IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JOHN BAXLEY, et al.,

Plaintiffs,

v. **Civ. Act. No. 3:18cv01526**
(Chambers, J.)

BETSY JIVIDEN, et al.,

Defendants.

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

NOW COME Plaintiffs John Baxley, Earl Edmondson, Joshua Hall, Heather Reed, Danny Spiker, Jr., and Donna Wells-Wright, by counsel, and pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), to move this Honorable Court to certify this proceeding as a class action.[1] Based upon this motion, the complaint, and the authorities and principles discussed in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Class Certification, Plaintiffs ask this Court to certify a Plaintiff class for declaratory and injunctive relief, defined as follows:

> All persons who are, or who will be, admitted to a jail in West Virginia.

Plaintiffs further ask this Court to certify a Plaintiff subclass for declaratory and injunctive relief, defined as follows:

> All persons who are, or who will be, admitted to a jail in West Virginia who meet the definition of being a "qualified individual with a disability" under the Americans with Disabilities Act.

[1] Amber Arnett and Eric Jones have been released from Defendants' custody, and Defendants have moved to dismiss them from this suit. Undersigned counsel has been unable to maintain contact with said individuals since their release, and thus does not pursue the present motion on their behalf. Robert Watson has withdrawn as a named Plaintiff in this matter, although he remains a member of the putative class.

As set forth in the attached exhibits and accompanying Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, the named Plaintiffs meet the requirements for certification of a class under Federal Rule of Civil Procedure 23(a), including numerosity, common questions of law and fact, common claims, typicality, and that "the representative parties will fairly and adequately protect the interests of the class." Moreover, this class is appropriate for certification under Federal Rule of Civil Procedure 23(b)(2), as the defendant "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). (*See* Exhibits 1 through 18, attached hereto.)

Undersigned counsel also request to be appointed as counsel for the class pursuant to Federal Rule of Civil Procedure 23(g), based upon the facts set forth in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Class Certification, and in class counsels' individual supporting declarations. (*See* Decl. of Lydia C. Milnes, attached as Ex. 19; Decl. of Jennifer S. Wagner, attached as Ex. 20; and Decl. of Rachel J. Kincaid, attached as Ex. 21.)

WHEREFORE, Plaintiffs, who bring this action to address widespread, systemic failures by Defendants to provide adequate and timely medical and mental health treatment to inmates in WVDCR's jail facilities, respectfully request that this Court certify the class and subclass as stated above.

Respectfully submitted,

JOHN BAXLEY, JR., EARL EDMONDSON, JOSHUA HALL, DONNA WELLS-WRIGHT, HEATHER REED, and DANNY SPIKER, JR., on behalf of themselves and others similarly situated,

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

This case arises from Defendants' systemic failures to provide minimally adequate medical and mental health care to inmates in the jail facilities operated by the West Virginia Division of Corrections and Rehabilitations (DCR), as well as meaningful access to programs, services, and activities for DCR jail inmates with disabilities. Defendants have been, and continue to be, deliberately indifferent to these systemic failures. Their indifference results in an unreasonable risk of serious harm to inmates' mental and physical health in violation of the United States Constitution, and the denial of access to federally-guaranteed services for inmates with disabilities in violation of federal disability anti-discrimination laws. As set forth below, the evidence of DCR's complete abdication of responsibility to the inmates in its custody is well-established, striking, and disturbing, with serious life-threatening impacts on those people who have no option but to rely on it for care.

The named Plaintiffs have been and continue to be subjected to and harmed by Defendants' constitutionally inadequate policies and procedures, and seek to represent a class of similarly situated inmates housed in DCR jails to prevent future inmates from having to suffer the same

injuries that they have suffered.[1] Jail residents are at the total mercy of their jailers when they need access to medical or mental health care or modifications due to their disabilities. Defendants' centralized policies and procedures affect all people held in DCR's jails, and each of these individuals suffer the same legal violations and actual harm as the result of Defendants' harmful policies and practices. Plaintiffs therefore seek class-wide declaratory and injunctive relief, including an order compelling Defendants to immediately develop and implement a plan to provide Plaintiffs and the proposed class with (1) constitutionally adequate and timely medical and mental health care and (2) policies and procedures to ensure inmates with disabilities have meaningful access to DCR services, programs, and activities.

Plaintiffs seek an order certifying this case as a class action under Federal Rules of Civil Procedure 23(a) and (b)(2). Specifically, Plaintiffs seek certification of the following class and subclass:

(1) DCR Jail Class composed of all persons who are, or who will be, admitted to a jail in West Virginia[2]; and

(2) Disability Subclass composed of all persons who are, or who will be, admitted to a jail in West Virginia who meet the definition of being a "qualified individual with a disability" under the Americans with Disabilities Act (ADA)

It is necessary for this Court to certify a class in order to remedy the conditions that expose DCR jail residents to an unreasonable risk of serious harm, and to remedy DCR's systemic violations of the ADA. *See Helling v. McKinney*, 509 U.S. 25, 35 (1993).

[1] As set forth in Plaintiff's Motion for Class Certification, Amber Arnett, Eric Jones, and Robert Watson, have effectively withdrawn from participation as class representatives. Amber Arnett was released from DCR custody on June 5, 2020, and counsel has been unable to make contact with her since that time. Mr. Jones was released from DCR custody on May 19, 2019, and has been unable to participate in a deposition. Mr. Watson remains incarcerated and a member of the putative class, but has requested to withdraw from representing the class. While these individuals no longer are seeking to represent the class, their medical records and information remains evidence in this case.

[2] Plaintiffs seek to amend the class definition set forth in the Second Amended Complaint to more accurately describe the class, given that all individuals admitted to any jail in West Virginia are subjected to the same policies, procedures, and lack of oversight and accountability by the DCR with regard to their medical and/or mental health needs, including the screening for such needs.

Plaintiffs meet the standard for class certification. Numerosity is met because the proposed DCR Jail Class consists of approximately 5,172 current inmates and untold numbers of future inmates. The proposed Disability Subclass similarly consists of approximately 2,068 current inmates and untold numbers of future inmates. Commonality is met because Plaintiffs challenge the legality of Defendants' system-wide policies and practices, which raise common questions capable of common answers through the system-wide injunctive relief Plaintiffs seek. Typicality is met because the named Plaintiffs are all subject to the same deficient policies, procedures, and practices as the class members. The named Plaintiffs and class counsel will fairly and adequately protect the interests of the proposed class and subclass and have done so dillegently to date. Finally, class certification is warranted because Defendants have acted, and refused to act, on grounds that apply generally to the class such that final injunctive and declaratory relief is appropriate as to the class as a whole.

This case is not about the care provided to any specific inmate, and Plaintiffs do not seek relief for individual inmates. Rather, this case is about whether DCR's system-wide policies and practice of failing to ensure adequate health care creates a substantial risk of serious harm to all DCR jail residents in violation of the Eighth and Fourteenth Amendments, and whether DCR has systemically failed to provide inmates with disabilities meaningful access to DCR programs, services, and activities by failing to put into place systems to ensure the provision of reasonable accommodations to enable such access. To address such common, systemic issues through thousands of individual inmate lawsuits would be grossly inefficient and unnecessary—and would cause untold harm and death to vulnerable people incarcerated in West Virginia jails—when the injunctive and declaratory relief requested in this matter would resolve these issues on behalf of all inmates.

Because the named Plaintiffs, the DCR Class, the Disability Subclass, and Plaintiffs' counsel satisfy all requirements of Federal Rule of Civil Procedure 23(a), (b)(2), and (g)(1) and (4), class certification should be granted.

I. FACTUAL BACKGROUND

A. DCR controls the provision of mental and medical health care in DCR's jails.

DCR is responsible for ensuring that "[a]ll inmates . . . have prompt access to necessary medical, dental, and psychiatric care, provided in a reasonable manner by licensed personnel." *See* W. Va. C.S.R. § 95-1-14.1[3]; *see also* Deposition of Debbie Hissom, Director of Correctional Health Care, at 8:9-14, 15:14-19, 32:21-24 (attached as Ex. 3). DCR employs statewide policies and procedures to regulate the delivery of health care. (Hissom Dep. 8:3-9, 15:20-24, 18:3-9, 32:11-14; Deposition of Shelby Searls, Superintendent of Western Regional Jail, at 27 (attached as Ex. 4).) DCR Commissioner, Defendant Betsy Jividen, must sign off on any changes to jail policy, including those governing the provision of health care in the facilities. (Hissom Dep. 18:10-17.) All new policies are distributed to the entire jail system and to all contracted and subcontracted entities, and must be followed throughout the system uniformly, including by the contracted medical providers. (Hissom Dep. 18:10-17; *see also* Deposition of Thomas Weber, CEO of PrimeCare Medical, Inc., at 197:5-12 (attached as Ex. 5); Deposition of Timothy Thistlethwaite, Medical Director of PsiMed Corrections, Inc. at 55-56

[3] Upon consolidation in 2018 of the West Virginia Regional Jail Authority (WVRJA) and the West Virginia Division of Corrections into DCR, West Virginia's Legislature directed that Title 95 of the Code of State Rules, which governed the operations of the WVRJA, would be repealed upon the Commissioner's enactment of new policies governing all DCR facilities. The Legislature specifically provided, however, that each section within Title 95 would remain in effect until replaced by a new policy. Consequently, until a new DCR policy is enacted to replace section 95-1-14.1, it remains controlling law. W. Va. Code § 15A-3-18(b) ("All legislative rules and policies of the former Division of Corrections, the former Division of Juvenile Services, and the Regional Jail and Correctional Facility Authority shall remain effective until amended or terminated pursuant to the provisions of § 29A-3-1 et seq. of this code by the Division of Correction and Rehabilitation: Provided, That these rules shall expire on July 1, 2021, if not superseded sooner.").

(attached as Ex. 6).) Any training on DCR policies is conducted by one centralized person—Debbie Hissom, DCR's Director of Correctional Health Care—and is consistent across facilities. (Hissom Dep. 19:22-24, 23:6-8, 23:24, 24:1-3.)[4] DCR's centralized policies and procedures are intended to provide essential care to inmates, but both the policies themselves and their implementation are broken.

DCR contracts with two for-profit medical vendors, PrimeCare Medical, Inc., (PrimeCare) and Wexford Health Sources, Inc., (Wexford) to fulfill its responsibility to provide medical and mental health care to inmates in the ten DCR jails.[5] DCR's obligations and expectations for these contractors are consistent across all ten jail facilities, as set forth in substantially identical contracts across facilities. (*See* Hissom Dep. 29:12-18, 43:18-24; Weber Dep. 26; Deposition of James Gray, Wexford Health Services Administrator for Northern Regional Jail and Correctional Complex at 129:1-8 (attached as Ex. 7).) The contractors' own policies are required, by contract, to reflect the guidelines set forth by the National Commission on Correctional Health Care (NCCHC) and are also consistent across facilities. (*See* Weber Dep. 20-21, 121; Gray Dep. at 127:9-13.) Further, the contractors' actual practices, including their failure to follow their nearly identical policies, are consistent across facilities. (*See, e.g.*, Searls Dep. 125-26; Thistlethwaite Dep. at 24-26; Weber Dep. 20-21, 26; Hissom Dep. 30:4-8; Venters Rep.; Wills Rep.) While PrimeCare and Wexford utilize

[4] Training on supposedly binding policies is systematically *not* provided to contractor personnel. (*See, e.g.*, Deposition of Susie Christian, PrimeCare Nurse, at 16-17, 30-31 (attached as ex. 10) (PrimeCare staff receive no training on PrimeCare or DCR policies, or on accreditation standards); Searls Dep. 105 (DCR employees receive no training on mental health); Thistlethwait Dep. 17 (PsiMed personnel receive no training on DCR policies).)

[5] PrimeCare provides medical care in nine jails. Wexford provides medical care in the remaining jail. Both PrimeCare and Wexford subcontract with PsiMed Corrections, Inc., to provide psychiatric and mental health care in certain facilities. These entities agree that they are responsible for the services provided by PsiMed. (*See* Weber Dep. 20; Gray Dep. 22:20-24 23:1-8.) PsiMed provides care in three PrimeCare-covered jails and the one Wexford jail; however, PrimeCare's CEO testified that the psychiatric care provided by PsiMed and the psychiatric care provided directly by PrimeCare does not meaningfully differ. (Weber Dep. 126:5-12, 127:6-10.)

different electronic medical record (EMR) systems, the information contained in each is nearly identical.[6] The EMRs create consistent inadequacies across facilities, as they are set up with the same inadequate data entry fields across facilities and contain the same inadequate triggers and work arounds regarding required next steps.[7] (*See*, *e.g.*, Searls Dep. 84; Venters Rep. 10-11.)

DCR's contracts with PrimeCare and Wexford contain nearly identical terms. Notably, both contracts contain *zero* performance measures or metrics that the contractors are required to meet. (Report of Dr. Homer Venters, Correctional Medicine Expert, at 5-9 (attached as Ex. 1).) In addition, the contracts no meaningful enforcement mechanism by which DCR can take action against contractors if they fail to provide adequate care. (Venters Rep. 6; *see also* Weber Dep. 48:21-49:1 (other states impose liquidated damages for non-performance on PrimeCare, but West Virginia does not).) Without liquidated damages or penalties, there is no financial incentive for the contractors to comply with their contractual obligations to provide adequate care. (Venters Rep. 5-9; *see also* Report of Dr. Cheryl Wills, Correctional Psychiatry Expert, ¶ 2 (attached as Ex. 2).)

In fact, the contracts actually create financial incentives to provide *substandard* care by paying the contractors a flat rate for all services, regardless of inmate need[8]; this rate includes payment for all treatment, staffing, medical equipment, orthoses, mental health

[6] PsiMed uses the EMR of the entity it subcontracts with; i.e., for Northern Regional Jail, it uses the Wexford EMR, and for the other three jails that it works in, it uses the PrimeCare EMR. (*See* Thistlethwaite Dep. 60:14-16.)

[7] For example, neither EMR has fields in the intake screening that adequately identify whether an individual needs an accommodation for a disability. Similarly, both EMRs permit for required appointments to be "rescheduled" such that they will not show up on any search for failing to hold a timely medical appointment. (*See* Rep. Dr. Homer Venters, Correctional Medicine Expert, at 10-11 (attached as Ex. 1).)

[8] The contract flat rate is calculated based on average daily population of the system. The contract permits the contractor to seek reimbursement for costs above $5,000 per inmate, per year, per illness or injury. (Ex. 17 at DCR 2078; Ex. 18 at DCR 2827-28).

services, dentistry, outside specialist referrals, emergency care, and more.[9] (Hissom Dep. 56:1-24; Weber Dep. 82:7-13; PrimeCare Contract, attached as Ex. 17; Wexford Contract Portions, attached as Ex. 18.) DCR has hired for-profit entities to provide these services, which touted their utilization management and reduction of costs to DCR in their successful bids. (*See* Ex. 18.) Each of the contractors' business models relies on making money, such that the financial incentives to skimp on care loom large. (*See* Weber Dep. 15, 70:3-5.) This incentive has been increased due to multiple contract extensions, which PrimeCare testifies has limited its profit margin. (Weber Dep. 70-71:8.)

As set forth below, despite its responsibility for and control of the entire system, DCR engages in identical lack of contractual oversight of both vendors. (Hissom Dep. 8:15-18; Gray Dep. 127:14-17.) If it did engage in appropriate oversight, it would soon learn that its system of care is dangerously haphazard and inadequate.

B. DCR's engages in no oversight of the provision of medical and mental health care in its jails.

Despite DCR's responsibility to ensure that its health care contractors provide adequate care, it is undisputed that WVDCR conducts no oversight of those contractors. (*See* Hissom Dep.

[9] The contract requires the contractors to provide, for the flat fee, all comprehensive services, including all medical and mental health staffing, health screenings, health appraisals, sick call, complaint triage, treatment access, maintenance of a medical observation unit, 24-hour on call physicians, infirmary, non-proprietary and electronic medical records that are integrated with the inmate management system, specialty services in the community, 24 hour access to emergency medical, dental, and mental health services, psychiatric services, psychiatric consultation, crisis intervention and evaluation by psychiatrist or psychologist, licensed mental health professionals to treat inmates on suicide watch, all lab, xray, and other ancillary services, dental services, pharmaceuticals and supplies, health education, record transfer, telemedicine, specialty clinics, administrative and clinical management, maintenance of a mental health and forensic unit, drug and alcohol detoxification, pregnancy care, physicals for inmate trustees, emergency treatment for DCR staff and visitors, regular facility inspections, medication administration, physical exams of DCR staff and officers, medical services, including immunizations for DCR staff, first aid, and infectious disease screenings, and all prosthetics, orthotics, medical equipment, and office equipment. (Ex. 17 at DCR 2065-79; *see also* Ex. 18.)

Notably, many of these services are not actually provided pursuant to the contract, including that the contractors do not comply with staffing and staff qualification requirements, nor do they provide access to a non-proprietary and integrated EMR. (*See* Wills Rep.) Due to DCR's failure to conduct any contractual oversight, no action has been taken with regard to these failures. (*See* Venters Rep. 5-9.)

43; Weber Dep. 23; Deposition of Krista Vallandingham, PrimeCare Regional Coordinator, at 105:14-106:9 (attached as Ex. 9); Gray Dep. 56-57; Venters Rep. 7-9; Wills Rep. ¶ 2.) WVDCR requests no data from the contractors; it does not review staffing levels, deficiencies, or qualifications; it does not track whether inmates or others raise repeated concerns about the same issues or staff members; and it does not conduct any chart review, site inspections, or audits to ensure that obligations are being met. (*See, e.g.*, Hissom Dep. 50:2-8; 52:6-11; 53:2-9, 55:14-16; 59:11-24, 105:15-17, 114:22-115:3, 120:20-121:5, 130:7-17; *see also* Gray Dep. 54, 56-57, 76:16-19; Weber Dep. 19, 96:4-7, 115; Searls Dep. 142; Vallandingham Dep. 125:6-13; Deposition of Joseph Wood, Superintendent at North Central Regional Jail, at 57-58 (attached as Ex. 15); Deposition of J.T. Binion, DCR Regional Director 2 of Prisons & Jails, at 14:16-20, 66:17-24 (attached as Ex. 11).) DCR does not know what medical services are being provided or requested. (Hissom Dep. 54-55.) DCR does not even review the contractors' manuals or protocols to ensure that they meet contractual requirements, and it is not involved in the drafting of its contractors' policies. (*See* Hissom Dep. 53:10-14; Weber Dep. 121:18-20.)

In addition to not conducting its own, independent audits, DCR does not review any audits purportedly conducted by the contractors or their accreditation body.[10] (Hissom Dep. 79:3-6.)

[10] While Wexford and PrimeCare purport to conduct internal audits, they do not provide the results of these audits to DCR, and have further refused to provide copies of the audits to either DCR or counsel for Plaintiffs in response to a subpoena in this case, thus preventing counsel and their experts from determining whether the purported audits are adequate or have identified serious deficiencies. (*See, e.g.*, Vallandingham Dep. 39:16-18, 63:18-19; *see also* Def.'s Resp. to Pls.' 3d Reqs. for Prod. of Docs. Numbers 9, 60-62 (attached as Ex. 12); Pls.' 2d & 3d Mots. to Compel [Docs. 61, 238, 257]; Pls.' Mot. to Compel PrimeCare [Doc. 242].) Wexford's representative did testify that its review of inmate deaths never leads to any change in policy or practice, which is not typical and indicates an inadequate audit process in this context. (*See* Gray Dep. 90:21-91:3; Venters Rep. 9; Deposition of Dr. Lawrence Mendel, Defendants' Expert Witness (to be supplemented when available).) The mortality reviews also apparently do not include engagement by DCR staff or by psychiatric clinical staff or lead to any improvements or suggestions, which is also atypical and improper. (Weber Dep. 49:3-50:6; Thistlethwaite Dep. 119-21; Venters Rep. 8-10.) PrimeCare also does not use a qualified mental health care provider to review its provision of mental health care, instead relying on a nurse with no psychiatric training. (Vallandingham Dep. 111:16-20.) Similarly, PrimeCare's quarterly meetings do not involve any review of the substance of quality improvement audits, and the Regional Coordinator does not review and is not formally involved in the audits. (Vallandingham Dep. 29:7-11, 34.) PsiMed's Medical Director noted that

Indeed, DCR's central office charged with oversight does not even attend regular meetings with the contractors. (Hissom Dep. 65-66; Thistlethwaite Dep. 27-28; Weber Dep. 53:21-24.) DCR similarly does not review any subcontracting agreements, nor does it even seek notification when a contractor subcontracts out all or some of its obligations to another corporation. [11] (Hissom Dep. 115:21-116:1, 117:8-11; Weber Dep. 115:1-3, 127:3-5.) In contrast to other states, DCR does not review or require a copy of the contractors' audited financial statements to ensure the viability of the contractors or the system of care. (Weber Dep. 16.)

DCR's facility level employees similarly report that—as a matter of policy—they seek no information or reporting from the medical/mental health contractors regarding inmates or even regarding the contractors' policies. (Searls Dep. 15-16, 96:16-22; Deposition of Shawn Straughan, Superintendent of Northern Regional Jail, at 22:17-20, 27:9-11 (attached as Ex. 8).) DCR staff insist that all medical and mental health decisions are delegated without oversight or even basic knowledge to the contractors. (Searls Dep. 23-24, 75, 77, 78, 80, 85, 87, 88, 89, 90, 115, 118-21; Straughan Dep. 61:4-7; 98:15-18; Wood Dep. 34:11-13.) The Superintendents do not even know when or what medical personnel are on site at their facilities. (Searls Dep. 100-01.) Nor do they review responses from medical when they refer inmate grievances to medical staff. (Straughan Dep. 36:2-13.) DCR's central office never reaches out to the Superintendents to check on the performance of the contractors or the provision of care in the jails. (Straughan Dep. 28:20-

PsiMed has never identified any areas in which it could improve, does not conduct internal audits, and does not track or review suicide attempts. (Thistlethwaite Dep. 117-18, 121.)

[11] In keeping with the total lack of oversight by DCR, Wexford and PrimeCare require no reporting and conduct no oversight of its subcontracted agent, PsiMed. (Thistlethwaite Dep. 29, 33, 34, 36, 38-39, 58 (explaining that PsiMed engages in no reporting, no continuous quality control meetings (required by NCCHC), no review for compliance with policies or procedures, no audits other than the NCCHC audit that occurs every three years, and no tracking of inmate complaints or concerns; PsiMed also does not document when its staff is working or provide any such documentation to any other entity); *see also* Gray Dep. 22:20-23:8 (Wexford conducts no oversight of PsiMed at Northern Regional Jail); Vallandingham Dep. 28:18-24 (PrimeCare has no formalized interactions with PsiMed, even to coordinate care).)

22.)

As Correctional Health Expert Dr. Homer Venters explains, DCR's policy comprises an "inadequate and deficient approach to maintaining the standards of care for correctional patients." (Venters Rep. 7.) Dr. Venters finds that DCR demonstrates "a gross lack of understanding of the core services that [it] stands in oversight of" and that its contracts and practices "reflect a lack of interest by the DCR in . . . promot[ing] quality in the correctional health services." (Venters Rep. 8.) Dr. Venters explains that the basic elements of creating an appropriate correctional health care system include the state entity's development and maintenance of "quality assurance, quality improvement, patient relations (grievances) and mortality reviews," through clear policy, structure, data, and review by qualified independent professionals. (Venters Rep. 8-9.) DCR undisputedly lacks any of these processes. (Venters Rep. 5-9.) As the result of this failure, during the many years in which DCR has maintained the medical services contracts with the two contractors, DCR has failed to identify even one area of concern or area for improvement. (Venters Rep. 8.) Dr. Venters explains, "[f]ailure to identify areas for improvement during mortality reviews or other audits or review is atypical and indicates an inadequate process." (Venters Rep. 9.) Dr. Venters concludes that "they DCR system has abdicated its own responsibility in oversight of the quality of care provided by its contract venders," resulting in significant harm to the individuals in its custody and care. (Venters Rep. 9.)

This lack of oversight is inconsistent with standard practice, results in DCR's failure to identify deficiencies in medical and mental health delivery, and directly leads to poor health outcomes for inmates. (Wills Rep. ¶¶ 2-4; Venters Rep. 5-9.) Through its utter lack of oversight, DCR has, by routine practice and policy, authorized its contracting agents to delay and refuse to provide necessary and in many cases life-saving treatment to patients. The harm is immeasurable,

and the care is constitutionally deficient.

C. DCR's policies, procedures, and lack of oversight of the provision of medical and mental health care in its jails result in constitutionally deficient medical and mental health care for jail residents.

DCR's policy of no oversight of its contractors results in system-wide constitutionally deficient medical and mental health care for inmates in DCR's jails. As correctional medicine expert Dr. Homer Venters and correctional psychiatry expert Dr. Cheryl Wills conclude from their review of patient medical records, policies and procedures, the governing contracts, and relevant testimony, the deficiencies range from "woefully deficient" psychiatric and mental health care, to failures in the intake process, inadequate medication delivery, lack of access to medical professionals and treatment, failures in chronic care, lack of care coordination, and lack of appropriate emergency care.[12] (Venters Rep.; Wills Rep.)

As noted by Dr. Wills, Defendants routinely deny access to psychotropic medications and appropriate mental health treatment. Defendants systematically fail to provide treatment by qualified mental health professionals for inmates with severe mental health conditions, and instead conduct assessments and "treatment" through individuals who lack the knowledge, expertise, and education to provide appropriate care. (Wills Rep. ¶ 1.) Dr. Wills further found that DCR systematic failed to provide care by qualified professionals with the ability to prescribe and

[12] Defendants have thus far refused to produce a sampling of medical records for all of its jail facilities. (*See* Defs.' Resp. to Mot. to Compel [Doc. 251].) Defendants have, however, produced hundreds of grievances submitted by inmates in jails that confirm the system-wide failures to provide adequate mental health and medical care as experienced and confirmed by the medical records that have been reviewed. Neither Defendants nor their contractors track trends in inmate grievances. (Wood Dep. 57-58; Binion Dep 14:16-20, 66:17-24; *see also* Gray Dep 102:4-18.) However, Plaintiffs are prepared, if necessary, to produce a comprehensive database of the grievances provided. Plaintiffs present a sampling here for the sake of efficiency. (*See, e.g.*, Grievance Samples, attached as Ex. 16, at DCR 7596, 7641-42, 8503 (lack of mental health treatment at Eastern Regional Jail); DCR 7640, 7649-50, 7525, 7527, 7535, and 7536 (lack of mental health treatment at Southwestern Regional Jail); DCR 7528, 7550, and 7547 (lack of mental health treatment at South Central Regional Jail); DCR 7192 (lack of mental health medication at Southern Regional Jail); DCR 7244, 7248, 7250, 7251 (lack of medical care and medications at South Western Regional Jail); DCR 7243 (lack of medical care during detox at Potomac Highlands Regional Jail); DCR 7131, 8502 (lack of medical treatment and medication at Eastern Regional Jail); DCR 7121, 7229, 7253 (lack of medications at South Central Regional Jail); DCR 7193, 7278 (lack of medication at Southern Regional Jail.)

evaluate psychiatric medications, created no individualized treatment plans (which are required by the standard of care), failed to provide timely psychiatric follow up care, provided wholly inadequate care for individuals on and after suicide watch, and permitted unqualified individuals to release inmates from suicide watch, with disastrous results. (Wills Rep. ¶ 5.) Indeed, according to DCR Medical Director Hissom, Defendants have no policy regarding the timeframe in which a person presenting with mental health symptoms at intake must be seen by a mental health provider, nor do they have a policy setting forth when a person placed on suicide watch will be seen by a mental health provider. (Hissom Dep. 101:13-103.) In fact, PsiMed—the psychiatric care provider at several facilities—reports that it has no responsibilities with respect to suicide watch at all, but rather it is only involved with inmates on suicide watch on a case-by-case basis; Defendants similarly have no policy about referring inmates to PsiMed who are engaged in self-harm. (Thistlethwaite Dep. 105-106.) As the result of these system-wide deficiencies, inmates are denied access to psychotropic mediations and mental health treatment, resulting in severe injury and risk of death. (Wills Rep.; Venters Rep. at 19-20 and throughout.)

DCR's system further fails to adequately coordinate care between facilities, staff, and agencies. For instance, in contrast to contractual requirements, DCR permits the use of two different proprietary electronic health records, which do not integrate with one another or with DCR's inmate records. (Wills Rep. ¶ 3.a; Venters Rep. 10-11.) This disrupts continuity of care for inmates as they transfer between facilities. (Wells Rep. ¶ 3.) The EMRs' endemic inadequacies further make coordinated and adequate care impossible, as they fail to include basic initial assessment data regarding disabilities and medical and mental health needs. (Venters Rep. 10-11.) DCR's medical and mental health staff further fail to coordinate care; Defendants maintain no policy or process for deciding whether to obtain a medical release from inmates in order to

obtain their complete medical history or even whether to look at prior records of inmate from the current contractor. (*See* Gray Dep. 22:20-23:8, 147:2-5; Weber Dep. 133:8-11; *see also, e.g.*, Vallandingham Dep. 28:18-24 (PrimeCare has no formalized interactions with PsiMed, even to coordinate care).)

As Dr. Venters explains, "Coordination of care extends to communication between security, mental health, and medical staff," which is wholly lacking in the DCR system. (Venters Rep. 11.) As a rule, the contractors do not advise DCR of an inmate's psychiatric or medical condition. (*See* Searls Dep. 111-12; Thistlethwaite Dep. 96-97; Deposition of Susie Christian, PrimeCare Nurse, at 24:10-21 (attached as Ex. 10).) DCR similarly does not request this information or consult with the contractors prior to placing an inmate in control-based restraints or using chemical agents or other force on inmates, even when an inmate has medical conditions that would place her at high risk from such a use of force. (Vallandingham Dep. 88-90; Straughan Dep. 107:21-23; Gray Dep. 39:2-19; 41:1-18; Wood Dep. 84.) No one—neither DCR nor the contractors—notifies PsiMed when an inmate is placed in restraints. (Thistlethwaite Dep. 105.) And Defendants have no policies regarding the use of force on inmates with mental or medical health diagnoses, and maintain no policies or procedures for how correctional officers should interact with inmates in mental health crisis. (Searls Dep. 102-104.) This lack of communication has grave consequences. Dr. Venters explains that increased morbidity and mortality is associated with the use of chemical agents, such as pepper spray; restraints; and prolonged solitary confinement for individuals with severe mental health conditions; similarly individuals with COPD and asthma are at increased risk from the use of pepper spray. (Venters Rep. 11-12, 15-16; Wills Rep. ¶ 6); *see also Thomas v. Bryant*, 614 F.3d 1288, 1315 (11th Cir. 2010).

Defendants' intake system is wholly deficient. At intake, through the use of system-wide

deficient forms and screening instruments, Defendants fail to identify serious health needs for follow-up—a primary purpose of conducting intake screenings and assessments. (Venters Rep. 10-11.) Defendants further fail to timely conduct necessary assessments and referrals for intellectual and developmental disabilities, mental health services, medications, or chronic care treatment. (Venters Rep. 12, 19.) Defendants do not conduct necessary medical screenings for reported medical history; and they do not ensure that medications are prescribed for existing medical conditions. (Venters Rep. 12-13.) Defendants have no set timeframe for someone who presents at intake with a medical need that is not an emergency to see a medical doctor for treatment, nor is there an established timeframe for a mental health consultation for an individual with psychiatric symptoms. (Hissom Dep. 7-19, 101:13-14, 137:4-18.) Dr. Venters further notes that, as a matter of practice, "DCR routinely halts life-saving medications for people who are placed into a detoxification protocol," which is "extremely dangerous" and increases risk of morbidity and mortality; DCR further conducts detoxification in crowded cells without proper bedding, making it "exceedingly difficult to detect . . . who is experiencing severe, even life-threatening complications of detoxification." (Venters Rep. 13.) These failures are systematic and lead to substantial risk and harm to inmates. (*See* Venters Rep. 10-13, 20; Wills Rep. ¶ 8.)

Defendants' medication delivery system is also inadequate. Defendants deny access to medications on intake, disrupt medications without notice, provide inconsistent access to purportedly prescribed medications, and fail to prescribe and deliver medications upon intake. These practices result in "clinical worsening of the health problems being treated." (Venters Rep. 13; *see also* Wills Rep. ¶¶ 7, 8; Venters Rep. 13-19.) Similarly, Defendants routinely deprive inmates of access to treatment for chronic medical conditions, such as heart disease, diabetes, asthma, and HIV, despite that the basic standard of care requires consistent chronic care services.

(Venters Rep. 19.) DCR similarly simply does not ensure that doctor or dental orders are complied with, that medical, dental, and mental health appointments are timely scheduled or kept, that requests for medical care are timely responded to, or that the process for making a medical request is properly explained or made available to inmates.[13] (*See* Venters Rep. 19-20.)

Despite the facially obvious nature of these deficiencies, through its policy of no oversight and no corrective action, DCR allows these system-wide failures to continue unaddressed, resulting in substantial harm to inmates in its custody, control, and care. (Wills Rep. ¶ 2; *see also* Venters Rep. 5-9.) Dr. Venters concludes:

> Taken together, these patient records reveal a lack of access to basic health services for detained people, starting from the intake into DCR facilities and extending throughout their incarceration. Without use of basic quality metrics and other standard elements of correctional health oversight, WVDCR has abdicated its clear role as the responsible party in ensuring the quality of care from the vendors that provide health services. This lack of oversight is unacceptable in both community and correctional health settings. It appears that the deficiencies in the care provided to these patients represent systematic problems created and permitted by the DCR's abdication of its responsibility to oversee and ensure the quality of care in its jail system.

(Venters Rep. 21.) Similarly, Dr. Wills concludes:

> A review of the records has determined that the mental health care, especially the psychiatric care, provided in West Virginia DCR jails is woefully deficient in several areas, does not comport with NCCHC Standards, falls below the standard of care and has resulted in unnecessary physical and emotional harm to many detainees. There is a reasonable likelihood that if the chart review continues, the number of deficiencies will increase, as the problem is pervasive in DCR.

(Wills Rep. at 3-4.)

D. DCR exercises complete control over disability-related accommodations in its jails and has utterly failed to implement any policy to ensure that inmates with disabilities receive the accommodations to which they are entitled.

As the preliminary discovery in this case clearly demonstrates, DCR—and its

[13] DCR's own failure to properly staff its facilities further interferes with patient care, including creating substantial delays in providing medical and dental care. (Weber Dep. 194:3-20, 195:11-24.)

contractors—has fully abdicated its responsibilities under the Americans with Disabilities Act, 42 U.S.C. § 12132. As a result, DCR is actively and on an ongoing basis discriminating against legally-disabled inmates in its custody. It is well settled that the ADA applies to inmates in state jail and prison facilities. 28 C.F.R. § 35.152; *Penn. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956 (1998). Moreover, the duty to provide reasonable accommodations and avoid discrimination explicitly extends to contractors of state correctional agencies, such as PrimeCare and Wexford. *See* 28 C.F.R. § 35.152. As a result of both DCR's and its contractors' complete lack of ADA policies, DCR is violating the rights of inmates with disabilities, including the named Plaintiffs and those in the putative Disability Subclass.

The evidence in this case—including testimony from DCR's Director of Correctional Health, multiple jail Superintendents, and the medical contractors, as well as written admissions from DCR—demonstrates conclusively that DCR makes *no* attempt to provide reasonable accommodations to ensure that inmates in its custody are able to receive the "benefits of the services, programs, or activities" of the jails, as it is required to do. 28 C.F.R. § 35.152(b)(1). DCR does not track the number of inmates with disabilities housed in its jails. (D's Resp. to 3rd Irrogs & RFPs No. 35.) DCR does not maintain or enforce any policy to identify inmates with disabilities, to create or ensure accommodations or modifications, or to notify staff of any such needs. (*See* Straughan Dep. 83, 115:22-24; Vallandingham Dep. 94:19-95:3; Searls Dep. 110-11; D's Resp. to 3rd Irrogs & RFPs No. 51, 52, 53.) Indeed, DCR has absolutely no idea of how many inmates in its facilities constitute qualified individuals with disabilities who need accommodations, as DCR does not collect information nor generate reports regarding individuals who cannot participate in the jails' activities, services, and programs. (*See* Straughan Dep. 88:20-23; Thistlethwaite Dep. 75; Vallandingham Dep. 129:1-

12, 129:15-130:15, 137:23-138:18; Weber Dep. 150:1-17.) Nor does DCR maintain or track inmate requests for disability accommodations or the provision of those accommodations. (D's Resp. to 3rd Irrogs & RFPs No. 37, 57, 58, 74.) It is therefore unsurprising that DCR has not complied with its obligations to provide information to inmates regarding their rights under the ADA, *see* 28 C.F.R. § 35.106; appoint a designated responsible employee for ADA compliance and ensure that that person has an appropriate job description and carries out their duties, *see id.* at § 35.107(a)[14]; or implement reasonable policies to ensure that inmates with disabilities are appropriately housed, *see id.* at § 35.152(b)(3). (*See* Email from Defs.' Counsel (June 22, 2020) (noting that Defendant has "no responsive documents" with regard to these issues) (attached as Ex. 13); Defs.' Resp. to 3d Mot. to Compel at 15 ("Defendant has no responsive documents.") [Doc. 251].)[15]

As Director Hissom testified, DCR maintains *no* policy or procedure to ensure that necessary medical assistive devices or protheses, such as hearing aids, false teeth, or even wheelchairs, are timely provided—or even provided at all—to individuals who need them to engage in life in jail. (Hissom Dep. 97:2-14, 98:2-12, 103:19-24; D's Resp. to 3rd Irrogs & RFPs No. 45, 46, 47, 48.) While DCR contends that accommodations are handled on a case-by-case basis, it is clear that this alleged method is ineffective, given that Defendant can produce *no* documentation of any accommodation that it has provided, no policy by which to even make such a determination, and no training on staff members' obligations. (*See* D's

[14] While Defendants assert that they have designated a responsible employee, they have not been able to identify that individual in discovery and attest that they have no documents reflecting or relating to that appointment, such as a job description or a communication advising inmates or staff of the existence or identity of the employee. (*See* Email from Defs.' Counsel (June 22, 2020) (noting that Defendant has "no responsive documents" with regard to these issues); Defs.' Resp. to 3d Mot. to Compel at 15 ("Defendant has no responsive documents.") [Doc. 251].)

[15] To the extent Defendants attempt to assert that WVRJA Policy and Procedure Statement 13007 (1997), "Special Medical Programs," produced in discovery under protective order, addresses its obligations under the ADA, such procedure is wholly deficient to meet ADA requirements for a public entity, does not mention nor cite to the ADA and in certain respects actually conflicts with the requirements imposed by the ADA.

Resp. to 3rd Irrogs & RFPs No. 37, 45, 51, 52, 53, 57, 58, 74.; Straughan Dep. 83, 88:20-23, 115:22-24; Vallandingham Dep. 94:19-95:3; Searls Dep. 110-11; Thistlethwaite Dep. 75; Vallandingham Dep. 129:1-12, 129:15-130:15, 137:23-138:18; Weber Dep. 150:1-17; Email from Defs.' Counsel (June 22, 2020) (noting that Defendant has "no responsive documents" with regard to these issues); Defs.' Resp. to 3d Mot. to Compel at 15 ("Defendant has no responsive documents.") [Doc. 251].) Indeed, Defendants' own staff and contractors report that they do not know when an accommodation might be required, or what that might entail. (*See id.*)

DCR's contractors likewise fail to even attempt compliance with the ADA—likely because they do not believe that they are required to. The CEO of PrimeCare—who is also an attorney—testified "**I don't think [the ADA] is applicable to correctional facilities**" in response to the question, "Do you have a process for identifying inmates who need disability accommodations?" (Weber Dep. 151:4-6 (emphasis added).)[16] The Medical Director for PsiMed similarly testified, when asked whether PsiMed provides accommodations for disabled inmates to ensure their ability to engage in mental health care, "**We don't provide that** [accommodations]." (Thistlethwaite Dep. 75 (emphasis added).) And Wexford has confirmed that it has no meaningful disability policies or documents. (D's Resp. to 3rd Irrogs & RFPs at No. 25, 28, 29, 33 and 38 (attached as Exhibit 12).) The failures of DCR's contractors is unsurprising, given that DCR itself has no policies or procedures or other mechanisms designed to ensure compliance with ADA standards by its contractors. (Email

[16] Confirming that PrimeCare does not appropriately identify and track inmates with disabilities, PrimeCare's Regional Coordinator stated that "special needs patients" are purportedly tracked by Health Services Administrators in a separate log that is not contained in the EMR, and is only kept for the purposes of passing the NCCHC audit. (Vallandingham Dep. 129:15-1300:15.) A PrimeCare nurse working at Western Regional Jail confirmed that the special needs logs were not utilized, testifying that she was not aware of what a "special health needs patient" was or what that would entail. (Christian Dep. 22:24-23:1.)

from Counsel for Defendants at 3.)

Indeed, the contractors' intake forms further are designed so that neither the contractors nor DCR can easily identify, track, or accommodate individuals with disabilities. These screening forms capture no information about many types disabilities and necessary accommodations, including basic disabilities such as hearing impairments. (*See* Vallandingham Dep. 136:2-12; Venters Rep. 10-11.) Moreover, even if the EMR did track disabilities, its contents are by design not communicated to DCR staff, such that DCR staff would have no knowledge with which to create an appropriate modification. (*See* Hissom Dep. 105:15-17, 138:16-24; Christian Dep. 24:10-21; Vallandingham Dep. 94:19-95:3; Straughan Dep. 83, 84:1-4115:22-24; 116:1.)

This uniform lack of policies or procedures to ensure or even address ADA compliance directly results in DCR's utter and complete failure to accommodate individuals with disabilities, resulting in across-the-board discrimination against said individuals, who are not provided with basic modifications to enable them to effectively participate in jail life, such as to accommodate hearing loss, learning disabilities, sight impairment, speech impairments, and inability to read or write. (*See, e.g.* Venters Rep. 10-11; Grievances at DCR 7673 (refusal to provide glasses at Potomac Highlands Regional Jail); DCR 7714 (same, at South Central Regional Jail); DCR 7920 (same, at lack of glasses after they were taken from her at Southern Regional Jail); DCR 8638 (same, at Eastern Regional Jail); Straughan Dep. 85-86, 111:10-13; Thistlethwaite Dep. 74, 75, 106.) Inmates with mental health needs are routinely placed in restrictive settings, seclusion, and restraints, rather than being provided accommodation of basic mental health care. (*See* Venters Rep.; Wills Rep.)

In short, as a matter of policy, DCR and its contractors have failed and refused to take

any action to comply with the ADA, such that all members of the Disability Subclass are harmed.

II. ARGUMENT

A. The Governing Legal Standards for Plaintiffs' Claims

Plaintiffs' claims are based on violations of the Eighth and Fourteenth Amendments to the United States Constitution, and the Americans with Disabilities Act (ADA).

1. Deliberate Indifference (14th Amendment & 8th Amendment)

The Eighth Amendment's Cruel and Unusual Punishment Clause governs constitutional claims brought by convicted inmates while the Fourteenth Amendment's Due Process Clause governs similar claims brought by pretrial detainees. *See Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015). Because DCR's jails hold both convicted inmates and pretrial detainees, both standards are applicable here.

The Eighth Amendment is violated when prison officials, acting with "deliberate indifference," expose inmates to "a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). In a case seeking only injunctive relief, it is the risk itself that violates the Eighth Amendment; the prisoner need not await bodily injury before seeking relief. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition."). A prison official acts with deliberate indifference when she "knows of and disregards an excessive risk to inmate health or safety[.]" *Farmer*, 511 U.S. at 837. In class actions challenging a prison's healthcare systems, "systemic deficiencies can provide the basis for a finding of deliberate indifference." *Postawko v. Missouri Dep't of Corr.*, No. 2:16-CV-04219-NKL, 2017 WL 3185155, at *7 (W.D. Mo. July 26, 2017), aff'd, 910 F.3d 1030 (8th Cir. 2018) (quoting *Harris v. Thigpen*,

941 F.2d 1495, 1505 (11th Cir. 1991)). Deliberate indifference to inmates' health needs may be shown "by proving that there are such systemic and gross deficiencies in . . . procedures that the inmate population is effectively denied access to adequate medical care." *Id.* (internal citations and quotations omitted); *see also Brown v. Plata*, 563 U.S. 493, 505 at n.3 (2011) ("Plaintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill inmates in California to 'substantial risk of serious harm'[.]").

Although the case law setting forth the standard for a deliberate indifference claim for a pretrial detainee incorporates standards arising from Eighth Amendment claims, complaints regarding the conditions of a pretrial detainee's confinement are not measured against the standards of the Eighth Amendment. As the Supreme Court has found, the state is without the "power to punish with which the Eighth Amendment is concerned [unless] . . . it [first] secured a formal adjudication of guilt in accordance with due process of law." *Lyons v. Powell*, 838 F.2d 28, 29 (1st Cir. 1988) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671-672 (1977)). Rather, the Due Process Clause of the Fourteenth Amendment provides the appropriate standards for the conditions of pretrial confinement. *Id.* (citation omitted). Under this standard, conditions that amount to punishment of the detainee deprive the detainee of his liberty without due process of law. *Lyons*, 838 F.2d at 29 (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). To determine whether a condition amounts to a punishment,

> [a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. (citation omitted). Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].

Id. at 30 (quoting *Bell*, 441 U.S. at 538). Accordingly, "[i]f a restriction appears to be unrelated to a legitimate governmental objective, and is, for example, arbitrary or purposeless, then a court may infer that it is intended to be punishment." *Id.* at 29 (citing *Bell*, 441 U.S. at 539).[17]

2. Americans with Disabilities Act

Pursuant to Title II of the ADA, a "qualified individual with a disability" cannot, "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; 28 C.F.R. § 35.130(a); *see also* 28 C.F.R. § 35.152(b)(1) (specifically applying this mandate to correctional facilities). Accordingly, the ADA requires public entities, including jails, to "make reasonable modification in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability" unless the such modifications would fundamentally alter the nature of the service, program, or activity provided by the public entity. 28 C.F.R. § 35.130(b)(7)(i).

ADA claims based on a failure to make reasonable accommodations are "framed in terms of the failure to fulfill an affirmative duty—the failure to reasonably accommodate the disabled individual's limitations." *Cotton v. Douglas Cty. Dep't of Corr.*, No. 8:16-cv-153, 2016 WL 5816993, at *5 (D. Neb. Oct. 5, 2016) (quoting *Peebles v. Potter*, 354 F.3d 761,

[17] This Court recently addressed the relationship between claims arising under the Eighth and Fourteenth Amendments:

> As the Fourth Circuit has explained, "[w]hile a convicted prisoner is entitled to protection only against 'cruel and unusual' punishment, a pretrial detainee, not yet found guilty of any crime, may not be subjected to punishment of any description." *Hill v. Nicodemus*, 979 F.2d 987, 991 (4th Cir. 1992) (citing *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988)) (internal citations omitted). Nevertheless, courts often look to the Eighth Amendment when considering claims by pretrial detainees because they can be afforded no less protection than convicted prisoners. *See Young v. City of Mount Ranier*, 238 F.3d 567, 575 (4th Cir. 2001) (stating that "[p]retrial detainees are entitled to at least the same protection under the Fourteenth Amendment as are convicted prisoners under the Eighth Amendment. Thus, deliberate indifference to the serious medical needs of a pretrial detainee violates the due process clause.") (footnote and citations omitted).

Hammonds v. Wolfe, et al., Case 3:18-cv-01377, 2020 WL 1243609 at * 3 (S.D.W. Va. Mar. 13, 2020).

767 (8th Cir. 2004)). For inmates who are qualified individuals with disabilities, a reasonable accommodation must provide meaningful and effective access to jail services, activities, and programs. *Wright v. NY State Dep't of Corr.*, 831 F.3d 64, 73 (2d Cir. 2016) (citing *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999).)

Because of the unique nature of correctional facilities, in which staff control nearly all aspects of inmates' daily lives, most everything provided to inmates is a public service, program, or activity, including, but not limited to: eating, showering, toileting, communicating with those outside of DCR by mail and telephone, exercising, safety and security, DCR's administrative, disciplinary, and classification proceedings, medical, mental health, and dental services, and programmatic classes. *See* 28 C.F.R., Pt. 35, App. A (U.S. Department of Justice Guidance, explaining that "correctional facilities are unique facilities under title II" because inmates "cannot leave the facilities and must have their needs met by the corrections system," which "include, but are not limited to, proper medication and medical treatment, accessible toilet and shower facilities, devices such as a bed transfer or a shower chair, and assistance with hygiene methods for inmates with physical disabilities"); *Yeskey*, 524 U.S. at 210 ("Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the inmates.…").

In the correctional context, courts have held that "[b]ecause the regulations implementing the ADA require a public entity to accommodate individuals it has identified as disabled, 28 C.F.R. § 35.104, some form of tracking system is necessary" to enable a correctional system to comply with the Act." *Armstrong v. Davis*, 275 F.3d 849, 876 (9th Cir. 2001) (abrogated on other grounds by *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141 (2005)). DCR is further required to

ensure that inmates with disabilities are housed in "the most integrated setting appropriate to the needs of the individuals" and in cells "with the accessible elements necessary to afford the inmate access to safe, appropriate housing." 28 C.F.R. § 35.152(b)(2)-(3). As an employer of over fifty individuals, DCR must additionally have a "designated responsible employee for ADA compliance," *id.* at § 35.107(a), and must provide information about inmates' rights under the ADA to all inmates. *Id.* at § 35.106.

B. The Legal Standard for Class Certification

"A decision to certify a class is far from a conclusive judgment on the merits of the case." *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1037 (8th Cir. 2018) (citing *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (internal quotations omitted)). For that reason, "Rule 23 does not give district courts a 'license to engage in free-ranging merits inquiries at the certification stage[.]'" *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013)). Courts are not permitted to consider the merits of plaintiffs' case in ruling on a motion for class certification. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 428 (4th Cir. 2003). The court's "primary task is not to determine the final disposition of a plaintiff's claims, but instead to examine whether those claims are appropriate for class resolution." *Id.*; *see also Amgen Inc.*, 568 U.S. at 466 ("Merits 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.").

For the Court to certify a class, Plaintiffs must satisfy the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and show that the class fits within at least one of three categories of class actions listed under Rule 23(b).

Fed. R. Civ. P. 23; *see also Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654 (4th Cir.), cert. denied, 140 S. Ct. 676, 205 L. Ed. 2d 440 (2019). "Rule 23 [also] contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.' *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). The DCR Jail Class and the Disability Subclass satisfy the explicit and implicit requirements of Rule 23(a) and meet the requirements of Rule 23(b)(2) and, as such, should be certified.

C. Plaintiffs, the Proposed Class, and Proposed Subclasses Satisfy the Requirements of Rule 23(a).

As a threshold matter, the proposed class and subclass here satisfy the implicit requirement from Rule 23 of ascertainability. A class definition is sufficient if it is administratively feasible for the court to determine whether a particular individual is a member of the class, based on objective criteria, without extensive and individualized fact-finding or mini-trials. *See* Charles Alan Wright & Arthur R. Miller, 7A *Federal Practice & Procedure* § 1760 (3d ed. 2020 update) ("The proposed class definition must not depend on subjective criteria or the merits of the case or require an extensive factual inquiry to determine who is a class member."); *see also Manual for Complex Litigation, Fourth* (2004), Section 21.222, at 270 ("The definition must be precise, objective, and presently ascertainable. . . . An identifiable class exists if its members can be ascertained by reference to objective criteria. . . A class may be defined to include individuals who may not become part of the class until later.").

Plaintiffs propose defining the class in the precise, objective manner required: **All persons who are, or who will be, admitted to a jail in West Virginia.** Plaintiffs additionally propose a subclass, defined in the following precise, objective manner: **All persons who are, or who will be, admitted to a jail in West Virginia who meet the definition of being a "qualified individual with a disability" under the ADA.**

The definitions appropriately restrict the boundaries of the class to those who have suffered or who imminently face irreparable harm as a result of the Defendant's failure to provide timely appropriate medical and mental health treatment upon admission to jail. The class as defined includes each of the named Plaintiffs and is appropriate for class certification.

1. The proposed DCR Jail Class and Disability Subclass are sufficiently numerous.

The proposed DCR Jail Class and Disability Subclass satisfy Rule 23(a)(1)'s numerosity requirement, as they are each "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). A class or subclass with "40 or more members raises a presumption of impracticability based on numbers alone." William Rubenstein, *Newberg on Class Actions* § 3:12 (5th ed. June 2020 Update). Courts have routinely found that numerosity is satisfied where, as here, the proposed class comprises current and future inmates who seek only declaratory and injunctive relief. *See Postawko*, 910 F.3d at 1037-1038 (affirming certification of a class of "at least 2,000" inmates with Hepatitis C); *Dockery v. Fischer*, 253 F. Supp. 3d 832, 853 (S.D. Miss. 2015), *petition for appeal pursuant to Rule 23(f) denied*, No. 15-90110, slip op. (5th Cir. Nov. 2, 2015) ("joinder would not be practical in this case because the population at [the prison] is subject to change as inmates are transferred into and out of that facility."); *Scott v. Clarke*, 61 F.Supp.3d 569, 584 (W.D. Va. 2014) ("With approximately 1,200 women prisoners housed at FCCW who are subject to its medical care system, the proposed class is sufficiently large, on its face, to satisfy the Rule 23(a)(1) "numerosity" criterion.").

The proposed DCR Jail Class is sufficiently numerous that joinder of all members would be impractical and infeasible. The DCR Jail Class consists of "All persons who are, or who will be, admitted to a jail in West Virginia." This putative class is easily ascertainable, but

membership in it changes daily as individuals enter and leave the DCR system. The average daily population of West Virginia jails in fiscal year 2019 was 5,172. *See* FY2019 Annual Report 45, WV DCR, https://dcr.wv.gov/resources/Documents/FY2019%20ANNUAL%20REPORT%20WVDCR.pdf. A total of 47,051 individuals were admitted to West Virginia jails during fiscal year 2019. *Id.* at 44. Each of the over 5,000 inmates in WVDCR's jails are subject to the same systemwide policies and practices challenged in this lawsuit. (*See supra* Section I.) As a result, the DCR Jail Class includes the approximately 5,000 current inmates in DCR's jails and an untold number of future inmates, and clearly satisfies the numerosity requirement.

The proposed Disability Subclass is also sufficiently numerous. The Disability Subclass consists of "all persons who are, or who will be, admitted to a jail in West Virginia who meet the definition of being a 'qualified individual with a disability' under the ADA." While these individuals can, and should, be readily identified, Defendants do not maintain a record of inmates with disabilities in DCR's jails. As the result, it is currently impossible to know with certainty the total size of the Disability Subclass. However, the most recent nationwide inmate survey indicated that 39.9% of inmates in jails across the country reported having a disability in 2011-2012. *See Disabilities among Prison and Jail Inmates*, 2011-2012, U.S. Dept. of Justice (Dec. 2015), https://www.bjs.gov/content/pub/pdf/dpji1112.pdf. Using this predictive statistic, on any given day, one could expect that approximately 2068 inmates in West Virginia jails has a disability. However, West Virginia has a dramatically higher rate of disabilities in its general population than the U.S. average—39.2% of West Virginians have a disability, compared with 25.6% of adults nationwide. *See Disability & Health U.S. State Profile Data: West Virginia, Centers for Disease Control*, https://www.cdc.gov/ncbddd

/disabilityandhealth/impacts/west-virginia.html. As a result, it is likely that the number of inmates in West Virginia jails with a qualifying disability dramatically exceeds the conservative estimate of 2068 based on nationwide data. These numbers are more than enough to satisfy numerosity.

2. The commonality requirement of Rule 23(a)(2) is satisfied because the claims of the class and subclass present common issues of fact and law that are capable of common resolution.

To meet the commonality requirement, there must be "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), and class members must "have suffered the same injury," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal citation and quotation marks omitted). "To satisfy Rule 23(a)(2), plaintiffs must show their claims involve a common question or contention 'of such a nature that it is capable of class-wide 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.'" *Postawko*, 910 F.3d at 1038 (quoting *Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 998 (8th Cir. 2016)). What matters is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (citations and emphasis omitted).

Differences among class members with respect to the specific incidents of inadequate health care or disability discrimination that they have suffered do not undermine commonality. *See Postawko*, 910 F.3d at 1039 (quoting *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) ("although a presently existing risk may ultimately result in different future harm for different inmates . . . every inmate suffers exactly the same constitutional injury when he is exposed to a single . . . policy or practice that creates a substantial risk of serious harm") (emphasis added)); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (abrogated

on other grounds by *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141 (2005)) (rejecting defendant's argument that class was improperly certified in prison case alleging several forms of systemic disability discrimination). Furthermore, it is not necessary that all questions be common. *Ebert v. General Mills, Inc.*, 823 F.3d 472 (8th Cir. 2016) (reaffirming that "a single common question 'will do' for purposes of Rule 23(a)(2)."); *Dukes*, 564 U.S. at 359 ("We quite agree that for purposes of Rule 23(a)(2) even a single common question will do.") (internal quotation marks and alterations omitted).

Importantly, "the commonality element is more easily established in proposed class actions seeking injunctive or declaratory relief . . . . Indeed, suits for injunctive relief by their very nature present common questions of law and fact." *Scott v. Clarke*, 61 F.Supp.3d 569, 585 (W.D. Va. 2014) (quotations omitted). In civil rights cases, "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members," *Armstrong*, 275 F.3d at 868, even if the challenged policy or practice will affect individual class members in different ways. *See, e.g.*, *Postawko*, 910 F.3d at 1038-1039 (finding commonality satisfied where "all class members share the common question of whether Defendants' policy or custom . . . constitutes deliberate indifference to a serious medical need" and while the "physical symptoms eventually suffered by each class member may vary . . . the question asked by each class member is susceptible to common resolution.") (internal quotation marks and alterations omitted); *Braggs v. Dunn*, 317 F.R.D. 634, 656 (M.D. Ala. 2016) (finding commonality "because being subjected to a substantial risk of serious harm is an actionable constitutional injury, even when a prisoner's physical or mental condition has not yet been detrimentally impacted.").

a. DCR Jail Class

Common questions capable of common answers suffuse this entire lawsuit. DCR is solely responsible for the provision of medical and mental health care to inmates in its custody. W. Va. C.S.R. § 95-1-14.1. As detailed in Section I, *supra*, Plaintiffs have identified multiple systemic deficiencies in DCR's policies and practices, which place the named Plaintiffs and the proposed DCR Jail Class at substantial risk of serious harm. *Postawko*, 910 F.3d at 1038 (whether a policy or custom "constitutes deliberate indifference to a serious medical need" is a question to which the answer "will resolve an issue central to the validity of each of the class members' claims.") (internal quotations omitted); *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) ("What all members of the putative class and subclass have in common is their alleged exposure, as a result of specified statewide [prison] policies and practices that govern the overall conditions of health care services and confinement, to a substantial risk of serious future harm to which the defendants are allegedly deliberately indifferent.").

The following issues related to liability for the DCR Jail Class's Eighth and Fourteenth Amendment claims are common to all class members and, as demonstrated through the evidentiary record, resolution of these issues will "generate common answers apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551.

- Is DCR deliberately indifferent to the Jail Class Members' health and safety, as a result of its abject failure to engage in any oversight whatsoever of the medical and mental health care provided by its contractors? (*See supra* Section I.B.)

- Does DCR's policy and practice of abdicating responsibility for development, oversight, and implementation of medical and mental health care policies, and overseeing implementation of those policies, to its for-profit contractors expose inmates to a substantial risk of serious harm? (*See* Section I.B-C *supra*.)

- Does DCR, through its failure to oversee or monitor its contractors' medical policies, practices, and provision of medical treatment, or lack thereof (including but not limited to intake and screening, staffing, requests for medical care treatment, medication administration and

monitoring, continuity of care, quality management, and training), expose inmates to a substantial risk of serious harm? (*See supra* Section I.B-C.)

- Does DCR, through its failure to oversee or monitor its contractors' provision of mental health care, or lack thereof (including but not limited to intake and screening, staffing, suicide prevention, use of isolation, requests for mental health care treatment, medication administration and monitoring, continuity of care, quality management, and training), expose inmates to a substantial risk of serious harm? (*See supra* Section I.B-C.)

- Does DCR's lack of any systematic mechanism to track and log inmate grievances and complaints regarding medical care and mental health care expose inmates to a substantial risk of serious harm? (*See supra* Section I.B.)

The questions presented here clearly raise questions of fact and law common to all members of the DCR Jail Class, and courts have found similar questions sufficient in similar cases. *See, e.g.*, *Ahlman v. Barnes*, --- F. Supp.3d ---, 2020 WL 2754938, at *7 (C.D. Cal. May 26, 2020) (jail inmates satisfied commonality in putative class action alleging deliberate indifference, based on defendant jail's policies related to COVID-19); *Whitney v. Khan*, 330 F.R.D. 172, 178 (N.D. Ill. 2019) (certifying class alleging policy of understaffing dental providers in jail, noting that "an illegal policy can serve as 'the 'glue' necessary to litigate otherwise highly individualized claims as a class.'" (quoting *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 498 (7th Cir. 2012)); *Scott*, 61 F.Supp.3d at 585 (certifying class based on common questions including "whether the [Virginia DOC] fails to provide appropriate oversight, training, and supervision of medical care at [prison]" and "whether the [Virginia DOC's] policies, procedures, and practices reflect deliberate indifference to the serious medical needs of residents of [prison] such that it has violated their right to be free from cruel and unusual punishment as proscribed by the Eighth Amendment.")

b. Disability Subclass

The members of the Disability Subclass also share common questions capable of common answers. As already explained, pursuant to Title II of the ADA, a "qualified individual with a disability" cannot, "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. In order to comply with the ADA, public entities must, among other things, "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).

As established in Section I, *supra*, DCR maintains no policies or procedures to identify or track inmates in its custody who have disabilities or who need accommodations and modifications to access the jails' services, activities, and programs. *See Armstrong*, 275 F.3d at 876. DCR has produced no evidence that it has a true designated responsible employee for ADA compliance, an ADA complaint procedure, nor that it provides information to inmates in its custody about their ADA rights. *See id.* at §§ 35.107(a)-(b), 35.106. DCR likewise has no policies or procedures to ensure that inmates with disabilities are housed in the most integrated settings appropriate, and that their cells have the necessary accessible elements. *See id.* § 35.152(b)(2)-(3).

Indeed, the evidence in the case demonstrates that DCR routinely violates the ADA by failing to provide reasonable modifications and accommodations to ensure access to its programs, services, and activities for inmates who are qualified individuals with disabilities. *See id.* at § 35.130(a). As noted in Section I, *supra*, examples include failing to provide medical assistive devices, such as hearing aids, eyeglasses, and false teeth, as well as failing to accommodate disabilities that require medications, including both medical and mental health related disabilities. Further, DCR routinely fails to provide modifications for inmates with intellectual, developmental, and/or specific learning disabilities.

Based on the clear language of the ADA and its implementing regulations, issues common to the Disability Subclass include, but are not limited to, the following:

- Does DCR, through its disability-related policies and practices, or lack thereof (including but not limited to: tracking and identification; housing; provision of assistive devices and auxiliary aids; access to programming including medical and mental health services; educational, vocational, and rehabilitative programs; effective communication; designated responsible employee for ADA compliance; and disability related request and grievance processes) deny inmates who are qualified individuals with disabilities access to DCR programs, services and activities? (*See supra* Section I.D.)

- Does DCR, through its disability-related policies and practices, or lack thereof (including but not limited to: tracking and identification; housing; provision of assistive devices and auxiliary aids; access to programming including medical and mental health services; educational, vocational, and rehabilitative programs; effective communication; designated responsible employee for ADA compliance; and disability related request and grievance processes) discriminate against inmates who are qualified individuals with disabilities on the basis of disability? (*See supra* Section I.D.)

Resolution of the issues listed above depends on common contentions and are not affected by the circumstances of any individual class member. Thus, such questions are capable of generating common answers and hence are appropriate for class-wide resolution. *See Dukes*, 564 U.S. at 350.

3. The typicality requirement of Rule 23(a)(3) is satisfied because the named Plaintiffs have claims sufficiently typical of the class and subclass they seek to represent.

To meet the typicality requirement, the claims of the named plaintiffs must be "typical of the claims or defenses of the class." Rule 23(a)(3). The typicality requirement is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Armstrong*, 275 F.3d at 868 (citations omitted). The injuries do not have to be identical but must be similar and arise from the same course of conduct. *Id.*; *Rodriguez*, 591 F.3d at 1124. In a "suit for prospective injunctive and declaratory relief, the potential for minor factual variations does not undermine the . . . conclusion that the violation allegedly suffered by the Named Plaintiffs is typical of that suffered by the class as a whole." *Postawko*, 910 F.3d at 1039 (internal

quotations omitted). For example, in *Armstrong*, the Ninth Circuit affirmed a ruling certifying a class composed of inmates with different disabilities, holding that the "plaintiffs all suffer a refusal or failure to afford them accommodations as required by statute, and are objects of discriminatory treatment on account of their disabilities." *Armstrong*, 275 F.3d at 869. Recognizing that inmates with different disabilities will suffer different specific injuries as a result of the defendants' conduct, the Court held that those "minor" differences were "insufficient to defeat typicality." *Id.*

The claims of the Named Plaintiffs meet the typicality requirement, as they have all suffered the same injuries as the absent class members who they seek to represent, and those injuries have been, and continue to be, caused by the same policies and practices of Defendants that harm the class and subclasses as a whole. The six Plaintiffs, four men and three women, are all currently housed in DCR custody, and all are or have been housed in DCR jails.[18] Collectively, they have been injured by every systemic deficiency discussed herein, including in the contexts of medical care, mental health care, and in the provision of reasonable modifications for prisoners with disabilities. (*See, e.g.*, Venters Rep.; Wills Rep.) As discussed in Section I, Defendants' policies and procedures, or lack thereof, apply equally to all inmates across all DCR jail facilities. All of the named Plaintiffs and the putative class and subclass members share a common injury of having these centralized policies and practices applied to them and, as a result, all are exposed to the same substantial risk of serious harm. The named Plaintiffs' claims are therefore typical because they are each exposed to the same risks of harm as the class they seek to represent. *See, e.g.*, *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 159-60 (N.D. Cal. 2015) (finding typicality for similar jail class and ADA

[18] Defendants have stipulated that even though some individual named Plaintiffs have been transferred between facilities while in DCR custody, DCR will not object to their ability to adequately represent the class on that basis.

subclass); *Dunn v. Dunn*, 318 F.R.D. 652, 666 (M.D. Ala. 2016).

4. The proposed class representatives and class counsel will fairly and adequately represent the interest of the class and subclass.

a. Proposed class representatives

Federal Rule of Civil Procedure 23(a)(4) requires that representative parties "fairly and adequately protect the interests of the class." The first component of the adequacy inquiry "goes to the heart of a representative parties' ability to represent a class." *Deiter*, 436 F.3d at 466. "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)); *see also, In re Serzone*, 231 F.R.D. at 238-9 (citing *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 546 (4th Cir. 1975)).

The requirement in Rule 23(a)(4) looks to whether any real and material conflicts of interest exist between the named parties and the class they seek to represent. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58, n. 13 (1982)). As the Fourth Circuit has noted:

> For a conflict of interest to defeat the adequacy requirement, "that conflict must be fundamental." A conflict is not fundamental when, as here, all class members "share common objectives and the same factual and legal positions [and] have the same interest in establishing the liability of [defendants]." Moreover, a conflict will not defeat the adequacy requirement if it is "merely speculative or hypothetical."

Ward, 595 F.3d at 180 (citing *Gunnells*, 348 F.3d at 430-431).

The named Plaintiffs will fairly and adequately represent and advance the interests of the class. Each is a member of the class and subclass as defined, each shares the same type of legal injury with absent members, and each has advanced the same legal and remedial theories

of relief that are advanced for the class as a whole. As a result, the named Plaintiffs have the same strong interest in vindicating the rights of all who have been similarly harmed by WVDCR's failure to provide adequate medical and mental health care upon admission to jails in West Virginia. Advancing their own individual legal claims will also advance and prove the claims and rights of the class as a whole.

There is no conflict between the interests of the named Plaintiffs and absent class members. Each share the same, crucial interest in receiving adequate and timely medical and mental health treatment. Moreover, the only relief the named Plaintiffs seek is relief that will benefit the class and subclass generally, themselves the same as all others. As a result, the named Plaintiffs meet the adequacy standard of Rule 23(a)(4).

b. Plaintiffs' counsel meet the requirements of Rule 23(g) and should be appointed class counsel.

Counsel for the named Plaintiffs request to be appointed counsel for the class, pursuant to Federal Rule of Civil Procedure 23(g). That Rule provides in pertinent part:

> (1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:
>
> (A) must consider:
>
> i. the work counsel has done in identifying or investigating potential claims in the action;
> ii. counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> iii. counsel's knowledge of the applicable law; and
> iv. the resources that counsel will commit to representing the class;
>
> (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class . . . .
>
> (2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4) . . . .

> (4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

Fed. R. Civ. P. 23(g). Class counsel are fiduciaries to the absent members of the class. *See Rodriguez v. W. Pub. Co.*, 563 F.3d 948, 968 (9th Cir. 2009); *see also Sondel v. NW Airlines, Inc.*, 56 F.3d 934, 938 (8th Cir. 1995). The duty of adequate representation requires counsel to represent the class competently, vigorously, and without conflicts of interest with the class. *See Amchem Prods.*, 521 U.S. at 626 n. 20. The interests of the absent class members in the vigorous and skilled prosecution of their claims must be protected by counsel adequate to that task. *See Woodard v. Online Info. Servs.*, 191 F.R.D. 502, 506 (E.D.N.C. 2000) (citing *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 183 (4th Cir. 1993)). The named plaintiffs' attorneys must be "qualified, experienced and generally able to conduct the litigation." *In re Serzone*, 231 F.R.D. at 238.

The named plaintiffs are represented by Lydia C. Milnes, Jennifer S. Wagner, and Rachel Kincaid, and the law firm of Mountain State Justice, Inc., a non-profit, public interest legal services firm with an institutional mission to advocate for the interests of vulnerable West Virginians, regardless of their ability to pay. The organization has a long history of and substantial expertise in class litigation on behalf of low-income West Virginians. *See, e.g.*, *Cyrus ex rel. McSweeney*, 233 F.R.D. 467 (certified class action suit brought by Mountain State Justice to challenge DHHR policy changes in operation of what is now known as the I/DD waiver program); *Michael T., et al. v. Bowling*, 2:15cv9655 (S.D.W. Va., September 30, 2016) (certified class action suit brought by Mountain State Justice to challenge DHHR policies relating to the calculation of benefits for those on the I/DD waiver program, raising ADA claims; Lydia Milnes certified as class counsel). Mountain State Justice has extensive experience in federal court litigation to enforce the requirements of law and the Constitution, and skill in the vigorous prosecution and management

of class action litigation. Moreover, it has the personnel and financial resources to pursue this litigation to a favorable outcome on behalf of the absent class members. (*See* Decl. of Lydia C. Milnes (attached as Ex. 19); Decl. of Jennifer S. Wagner (attached as Ex. 20); Decl. of Rachel J. Kincaid, (attached as Ex. 21).)

Counsel have demonstrated they are "qualified, experienced and generally able to conduct the litigation." *In re Serzone*, 231 F.R.D. at 238. Based on this showing, and the reasons stated above, counsel request this Court appoint them as class counsel pursuant to Federal Rule of Civil Procedure 23(g).

D. Plaintiffs, the Proposed Class, and the Proposed Subclass Satisfy the Requirements of Rule 23(b)(2).

In addition to satisfying Rule 23(a), a class action must meet the requirements of one of the provisions of Rule 23(b). Plaintiffs move for certification under Rule 23(b)(2), which authorizes class certification where "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). Although a Rule 23(b)(2) class is not required to satisfy the additional predominance and superiority requirements of Rule 23(b)(3), "the class claims must be cohesive." *Postawko*, 910 F.3d at 1039 (citing *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1035 (8th Cir. 2010)) (internal quotation marks omitted).

Rule 23(b)(2) "is almost automatically satisfied in actions primarily seeking injunctive relief." *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 58 (3rd Cir. 1994); *see also Postawko*, 910 F.3d at 1039-1040 (finding district court did not abuse its discretion in "holding that sufficient evidence of a common policy existed to comply with Rule 23(b)(2)" in case involving the Missouri Department of Corrections' uniform policy regarding Hepatitis

C); *Bradley v. Harrelson*, 151 F.R.D. 422, 427 (M.D. Ala. 1993) (subsection (b)(2) "is particularly applicable to suits . . . involv[ing] conditions of confinement in a correctional institution."). Indeed, cases in which a group of inmates seek to challenge the lawfulness of prison policies are so well suited for Rule 23(b)(2) class treatment that the leading class-action and federal-practice treatises both use it as the exemplar of a case fitting within that subsection: "For example, if a prisoner in a prison conditions lawsuit secures a ruling that a prison policy violates the Constitution, the court-ordered injunctive relief will necessarily apply to all other inmates." 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 4.34 (5th ed. 2020 update); *see also* Wright & Miller, 7A Fed. Prac. & Proc. § 1776.1 (3d ed. 2020 update) (noting that (b)(2) classes are frequently used to enforce the ADA).

Here, Defendants' policies apply generally to the proposed DCR Jail Class and proposed Disability Subclass, such that the requested injunctive and declaratory relief would provide relief to all class and subclass members. Plaintiffs have produced significant evidence demonstrating the broken nature of the provision of medical and mental health care in West Virginia's jail system. Pursuant to Defendants' policies and practices, or lack thereof: (1) the DCR Jail Class is subjected to a health care system that places them at substantial risk of serious harm, including unnecessary injury, illness, and death (*see supra* Sections I.B-C); and (2) DCR discriminates against the Disability Subclass by failing and refusing to provide reasonable accommodations to enable inmates to access to vital programs, services, and activities of the WVDCR (*see supra* Sections I.D, II). To remedy these constitutional and statutory violations, Plaintiffs seek only injunctive and declaratory relief. Accordingly, the requirements of Rule 23(b)(2) are met.

III. CONCLUSION

As set forth herein, Plaintiffs respectfully request this Court certify this case as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), and to appoint the undersigned as class counsel pursuant to Federal Rule of Civil Procedure 23(g).

Respectfully submitted,

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