**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEBRASKA**

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| **BILL M., et al.,** | ) | **Case No. 4:03CV3189** |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **vs.** | ) | **PLAINTIFFS' MEMORANDUM BRIEF** |
| | ) | **IN SUPPORT OF MOTION FOR** |
| | ) | **CLASS CERTIFICATION AND** |
| | ) | **APPOINTMENT OF CLASS COUNSEL** |
| **NEBRASKA DEPARTMENT OF** | ) | |
| **HEALTH AND HUMAN SERVICES** | ) | |
| **FINANCE AND SUPPORT, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

## INTRODUCTION

The representative Plaintiffs, BILL M., by and through his father and natural guardian, William M.; JOHN DOE, by and through his mother and natural guardian, Jane Doe; HEATHER V., by and through her mother and guardian, Marcia V.; JANE S., by and through her mother and natural guardian, Patricia S.; KEVIN V., by and through his mother and legal guardian, Kathy V.; JENNIFER T., by and through her parents and legal guardians, Sharon and Greg T.; MARCUS J., by and through his parents and legal guardians, Julie and Miles J.; on behalf of themselves and all other persons similarly situated; and Nebraska Advocacy Services, Inc., (hereinafter "NAS"), the designated protection and advocacy system for individuals with developmental disabilities and mental illness, have moved this Court for an order certifying this as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The proposed Plaintiff class consists of "all present and future individuals with developmental disabilities in Nebraska who are eligible for Medical Assistance Home and Community-Based Services, but either are not receiving funding for

such services, or are not receiving sufficient funding for such services to reasonably achieve the purpose of the service, assure the class member's health and safety, or ensure progress toward independence, interdependence, productivity, and community integration." (Exhibit 1, Amended Complaint, Filing 23, ¶ 16). Due to the failure of Nebraska Department of Health and Human Services (hereinafter "NDHHS") and Nebraska Department of Health and Human Services Finance and Support (hereinafter "Finance & Support"), all class members have been, or are at risk of being, unnecessarily placed at Intermediate Care Facilities for the Mentally Retarded (hereinafter "ICF/MR"), nursing homes, or other institutional settings, contrary to applicable law.

In addition, this action seeks declaratory and injunctive relief, challenging the Defendants' and their agents' (hereinafter "Defendants") failure to provide Plaintiffs with funds for the home and community-based developmental disability services for which they are eligible, in violation of the Medical Assistance Act (hereinafter "Medicaid") 42 U.S.C. §1396 et seq.; the Americans with Disabilities Act of 1990, as amended, and its implementing regulations, (hereinafter "ADA"), 42 U.S.C. §12101 et seq.; Section 504 of the Rehabilitation Act of 1973, (hereinafter "Section 504"), 29 U.S.C. §794, and 42 U.S.C. §1983. The Plaintiffs individually named are each eligible for, desire, have applied for, or have attempted to apply for and have been denied home and community-based Medicaid-funded services, specifically services available pursuant to the Home and Community Based Waiver Program (hereinafter "the Waiver Program"), 42 U.S.C. §1396n, and Neb. Rev. Stat. 68-1018 et seq., and its implementing regulations. Plaintiffs have been unable to gain access to these critical services consistent with their needs because Defendants have unlawfully restricted funding to the Waiver Program, resulting in (1) unlawfully long waits to receive any community-based services, and (2) the failure to provide services to Plaintiffs which are adequate to meet their needs.

Based on Defendants' actions, the individually named Plaintiffs, and all those who are similarly situated, are at imminent risk of unnecessary institutionalization in ICF/MR's, nursing homes, or other institutional settings, and their health and safety is otherwise at risk.

## FACTS

On May 19, 2003, the Plaintiffs filed a Complaint in the United States District Court for the District of Nebraska. (Filing 1). On August 28, 2003, this Court approved Plaintiffs' Motion for Leave to Amend their Complaint. (Exhibit 1, Amended Complaint, Filing 23). The representative Plaintiffs in this action, Bill M., John Doe, Heather V., Jane S., Kevin V., Jennifer T., and Marcus J., as well as all class members, are individuals who are diagnosed with a developmental disability (Exhibit 1, Amended Complaint, ¶ ¶ 5-11, 16). Additionally, all class members are either eligible for the Medical Assistance Home and Community-Based Services but either are not receiving funding for such services or are not receiving sufficient funding for such services.

Individuals who are found eligible to receive home and community based waiver services but are denied this service by the Defendants, are placed on the registry of persons with unmet needs (Exhibit 2, Stortenbecker Deposition 93:17-94:9). As of May 6, 2003, the registry of persons with unmet needs identified approximately 1,433 individuals (Exhibit 3, May 2003 Registry, pp.3736-4071) who were eligible for services, had requested services, and whose need date for such services was more than 90 days past due (i.e., earlier than February 1, 2003). Furthermore, subsequent to filing this suit, NAS has identified approximately 70 additional individual class members who receive insufficient Waiver services to reasonably achieve the purpose of the service, assure their health and safety, or ensure progress toward independence, interdependence, productivity and community integration. (Exhibit 4, Affidavit of Bruce G. Mason).

## ARGUMENT

### I.
### Constitutional and Statutory Scheme.

The Plaintiffs, all present and future individuals with developmental disabilities in Nebraska who are eligible for Medical Assistance Home and Community-Based Services but who are either not receiving those services or not receiving sufficient funding to be accommodated by those services, allege that the Defendants deprived them of their constitutionally protected rights under the Fourteenth Amendment of the United States Constitution and the laws of the State of Nebraska. In particular, the Plaintiffs argue that the Defendants' acts and omissions constitute an intentional and invidious discrimination against the Plaintiffs as persons with disabilities by allowing unnecessary segregation and institutionalization, resulting in a lack of full participation in and access to community services and activities.

The representative Plaintiffs further allege the following causes of action: (1) that the Defendants have violated provisions of the ADA by placing eligible individuals with disabilities on an indefinite wait list for appropriate services and by providing an insufficient level of service, forcing these individuals into more restrictive, less appropriate placements; (2) that the Defendants have violated provisions of Section 504 by failing to provide individuals with disabilities, who are otherwise qualified to participate in Nebraska's medical assistance plan, with the necessary assistance to obtain appropriate community-based services; (3) that the Defendants have violated the Medicaid Act, 42 U.S.C. §1396a(a)(8), by denying the Plaintiffs, as eligible persons with disabilities, the opportunity to timely apply for medical assistance that would cover expenses of necessary services; (4) that the Defendants have violated federal Medicaid regulations, 42 C.F.R. §440.230(b), by adopting a methodology for determining the level of funding for home and community-based

services, which fails to provide individuals with disabilities services sufficient in amount, duration, and scope to reasonably achieve their purpose; (5) that the Defendants have violated the Medicaid Act, 42 U.S.C. §1396n(c)(2)(A), by adopting a methodology for determining the level of funding for home and community-based services, which fails to provide services sufficient in amount, duration, and scope to protect the health and welfare of individuals with disabilities; (6) that the Defendants have violated the Nebraska Developmental Disabilities Act and related regulations, Neb. Rev. Stat. §83-1202(1), 205 NAC 4-017, 480 NAC 2-002.01, by adopting a methodology for determining the level of funding for home and community-based services, which fails to provide individuals with disabilities services sufficient in amount, duration, and scope to present opportunities to increase or maintain independent functioning, self-determination, interdependence, productivity, and community integration; (7) that the Defendants have violated Nebraska state regulation, 205 NAC 2-011.08, by adopting a methodology for determining the level of funding for home and community-based services, which fails to permit determinations of type and amount of specialized supports and services funded by the State to be made in the local field office; and (8) that the Defendants have violated the Due Process Clause of the Fourteenth Amendment, the Medicaid Act, and the Due Process Clause under the Nebraska State Constitution, by failing to provide notice and a hearing to persons with disabilities who were placed on the wait list. (Exhibit 1, Amended Complaint, Filing 23).

## II.
## This Class Should Be Permitted to Proceed as a Class Action Pursuant to the Provisions of Rule 23(a) of the Federal Rules of Civil Procedure.

The Plaintiffs herein comply with the requirements of Federal Rule of Civil Procedure 23(a). Plaintiffs allege that the class which they seek to represent, consists of all present and future

individuals with developmental disabilities in Nebraska who are eligible for Medical Assistance Home and Community-Based Services, but either are not receiving funding for such services, or are not receiving sufficient funding for such services to reasonably achieve the purpose of the service, assure the class members' health and safety, or ensure progress toward independence, interdependence, productivity, and community integration. (Exhibit 1, Amended Complaint, Filing 23, ¶16). This class includes approximately 1,400 persons who have been waiting for services for which they are eligible for over 90 days and up to 2,200 persons with developmental disabilities who are receiving community-based services, which are either inadequate or are at risk of having their services reduced to an inadequate level. (Exhibit 5, Sorenson Deposition, 47:1-51:1; Exhibit 2, Stortenbecker Deposition, 59:11 - 63:1). Therefore, the representative Plaintiffs meet the requirements of Rule 23(a) for all subclasses. Specifically, the representative Plaintiffs have satisfied the four (4) requirements enumerated in Rule 23(a).

**A. Joinder is impracticable.**

The representative Plaintiffs have satisfied the first requirement under Rule 23(a)(1) that "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1)(2004). This requirement stresses the word, "impracticable," and thus does not mean that joinder must be impossible. Cross v. 21st Century Holding Co., 2004 WL 307306 (S.D.N.Y. Feb. 18, 2004); Reese v. Arrow Financial Services, LLC, 202 F.R.D. 83, 90 (D.Conn. 2001); Caroline C. by Carter v. Johnson, 174 F.R.D. 452, 462 (D.Neb. 1996); Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993); Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 574 (D. Minn. 1995).

In addition, there is no set number of proposed class members at which joinder becomes impracticable. Sanft v. Winnebago Industries, Inc., 214 F.R.D. 514, 521 (N.D. Iowa 2003);

Schneider v. U.S., 197 F.R.D. 397, 400 (D.Neb. 2000); Caroline C., 174 F.R.D. at 462-463; Robidoux, 987 F.2d at 935; Lockwood, 162 F.R.D. at 574. For example, a court may certify a class even if it is composed of as few as fourteen members. Sanft, 214 F.R.D. at 522; Grant v. Sullivan, 131 F.R.D. 436, 446 (M.D. Pa. 1990).

Further, as courts have noted, "A leading treatise concludes, based on prevailing precedent, that the difficulty in joining as few as 40 class members should raise the presumption that joinder is impracticable." Caroline C., 174 F.R.D. at 463; Robidoux, 987 F.2d at 936, citing 1 Herbert B. Newberg, Newberg on Class Actions: A Manual for Group Litigation at Federal and State Levels, §3.05, at 141-42. This presumption has become the prevailing precedent in the numerosity requirement, and a plaintiff class that is at least as large as 40 should meet the test of Rule 23(a)(1) alone. Lockwood, 162 F.R.D. at 574.

Moreover, actions sought on behalf of possible future class members make joinder impracticable. Caroline C., 174 F.R.D. at 463; Ellis v. Naval Air Rework Facility, Alameda Cal., 404 F.Supp. 391, 396 (N.D. Cal. 1975) rev'd on other grounds, 608 F.2d 1308 (9th Cir. 1979). Finally, other factors bearing on the impracticability of joinder include the lack of knowledge and sophistication of the class members, their need for protection, and the disproportionately high cost of maintaining separate actions. Sanft, 214 F.R.D. at 526; Reese, 202 F.R.D. at 90; Caroline C., 174 F.R.D. at 463. See also, Robidoux, 987 F.2d at 936 ("[c]onsolidating in a class action what could be over 100 individual suits serves judicial economy.").

In this case, the proposed class includes well over fourteen hundred individuals with disabilities who are on the wait list for services. (Exhibit 3, May 2003 Registry of Persons with Unmet Needs). In addition, over two thousand individuals are receiving Home and Community-

Based Services. However, due to the use of a flawed mechanism for determining the appropriate level of service for each individual receiving services, a large percentage of those receiving services are either receiving an inadequate level of services or are at risk of receiving an inadequate level of services. Furthermore, the class is larger than the size proposed by Newberg, and endorsed in Robidoux and Lockwood, to raise the presumption of meeting the numerosity requirement. 987 F.2d at 936; 162 F.R.D. at 574. Thus, the class is larger than classes joined in other cases. Moreover, as noted in Ellis, the proposed class includes potential future members, therefore making joinder impractical. 404 F.Supp. at 396.

The proposed class consists of individuals with various degrees of developmental disabilities. This understandably affects the knowledge and sophistication of the potential class members and increases their vulnerability and need for protection; both listed in Caroline C. as factors that should be considered in terms of meeting the numerosity requirement. 174 F.R.D. at 463. Furthermore, the lack of knowledge and sophistication that the potential class members face reduces their likelihood of being able to pursue individual actions. Id. Therefore, this group of Plaintiffs is precisely who class actions are designed to protect. Armstead v. Pingree, 629 F.Supp. 273, 279 (M.D. Fla. 1986).

Moreover, the maintenance of separate actions in this case would be disproportionately high in cost. Williams v. Philadelphia Housing Authority, 1993 WL 246086 (E.D.Pa. June 30, 1993). Judicial economy dictates a single class action rather than numerous separate actions. See generally, Gratz v. Bollinger, 539 U.S. 244, 268 (2003), citing General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 159 (1982), quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

The class in this case is sufficiently large to make joinder impracticable. Additionally, the probability of future class members, the lack of sophistication, and the enhanced vulnerability of

potential members, as well as the disproportionately high cost of maintaining separate actions all make joinder impracticable. For these above-mentioned reasons, the requirement of Rule 23(a)(1) has been met.

**B. There are questions of law and fact common to the class.**

The Supreme Court has held that "[c]lass relief is peculiarly appropriate when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class." Falcon, 457 U.S. at 155, quoting California v. Yamasaki, 442 U.S. 682, 700-701 (1979). Here, the commonality requirement under Rule 23(a)(2) is satisfied because the named Plaintiffs share questions of law and fact and the grievances of the prospective class are common to the class as a whole. The requirement can be met by the existence of a single common issue, but does not require that the claims of class members be identical. Boulet v. Cellucci, 107 F.Supp.2d 61, 81 (D. Mass. 2000).

Courts have held that only one common question of law or one common question of fact is necessary, thus this requirement is easily met. Caroline C., 174 F.R.D. at 464; Baby Neal v. Casey, 43 F.3d 48, 56 (3d. Cir. 1994); Lockwood, 162 F.R.D. at 575. Class members need not have all suffered actual injury; it is sufficient to demonstrate that all members of the class are subject to the same harm. Caroline C., 174 F.R.D. at 461; Baby Neal, 43 F.3d at 56. Furthermore, "injunctive actions, by their very nature often present common questions satisfying Rule 23(a)(2)." Caroline C., 174 F.R.D. at 464; Baby Neal, 43 F.3d at 57, citing 7A Charles A Wright et al., Federal Practice and Procedure § 1763, at 201 (1986). See also, DeBoer v. Mellon Mortgage Company, 64 F.3d 1171, 1174 (8th Cir. 1995) ("declaratory and injunctive nexus is sufficient to establish the requisite commonality.").

This case more than meets the requirement of Rule 23(a)(2), as common questions of both law and fact abound. Common questions of law include, but are not limited to, (1) whether it is permissible under federal law for Nebraska to fail to provide an individual eligible for services under the community-based services waiver with funding for such services within a reasonable time frame; (2) whether it is permissible under federal law for Nebraska to fail to provide an individual eligible for services under the community-based services waiver with a choice between an institutional setting and Home and Community-Based Services; (3) whether it is permissible under the Due Process Clause of the Fourteenth Amendment to deny funding for Home and Community-Based waiver services to eligible individuals without notice and an opportunity to be heard; (4) whether it is permissible under the ADA to fail to provide funding eligible individuals services under the Home and Community-Based Services waiver, i.e., residential services and day habilitation services in the most integrated setting appropriate to meet the needs of eligible individuals with disabilities; and (5) whether it is permissible under federal law, as well as applicable state law, for NDHHS and Finance and Support to provide a level of funding to individuals approved for Home and Community-Based Services which is insufficient to accomplish the purpose of the services, i.e., to assure the individuals' health and safety, or to ensure the individuals' progress toward independence, interdependence, productivity, and community integration. (Exhibit 1, Amended Complaint, Filing 23, ¶16).

Common questions of fact are also prevalent in this case. Such common questions include, but are not limited to: (1) whether the Defendants have failed to provide the putative class with funds for Home and Community-Based Waiver services; (2) whether the Defendants have failed to provide putative class members with a choice between an institutional setting and Home and Community-

Based services; (3) whether the Defendants have failed to provide putative class members with funds for waiver services in a timely manner; (4) whether the Defendants have denied putative class members with notice and an opportunity to be heard; (5) whether the Defendants have failed to provide putative class members with funds for residential and day habilitation services in the most integrated setting appropriate to the needs of the individual with disabilities; and (6) whether Defendants have failed to provide a level of funding to individuals approved for Home and Community-Based services sufficient to accomplish the purpose of services, to assure the individuals' health and safety, or to ensure the individuals' progress toward independence, interdependence, productivity, and community integration. (Exhibit 1, Amended Complaint, Filing 23, ¶16).

In addition to the many common questions of law and fact present in this case, this is also a request for declaratory and injunctive relief. As seen in DeBoer, by its very nature, injunctive relief often presents common questions, thus satisfying Rule 23(a)(2). 64 F.3d at 1174. In this case, injunctive relief provides a common question and does not require an individualized inquiry into damage awards. Rather, the benefit of injunctive relief is equally applicable to the class as a whole. The injunctive relief requested in the instant case applies to all the named-plaintiffs and potential class members. Moreover, it is also the basis for the many common questions of law and fact which are present in this case. Therefore, since injunctive relief is sought, the commonality requirement of Rule 23 (a)(2) has been met.

**C. The claims of the representative Plaintiffs are typical of the class' claims.**

The typicality requirement is satisfied in this case under Rule 23(a)(3) on the basis that the class representatives have suffered same types of injuries which affect the entire class and all

members of the class would benefit from the Plaintiffs' actions. Typicality is met when either the claims of the representative Plaintiffs emanate from the same event, or when the claims are based on the same legal theory as the claims of the class members. Cooper v. Miller Johnson Steichen Kinnard, Inc., 2003 WL 1955169 (D.Minn. April 21, 2003); In re Hartford, 192 F.R.D. 592, 603 (D.Minn. 1999); Caroline C., 174 F.R.D. at 465; Lockwood, 162 F.R.D. at 575. If all the members of the purported class would benefit by the Plaintiffs' action, then the requirement has been met. Caroline C., 174 F.R.D. at 461; Ellis, 404 F.Supp. at 396; Baby Neal, 43 F.3d at 57-58.

Additionally, a strong similarity of legal theories satisfies the requirement despite any substantial factual differences. Cooper, 2003 WL 1955169 (D.Minn. April 21, 2003); In re Hartford, 192 F.R.D. at 603 (D.Minn. 1999); Caroline C., 174 F.R.D. at 465; Lockwood, 162 F.R.D. at 575; Baby Neal, 43 F.3d at 58. In particular, when an action challenges a policy or practice, the named Plaintiffs suffering one particular injury from the practice can represent a class suffering other injuries when those injuries result from the same practice. Baby Neal, 43 F.3d at 58; Caroline C. 174 F.R.D. at 465.

As the court stated in Ellis and Baby Neal, if the actions of the representative Plaintiffs will benefit the class as a whole, then any factual differences are of no real significance. 404 F.Supp. at 396-397; 43 F.3d at 58. Since, in the instant case, the deprivations alleged by the representative Plaintiffs stem from the same deficient policies and practices that affect the class, any successful action by the Plaintiffs will benefit the entire class by the avoidance of further class deprivations. Therefore, based on the fact that the representative Plaintiffs have suffered deprivations emanating from the same events and legal theories; and the representative Plaintiffs' actions will benefit the class as a whole, the typicality requirement of Rule 23(a)(3) has been met.

Specifically, in the instant case, the representative Plaintiffs' claims emanate from the same types of events and the same legal theories as the class members' claims. The representative Plaintiffs' claims are typical of the class' claims in that each representative Plaintiff have either been denied funding for requested services, or they are receiving funding inadequate to reasonably achieve the purpose of their service, i.e., assure the class members' health and safety, or ensure progress toward independence, interdependence, productivity, and community integration. (Exhibit 1, Amended Complaint, Filing 23, ¶19). Therefore, in this case, typicality is met under both above-mentioned requirements.

**D. The representative Plaintiffs will fairly and adequately protect the interests of the class.**

The adequacy requirement is met under Rule 23(a)(4) on the basis that the representative Plaintiffs' interests in this case are coextensive with the class' interests and the representative Plaintiffs' counsel is fully competent to prosecute this action as a class action. There are two requirements under Rule 23(a)(4): (1) The representatives' interests must be coextensive and not antagonistic to the interests of the remainder of the class, so that their goals and viewpoints will not diverge, and (2) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously. Smith v. United Health Care Services, Inc., 2002 WL 192565 (Feb. 5, 2002); Lockwood, 162 F.R.D. at 576; 5 Matthew Bender, Moore's Federal Practice, §23.07 (2002).

"[The Supreme Court has] repeatedly held that a class representative must be part of the class and possess the same interests and suffer the same injury as the class members." Falcon, 457 U.S. at 156, citing East Texas Motor Freight Systems, Inc. V. Rodriguez, 431 U.S. 395, 403

(1977), quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 (1974). The representatives of the proposed class here easily meet the Falcon test on the basis that they are members of the class, they possess the same interests, and they have suffered the same injury as the proposed class members. In respect to the first requirement of the rule, the instant case does involve shared deprivations of constitutional and statutory rights based on the Defendants' policies and practices, thus the first requirement is met. Moreover, the representative Plaintiffs' desire to make the Defendants' practices comply to constitutional and statutory requirements are coextensive and not antagonistic to the interests of the class. Finally, there is no evidence of collusion or conflicting claims among members of the class and the representative Plaintiffs. See Ellis, 404 F.Supp. at 397 (adequacy requirement met when no evidence was present of conflicting claims).

In respect to the second requirement, the representative Plaintiffs are willing and able to proceed with the action, and the Plaintiffs' counsel are fully competent to prosecute the class action. In its role as the designated protection and advocacy system for individuals with developmental disabilities or mental illness, NAS has the authority and responsibility to pursue legal, administrative, and other such approaches as may be necessary to protect and advocate for the rights of those persons within the State of Nebraska, who are or who may be, eligible for treatment, services, or habilitation due to their disabilities. NAS has represented hundreds of clients in individual actions, and has represented class members in the past, to secure rights and entitlements for Nebraska citizens who have developmental disabilities and/or mental illnesses. (Exhibit 4, Affidavit of Plaintiffs' Attorney, Bruce G. Mason).

In addition, Kinsey Ridenour Becker & Kistler ("KRBK") is an established AV law firm

in Lincoln, Nebraska. KRBK's attorneys have extensive litigation experience which includes experience in a number of class actions. In addition, KRBK's attorneys have long been active in providing counsel and representation to persons with disabilities. (Exhibit 6, Affidavit of Plaintiffs' Attorney, David Rowe). Therefore, as shown above, the Plaintiffs submit that this case meets all of the requirements for class action certification enumerated in subsection (a) of Rule 23.

**III.**

**This case satisfies the requirements of Rule 23(b) of the Federal Rules of Civil Procedure.**

The Plaintiffs satisfy the requirements of Fed. R. Civ. P. Rule 23(b) on the basis that their action meets the prerequisites of Rule 23(a) and falls within several categories enumerated in the rule though it is only necessary that one of the categories is met. Fed. R. Civ. P. Rule 23(b) provides, in part, that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (1) the prosecution of separate actions against individual members of the class would create a risk of:
> >
> > > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> > >
> > > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> >
> > (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;…"

Fed. R. Civ. P. Rule 23(b)(2004).

The Plaintiffs in this action satisfy the criteria of Fed.R.Civ.P. Rules 23(b)(2); 23 (b)(1)(A); and 23(b)(1)(B). In particular, the party opposing the class has acted and refused to act on grounds generally applicable to the class as a whole, making injunctive relief appropriate to the class as a whole. The requirement of adequacy "is almost automatically satisfied in actions primarily seeking injunctive relief." Caroline C., 174 F.R.D. at 467; Baby Neal, 43 F.3d at 58. This injunctive class provision is especially applicable to civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons. Baby Neal, 43 F.3d at 58. The rule does not require that the Defendants act identically with respect to every member of the class. Rather, all that is required is that the Defendants' challenged conduct or policy has general application to the entire class. Id.

In this case, Defendants, their agents, employees, predecessors, and successors in office, have acted or will act on grounds generally applicable to the class, thereby making appropriate injunctive or declaratory relief with respect to the class as a whole. Such circumstances necessarily make injunctive relief appropriate to the class as a whole, thus meeting the requirement of Rule 23 (b)(2). Alternately, the requirements of both Rule 23(b)(1)(A) and Rule 23(b)(1)(B) are met in this case. In regard to Rule 23(b)(1)(A), inconsistent or varying adjudications in this case would establish incompatible rules of law for the provision of services to residents of, and applicants to, BSDC and other ICF/MR institutional settings. In regard to Rule 23(b)(1)(B), individual adjudications in this matter could serve to be dispositive of the interests of other members of the class not party to the actions, which would substantially impair their ability to protect their interests. Overall, the instant case is precisely the type of action that is typically handled as a class action and is best handled as a class action. See generally, Baby

Neal, 43 F.3d 48. Therefore, the proposed class has met the requirements of Rule 23(a) and fits into the categories required by Rule 23(b), the class must be allowed to proceed as a class action.

**IV.**
**The representative named Plaintiffs and their attorneys will be able to provide adequate and sufficient notice to members of the proposed class.**

Notice in this case can be easily accomplished by single state-wide newspaper publication in the Omaha World Herald and/or through the use of the U.S. mail. See, In re Potash Antitrust Litigation, 161 F.R.D. 411 (D.Minn. 1995) (held that notice to potential class members by direct mail and by single publication in national newspaper was appropriate). Furthermore, on the basis that the Defendants have easy access to all records and documentation pertaining to all the potential members of the class and will be the first to have knowledge of potential future members, it is strongly suggested that the Defendants assist in providing notice to the class. See, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 98 S.Ct. 2380 (1978) (held that the district court has the authority under Fed. R. Civ. P. 23(d) to require a defendant's cooperation in identifying the class members to whom notice must be sent).

**V.**
**Appointment of Plaintiffs' Class Counsel pursuant to F.R.C.P. 23(g) must be made by the Court.**

Recently, U.S. Federal District Courts have held: **"**[i]n accordance with amended Rule 23(c)(1)(B) and the new Rule 23 (g), effective December 1, 2003, a court certifying a class must appoint class counsel." Coleman v. General Motors Acceptance Corp., 220 F.R.D. 64, 99 (2004);see also, Kerr v. Holsinger, 2004 WL 882201 (E.D.Ky.); Noble v. University Place Corporation, 2004 WL 944543, (S.D.N.Y.); and In re Terazonosin Hydrochloride Antitrust Litigation, 220 F.R.D. 672, 701 (S.D. Fla. 2004). In addition, the Advisory Committee's Note to this new rule makes clear that

the primary responsibility of the class counsel, resulting from an appointment as such, is to represent the best interests of the class. Fed.R.Civ.P. 23(g)(1)(B) Advisory Committee's Note.

In the instant case, the Plaintiffs' counsel are fully competent to vigorously prosecute this class action. Specifically, NAS, in its role as the designated protection and advocacy system for Nebraska residents with disabilities, has the authority and responsibility to fairly and adequately represent the interests of the class. NAS' attorneys have extensive complex litigation experience both in federal and state courts, on behalf of persons with disabilities and have previously litigated the same types of claims outlined in the Plaintiffs' Amended Complaint in administrative hearings and state court. Moreover, NAS has represented hundreds of clients in individual actions, and successfully litigated two previous class action lawsuits on behalf of individuals with disabilities. (see, Exhibit 4, Affidavit of Plaintiffs' Attorney Bruce G. Mason).

In addition, Kinsey Ridenour Becker & Kistler ("KRBK") is an established AV law firm in Lincoln, Nebraska. KRBK's attorneys have extensive litigation experience which includes experience in a number of class actions. Furthermore, KRBK's attorneys have long been active providing counsel and representation to persons with disabilities. (See, Exhibit 6, Affidavit of Plaintiffs' Attorney David Rowe). Therefore, for the foregoing reasons, both NAS and KRBK are appropriate to be appointed class counsel.

## VI.
## Conclusion

For the reasons stated above and those set forth in the Motion filed herein, the Plaintiffs respectfully submit that a class be certified in this cause and that Nebraska Advocacy Services, Inc., and Kinsey Ridenour Becker & Kistler, LLP be appointed to serve as class counsel.

**Dated** this 1st day of July, 2004.

Respectfully submitted,

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