an identified corporate-wide discriminatory policy or practice sufficient to satisfy Title VII's intent requirement and the fact that the millions of pay and promotion decisions being challenged as discriminatory were made by thousands of store managers on an individual basis. *See id.* at 2552 ("Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."). To establish commonality, the Court held, the plaintiffs' claims must:

> depend on a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

*Id*. at 2551. One example the Court cited as a "common contention" in a compensation discrimination case was if a company used "'a biased testing procedure'" to determine pay and promotions. *Id.* at 2553 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n. 15 (1982).). However, when the allegation is that the numerous subjective decisions of individual managers, when viewed collectively, constitutes class-wide discrimination, establishing commonality requires "'[s]ignificant proof that an employer operated under a general policy of discrimination . . . .'" *Id.* (quoting *Falcon*, 457 U.S. at 159 n. 15).

### B. *Olmstead* Cases Often Present Common Contentions Capable of Class-wide Resolution

Cases brought to enforce the ADA and *Olmstead* present an entirely different set of facts set in an altogether different legal framework than *Wal-Mart*. Title II of the ADA mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . . . " 28 C.F.R. § 35.130(b)(7). Public entities must further "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[5] 28 C.F.R. § 35.130(d). The Supreme Court reviewed these authorities and held that "unjustified institutional isolation of persons with disabilities is a form of discrimination . . . . " *Olmstead*,

[5] The preamble discussion of the "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . . " 28 C.F.R. Pt. 35, App. B at 673 (2011).

527 U.S. at 600. Here, Plaintiffs' *Olmstead* claim challenges Defendants' policy and practice of denying community-based services to individuals with developmental disabilities in nursing facilities, including effectively restricting access to community-based services to other groups of individuals with developmental disabilities and failing to provide the putative class members with information regarding community-based options. Compl. ¶¶ 27a, 56, 57, 100. Accordingly, this "common contention" in Plaintiffs' ADA claim, *see Wal-Mart*, 131 S. Ct. at 2551, is dispositive of whether Defendants are providing community-based services in "the most integrated setting appropriate " to class members' needs, as required by the ADA, *see* 28 C.F.R. § 35.130(d), and is therefore "central to the validity" of each class member's ADA claim. *See Wal-Mart*, 131 S. Ct. at 2551.

Additionally, in delineating a state's affirmative defenses in an ADA integration case, the *Olmstead* Court eschewed the very discretionary and individualized employment decision-making process that was central to the *Wal-Mart* Court's rejection of commonality. The *Olmstead* Court held that "the fundamental-alteration component of the reasonable-modifications regulation would allow the state to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." 527 U.S. at 604. Were the State to meet this burden, it could then "demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated . . . . " *Id.* at 605-06. Accordingly, analysis of this fundamental alteration defense, if raised by the State here, would necessarily require looking beyond the individually named Plaintiffs to the State's service system for

individuals with developmental disabilities. Whether the State can meet the burden of this defense is also a "common contention" that would "produce a common answer" as to whether Defendants have met their legal obligations to the class under the ADA. *See Wal-Mart,* 131 S. Ct. at 2551-52. Thus, *Olmstead* cases present a "prime example," *see id.* at 2557, of civil rights cases that are appropriate for class-wide resolution.

### C. The Determination of Whether an Individual is Appropriate for and Does not Oppose Community Placement Does Not Defeat Commonality

Defendants incorrectly argue that *Olmstead* classes may never be certified because the questions of whether individuals are appropriate for community placement and do not oppose community placement will always defeat commonality. Defs.' Resp. 18-19. Defendants fail to recognize that to establish commonality, Plaintiffs need only identify *one* common question of law or fact. *See Wal-Mart*, 131 S. Ct. 2556. Dissimilarities among the class members do not defeat commonality so long as there is at least one common question. *Id*. Further, Defendants' extreme interpretation that no class can be certified under *Olmstead* cannot follow from *Wal-Mart* because the Court recognized that, had plaintiffs identified a company-wide policy that they claimed resulted in lower pay or benefits for women, such as a discriminatory testing procedure, such claims would have been appropriate for class-wide resolution. *See id*. at 2553. This would have been the case despite the fact that each class member's circumstances and relief still would have undoubtedly differed (*e.g.*, job titles, lost compensation, lost promotions).

Defendants' reliance on *Jamie S. v. Milwaukee Pub. Schs*, 668 F.3d 481 (7th Cir. 2012) and *M.D. v. Perry*, 675 F.3d 832 (5th Cir. 2012), Defs.' Resp. 14-20, for their argument that a proposed *Olmstead* class must fail commonality is misplaced. Unlike here, the plaintiffs in *Jamie S.* and *M.D.* failed to identify a policy or practice that caused or contributed to the

discrimination faced by the class. In *Jamie S.*, the plaintiffs broadly challenged the "child find" process by which a public school system identified students with disabilities for evaluation and services under Individuals with Disabilities Education Act, but failed to identify any illegal policy the school district engaged in as part of this process. *Id*. at 498. Here, Plaintiffs have clearly identified a policy and practice that is the cause of the discrimination faced by the class: the Defendants' failure to offer community-based services to members of the putative class, as required by the ADA, including effectively restricting access to community-based services to other groups of individuals with developmental disabilities and failing to provide putative class members with information regarding community-based options. Compl. ¶¶ 27a, 56, 57, 100.

In *M.D. v. Perry*, the Fifth Circuit Court of Appeals was not able to determine whether the plaintiffs identified a common contention because the district court's analysis was so sparse that it prevented effective appellate review. 675 F.3d at 842. *M.D.* involved broad and multiple constitutional challenges to numerous differing aspects of the State foster care system. *Id*. at 834. The district court granted class certification before the Supreme Court's decision in *Wal-mart*. *Id.* at 837. The Fifth Circuit found that the district court, which "conducted no analysis of the elements and defenses for establishing any of the proposed class claims," *id*. at 842, failed to explain the link between the proffered common factual questions and the plaintiffs' claims, in other words "how the resolution of the alleged common question of fact would decide an issue that is central to the substantive due process claims, family association claims, or procedural due process claims of every class member at the same time." *Id*. at 841. Importantly, the Fifth Circuit did not hold that the individualized needs of class members would necessarily preclude class certification, and noted that "[s]ome of the Plaintiffs' legal claims may depend on common contentions of law capable of classwide resolution, and some may not." *Id*. at 842; *see also id*. at

846 ("[S]ome of the proposed class' sub-claims could potentially be certified under Rule 23(b)(2) …"). The Fifth Circuit therefore remanded the case for further analysis to identify which common contentions would resolve some or all of the plaintiffs' claims. *See id*. at 848-49.

The concerns raised by the court in *M.D.* are not present in the instant case. Plaintiffs have identified a policy and practice – the failure to offer and provide community-based services to the putative class members, including effectively restricting access to community-based services to other groups of individuals with developmental disabilities and failing to provide putative class members with information regarding community-based options. Compl. ¶¶ 27a, 56, 57, 100. The answer to this question is at the heart of the Plaintiffs' ADA claim and "'will resolve an issue that is central to the validity of each of the [class member's] claims in one stroke.'" *M.D.*, 675 F.3d at 840, *quoting Wal-Mart*, 131 S. Ct. at 2551.

**D. Post *Wal-Mart*, Courts Have Found Commonality in *Olmstead* and Other Civil Rights Cases Notwithstanding Differences in the Ultimate Relief to Each Class Member**

Following *Wal-Mart*, numerous courts have certified classes in civil-rights cases challenging discriminatory policies and practices against persons with disabilities or other similar classes, including cases in which individuals have their own unique needs for services and preferences. In *Pashby v. Cansler*, 279 F.R.D. 347 (E.D.N.C. 2011), the court certified a class of plaintiffs with disabilities who challenged the State's termination of in-home personal care services via implementation of more restrictive eligibility rules. *Id*. at 351, 354. The court concluded that plaintiffs had shown a common contention that "will resolve the claims of all potential plaintiffs, irrespective of their particular factual circumstances." *Id*. at 353.

In *Lane v. Kitzhaber*, ____F.R.D. ___, No. 3:12cv00138, 2012 WL 3322680 (D. Or. Aug. 6, 2012), plaintiffs sought class certification to challenge the defendants' failure to "plan,

administer, operate and fund a system that provides employment services that allow persons with disabilities to work in the most integrated setting". *Id*. at *10. The court rejected nearly identical arguments to those raised by Defendants and found commonality even though the class members were not "identically situated." *Id*. Further, the court determined that "[i]t is not necessary, as defendants contend, for plaintiffs to prove at this stage that they and all punitive members are unnecessarily segregated and would benefit from employment services. That is, in effect, the answer to the common question and not the common question of whether they are being denied supported employment services for which they are qualified." *Id*.

In *DL v. Dist. of Columbia*, 277 F.R.D. 38 (D.D.C. 2011), a class of students with disabilities challenged the District of Columbia's denial to them of a free appropriate public education as required by the Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(1)(A). *Id*. at 41. Again, even though each student had a differing level of need, the court found that the plaintiffs had satisfied commonality because "[a]ll of the class members have suffered the same injury: denial of their statutory right to a free appropriate public education." *Id*. at 45. The court further rejected the defendants' claim that each class member raised differing allegations as to how their rights had been violated, finding that "these differing allegations only represent the differing ways in which defendants have caused class members' common injury." *Id*. The court also found that unlike in *Wal-Mart*, where the discriminatory intent behind millions of employment decisions was not conducive to class-wide proof, the common question of whether the class members received a free and appropriate public education, including statistical evidence that the District of Columbia is "underserving its population of disabled children," could answer the operative common question. *Id*. at 45.

Similarly, in *Oster v. Lightbourne*, No. 09-4668, 2012 WL 685808 (N.D. Cal. Mar. 2, 2012), the Court found commonality among the plaintiff class whose state in-home support services would be "limited, cut, or terminated" by 20% under a new state law, even though some individuals in the class may not actually be impacted by the reduction in services because of their ability to apply for supplemental hours. *Id*. at *1, *4-6.[6]

Even in post-*Wal-Mart* employment discrimination cases, courts have certified classes in which plaintiffs – like the Plaintiffs here – have identified a discriminatory or illegal policy or practice that affects all class members. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith*, 672 F.3d 482 (7th Cir. 2012), the Seventh Circuit found that class certification was appropriate to determine defendants' liability for two specific employment practices alleged to discriminate against African Americans. *Id*. at 488-90. The Seventh Circuit recognized that *Wal-Mart* precludes class certification in an employment discrimination case only when there is "no company-wide policy to challenge" and therefore "no common issue to justify class treatment." *Id*. at 488.

[6] Courts also routinely certified *Olmstead* classes prior to *Wal-Mart*. *See, e.g., Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 489 (3d Cir. 2004) ("Appellants represent a class of mental health patients institutionalized … [and] who are qualified for and wish to be placed in a community - care setting."); *Townsend v. Quasim*, 328 F.3d 511, 515 (9th Cir. 2003) ("Mr. Townsend filed suit on behalf of himself and a class of similarly situated Medicaid recipients certified by the district court, seeking to enjoin the requirement that he move to a nursing home as a condition of receiving needed, available Medicaid services."); *Pitts v. Greenstein*, No. 10-635-JJB-SR, 2011 WL 2193398, at *2-4, *7 (M.D. La. June 6, 2011) (certifying class of persons with disabilities challenging reductions to community services despite differences in each class member's service needs and condition.); *Messier v. Southbury Training Sch.*, 562 F. Supp. 2d 294, 298 (D. Conn. 2008) (noting a certified "plaintiff class to include all current STS residents, persons who might be placed at STS in the future, and persons who were transferred from STS but remain under the control of the STS Director."); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 WL 4571904, at *3 (N.D. Fla. Oct. 14, 2008) (certifying class of nursing home residents who "could and would reside in the community with appropriate community-based services.").

Similarly, in *Espinoza v. 953 Assocs. LLC*, 280 F.R.D. 113 (S.D.N.Y. 2011), the court held that *Wal-Mart* did not prevent class certification in a Fair Labor Standards Act case in which plaintiffs had identified, and were challenging, specific illegal employment practices:

> The facts and circumstances of *Wal-Mart* are very different from the instant action. Here, Plaintiffs allege that Defendants failed to pay minimum wages and overtime compensation as a result of certain policies and practices. Although plaintiffs' claims may raise individualized questions regarding the number of hours worked and how much each employee was entitled to be paid, those differences go to the damages that each employee is owed, not to the common question of Defendants' liability. Plaintiffs have alleged a common injury that is capable of class-wide resolution without inquiry into multiple employment decisions applicable to individual class members. Accordingly, *Wal-Mart* is distinguishable and does not preclude class certification.

*Id*. at 130. *See also Myles v. Prosperity Mortg. Co.*, Civil No. CCB-11-1234, 2012 WL 1963390, at *6 (D. Md. May 31, 2012) ("The crux of the Court's problem in *Dukes* was that plaintiffs did not allege 'any express corporate policy' of discrimination. … Here, on the other hand, … no local management discretion is at issue and no individualized inquiry is necessary to determine why individual loan officers were disfavored.").

Class actions are an efficient tool for resolution of civil rights claims that warrant systemic reform. *See Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974) (finding class actions promote "the efficiency and economy of litigation."). Indeed, the *Olmstead* case itself illustrates the problem of bringing an action on behalf of a few individuals, rather than a class. *Olmstead* was filed on behalf of two individuals, L.C. and E.W., who were unnecessarily institutionalized in Georgia's state psychiatric hospitals. *Olmstead*, 527 U.S. at 593. Plaintiffs prevailed in that case, and L.C. and E.W. obtained relief. *See id.* at 607. However, the hundreds of other individuals who were also unnecessarily institutionalized in Georgia's institutions obtained no relief as a result of that decision. In fact, it was not until more than a decade later

when the United States filed an *Olmstead* case on behalf of all of the individuals in Georgia's mental health system who were unnecessarily institutionalized or at risk of unnecessary institutionalization, that Georgia changed its policy and practices that had favored institutions over services in the community. *See United States v. Georgia*, No. 1:10- 249 (N.D. Ga. Oct. 29, 2010) (order granting settlement affording systemic relief to remedy ADA violations); *cf. M.R. v. Dreyfus*, 663 F.3d 1100, 1120-21 (9th Cir. 2011) (although the challenged reduction in community services under *Olmstead* would "obviously" justify state-wide injunctive relief, because the district court had not yet certified a class "'a court cannot grant relief on a class-wide basis.'") (quoting *Zepeda v. Immigration and Naturalization Serv*., 753 F.2d 719, 728 n. 1 (9th Cir. 1984)).

**E. Class-wide Resolution of the Plaintiffs' Injuries is Possible and Appropriate Under Rule 23(b)(2)**

Plaintiffs seek class certification under Rule 23(b)(2) and thus must 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. Proc. 23(b)(2). Here, the Defendants have acted or refused to act on grounds generally applicable to the class, as discussed above, and final injunctive relief is appropriate to the class as a whole.

A unanimous Supreme Court took great pains in the *Wal-Mart* opinion to recognize the important role that class actions play in remedying civil rights violations outside the facts before the Court in *Wal-Mart*. The Court concluded: "As we observed in *Amchem*, '[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what [Rule 23](b)(2) is meant to capture." *Wal-Mart*, 131 S. Ct. at 2557-58 (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). The Court did not, therefore, disturb well-established

class certification parameters in more traditional civil rights cases, such as the case at bar. Indeed, the advisory notes to Rule 23 explain that civil rights cases are illustrative of the type of cases appropriately brought under section (b)(2) of the rule, the section at issue in this case. 1966 advisory committee notes to Fed. R. Civ. P. 23 ("Illustrative [of cases brought under 23(b)(2)] 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."); *See also M.D.*, 675 F.3d at 847-48 (12(b)(2) class actions are appropriate in a civil rights case where the "State engages in a pattern or practice of agency action or inaction – including a failure to correct a structural defect within the agency, such as insufficient staffing – 'with respect to the class,' so long as declaratory or injunctive relief 'settling the legality of the [State's] behavior with respect to the class as a whole is appropriate.") (citing 1996 advisory committee notes to Fed. R. Civ. P. 23(b)(2).)

With respect to their ADA claim, the Plaintiffs seek injunctive relief requiring that the Defendants provide appropriate integrated community services and supports for class members, *see* 28 C.F.R. § 35.130(d), and to reasonably modify their policies, practices, and procedures, *see* 28 C.F.R. § 35.130(b)(7), so that class members may access services in the most integrated setting. Compl. ¶ VII(2). An order requiring Defendants to take this action would resolve the Plaintiffs' complaint, is "appropriate respecting the class as a whole," *see* Fed. R. Civ. Proc. 23(b)(2), and constitutes "a single injunction or declaratory judgment [that] would provide relief to each member of the class." *See Wal-Mart*, 131 S. Ct. at 2557. Further, unlike the *Wal-Mart* plaintiffs who sought individualized back-pay determinations, *id.*, or the plaintiffs in *M.D.*, which requested a "special expert panel" to essentially adjudicate their individual claims and implement specific remedial steps, 675 F.3d at 846-47, the Plaintiffs here allege an injury that is

uniform across the class: that the State has denied them the opportunity to receive services in the most integrated setting appropriate to their needs. That each class member will need particular community services for their individual needs is to no avail. The Fifth Circuit Court of Appeals has already rejected the State's argument that all putative class members must be subjected "to the alleged harms in the same way," *see* Defs.' Resp. 34. *See M.D.*, 675 F.3d at 847-48 (a state's policy need not uniformly affect and injure each class member in the same manner in order to certify a 23(b)(2) class.).

Contrary to Defendants' contentions, the Plaintiffs do not seek, *see* Compl. ¶ VII(2), nor would their requested injunction require, this Court "to determine which services and supports were appropriate for each individual class member based on 'their individual needs.'" Defs.' Resp. ¶ 35. Despite the individualized relief in class-wide *Olmstead* case, courts have repeatedly recognized that they do not have to perform or review individual eligibility determinations to establish liability or grant relief to the class; instead, courts have *enjoined states* to conduct such determinations and provide services consistent with the results of these determinations. *See Lane v. Kitzhaber*, 2012 WL 3322680, at *14 (certifying a 23(b)(2) class where "plaintiffs seek to enforce the Employment First Policy by ordering defendants to take specific classwide operational actions to comply with the integration mandate."); *State Office of Prot. & Advocacy v. Connecticut*, 706 F. Supp. 2d 266, 286 (D. Conn. 2010) (State defendants would individually evaluate the plaintiffs, not the court); *Colbert v. Blagojevich*, No. 07-C-4737, 2008 WL 4442597, at *3 (N.D. Ill. Sept. 29, 2008) ("Should plaintiffs ultimately succeed, *defendants* – not the court – will need to determine, based on reasonable assessments by their own state treatment professionals, what type of community-based long-term services it would be administratively feasible for the state to supply each class member."); *Ligas v. Maram*, No. 05-C-4331, 2006 WL

644474, at *14 (N.D. Ill. Mar. 7, 2006) ("Because the defendants would be evaluating based on their own criteria whether a potential class member would meet the state's requirements and thus the class definition, [the] court could order the defendants to engage in individual determinations should any relief be granted and not do so itself."); *Risinger v. Concannon*, 201 F.R.D. 16, 20 (D. Me. 2001) ("[T]his lawsuit will not require the Court to make individualized determinations of eligibility or to evaluate the clinical appropriateness of individual class members' treatment plans.").[7]

It is not only possible to issue an injunction that resolves the Plaintiffs' claim by permitting them access to services that will enable them to live in integrated settings and avoid unnecessary institutionalization, it is the efficient approach to litigating this claim.

## III. CONCLUSION

For the reasons stated above, the United States submits that *Wal-Mart v. Dukes* should not preclude certification of the proposed class and that *Olmstead* cases lend themselves to class-wide resolution because they are often premised upon a discriminatory policy or practice that provides the common contention necessary to satisfy commonality.

Dated: September 10, 2012

[7] Likewise, in *Fields v. Maram*, No. 04-C-174, 2004 WL 1879997 (N.D. Ill. Aug. 17, 2004), plaintiffs challenged, under Medicaid, the State's denial of medically-necessary motorized wheelchairs to nursing facility residents, the court found that "[G]iven that the Plaintiffs are not challenging how Defendant makes medical necessity determinations but are only seeking to ensure that such determinations are made for nursing home residents, the Court will not need to make plaintiff-by-plaintiff medical necessity inquiries and decisions in this case." *Id*. at *2, *7 n.8.

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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