

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

Suffolk, ss.

Super. Ct. No. 20-00855-D

**STEPHEN FOSTER, MICHAEL GOMES,
 PETER KYRIAKIDES, RICHARD
 O'ROURKE, STEVEN PALLADINO,
 MARK SANTOS, DAVID SIBINICH,
 MICHELLE TOURIGNY, MICHAEL
 WHITE, FREDERICK YEOMANS, and
 HENDRICK DAVIS**, individually and on
 behalf of all others similarly situated,

Plaintiffs,

v.

CAROL MICI, Commissioner of the
 Massachusetts Department of Correction,
GLORIANN MORONEY, Chair
 Massachusetts Parole Board, and **THOMAS
 TURCO**, Secretary of the Executive Office of
 Public Safety and Security,

Defendants.

UFFOLK SUPERIOR COURT
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PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs move the Court for an order that this action be certified as a class action under Rule 23 of the Massachusetts Rules of Civil Procedure on the ground that it is a proper class action on all issues, as more fully appears from the allegations of the complaint and the memorandum submitted herewith. The proposed class is all prisoners who are incarcerated at prisons and jails in Massachusetts, including a subclass of all prisoners who are at a heightened risk for serious complication or death from COVID-19 due to underlying medical condition or age (the "medically vulnerable subclass").

The proposed class satisfies the requirements of Mass. R. Civ. P. 23(a) because: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of representative parties are typical of the class; and (4) the representative parties will fairly and adequately represent the interests of the class. The proposed class satisfies the requirements of Rule 23(b) because: (1) questions of law or fact common to members of the class predominate over questions affecting only individual members, and (2) a class action would be superior to other available methods for fair and efficient adjudication of this controversy.

Plaintiffs further request that their counsel be appointed to represent the certified class, pursuant to Rule 23(d) of the Massachusetts Rules of Civil Procedure.

Dated: July 27, 2020

Respectfully Submitted,

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/s/ Michael J. Horrell

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**MEMORANDUM IN SUPPORT OF
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INTRODUCTION

This action was brought in response to the immediate and extraordinary risk of infection, complications, and death from the novel coronavirus (COVID-19) prisoners in Massachusetts prisons and jails face due to the conditions of their confinement. The Supreme Judicial Court has twice recognized that “the situation inside the Commonwealth’s jails and prisons is urgent and unprecedented, and that a reduction in the number of people who are held in custody is necessary.” *Foster v. Comm’r of Correction*, 484 Mass. 698, 701 (2020) (quoting *Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Ct.*, 484 Mass. 431, 445 (2020)). The Plaintiffs seek certification of a class of all those incarcerated in the Commonwealth, and a subclass of those vulnerable to serious complications or death from COVID-19 due to age and/or medical condition. This case, seeking relief from Defendants’ failure to effectuate a meaningful reduction in the prison population, is dominated by common questions of fact and law. Proceeding as a class action is the most efficient—and for most prisoners, effectively the only—method of remedying these violations. As detailed below, the proposed class and subclass meet all of the requirements of Mass. R. Civ. P. 23(a) and (b).

The COVID-19 pandemic is the greatest public health emergency in living memory, and society has taken drastic action in response to it. Businesses have been shuttered to prevent large numbers of people from coming in close contact with one another. Schools have also been closed, and threaten to remain so for the coming year. These protective measures, implemented throughout the Commonwealth and the country, are designed to limit the spread of the virus through “social distancing”—*i.e.*, maintaining at least six feet of separation between people so that they cannot transmit the virus. Despite the clear imperative from public health authorities

that everyone practice social distancing, Defendants have failed to implement this most basic of safety measures in Massachusetts prisons and jails. Thousands of incarcerated people still sleep or eat less than six feet from others. Not even those medically vulnerable to grave complications from the virus have been put in single cells.

Social distancing is currently impossible in Massachusetts prisons and jails because they are overcrowded. Many of them exceed their design capacity and fail to meet minimum space standards promulgated by the Department of Public Health. Defendants have failed to meaningfully reduce the prison and jail population to a level where social distancing would be feasible. Instead, Defendants imposed broad lockdowns that have subjected prisoners to harsh conditions in many ways similar to those of solitary confinement. Despite these efforts, at least ten prisoners have died from COVID-19 in Massachusetts prisons and jails, and all members of the proposed class have been forced to endure effectively punitive conditions.¹ Now, before the virus spreads to more facilities, and more people in custody, Plaintiffs seek classwide relief.

ALLEGATIONS OF THE PROPOSED CLASS REPRESENTATIVES

Plaintiffs in this case include six individuals in the custody of the Department of Correction (“DOC”) and two individuals in the custody of county sheriffs, all following criminal

¹ *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, No. SJC-12926, Special Master’s Weekly Report at 1, 21 (July 23, 2020), available at <https://www.mass.gov/doc/sjc-12926-special-masters-weekly-report-72320>.

convictions.² Compl. ¶¶ 11-21. They are proposed as representatives of both the overall class and the medically vulnerable subclass.

Plaintiff Stephen Foster is imprisoned in the Old Colony Correctional Center. *Id.* ¶ 11. He is 43 years old with a history of numerous serious medical conditions—including heart failure, infective endocarditis, septic emboli to the brain, lungs, spine, and joints, and serious ears, nose, and throat complications—that heighten his risk of death should he contract COVID-19. *Id.* After accounting for his good conduct in prison (*i.e.*, his eligibility for an early release due to “earned good time”), Mr. Foster is scheduled to complete his three- to five-year sentence for assault and battery and related convictions in 2022; in June 2020, the Parole Board denied his application for parole, and the DOC denied his petition for release on medical parole.

Plaintiff Michael Gomes is imprisoned in Massachusetts Correctional Institution (“MCI”) Concord. *Id.* ¶ 12. He is 50 years old and had a liver transplant in 2016, which requires Mr. Gomes to take daily anti-rejection medication that leaves him immunocompromised. *Id.* He is imprisoned for failing a drug test while on probation in August 2019 after his sister, mother, and daughter all died within 90 days of each other and he relapsed. *Id.* Mr. Gomes is set for release in July 2021. *Id.* He was denied parole in June 2020. Currently, he lives in a prison dormitory with over 80 other people who sleep in bunk beds just three feet apart. *Id.*

² Three additional named plaintiffs—Peter Kyriakides, David Sibinich, and Mark Santos—have been released from custody and are not proposed as class representatives. Mr. Santos was civilly committed pursuant to G.L. c. 123, § 35 (“Section 35”), but Plaintiffs are no longer seeking certification of a subclass of members civilly committed to DOC custody pursuant to Section 35 in this action. A class of men committed pursuant to Section 35 has been certified in a separate action that challenges the lawfulness of Section 35 commitment to DOC. *Doe, et al. v. Mici*, No. 2019-828, Dkt. 11, Mem. and Order on Pls.’ Mot. on Class Cert. (Mass. Super. July 2, 2019).

Plaintiff Richard O'Rourke is imprisoned in the Plymouth County Correctional Facility. *Id.* ¶ 14. He is 64 years old and has a history of respiratory conditions, including multiple hospitalizations for bronchitis and severe pneumonia. *Id.* He has already served more than half of his three-year sentence for operating a vehicle while under the influence. He is currently eligible for early parole and he will be eligible for regular parole this year. *Id.*

Plaintiff Steven Palladino is imprisoned in MCI Norfolk. *Id.* ¶ 15. He is 62 years old and has insulin-dependent diabetes as well as kidney disease. *Id.* He has served eight and a half years of a 10- to 12-year sentence, plus two years on and after for committing non-violent financial and related crimes. *Id.* He was participating in the dog training program at MCI Norfolk until DOC locked down the prison in response to COVID 19 and removed the dogs. *Id.*

Plaintiff Michelle Tourigny is imprisoned in MCI Framingham. *Id.* ¶ 18. She is 53 years old and suffers from serious medical conditions, including spinal stenosis, morbid obesity, a heart condition that requires a pacemaker, and a lung that has been surgically partially removed. *Id.* Ms. Tourigny is living in the Health Services Unit because of her medical conditions, which means she is in routine contact with sick prisoners as well as medical and correctional staff. *Id.* She is serving a second-degree life sentence for killing her abusive boyfriend in 1998. *Id.* DOC denied her petition for medical parole on May 8, 2020. *Id.*

Plaintiff Michael White is imprisoned in MCI Concord. *Id.* ¶ 19. He is 35 years old and has chronic obstructive pulmonary disease ("COPD") as well as severe asthma. *Id.* He is housed in a dormitory with over 80 other people, all of whom sleep in bunk beds and share just five lunch tables and two bathrooms. *Id.* Now that MCI Concord has been locked down, they are all

always in the room together, and he is often within arm's reach of others. *Id.* He is scheduled to complete his sentence in July 2021. *Id.*

Plaintiff Frederick Yeomans is imprisoned in the Barnstable County Correctional Facility for driving with a suspended license. *Id.* ¶ 20. He is 72 years old and has heart disease and high blood pressure. *Id.* ¶ 20. Mr. Yeomans's sentence ends in October 2021, but he is currently eligible for early parole and will be eligible for regular parole later this year. *Id.*

Plaintiff Hendrick Davis is imprisoned in the Massachusetts Treatment Center ("MTC"). *Id.* ¶ 21. Mr. Davis is 37 years old and suffers from stage-four kidney disease. *Id.* He has served more than four years of his five-year to five-year-and-a-day sentence. With good time, he will be eligible for release later this year. *Id.*

PROPOSED CLASS DEFINITION

The proposed class is all prisoners who are incarcerated at prisons and jails in Massachusetts, including a subclass of all prisoners who are at a heightened risk for serious complications or death from COVID-19 due to underlying medical condition or age (the "medically vulnerable subclass"). Specifically, the proposed medically vulnerable subclass includes prisoners 50 years of age or older, prisoners with diseases and chronic medical conditions identified by the Centers for Disease Control and Prevention ("CDC") as being known or suspected to increase vulnerability to serious complications from COVID-19,³ and

³ Such conditions include cancer; chronic kidney disease; COPD (chronic obstructive pulmonary disease); immunocompromised state (weakened immune system) from solid organ transplant; obesity (body mass index [BMI] of 30 or higher); serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies; sickle cell disease; diabetes mellitus type 1 and type 2; asthma (moderate-to-severe); cerebrovascular disease (affects blood vessels and blood supply to the brain); cystic fibrosis; hypertension or high blood pressure; immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines; neurologic conditions, such as dementia; liver disease; pregnancy; pulmonary fibrosis (having damaged or

prisoners with severe psychiatric illness and cognitive disabilities. *See* Declaration of Yoav Golan, M.D. (“Golan Decl.”), submitted herewith.

ARGUMENT

Mass. R. Civ. P. 23(a) establishes four requirements for maintaining a class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative parties are typical of the class; and (4) the representative parties will fairly and adequately represent the interests of the class. Rule 23(b) imposes two additional requirements: questions of law or fact common to members of the class predominate over questions affecting only individual members, and a class action would be superior to other available methods for fair adjudication of the controversy.

While “[t]he plaintiffs bear the burden of providing information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23; they do not bear the burden of producing evidence sufficient to prove that the requirements have been met.”

Weld v. Glaxo Wellcome Inc., 434 Mass. 81, 87 (2001). Additionally, if “a natural alternative class or set of subclasses would address a judge’s concerns about certifying a class as initially proposed, the judge should redefine the original class or certify subclasses as appropriate.”

Bellermann v. Fitchburg Gas & Elec. Light Co., 470 Mass. 43, 58 (2014).

Here, the Plaintiffs provide sufficient information to show that the proposed class (*i.e.*, all prisoners who are incarcerated at prisons and jails in Massachusetts) and the medically vulnerable subclass meet these requirements. In cases across the country, courts have certified classes of prisoners who, as in this case, are at grave risk from the COVID-19 pandemic due to

scarred lung tissues); smoking; and thalassemia (a type of blood disorder). *See* CDC, People with Certain Medical Conditions, <https://tinyurl.com/v8bffjhb>, (updated July 17, 2020).

the conditions of their confinement. *See, e.g., Savino v. Souza*, No. CV 20-10617-WGY, 2020 WL 1703844, at *4 (D. Mass. Apr. 8, 2020) (certifying class of civil immigration detainees at Bristol County House of Corrections and C. Carlos Carreiro Immigration Detention Center); *Quadrelli v. Moniz*, No. 20-CV-10685-ADB, 2020 WL 3051778, at *7 (D. Mass. June 8, 2020) (certifying class of civil immigration detainees in county jail); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *4 (N.D. Ill. Apr. 9, 2020) (conditionally certifying subclasses including one of prisoners “who, because of age or previous medical conditions, are at particularly grave risk of harm from COVID-19”). Further, while the gravity and immediacy of the harm prisoners face from COVID-19 are unique, this case fits comfortably in the long line of Massachusetts cases challenging conditions in prison on a classwide basis.⁴ As these cases demonstrate, class certification is particularly appropriate when prisoners seek relief from harm caused by conditions of confinement, and where practical difficulties render class members incapable of seeking relief individually.

⁴ *See, e.g., Haverty v. Comm’r of Correction*, 437 Mass. 737, 739 (2002) (noting certified class of “all prisoners who are now confined or may at some point be confined” at MCI-Cedar Junction in restrictive cell blocks); *Doe, et al. v. Mici*, No. 2019-828, Dkt. 11, Mem. and Order on Pls.’ Mot. on Class Certification at 2 (Mass. Super. July 2, 2019) (certifying class of men committed to a DOC facility pursuant to Section 35); *Battle, et al. v. Hodgson, et al.*, No. 1873CV00020, Dkt. 38, Mem. of Decision and Order on Pls.’ Mot. for Class Certification at 1 (Mass. Super. Apr. 24, 2019) (certifying class of prisoners at jail suffering from mental illness who are or may be subject to segregation); *Cantell, et al. v. Spencer, et al.*, No. 12-00250-B, Dkt. 63, Mem. of Decision and Order on Pls.’ Mot. for Class Certification at 2 (Mass. Super. June 21, 2017) (certifying class of prisoners challenging conditions of non-disciplinary segregation); *Richardson v. Sheriff of Middlesex Cty.*, 407 Mass. 455, 468 (1990) (affirming order imposing population cap in class action brought by detainees challenging overcrowding at Middlesex County jail); *see also Tyler v. Suffolk Cty.*, 253 F.R.D. 8, 11 (D. Mass. 2008) (certifying class of prisoners denied access to toilets); *Masonoff v. DuBois*, 336 F. Supp. 2d 54, 55 (D. Mass. 2004) (noting certification of class of all prisoners at institution in case challenging conditions of confinement); *Cohen v. DiPaolo*, No. CIV. A. 93-7314-B, 1995 WL 419942, at *7 (Mass. Super. July 13, 1995) (certifying class challenging overcrowding and conditions of confinement at MCI Concord).

I. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23(A)

A. The Class Is So Numerous that Joinder of All Members Is Impracticable.

The number of proposed members in the class and subclass, as well as practical difficulties created by the COVID-19 pandemic, render joinder impracticable.

The showing of impracticability is a “low threshold,” for which no minimum number of class members is required, although a class of 40 will generally be sufficient. *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009) (citation omitted). “[T]he word impracticable in the context of Rule 23 has been interpreted to mean impractical, unwise or imprudent rather than impossible or incapable of being performed. . . . Considerations of efficiency, limitation of judicial resources and expense to the plaintiffs support a determination that joinder will not be required.” *Brophy v. School Comm. of Worcester*, 6 Mass. App. Ct. 731, 735 (1978).

1. *The number of class members makes joinder impracticable*

The number of proposed class members and subclass members here is well over 40. With respect to the proposed class, Massachusetts prisons and jails currently hold over 13,000 prisoners—7,305 in DOC prisons, and 5,742 in county jails and houses of correction as of July 15, 2020. *Comm. for Pub. Counsel Servs.*, No. SJC-12926, Special Master’s Weekly Report at 1, 21 (Mass. July 23, 2020). The number of members in the medically vulnerable subclass is also in the thousands. In the DOC alone, more than half of all inmates are over the age of 50 or have a medical condition putting them in a high-risk group. *See Foster, et al. v. Mici, et al.*, No. 20-00855-D, Dkt. 52, Factual Findings of the Superior Court at 8 (Mass. Super., May 1, 2020). Moreover, if a class is not certified, it is likely that other prisoners will file separate individual

lawsuits, resulting in multiple cases simultaneously raising the same issue and wasting judicial resources. James W. Smith & Hiller B. Zobel, 6 Mass. Prac. Rules Practice § 23.9 (2d ed.).

2. *The pandemic makes joinder impracticable*

“Despite its moniker, the numerosity requirement is less about the number of class members than it is about the impracticability of joinder of the several parties.” *Gammella v. P.F. Chang’s China Bistro, Inc.*, 482 Mass. 1, 12 n.15 (2019) (citations omitted). Joinder here would be particularly impracticable. The Commonwealth is in a state of emergency, courts are operating on modified procedures, and visitation in prisons and jails is restricted for safety reasons. Attempting individual joinder would create overwhelming and pointless complications in a case where plaintiffs seek urgent relief.

B. There Are Questions of Law or Fact Common to the Class

Commonality exists when plaintiffs “demonstrate that the class claims ‘depend upon a common contention’ and that determining the truth or falsity of that contention ‘will resolve an issue that is central to the validity of each one of the claims in one stroke.’” *Connor B., ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 32 (D. Mass. 2011) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Even “a single common question” is sufficient to satisfy the rule. *Walmart*, 564 U.S. at 359. Courts since *Wal-Mart* have found commonality where class members claim harm from “specific and overarching systemic deficiencies,” which “provide the ‘glue’ that unites Plaintiffs’ claims.” *Connor B.*, 278 F.R.D. at 34 (certifying class of 8,500 children in custody of Mass. Department of Children and Families, distinguishing *Wal-Mart*); see *Parsons v. Ryan*, 754 F.3d 657, 684 (9th Cir. 2014) (“A clear line of precedent, stretching back long before *Wal-Mart* and unquestionably continuing past it, firmly establishes that when inmates provide

sufficient evidence of systemic and centralized policies or practices in a prison system that allegedly exposes all inmates in that system to a substantial risk of serious future harm, [commonality] is satisfied.”).

Here, the Plaintiffs’ claims present a systemic issue—whether their imprisonment in a Massachusetts correctional facility violates their substantive legal rights under the Massachusetts Declaration of Rights and U.S. Constitution by subjecting them to conditions that put them in great danger of contracting the COVID-19 virus. This is sufficient to establish commonality. *See, e.g., Savino*, 2020 WL 1703844, at *7 (citation omitted) (certifying class of immigration detainees held at two facilities because “[a]t bottom, a common question of law and fact in this case is whether the government must modify the conditions of confinement—or, failing that, release a critical mass of Detainees—such that social distancing will be possible and all those held in the facility will not face a constitutionally violative ‘substantial risk of serious harm.’”); *Quadrelli*, 2020 WL 3051778, at *5 (certifying class of immigration detainees held in unit of jail where “common question identified by Movants focuses on the conditions at [the jail] and the risk of infection to Petitioners in general, rather than on the unique impact of those conditions on individual petitioners”); *Mays*, 2020 WL 1812381, at *4 (claims of a subclass of prisoners at elevated risk of harm from COVID-19 and a subclass of prisoners housed on a tier where someone tested positive for the virus both “turn on a common question of whether detainees are facing an unconstitutional risk of harm to their health due to conditions in the Jail that facilitate the spread of coronavirus and the absence of protections adequate to stem its spread.”).

The overarching common question in this case—whether Defendants are violating the Constitution by subjecting prisoners to a substantial risk of serious harm—contains numerous

additional common questions of law and fact. One set of questions revolves around the extent to which social distancing is possible in living quarters and elsewhere, such as recreation, programs, dining, and in health care delivery, and the degree of risk involved in the absence of social distancing in these settings. Another set of common questions concerns what measures Defendants have taken to prevent the virus's spread and to mitigate the risk of harm to prisoners, including whether there are systemic deficiencies in the provision of personal protective equipment and cleaning supplies, and in Defendants' efforts to ensure that adequate cleaning occurs and that staff and prisoners are following safety protocols (such as wearing masks or washing hands). Additional common questions concern whether Defendants have failed to reduce the prison population by providing sufficient programming and opportunities to earn good time, boost time, and completion credit, and by making meaningful use of available release mechanisms such as home confinement and medical parole.⁵ Another set of common questions concerns the DOC's implementation of a system-wide lockdown to respond to the pandemic, which has itself resulted in severe and unlawful deprivations and in denials of medical and mental health care. Finally, common questions arise from the DOC's failure to use its supervisory authority and to promulgate minimum standards to ensure that prisoners in county jails and houses of correction are protected from COVID-19.⁶ Plaintiffs' claims against the

⁵ See, e.g., *Torres v. Milusnic*, No. CV204450CBMPVCX, 2020 WL 4197285, at *22 (C.D. Cal. July 14, 2020) (certifying class after finding the process for considering "inmates for home confinement and compassionate release [is] common to the entire putative class, and common questions exist as to whether Respondents' failure to make prompt and meaningful use of home confinement and compassionate release in light of the pandemic, and disregard of inmates' age and medical conditions in determining eligibility for home confinement and compassionate release violate the Eighth Amendment.").

⁶ See *Dimarzo v. Cahill*, 575 F.2d 15, 17 (1st Cir. 1978) (holding that DOC Commissioner has "an express duty to establish rules and regulations relating to sanitation, safety, recreation, classification, care and custody of the persons committed to the correctional facilities").

Parole Board also share common questions of law and fact, including whether the Parole Board has improperly failed to consider COVID-19 in its parole decisions—as a factor relevant to whether the prisoner’s release is “not incompatible with the welfare of society,” G.L. ch. 127, § 130, or otherwise—and whether the Board has failed to meaningfully use its authority to consider prisoners for early parole in light of the pandemic.⁷

With respect to the medically vulnerable subclass, there additionally exists a common question of whether the Defendants have adequately considered their medical vulnerabilities in their pandemic response including decisions about housing, and decisions about early release and parole. *See Foster v. Comm’r of Correction*, 484 Mass. 698, 713 (2020) (finding substantial likelihood that medically vulnerable subclass could be certified because “[w]hile there may be some variance between facilities, the legal claim and its basic factual underpinning are common to all potential class members: that the increased risk of contracting COVID-19 caused by the current conditions of the correctional facilities, in concert with the individuals’ medical vulnerability, constitutes cruel and unusual punishment.”).

Differences in the circumstances of individual plaintiffs are not reason to deny class certification. As the federal court for the District of Massachusetts recently concluded in *Savino*, “[t]he question is not so much whether any particular Detainee should be released—a matter as to which the various individuals are surely differently situated. Rather, the question is whether the government is taking reasonable steps to identify those Detainees who may be released in

⁷ *Hawker v. Consovoy*, 198 F.R.D. 619, 625–26 (D.N.J. 2001) (certifying class of thousands of prisoners where common issue was entitlement to injunctive relief “requiring the Parole Board to . . . conduct parole hearings in a timely manner”).

order to protect everyone from the impending threat of mass contagion.” 2020 WL 1703844, at

*7. The court further stated:

Nor does it matter how the density of Detainees is reduced. Transfer to less crowded facility, deportation, release on bond, or simply declining to contest lawful residence -- any of these methods would effectively minimize the concentration of people in the facility. This affords the government greater flexibility and minimizes the differences among the various Detainees.

Id. This reasoning comports with a long line of prison class actions, where individual differences in class members did not prevent a finding of commonality. For example, in *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132 (N.D. Cal. 2015), the plaintiffs sought to certify a class challenging a range of injuries broader than in this case, including the inadequate staffing, training, space, classification, intake health screening, care scheduling, medication infection control, emergency response, and suicidal inmate segregation. *See id.* at 140. The proposed class claimed harm from “dozens of specific jail policies and practices,” which the defendants argued would require “distinct legal questions, burdens of proof and ‘mini-trials’ for each Plaintiff.” *Id.* at 140, 155. The court rejected that argument, finding the Plaintiffs had “produced adequate evidence of specific system-wide policies and practices exposing inmates to a substantial risk of serious harm.” *Id.* at 155-56. “While results of exposure may vary, ranging from no harm to death, each inmate suffers the same constitutional or statutory injury when exposed to a policy or practice that creates a substantial risk of serious harm.” *Id.* at 157. “Where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists.” *Id.* at 153 (citation omitted); *see also, e.g., Tyler v. Suffolk Cty.*, 253 F.R.D. 8, 11 (D. Mass 2008) (certifying class of 4,000 prisoners challenging a system restricting access to bathrooms even though “the lack of access . . . certainly affected different

inmates differently”). Massachusetts courts have similarly found commonality even where the harm varied among class members.⁸

C. Plaintiffs’ Claims Are Typical of the Class

Rule 23(a)(3) requires that the claims of the named plaintiffs are typical of the claims of the class. “The typicality requirement may be satisfied by an allegation that the defendant acted consistently toward the members of a putative class.” *Fletcher v. Cape Cod Gas Co.*, 394 Mass. 595, 606 (Mass. 1985). An alignment of claims ensures that the named plaintiff will advance the interests of the class by pursuing his or her own self-interest. *Weld*, 434 Mass. at 87 (citing 1 H. Newberg, *Class Actions*, § 3-13 at 3-75 (3d ed.)). “When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.” Newberg § 3:29 (5th ed.); see *Weld*, 434 Mass. at 87 (“Typicality is established when there is ‘a sufficient relationship . . . between the injury to the named plaintiff and the conduct affecting the class,’ and the claims of the named plaintiff and those of the class ‘are based on the same legal theory’”) (quoting Newberg § 3.13, at 3-76 (3d ed. 1992)).

⁸ See, e.g., *Battle*, Dkt. 38 at 10 (class of mentally ill prisoners shares a “common interest in the subject matter and in the relief sought” even if “the individual harms may differ”); *Campbell v. Glodis*, No. WOCV20100397C, 2011 WL 2736502, at *3 (Mass. Super. May 27, 2011) (finding commonality where prisoners were subjected to different forms of excessive force or restraints; “Although the interests of all the potential class members are not identical, since the circumstances surrounding each alleged use of excessive force differ, the interests all arise from a common wrong, i.e., the Worcester Jail’s alleged policy and/or practice of using excessive force to discipline inmates”); *Brophy*, 6 Mass. App. Ct. at 736 (certifying class of teachers challenging employment practices “even though there is a difference in the employment circumstances of individual class members,” because the defendant “acted consistently” with respect to the plaintiff class).

The Plaintiffs satisfy typicality because they allege “that the defendant acted consistently toward [the representative and the] members of the putative class.” *Weld*, 434 Mass. at 87. The Plaintiffs, like the proposed class members, are prisoners in Massachusetts prisons and jails at risk of infection with COVID-19. Like members of the proposed class, the Plaintiffs challenge their treatment under the Massachusetts Declaration of Rights and the federal Constitution. Differences in factual circumstances do not defeat typicality, which “may exist ‘even if the claims present varying fact patterns . . . because the rules require neither a joint wrong nor a substantial identity of claims or defenses.’” *Campbell*, 2011 WL 2736502, at *4 (quoting *Smith & Zobel* § 23.6); *see also Parsons*, 754 F.3d at 678 (rejecting defendants’ contention that systemic challenge to medical, mental health, and dental care was merely a collection of individual claims each of which hinged on the particular facts and circumstances of each prisoner); *Smith v. Ashe*, 106 F.R.D. 353, 355-56 (D. Mass. 1985) (rejecting sheriff’s contention that because placement in segregation involved the exercise of case-by-case discretion there could be no typicality of claims); *Hennessy v. Brookdale Senior Living Communities, Inc.*, No. 1784CV04215BLS2, 2018 WL 4427020, at *6 (Mass. Super. Aug. 1, 2018) (“class certification cannot be denied . . . merely because [the plaintiff] seeks to represent people who live or have lived at other facilities.”). The Plaintiffs similarly present claims typical of the subclass due to the increased risk posed by their age and medical conditions.⁹

⁹ Stephen Foster has had serious heart conditions, including heart failure and infective endocarditis. Michael Gomes is immunocompromised from an organ transplant. Steven Palladino has diabetes and kidney disease. Michelle Tourigny is obese and has a serious heart condition requiring a pacemaker. Richard O’Rourke has hypertension. Michael White has COPD and severe asthma. Frederick Yeomans is 72 years old and has heart disease and high blood pressure. Hendrick Davis has advanced kidney disease.

D. Plaintiffs Will Adequately Represent the Class

There are two components to the requirement of Rule 23(a)(4) that the named plaintiffs fairly and adequately represent the interests of the class. Plaintiffs must show “first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the proposed litigation.” *Reid v. Donelan*, 297 F.R.D. 185, 191 (D. Mass. 2014) (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)). Both components are satisfied in this case.

Here, there is no conflict between the interests of the proposed class representatives and those of the class or subclass. The representatives seek the same relief for themselves as they do for the class and subclass: an order requiring Defendants to reduce the prison and jail populations to permit adequate social distancing, and to do so without imposing lockdown conditions that are themselves unconstitutionally harsh. *Foster v. Comm’r of Correction*, 484 Mass. 698, 731 (2020) (“[W]hile the pandemic continues, the lockdown conditions instituted by the DOC to prevent a serious risk of harm themselves risk becoming Eighth Amendment violations.”). The proposed class representatives, who allege that DOC’s deliberate indifference has put the health and safety of all prisoners at grave risk, have a strong incentive to pursue the litigation vigorously. *See Smith & Zobel* § 23.7 (“A significant stake in the outcome of the litigation will likely induce a vigorous prosecution or defense.”). “[I]t does not matter for purposes of Rule 23(a)(4) that the named plaintiffs allegedly suffered different manifestations of the prison’s unconstitutional overcrowding.” *Dittimus-Bey v. Taylor*, 244 F.R.D. 284, 292 (D.N.J. 2007) (citing *Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir.1994)).

Vigorous prosecution of the case is assured because the plaintiffs are represented by attorneys from Prisoners' Legal Services (PLS, formerly known as Massachusetts Correctional Legal Services). This organization exclusively specializes in the representation of prisoners. At present PLS represents certified classes of prisoners in active litigation or monitoring of settlement agreements in the following cases: *Cantell v. Comm'r of Correction*, 475 Mass. 745 (2016) (due process in non-disciplinary segregation in the DOC); *Battle, et al. v. Hodgson, et al.*, No. 1873CV00020 (Mass. Super. Apr. 24, 2019) (solitary confinement and mental health care in Bristol County); *Doe, et al. v. Mici*, No. 2019-828 (Mass. Super. July 2, 2019) (challenging incarceration of patients civilly committed for treatment of substance use disorder); *Briggs et al. v. Massachusetts Dep't of Correction, et al.*, 15-cv-40162-GAO (D. Mass. filed Nov. 24, 2015) (challenging lack of accommodations for deaf and hard of hearing prisoners); *Minich, et al, v. Spencer, et al.*, SUCV2015-00278 (Mass. Super. filed Jan. 29, 2015) (challenging unlawful seclusion and restraint at Bridgewater State Hospital). PLS has a long and successful prior record of institutional reform litigation, including *Haverty v. Comm'r of Correction*, 437 Mass. 737 (2002) (due process in DOC administrative segregation); *Richardson v. Sheriff of Middlesex Cty.*, 407 Mass. 455 (1990) (overcrowding in Middlesex County House of Correction); *Ahearn v. Vose*, 64 Mass. App. Ct. 403 (2005) (lack of flush toilets in cells); and *Souza v. Hodgson*, 455 Mass. 573 (2010) (unlawful fees charged to Bristol County prisoners).

II. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23(B)

In addition to the above requirements, a party seeking class certification must demonstrate that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other

available methods for the fair and efficient adjudication of the controversy.” Mass. R. Civ. P. 23(b). Both requirements are met here.

A. Common Questions of Law and Fact Predominate Over Any Questions Affecting Only Individual Members

“The predominance requirement seeks to ensure, in part, that the economies of class action will be realized in the particular litigation.” *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 362 (2008) (citing *Newberg*, § 4.24, at 154 (4th ed. 2002)). It requires the court to “make a comparison between the common and individual questions involved in order to reach a determination of such predominance of common questions in a class action context.” *Id.* at 363.

The “predominance” requirement is satisfied when the interests of the class outweigh individual interests. *Ramos v. Registrars of Voters of Norfolk*, 374 Mass. 176 (1978); *Smith & Zobel* at § 23.8. The requirement is satisfied by a “sufficient constellation of common issues that bind class members together and cannot be reduced to a mechanical, single-issue test.” *Weld*, 434 Mass. at 92 (internal citation and punctuation omitted). Courts often find that common issues predominate when the alleged harms are the result of a “single course of conduct” by the defendants. *Id.* at 92 (finding that pharmacy customers who had received letters following a scan of customers’ prescription drug profiles satisfied predominance requirement in action for invasion of privacy); see *Dean v. Coughlin*, 107 F.R.D. 331, 333-34 (S.D.N.Y. 1985) (rejecting argument that the unique dental history of each prisoner made class certification inappropriate in case challenging adequacy of prison dental care).

The Plaintiffs here challenge conditions affecting the entire class and subclass, as well as the systemic failures of the defendants to sufficiently act to secure prisoners’ safety during the COVID-19 pandemic. As discussed above with regard to commonality, the Defendants’

incarceration of prisoners in conditions that subject them to grave and unreasonable risk from COVID-19 violates the rights of the class and subclass. Accordingly, common questions predominate in this case because they “form the nucleus of a liability claim.” *Salvas*, 452 Mass. at 365; *Weld*, 434 at 92 (where injuries are result of a “single course of conduct” determination of violation “will turn largely on questions of law and fact” regarding whether defendants’ implementation of a program violated duty they had to class members). Moreover, the systemic nature of the common issues—*e.g.*, DOC’s failure to make use of home confinement, the effects of the DOC-wide lockdown, and the Parole Board’s failure to appropriately consider COVID-19 in granting parole or early parole—outweighs any individual issues. The predominance of class issues is reinforced by the relief sought: rather than particular individual releases, this case seeks a reduction in the overall prison and jail population so that prisoners can maintain appropriate social distance. Further, certification serves judicial economy; trying individual cases challenging the conditions in each particular cell, or unit, or facility would overburden the court with piecemeal litigation that results from a systemic problem.

B. A Class Action in This Case Is Superior to Other Forms of Litigation

The second part of Rule 23(b) requires that a class action be superior to other available forms of litigation. A court will consider factors including: (1) the size of the class; (2) the number and dollar amount of the claims which the class members hold; (3) whether the relief sought is solely injunctive, or instead includes money damages; (4) whether the class is party-plaintiff or defendant; (5) the desirability of a uniform determination of common legal and factual issues; (6) the expense to the parties and to the Commonwealth of maintaining separate actions; and (7) the administrative difficulty of subsequently determining and distributing

damages to absentee class members, as opposed to the problems presented by administering multitudinous individual lawsuits. *Smith & Zobel* § 23.9. It is well-established that class certification is “an especially appropriate vehicle for civil rights actions” seeking hospital or prison reform. *See Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980). Indeed, the Supreme Court has stated that the superiority of class treatment in an action seeking only declaratory and injunctive relief is “self-evident.” *Wal-Mart Stores*, 564 U.S. at 363. It is thus unsurprising that Massachusetts courts have certified class actions challenging prison conditions again and again.¹⁰

Class certification is appropriate here because the plaintiffs seek injunctive and declaratory relief from systematic conditions of confinement that present a high risk of danger due to the COVID-19 pandemic. The immediacy of the risk, and the society-wide logistical constraints imposed by the pandemic, make individual actions infeasible. Further, individual actions would create a risk of inconsistent adjudications that might impose conflicting requirements upon the defendants and subject individual plaintiffs to varying outcomes.

CONCLUSION

For all the above reasons, the Court should allow Plaintiffs’ Motion for Class Certification.

¹⁰ *See, e.g., Doe*, No. 2019-828, Dkt. 11 (certifying class of men committed to a DOC facility pursuant to Section 35); *Battle*, No. 1873CV00020, Dkt. 38 (certifying class of prisoners at jail suffering from mental illness who are or may be subject to segregation); *Cantell*, No. 12-00250-B, Dkt. 63 (certifying class of prisoners challenging conditions of non-disciplinary segregation); *Cohen*, 1995 WL 419942, at *7 (certifying class challenging overcrowding and conditions of confinement at MCI Concord); *Campbell*, 2011 WL 2736502, at *3 (certifying class of jail inmates).

Dated: July 27, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, along with the Declaration of Yoav Golan and

Appendix of Unreported Cases, was served on July 27, 2020 by email to the following addresses:

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/s/ Michael J. Horrell

**APPENDIX OF
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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

BRISTOL SS SUPERIOR COURT
FILED

SUPERIOR COURT
CIVIL ACTION
NO.:1873CV00020

APR 24 2019

MARC J SANTOS, ESQ.
CLERK/MAGISTRATE

DANYEL BATTLE & others¹
Plaintiffs,

vs.

THOMAS M. HODGSON, SHERIFF, BRISTOL COUNTY & others²
Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR
CLASS CERTIFICATION

The plaintiffs seek class certification pursuant to Mass. R. Civ. P. 23, the class consisting of those individuals held at the Bristol County House of Correction who suffer from severe mental illness and who are or may be subject to segregation. The defendant's oppose. For the reasons set forth below, the motion is ALLOWED.

BACKGROUND

The Plaintiffs, Danyel Battle, Megan Downey and Andrew Welch, are prisoners allegedly suffering from mental illness and are in the custody of the Defendant, Thomas M. Hodgson, Sheriff, Bristol County. They are housed at the Bristol County House of Correction, ("BCHOC"), which is operated by the Bristol County Sheriff's Office, ("BCSO"). The plaintiffs allege they have suffered severe harm as a result of confinement in solitary or segregation units. The plaintiffs now move for class certification, the class being prisoners with serious mental

¹ Megan Downey and Andrew Welch

² Judith Borges, Director of Medical Services, Bristol County Sheriff's Office, and Steven Souza, Superintendent, Bristol County Sheriff's

illness who are or will be held in solitary confinement or segregation while serving sentences or otherwise being held at the BCHOC. The defendants oppose, arguing that sections of the Criminal Justice Reform Act, St. 2018, c. 69, which became effective January 1, 2019, render the plaintiffs' complaint moot. According to the defendants, the plaintiffs essentially claim that placing prisoners in "segregation" or what is now defined as "restrictive housing" for disciplinary reasons is unconstitutional. The defendants point out that the Criminal Justice Reform Act authorizes the complained of placement of prisoners in segregation, limits the length of such segregation, and specifies the type of mental health services to be provided prior to and during any such segregation. The defendants assert that the complaint and the allegations asserted by the plaintiffs constitute a direct challenge the validity of the Act as it pertains to inmates with serious mental illness.

DISCUSSION

The Plaintiffs' complaint. The complaint alleges that the BCSO's policies and practices as related to prisoners with severe mental illness have increased the risk of psychological deterioration, self-injurious behavior, and suicide. These policies and practices include the failure to exclude from segregation prisoners whose mental disorders place them at serious risk of substantial harm; the failure to take mental illness into account in the disciplinary process; and the failure to adequately assess prisoners before they enter segregation to determine whether such placement is clinically contraindicated or otherwise dangerous.

The plaintiffs also assert the BCSO has a policy and practice of failing to provide adequate mental health care to prisoners in custody in general and in particular to those in segregation. As relates specifically to prisoners with serious mental illness, it is alleged that the BCSO fails to offer regular or meaningful mental health therapy to prisoners in segregation; fails

to adequately prescribe, monitor, and evaluate the use of psychotropic medication; fails to ensure that clinical rounds while in segregation will identify those with mental illness who may be decompensating or experiencing a psychiatric emergency; fails to provide a secure residential treatment unit as an alternative to segregation; and fails to provide appropriate treatment and supervision to prisoners who are at risk of suicide and that BCSO's practices actually discourage prisoners from reporting thoughts of self-harm or suicide. It is asserted that the plaintiffs in the proposed class are entitled to relief under the Eighth and Fourteenth Amendments to the Constitution of the United States, as secured by 42 USC, § 1983; Articles 1, 10, 12, 26 and 14 of the Massachusetts Declaration of Rights; Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act; G. L. c. 127, § 32; 103 CMR 943.03(2); G. L. c. 127, § 41; G. L. c. 93, § 103; 103 CMR 943.09; and G. L. c. 231A, § 2.

The plaintiffs seek various forms of relief, including a permanent injunction preventing the BCSO from housing prisoners with serious mental illness in segregation; an order requiring the BCSO to develop and implement "appropriate" disciplinary policies and practices with regard to prisoners with serious mental illness; an order mandating the BCSO provide appropriate and necessary mental health care to the plaintiff and the class; the appointment of an independent mental health care professional to ensure future compliance with the permanent injunction; an order that the BCSO provide "the court appointed monitor" and the plaintiff's counsel with certain statistical reports and other documents to ascertain compliance with the court's orders; and that the court retains jurisdiction to ensure future compliance with the above orders.

The named Plaintiffs. It is alleged that Danyel Battle and Megan Downey both have a long history of mental illness. Battle has been placed in segregation multiple times, even though

he alleges to suffer from serious mental illness and repeatedly attempted suicide during previous incarcerations. He feels he is "losing his mind" while in segregation and that while at the BCHOC, he has received only minimal and inadequate healthcare. There is no allegation that he has attempted suicide or that he has expressed suicidal ideation, nor is there any allegation he has attempted to harm himself.

Megan Downey received various disciplinary reports and has spent most of her time in segregation. While in custody she received little or no mental health care. Plaintiff Andy Welch reported a suicide by attempted overdose, psychiatric hospitalizations, sexual abuse and bipolar disorder, among other mental health conditions. Andy Welch has been in segregation repeatedly, where at times he reports being delusional and his mental health treatment has been inadequate.³

General allegations. The BCSO is responsible for two facilities, the House of Correction in Dartmouth, and the Ash Street Jail in New Bedford. At capacity, the two facilities hold approximately 1,300 adults, held either waiting trial or serving a sentence of up to 2 ½ years. At the BCHOC there are approximately eighty segregation units categorized into three units for male prisoners. One contains sixteen cells with single beds; one contains sixteen cells with two beds; and one contains eight cells with two beds. The female segregation unit contains eight cells, each with two beds. There is also an area apart from the segregation unit where male

³ Since the filing of this complaint Megan Downey and Andy Welch have been released from custody. A proposed amended complaint seeks to substitute those two named plaintiffs for two others. Battles was released but subsequently returned and is currently held at the BCHOC. Proposed plaintiff Gerald Francis alleges a long history of mental health illness, including bipolar disorder, PTSD, anxiety, and depression. While a teenager, he has been in custody with DYS, DSS and South Bay Correctional Facility. He is constantly in and out of various jails, consistently for drug offenses. While in segregation at the BCHOC, he claims he has been denied medication, he hallucinates, and when he requested treatment, it was not forthcoming. Proposed plaintiff Tanisha Ibay has been diagnosed with ADD, bipolar disorder, and anxiety. Medications effectively treat these disorders. She has been in segregation for long periods of time and while she received treatment from mental health counselors, her usual medications were not prescribed. Instead, she was started on a different medication which she asserts caused a panic attack.

prisoners may be confined for up to twenty-two or twenty-three hours per day in segregation-like conditions.

Administrative segregation is used for prisoner safety or for institutional security, and may continue indefinitely. Disciplinary segregation is imposed on prisoners found guilty of disciplinary infractions and punished with a term in segregation. Prisoners may also be in disciplinary segregation while "awaiting action" on a particular infraction or pending investigations.

Segregation cells contain a bed, a small desk and a single unit basin/toilet. Prisoners are allowed one hour of exercise per day, weather permitting, outside in a segregated area. Meals may be reduced in portion size from the regular meals and are given to prisoners through a slot for consumption in their cell. The complaint describes generally poor conditions with regard to hygiene, noise, and both verbal and physical abuse. The length of time a prisoner spends in segregation varies according to the individual reasons for being in segregation.

With regard to the impact of segregation, the complaint relies on "clinical literature" and asserts that prisoners with mental illness held in segregation manifest a variety of symptoms including anxiety, panic attacks, insomnia, uncontrollable rage, social withdrawal, hopelessness, depression, hallucinations, paranoia, and suicidal ideation. The alleged effects of segregation on the named and proposed plaintiffs are described above.

The complaint asserts that "accepted professional standards" require correctional facilities to identify and exclude from segregation those prisoners with mental illness who are at risk of harm from segregation. It is alleged that at the BCHOC, little or no clinical review is conducted prior to placement in segregation. Nor is there any meaningful ongoing review or assessment to evaluate whether a prisoner may be decompensating while in segregation. The

complaint asserts that mental health professionals should have input in the disciplinary process as it concerns prisoners with severe mental illness and that despite "generally accepted standards," the BCSO does not provide for input by mental health clinicians. As an example, it is alleged that plaintiff Battle, after being on mental health watch for a week, was given a disciplinary sanction of twenty-five days. It is alleged that while in segregation, prisoners with mental illness often deteriorate and generate additional disciplinary reports and additional time in segregation.

The complaint also alleges and describes in general that both the BCSO's policies and their implementation with regard to intake screening and ongoing evaluations is deficient. It is alleged that prisoners who are screened on intake and found to have past mental health diagnoses are not treated properly, and in some instances prior diagnoses are rejected. Prescribed medication may not be administered and clinical visits or psychiatric referrals are often not provided. It is alleged that BCSO has a policy and practice of failing to provide adequate mental health care to prisoners in segregation.

It is alleged that the BCSO does not have a residential treatment facility or a severe treatment unit for certain types of prisoners. It is alleged that "generally accepted correctional standards" allow prisoners with serious mental illness contraindicating segregation ten hours per week of structured out-of-cell programs, ten additional hours per week of unstructured out-of-cell time, and at least one hour per week of private individual therapy. Plaintiffs assert that while the BCSO implemented a "Dartmouth Behavioral Unit," it is inadequate as it does not meet all of the "generally accepted" criteria.

The defendants claim that certain provisions of the Criminal Justice Reform Act, St. 2018, c. 69, render the plaintiffs' claims moot. Specifically, the defendants point to sections

which govern placement in restrictive housing of inmates with serious mental illness. Section 93 of the Act amended and replaced certain sections of G. L. c. 127, §§ 39, 39A. The amended Section 39, as effective January 1, 2019, authorizes placement in restrictive housing for disciplinary reasons. Section 39(b) sets out standards for restrictive housing. For example, meals must be the same standards as those for the general population, and periodic mental and psychiatric examinations under the supervision of the department of mental health are now required. Section 39(c) requires screening to determine if a prisoner has a serious mental illness or if placement in restrictive housing is clinically contraindicated. Additionally, Section 39A prohibits holding a prisoner in restrictive housing if the prisoner has a serious mental illness or where a finding has been made that restrictive housing is clinically contraindicated, unless the Sheriff certifies in writing that certain enumerated conditions and circumstances have been met.

That the amended statutes now govern and regulate many of the claims asserted by the plaintiffs, those claims are not moot. While it is possible that the defendant's may ultimately prevail by asserting and proving compliance with the current statutory requirements, that possibility does not render the plaintiffs' claims moot at this point in the litigation. *Gammella v. P.F. Chang's China Bistro, Inc.*, Massachusetts Supreme Judicial Court, No. 19-12604, slip op. at 21 (April 12, 2019) (burden of proof at class action stage differs from burden of proof at trial).

CLASS CERTIFICATION

Massachusetts Rules of Civil Procedure 23 governs class actions and sets forth the criteria for certification of a class. The class must be adequately defined and if so the four prerequisites of Rule 23(a) must be satisfied. Having met this minimum threshold, a prospective class action must also satisfy the requirements 23(b). It is the plaintiff's burden to demonstrate that the class meets the requirements for class certification. *Fletcher v. Cape Cod Gas Co.*, 394

Mass. 595, 601 (1985). A plaintiff need not prove that the requirements have been met, but must satisfy provide "information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23." *Weld v. Glaxo Wellcome, Inc.*, 434 Mass. 81, 87 (2001).

The burden at the class certification stage is different than the burden of proof required at trial. "[N]either the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies the Rule." *Id.* (citation omitted).

Numerosity. To maintain a class action under Rule 23 "the class must be so numerous that joinder of all parties is impractical." Mass. R. Civ. P. 23(a)(1). Analysis of the numerosity requirement looks to whether joinder of the parties would be impractical, unwise, or imprudent. *Brophy v. School Comm. of Worcester*, 6 Mass. App. Ct. 731, 735 (1978). Numerosity is not based solely on the number of potential class members. Additionally, "[u]ncertainty as to the numbers of plaintiffs, due to the possibility of affirmative defenses regarding some of the plaintiffs, is not grounds for denying class certification . . ." *Gammella*, at 21-22. The class for which the plaintiffs seeks certification consists of "all prisoners with serious mental illness who are now or may be in the future, held in segregation in Bristol County." Thus, to be a class member, a prisoner at the BCHOC must (1) have a serious or severe mental illness, and (2) is currently or may be held in segregation. The plaintiffs argue that the number of class members is well over forty. They rely on 2006 statistical data from the Bureau of Justice and assert based on those statistics "that a substantial number of BCSO prisoners with mental illness or disability are or will be housed in segregation." The plaintiffs do not attempt to define "severe mental illness."

The BCSO asserts that at any given time the actual number of individuals meeting both requirements is approximately between twelve to twenty prisoners. They assert that the statutory definition of "seriously mentally ill" or "severe mental illness" should be used to determine those prisoners who may be members of the class.

The recent amendment, effective January 1, 2019, G. L. Chapter 127, § 1 defines "serious mental illness" as follows:

"A current or recent diagnosis by a qualified mental health professional of one or more of the following disorders described in the most recent edition of the diagnostic and statistical manual of mental disorders: (i) schizophrenia and other psychotic disorders; (ii) major depressive disorders; (iii) all types of bipolar disorders; (iv) a neurodevelopmental disorder, dementia or other cognitive disorder; (v) any disorder commonly characterized by breaks with reality or perceptions of reality; (vi) all types of anxiety disorders; (vii) trauma in stressor related disorders; or (viii) severe personality disorders; or a finding by a qualified mental health professional that the prisoner is at serious risk of substantially deteriorating mentally or emotionally while confined in restrictive housing, or already has so deteriorated while confined in restrictive housing, such that diversions or removal is deemed to be clinically appropriate by a qualified mental health professional."

The BCSO estimates that approximately 40% of the inmate population falls within that definition in that approximately 12% (of the 40%), incurred disciplinary issues which require "restrictive housing."⁴ The BCSO suggests that the number of inmates suitable for class membership is approximately twelve to twenty at any given time.⁵ As noted above, the focus is not so much on the number, but on whether joinder would be impractical, unwise or imprudent.

⁴ Chapter 69 of the Acts of 2018 amended G.L. c. 127, § 1 to insert a definition of "restrictive housing" as "a housing placement where a prisoner is confined to a cell for more than 22 hours per day; provided, however, that observation for mental health evaluation shall not be considered restrictive housing." A definition of "disciplinary restrictive housing" was also added, as follows: "a placement in restrictive housing in a state correctional facility for disciplinary purposes after a finding has been made that the prisoner has committed a breach of discipline."

⁵ A mathematical calculation results in a higher number. According to the BCSO, its inmate population averages around 1200, 40% of which have "severe mental illness" as statutorily defined. That results in approximately 480 inmates, of which 1% - 8% are subject to discipline which may require segregation in restrictive housing, rendering the potential class is anywhere from one to thirty-eight inmates at any given time.

Here, the inherently transient nature of the proposed class renders joinder impractical. See *Green v. Johnson*, 513 F. Supp. 965, 975 (D.Mass. 1981).

Commonality. Rule 23(a)(2) authorizes certification of a class only if “there are questions of law or fact common to the class.” Mass. R. Civ. P. 23(a)(2). This requirement is satisfied if the claims are “derive[d] from a common course of conduct on the part of the defendants and present the identical issue.” *Aspinall v. Phillip Morris Cos.*, 442 Mass. 381, 392-393 (2004). The plaintiffs assert that this requirement is met because they have alleged policies or practices which put inmates with serious or severe mental illness at serious risk of substantial harm and that these inmates all share a common risk of harm, regardless of differences in individual factual circumstances or individual differences in the harm suffered. The defendant argues that because reasonable medical professionals differ as to whether an inmate suffers from a serious mental illness, the plaintiffs cannot establish that all class members share common issues of fact.

Here, the class proposed by the plaintiff consists of inmates who suffer from severe mental illness and it is therefore self-defining. Those inmates that meet that criteria for diagnosis share a common objective, even if the individual harms may differ. The common interest in the subject matter and in the relief sought is shared by those inmates suffering from severe mental illness. See *id.* at 392-393 (commonality satisfied if claims derive from common course of conduct and present identical issues). Based on the information presented, the plaintiffs have satisfied their burden as to commonality.

Typicality. Rule 23 requires that the claims and defenses of the representative parties be typical of the claims or defenses of the class. A finding of typicality is warranted when a consistent course of conduct by the defendant is alleged to have affected the class as a whole.

Weld, 434 Mass. at 87. The plaintiffs here allege such a course of conduct with regard to screening of mentally ill inmates, the placement of mentally ill inmates in restrictive housing, and that the general condition of such housing results in harm to the plaintiffs.

Adequacy of representation. It must be demonstrated that the representative parties will fairly and adequately protect the interests of the class. Mass. R. Civ. P. 23(a)(4). The adequacy requirement depends on whether the interest of the representative party will conflict with the interests of any of the class members and whether counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the class action. As to whether the plaintiff Battles can adequately represent the class, defendant argues he has been diagnosed with a behavioral problem and that he does not suffer from a severe mental illness. As the defendant previously noted, reasonable minds can differ over diagnoses. Taking the plaintiff's allegations at face value, the plaintiff is an adequate representative and his interests are in line with the interests of the potential class. Counsel for the potential class appears competent and capable of pursuing the case in claims and issues raised.

Additional requirements. In addition to the requirements discussed above, it also must be shown "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass. R. Civ. P. 23(b). For the predominance requirement to be met, it must be shown that the common question shared by the proposed class is not secondary to the class of individuals. *Fletcher*, 394 Mass. at 601-604. Judicial economy would not be served and absentee class members would not be adequately represented by a class action made up of individuals or unique issues of fact or law. *Id.* at 604. The relevant inquiry is whether the plaintiff's claims are sufficiently cohesive enough

to warrant adjudication by representation. *Salvas*, 452 Mass. at 364. This requires a case-by-case evaluation, on an individual basis, of the relationship between the common and member specific issues. Thus, a comparison between the common and individual questions involved is necessary in order to determine whether common questions predominate in a class action context. *Id.* at 363.

The plaintiffs here challenge the defendant's policies with regard to inmates with serious mental illness and allege that those policies subject inmates with serious mental illness to a substantial risk of harm and to unlawful discrimination. However, in order to get there, individual questions must be addressed, the threshold individual question being, whether a particular inmate actually suffers from or is diagnosed with a severe mental illness as that phrase is now defined by statute. This is a threshold question and in all likelihood requires an assessment of each inmate's present and potential mental health issues. The question therefore becomes whether the individual diagnosis effect the common questions raised by the complaint. Screening for mental health issues is highly individualized, as is distinguishing between behavioral problems unrelated to an inmate's mental health diagnosis. Here, however, because the statute now defines serious mental illness and sets for the criteria for a diagnosis, the individual nature of a diagnosis must meet statutory criteria. Once and if it is determined that an inmate is properly diagnosed according to the statute, the common questions predominate.

If the predominance and other requirements are satisfied, the court must also determine whether the class action is superior to other methods of adjudicating the case and all claims brought. Mass. R. Civ. P. 23(b); *Fletcher*, 394 Mass. at 601. The focus here is on the efficiency of the class action device, the possible expense to the plaintiffs, and the likelihood of judicial economy being served. See *Berry v. Town of Danvers*, 34 Mass. App. Ct. 507, 515 (1993).

Relevant factors include the size of the class; the amount of money in dispute or whether the class is seeking injunctive relief; the expense to the parties in the state of litigating multiple actions; the difficulty of determining and distributing damages; and the administrative difficulties that may arise in administering multiple lawsuits. The trial judge has particularly extensive discretion in class certification issues. *Id.* at 514-515. If another means of adjudication is decidedly more effective, class certification is inappropriate even if all other requirements are satisfied. *Fletcher*, 394 Mass. at 601. However when the predominance inquiry is resolved affirmatively, superiority will also be satisfied. See *Weld*, 434 Mass. at 93 (when common issues predominate, judicial economy inconsistency of result dictate class treatment). Under the circumstances presented in this case, class certification is an appropriate method to adjudicate the claims raised.

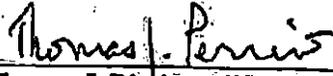
CONCLUSION

The plaintiffs seek a class consisting of prisoners with serious mental illness who are or will be held in solitary confinement or segregation while serving sentences or otherwise being held at the BCHOC. However, in light of the recently effective revisions to the relevant statutes, the proposed class is modified to incorporate the statutory definitions most relevant to this case, as follows: those inmates in the custody of the Bristol County Sheriff who have a serious mental illness, as defined in G. L. c. 127, § 1, and who may be housed in restrictive housing or disciplinary housing, as defined in G. L. c. 127, § 1, while serving a sentence or otherwise held in the custody of the Bristol County Sheriff.

ORDER

For the foregoing reasons the plaintiffs motion for class certification is **ALLOWED**.

So ordered,


Thomas J. Perrino
Justice of the Superior Court

DATED: April 24, 2019

NOTIFY

RECEIVED
JUN 26 2017

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 12-00250-B

ROBERT CANTELL; & others¹

vs.

LUIS S. SPENCER, COMMISSIONER OF CORRECTION; & others²

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs are inmates at various Massachusetts Department of Correction ("DOC") facilities who either are, or were, held in non-disciplinary segregation in Special Management Units ("SMUs"). They commenced this action on their behalf, and on behalf of all others similarly situated, seeking declaratory and injunctive relief and alleging violations of DOC regulations, and their right to due process of law under the United States Constitution and the Massachusetts Declaration of Rights. Plaintiffs' claims arise from defendants' alleged failure to provide them certain procedural protections (notice of basis for segregation; timely hearing; written explanation of reasons for segregation, etc.) once the inmates were placed in administrative non-disciplinary segregation in SMUs. Specifically, plaintiffs seek a declaratory judgment that defendants violated their own Departmental Segregation Unit ("DSU") regulations, 103 Code Mass. Regs. §§ 421.00, the Massachusetts Declaration of Rights, the United States Constitution, and G. L. c. 127, § 32. Plaintiffs also seek to enjoin defendants from

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¹ Derrick Maldonado, Luis Bizarro, John T. Fernandes, Albert Jackson, and Wilfredo Virella, on behalf of themselves and all others similarly situated.

² Defendants are the Superintendents of the institutions where the named plaintiffs are, or were, incarcerated (MCI-Cedar Junction, MCI-Shirley, and Souza Baranowski Correctional Center), and the superintendents of Department of Correction (DOC) facilities that house inmates in Special Management Units (SMUs) (collectively, "Superintendents").

holding prisoners in administrative non-disciplinary segregation in SMUs without providing the procedural protections and privileges enumerated in both 103 Code Mass. Regs. §§ 421.00 and LaChance v. Comm'r of Corr., 463 Mass. 767 (2012), and from interfering with this action or retaliating against plaintiffs.

The case is currently before this court on the plaintiffs' motion for class certification in which they seek to certify a class of "all prisoners who are now, or may be in the future, held in non-disciplinary segregation in Special Management Units (SMUs) of the Massachusetts [DOC]."

After hearing and upon careful consideration of the parties' submissions, plaintiffs' motion for class certification is ALLOWED.

PROCEDURAL HISTORY

Plaintiffs have endured a long litigious journey to get to the merits of their motion for class certification ("Motion"). The Motion was filed on January 20, 2012. This court, in the wake of the Supreme Judicial Court's (SJC) decision in LaChance v. Comm'r of Corr., 436 Mass. 767 (2012) ("LaChance"), declined to act on the Motion, finding it "unnecessary," as the LaChance decision made it clear that the defendants were required to extend the protections discussed in LaChance to the plaintiffs and all prospective class members.³ This court dismissed plaintiffs' § 1983 claims on the ground that LaChance extended qualified immunity to the defendants. The dismissal was without prejudice. This court invited the plaintiffs to file an amended complaint should DOC fail to properly comply with the holding in LaChance.

Plaintiffs filed an appeal of the dismissal, which was upheld by a divided panel of the Appeals Court. Cantell v. Comm'r of Corr., 87 Mass. App. Ct. 629 (2015). The Appeals Court

³ See Order (Paper No. 35), dated January 31, 2013. In that Order, this court memorialized defendants' agreement, in open court, to apply the LaChance protections to inmates in the SMUs at issue. It is clear from the Second Amended Complaint that plaintiffs contend that defendants have not fulfilled those promises.

held that the appeal was moot, as all named plaintiffs had been moved out of SMUs into the general prison population, and “improvident” as the DOC was allegedly drafting new regulations to address the procedural deficiencies that form the basis of the plaintiffs’ claims.⁴ Id. A dissenting justice wrote that the plaintiffs’ class claims should not be treated as moot, as the LaChance decision did not resolve the merits of the plaintiffs’ claims, and this court had not ruled on the merits of the request for class certification. Id.

The SJC allowed the plaintiffs’ application for further appellate review and reversed this court’s prior dismissal. Cantell v. Comm’r of Corr., 475 Mass 745, 747 (2016). The SJC agreed with the dissenting justice of the Appeals Court that the appeal was not moot and that the merits of the plaintiffs’ claims had not been resolved by the LaChance decision. Id. The SJC reversed this court’s judgment of dismissal and remanded the matter for further proceedings. Id. Of import to the motion now before this court, the SJC held that “the class action allegations contained in the amended complaint remain operative until a judge has considered them and rejected them on their merits.” Id. at 753, citing Wolf v. Comm’r of Pub. Welfare, 367 Mass. 293, 297-298 (1975). This court now undertakes the required examination of the merits of the plaintiffs’ motion for class certification.

In addition, the SJC noted that the motion for class certification, back in 2013, was properly reviewed in light of the allegations of the complaint, as amended, then pending before this court. Cantell, 475 Mass. at 749 n. 9. Plaintiffs have since moved to further amend their complaint, which this court has allowed. For the purposes of deciding the motion now before it,

⁴ The SJC noted in Cantell v. Comm’r of Corr., 475 Mass 745 (2016), that as of the writing of its decision in October 2016 no new regulations had been promulgated. The only DOC response has been to amend the “standard operating procedures” (SOPs) for SMUs by memorandum. Id. at 753 n.15. To date, this court has received no indication from any party that any new regulations for SMUs have been drafted by DOC.

this court concludes that the claims of plaintiffs' Second Amended Complaint should be included in its consideration of class certification at this time in the proceeding.⁵

BACKGROUND

Plaintiffs seek to certify a class of "all prisoners who are now, or may be in the future, held in non-disciplinary segregation in Special Management Units (SMUs) of the Massachusetts [DOC]." Second Amended Complaint, p. 15. As the parties disagree about what "non-disciplinary segregation" means for the purposes of class certification, this court adopts the following meaning from the brief of the plaintiffs who bear the burden of proving compliance with Rule 23: "non-disciplinary segregation" refers to any prisoner incarcerated in an SMU that has not been sentenced to segregation after a disciplinary conviction pursuant to 103 Code Mass. Regs. §§ 423.00. For the purposes of deciding whether a class should be certified, this court views the category of "non-disciplinary segregation" to include those prisoners awaiting a disciplinary hearing, under investigation, or awaiting protective custody classification, and all other categories described under 103 Code Mass. Regs. § 423.08(1)(a)-(g).

Plaintiffs allege that the conditions in SMUs are at least as restrictive as conditions in DSUs, and that DOC's failure to provide them with the protections and privileges contained in the "DSU regulations," 130 CMR §§ 421.00, infringes their state and federal right to due process and violates the state's "kindness" statute, G. L. 127, § 32. Plaintiffs further allege that the current standard operating procedures ("SOPs") put in place by DOC for inmates held in non-

⁵ A hearing was held on March 31, 2017, giving the parties the opportunity to re-argue the motion for class certification in light of the SJC's remand. At that hearing, this court also heard argument on plaintiff's motion to further amend the complaint to add parties and refine their claims under the United States Constitution, the Mass. Declaration of Rights, and *LaChance*. This court allowed plaintiffs' motion and their Second Amended Complaint (Paper No. 57) was filed on April 19, 2017. Prior to the March 31, 2017 hearing, the parties provided supplemental briefing addressing the impact of the Second Amended Complaint on plaintiffs' request for class certification. As this court has the benefit of the parties' briefs, and finds the claims stated in the Second Amended Complaint arise from substantially the same conduct alleged in the prior Amended Complaint, this court will review the request for class treatment of all claims now asserted by the plaintiffs in their Second Amended Complaint.

disciplinary detention in SMUs do not provide the minimum protections discussed in LaChance, and therefore violate their Constitutional right to due process of law under the United States Constitution.

To prove their claims, plaintiffs will have to show at trial that: the conditions in SMUs are at least as restrictive than DSUs, and implicitly more penal than general conditions of incarceration; that the protections and privileges of the DSU regulations are (or were) not applied to those plaintiffs held in non-disciplinary segregation in SMUs; that the SOPs applied by DOC to inmates so held do not meet minimal due process requirements under both state and federal law; and that the current SOPs fail to treat any inmate held in non-disciplinary segregation with the kindness which their obedience, industry and good conduct merit.

According to the complaint, while confined in an SMU, prisoners are locked in their individual cells for twenty-three hours per day, with permitted recreation in a small, outdoor cage for one hour per day on weekdays and no permitted recreation on weekends; each prisoner must eat all meals alone in his or her cell; the prisoners are permitted to shower and shave no more than three times per week; all visits are noncontact visits, and these are generally limited to two visits per week of no more than one hour's duration; prisoners are not allowed to visit the general prison library, have no access to employment or to rehabilitative, therapeutic, or educational programs and therefore no access to programs from which they might earn "good time" sentence credits or reductions; they may not attend communal religious services; and they are substantially restricted, compared to the general prison population, in terms of what they may purchase and how much money they may spend at the prison canteen. They allege the conditions are at least as restrictive as those applied to units designated as "departmental segregation units" (DSUs). Plaintiffs also allege that none of the plaintiffs has been provided the

procedural protections required by the DSU regulations, or the visitation, canteen, and other privileges included within the DSU regulations, or the procedural protections outlined in LaChance, and support those allegations with affidavits submitted with their Supplementary Memorandum in Support of Class Certification.

Plaintiffs have provided evidence that as of June 2008, there were a total of 451 SMU beds in DOC facilities, housing 352 inmates. Pl. Memo in Supp., at p. 3. Plaintiffs allege that “turnover is high in the SMUs, which generally house prisoners for less than a year” and that the population of the SMUs is “frequently changing.” Id.

This court notes that the plaintiffs are represented by attorneys from Prisoners’ Legal Services, an organization specializing in the representation of prisoners, and accepts that plaintiffs’ counsel is experienced in representing prisoners and in conducting class action litigation.

DISCUSSION

I. Standard for Class Certification

“A judge has broad discretion to certify or decertify a class.” Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 361 (2008). Rule 23 of the Massachusetts Rules of Civil Procedure sets out the six requirements a plaintiff must satisfy to maintain a class action. The plaintiff must establish that (1) the class is so numerous that joinder of all members is impracticable [“numerosity”], (2) there are questions of law and fact common to the class [“commonality”], (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class [“typicality”], and (4) the representative parties will fairly and adequately protect the interests of the class [“adequacy”]. Mass. R. Civ. P. 23(a). Additionally, the plaintiff must demonstrate “that the questions of law or fact common to the members of the class predominate

over any questions affecting only individual members [“predominance”], and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy [“superiority”].” Mass R. Civ. P. 23(b).

At the pre-trial class certification stage of the proceeding, the party seeking class certification must “provide information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23; they do not bear the burden of producing evidence sufficient to prove that the requirements have been met.” Weld v. Glaxo Wellcome, Inc., 434 Mass. 81, 87 (2001). As discussed more fully below, the plaintiffs have satisfied this burden here.

a. Numerosity

A plaintiff satisfies the numerosity requirement of Mass. R. Civ. P. 23(a)(1) if they can demonstrate that joinder of all of the putative class members would be impracticable, “mean[ing] impractical, unwise or imprudent rather than impossible or incapable of being performed.” Brophy v. School Comm. of Worcester, 6 Mass. App. Ct. 731, 736 (1978). In determining whether the plaintiffs have satisfied this requirement, the court may consider “efficiency, limitation of judicial resources [,] and expense to the plaintiff...” Id. “Numbers alone...do not control.” James W. Smith and Hiller B. Zobel, Rules Practice § 23.4, at 337 (2d ed. 2006 & Suppl. 2010).

Here, the plaintiffs assert that the putative class consists of a fluctuating number of inmates held in 451 available SMU beds located in DOC facilities. They aver that as of June 2008, there were 352 inmates held in SMU beds, although they do not aver that all of the prisoners then held in SMUs were held for administrative non-disciplinary reasons. All of the

named plaintiffs have been, or are currently, held in SMUs on an administrative non-disciplinary basis, the categories of which are defined by 103 CMR §423.08(1)(a)-(g).

While it is difficult to arrive at a precise number of putative class members at any given time, from the information provided, this court concludes that the number will exceed fifty and, very likely, consists of more than one hundred inmates system-wide on any given day. The court finds that plaintiffs have therefore satisfied the numerosity requirement as joinder of any number of inmates within the range identified above would be "impractical, unwise or imprudent..." See Brophy, 6 Mass. App. Ct. at 735.

b. Commonality

Mass. R. Civ. P. 23(a)(2) requires that there be questions of law or fact common to the class. The commonality requirement is satisfied when all class members "have a common interest in the subject matter of the suit and a right and interest to ask for the same relief against the defendants." Salvas, 452 Mass. at 363-364, quoting Spear v. H.V. Greene Co., 246 Mass. 259, 266 (1923). "It is not essential that the interest of each member of the class be identical in all aspects with that of the plaintiffs." Id. (citation omitted); see Smith, supra, § 23.5, at 337 ("...total commonality is unnecessary."). Commonality "is easily met... [w]hen the party opposing the class has engaged in a course of conduct that affects a group of persons and gives rise to a cause of action [because] one or more of the elements of that cause of action will be common to all of the persons affected." Conte & Newberg, Newberg on Class Actions, § 3.10, at 272-274 (4th ed. 2002) ("Newburg").

Here, all members of the proposed class are, or were, held in SMUs that are operated under the same SMU regulations, 103 Code Mass. Regs. §§ 423.00. It is undisputed that the DOC applies the same regulations and SOPs to all inmates placed in SMUs. It is this "course of

conduct" that the plaintiffs challenge. DOC's policies apply equally to any inmate held in non-disciplinary segregation in an SMU. As such, any cause of action arising from those policies is available to any prisoner so held, and one or more of the elements of each related cause of action are common to all affected prisoners. See Newburg, § 3.10, at 272-274. The injury that plaintiffs allege is one that is common to all members of the proposed class: incarceration in a DSU-equivalent unit, for non-disciplinary reasons, without the benefit of certain procedural due process protections, both those contained in the DSU regulations and the more general protections enumerated in the LaChance decision and the Mass. Declaration of Rights. The individual reasons for prisoner placement in the SMU, e.g., pending transfer, awaiting a hearing, etc., are not germane to the rights which the inmates claim they are denied once placed. All inmates incarcerated in SMUs are treated similarly under the DOC's regulations, and it is the lack of procedural protections contained in those regulations that are challenged, not the individual reasons behind each inmate's placement in the SMU. This court finds that plaintiffs have met their burden to show common questions of law and fact are present.

Defendants have recently added to their argument the contention that plaintiffs' Second Amended Complaint adds a "new" federal due process claim that should defeat class certification on commonality grounds. Def. Suppl. Memo. in Opp. to Pl. Motion for Class Cert., p. 6-7. This court rejects defendants' argument that the federal constitutional claim in the Second Amended Complaint is "new." A review of the original and first amended complaint shows that plaintiffs have consistently asserted a violation of their federal Constitutional right to due process based on the same conduct of DOC. Further, even if it were a "new" claim, class plaintiffs, like any other plaintiff, are allowed to pursue relief under various legal theories. See Weld v. Glaxo Wellcome, Inc., 434 Mass. 81, 95 (2001). As the Supreme Court has stated about

the standard for commonality, a plaintiff has to demonstrate that the class claims “depend upon a common contention” and that determining the truth or falsity of that contention “will resolve an issue that is central to the validity of *each one of the claims* in one stroke.” Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011) (emphasis added).

This court concludes that the plaintiffs have met Rule 23’s commonality requirement.

c. Typicality

Typicality is established when there is a sufficient relationship between the injury to the named plaintiff and the conduct affecting the class, and the claims of the named plaintiff and those of the class are based on the same legal theory. Weld, 434 Mass. at 87. An alignment of claims ensures that the named plaintiff will advance the interests of the class by pursuing his or her own self-interest. Id. “A plaintiff representative nominally satisfies the typicality requirement with an allegation that the defendant acted consistently toward [the representative and the] members of a putative class.” Id., quoting Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 616 (1985).

This court sees no divergence between the claims of the plaintiffs and the claims of the proposed class. All of the plaintiffs and class members are, or were, housed in non-disciplinary segregation in SMUs, and none allegedly received the procedural protections of the DSU regulations, LaChance, or the Mass. Declaration of Rights. All such units are operated under the same set of DOC regulations and policies. Regardless of the individual reasons for each inmate’s incarceration in the SMUs, the alleged deprivation of rights takes place after they are placed there. This court finds that plaintiffs’ claims are typical of all prisoners housed in non-disciplinary segregation in SMUs. Plaintiffs’ claims meet the requirement for typicality.

Defendants argue that because some inmates held in “non-disciplinary” detention are being held for potential “disciplinary” reasons, or for their own protection, the named plaintiffs’ claims are not “typical” of all potential class members. Def. Suppl. Memo. in Opp. to Pl. Motion for Class Cert., p. 9-10. This court rejects Defendants’ argument for the reasons articulated above: the basis of placement in non-disciplinary segregation are not germane to the plaintiffs’ claims concerning their deprivation of legally-protected rights once placed in the SMU.

The court sees no basis or need for the use of “subclasses” as defendants propose, and has already found that plaintiffs’ claims, as alleged, satisfy the typicality requirement of Mass. R. Civ. P. 23(a).

d. Adequacy

The adequacy requirement has two parts. “The moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation.” Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985). “A class representative has the responsibility to protect the interests of all class members.” Spence v. Reeder, 382 Mass. 398, 409 (1981). Counsel for a class “has a continuing obligation to [represent appropriately] each class member.” Id. Here, there is no evidence to suggest either the plaintiffs, or their counsel, will not adequately protect the interests of the class as a whole.

First, the plaintiffs have demonstrated that their interests will not conflict with the interests of the putative class members as they seek the same relief for all class members. See Spence, 382 Mass. at 409. Plaintiffs seek an order that defendants’ failure to provide the protections and privileges of the DSU regulations to inmates who, like them are, or were, held in

administrative non-disciplinary segregation in SMUs, violated those regulations, their right to due process under the Declaration of Rights, as well as the state "kindness" statute. See Second Amended Complaint, pp. 14-15. Plaintiffs also seek an order that the current SOPs applied by DOC to inmates so housed violates their federal right of due process, and request an injunction preventing DOC from continuing its current practices. *Id.*, p. 15. Plaintiffs' claims and legal theories are the same as those that would be asserted by other potential class members allegedly harmed by the existing DOC policies, as is the requested relief.

Second, the plaintiffs have also established that their counsel, Prisoner's Legal Services of Massachusetts, is at least adequate to represent them and the putative class in this litigation. Significantly, plaintiffs' counsel has successfully represented inmates in other class actions seeking protections of prisoners' constitutional rights, and challenging DOC's procedures applicable to SMUs. See e.g., Haverty v. Comm'r of Corr., 437 Mass. 737 (2002). Plaintiffs' counsel has also successfully demonstrated their ability to vigorously represent the plaintiffs in the proceedings related to this action. See Cantell, 475 Mass. 745 (2016).

e. Predominance

"The predominance test expressly directs the court to make a comparison between the common and individual questions involved," in order to reach a determination as to whether the common questions presented outweigh any individual questions. Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 363 (2008). "[T]he presence of individual questions does not, *per se*, contraindicate class action treatment." Smith, *supra*, §23.8, at 341. Rather, "the question is whether the individual questions so inundate the common issues that a class action is no longer desideratum—or even useful" *Id.* "The predominance requirement seeks to ensure, in part, that the economies of class action will be realized in the particular litigation." *Id.* at 362. Where

plaintiffs' alleged injuries are the result of a "single course of conduct" engaged in by defendants against a large group of individuals. the determination of an actionable violation arising from that conduct "will turn largely on common questions of law and fact..." See Weld, 434 Mass. at 92 (citations omitted).

Here, the plaintiffs' claims and alleged injuries are the same as those experienced by other members of the class. The legal theories upon which those claims rest are also the same. One common question predominates over all other potential individual questions – whether DOC's policy of not extending the protections and privileges of the DSU regulations to inmates held in administrative non-disciplinary segregation violated the holdings of Haverty, 437 Mass. 737, LaChance, 463 Mass. 767, the Declaration of Rights, or the Constitution. These common questions outweigh any questions regarding any individual inmate's treatment or classification under the administrative segregation regulations. The "single course of conduct" complained of will "turn largely on common questions of fact and law" about what DOC's policies are toward the identified prisoner populations, and the extent of due process protections owed to those inmates. See Weld, 434 Mass. at 92. This court concludes that plaintiffs have met Rule 23(b)'s predominance requirement.

f. Superiority

Once the other prerequisites for class certification have been met, the plaintiff must still demonstrate that a class action is superior to other methods for efficiently adjudicating the controversy. Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 601 (1985). This determination overlaps with some of the analyses under the previous requirements. In analyzing the superiority requirement, the court may consider the following:

“(1) The size of the class; (2) the number...of claims which the class members hold...; whether the relief sought is solely injunctive, or instead includes money damages...; (4) whether the class is party-plaintiff or defendant...; (5) the desirability of a uniform determination of common legal and factual issues...; (6) the expense to the parties and to the Commonwealth of maintaining separate actions; and (7) the administrative difficulty of subsequently determining and distributing damages to absentee class members, as opposed to the problems presented by administering multitudinous individual lawsuits.” Smith, supra, § 23.8. at 342.

“[W]hen common issues predominate, judicial economy and consistency of result dictate class treatment.” Weld, 434 Mass. 93 (citation omitted).

In this case, analysis of the above factors demonstrates that a class action is the superior method for efficiently adjudicating the controversy. The size of the possible class makes joinder impracticable. The parties involved will benefit from one uniform determination of the facts concerning DOC policies applicable to the plaintiff class, and the extent of state and federal due process guarantees DOC owed to the class. The relief sought is primarily injunctive and best applied to all affected class members via a single injunction. Maintaining separate causes of action for each class member would be unnecessarily costly. This court is mindful that the Commonwealth will bear the cost of defending this litigation, making a single adjudication beneficial to it, despite its opposition to the present Motion. Finally, as the class is readily identifiable from DOC records, there is no special administrative difficulty identifying class members and ensuring proper application of any judgment received in favor of the class.

This court concludes that the plaintiffs have met the superiority requirement of Rule 23(b).

II. Plaintiffs' incarceration status,

Defendants argued, prior to the SJC's remand, that because none of the named plaintiffs are currently being held in an SMU, they are not able to maintain their claims arising from their incarceration in the SMU, and cannot serve as representative plaintiffs for the proposed class. Def. Opp. at p. 1, 4. This argument deserves a brief discussion in light of the SJC's ruling.

The SJC addressed the argument directly in its Cantell decision, 475 Mass. at 749, 753, and this court will follow that reasoning here. The SJC found that the named plaintiffs' change in status, once moved from the SMU to the general inmate population, did not moot the proposed class claims concerning class members' incarceration in SMUs, or hinder plaintiffs' ability to request to serve as representative plaintiffs for the class members. Id. at 753. The SJC also noted that because the named plaintiffs remain incarcerated, they remain subject to being returned to an SMU and, therefore, continue to have a real stake in the outcome of this litigation. Id. at 754 n.17.

III. Use of an "open" class.

Plaintiffs seek a class defined as "all prisoners who are now, or may be in the future, held in non-disciplinary segregation in Special Management Units (SMUs)..." Second Amended Complaint, p. 14.

While requests for relief are generally limited to actual, not future, harm, the use of an "open class" has been used in prisoners' rights cases where the claims arise from DOC policies that are applied uniformly to a large group of prisoners, and where inmates are often moved between units, and the unit populations are often changing. See, e.g., Haverty v. Comm'r of Corr., 437 Mass. 737, 739 (2002) (class of "all prisoners who are now confined or may at some point be confined"); Blaney v. Comm'r of Corr., 374 Mass. 337, 338 (class action "on behalf of all present and future protective custody inmates..."). See also Smith v. Ashe, 106 F.R.D. 353,

354-355 (D. Mass. 1985) (certifying class “consisting of all present and future prisoners incarcerated at the Hampden County Jail and House of Correction...”).

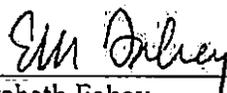
Here, plaintiffs have noted that “turnover is high in the SMUs, which generally house prisoners for less than a year” and that the population of the SMUs is “frequently changing.” Pl. Memo in Supp. at p. 3. Defendants have not provided any contrary information. This court credits plaintiffs’ characterization of the SMU population for the purposes of this motion. Further, the plaintiffs’ claims arise out of the same DOC policies applied uniformly to all inmates in SMUs. Given these circumstance, the use of an open class definition, to include inmates that are placed in administrative non-disciplinary segregation in SMUs “in the future”, is warranted.

IV. Conclusion.

The plaintiffs have provided this court with sufficient information to enable it “to form a reasonable judgment that the class meets the requirements of rule 23...” Salvas, 452 Mass. at 363, quoting Weld, 434 Mass. at 87. Accordingly, this court certifies a class of “all prisoners who are now, or may be in the future, held in non-disciplinary segregation in Special Management Units (SMUs) of the Massachusetts Department of Correction.”

ORDER

This court finds that the plaintiffs have met the class certification requirements established by Mass. R. Civ. P. 23. For this reason, it is hereby ORDERED that Plaintiffs’ Motion for Class Certification is ALLOWED.


Elizabeth Fahey
Justice of the Superior Court

DATED: June 21, 2017

V-719

Notary

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 2019-828**

**JOHN DOE 1-10,
Plaintiffs,**

vs.

**CAROL MICI, COMMISSIONER OF THE MASSACHUSETTS
DEPARTMENT OF CORRECTION et al.,
Defendants.**

**MEMORANDUM AND ORDER ON
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

The plaintiffs, John Doe 1-10 ("named plaintiffs") are individuals who have been civilly committed under G.L. c. 123, § 35 ("Section 35") to the Massachusetts Alcohol and Substance Addition Center (MASAC), which is operated by the Massachusetts Department of Correction (DOC). The defendants are Carol Mici, as Commissioner of the Massachusetts Department of Correction (DOC Commissioner), Pamela MacEachern, Superintendent of MASAC, Thomas Turco, Secretary of the Executive Office of Public Safety and Security (EOPS); DOC itself, Monica Bharel, as Commissioner of the Massachusetts Department of Public Health (DPH Commissioner), Marylou Sudders, Secretary of Health and Human Services (HHS), and the Department of Public Health ("DPH").

The plaintiffs allege that they have faced unlawful conditions even though they are civilly committed for treatment of substance abuse and have not been charged with, or convicted of, a crime. On June 5, 2019, the Plaintiffs filed "Plaintiffs' Motion for Class Certification" ("Motion"), which the defendants opposed. The proposed class would consist

*Notice sent 07.09.19
BPT
AMS
JRP
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of: "all men who are now or will be placed in a correctional facility under Section 35." After hearing on June 24, 2019, the Court **ALLOWS** the Motion.

BACKGROUND

For purposes of the Motion only, the Court finds the following preliminary facts for purpose of making a reasonable judgment on whether the proposed class meets the requirements of Mass. R. Civ. P. 23:

In Massachusetts, G.L. c. 123, § 35 authorizes the district court or juvenile court to order civil commitment for up to 90 days "for the purpose of inpatient care for the treatment of an alcohol or substance use disorder in a facility licensed or approved by the department of public health or the department of mental health." See generally In the Matter of G.P., 473 Mass. 112 (2015); Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Abuse.

DPH has a contract with a private company, High Point, to operate the Men's Addiction Treatment Center ("MATC"), a 108-bed facility located in Brockton. If DPH informs the court that there is no space available in a suitable DPH or DMH approved facility or "if the court makes a specific finding that the only appropriate setting for treatment for the person is a secure facility," then the court may commit a man – but not a woman – to "the Massachusetts correctional institution at Bridgewater, or other such facility as designated by the commissioner of correction." DOC operates MASAC in Plymouth, which is a 251-bed facility for Section 35 Commitments. Pursuant to a memorandum of Understanding with DOC, the Hampden County Sheriff's Department operates the Stonybrook Stabilization and Treatment Center ("SSTC"), which consists of two facilities: (1) SSTC-Ludlow, an 85-bed facility located at the Ludlow House of Correction and (2) SSTC-Springfield, a 32-bed

facility located at the Western Massachusetts Recovery and Wellness Center, a residential treatment center.

Section 35 provides that women may be committed to "a secure facility for women approved by the department of public health or the department of mental health." There is no statutory authority to commit women under Section 35 to a DOC facility. Women uniformly receive treatment in DMH or DPH facilities, including two facilities operated by High Point pursuant to a DPH contract (the 102- bed Women's Addiction Treatment Center (WATC) in New Bedford) and the 32- bed Highpoint Treatment Center at Shattuck ("JP").

The complaint alleges that the defendants have chosen not to establish enough DPH or DMH approved beds for men, but have elected to make DOC institutions a core component of treatment under Section 35. As a result, more than 2,000 men are committed to DOC facilities, including MASAC, under Section 35 every year.

The complaint alleges, in effect, that men committed to MASAC are treated in ways reflective of punishment, which is not appropriate for civilly committed individuals. For instance, MASAC is surrounded by razor wire; patients are strip searched, wear ID badges labelling them as "inmates" must adhere to numerous prison rules, endure unsanitary living conditions, are deprived of visitors, have their mail and phone calls monitored and are subjected to disciplinary punishments, including solitary confinement. They also receive only minimal treatment. Many, if not most, return to the community traumatized by the experience and are more vulnerable to relapse and overdose. Women are not subjected to these experiences. The complaint alleges that the use of correctional facilities is "a substantial departure from accepted professional judgment, practice or standards."

The complaint sets forth details of the individual experiences of each of the ten named plaintiffs. They have submitted affidavits in support of the Motion, to verify those allegations. As noted below, however, they are not able to state whether they were sent to MASAC because of the lack of space in a DPH or DMH facility, or whether their placement reflects a determination that they need to be held in strict security.

The complaint alleges three principal theories:

- Gender discrimination in violation of Equal Protection, the Massachusetts Equal Rights Amendment and G.L. c. 93, § 102;
- Violation of the Americans with Disabilities Act (ADA) Section 504 of the Rehabilitation Act, the Massachusetts Declaration of Rights and G.L. c. 93, §103;
- Violation of substantive Due Process, by subjecting civilly committed persons to conditions that effectively amount to punishment, without conviction of a crime.

DISCUSSION

Class certification does not turn on the merits. Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 361 (2008), quoting Weld v. Glaxo Wellcome Inc., 434 Mass. 81, 84-85 (2001). See generally Aspinall v. Philip Morris Cos., 442 Mass. 381, 391-392 (2004), quoting Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 605 (1985). The plaintiff's burden is well established:

On a motion for class certification pursuant to either rule 23 or G.L. c. 93A, § 9(2), "[t]he plaintiffs bear the burden of providing information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23 [and c.93A § 9(2)]; they do not bear the burden of producing evidence sufficient to prove that the requirements have been met" (emphasis added). Weld v. Glaxo Wellcome Inc., 434 Mass. 81, 87 (2001).

Kwaak v. Pfizer, Inc., 71 Mass. App. Ct. 293, 297 (2008).

I.

To grant a motion for class certification, the court must find, among other things that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Mass. R. Civ. P. 23(b). This criterion requires consideration of the efficiency of the class-action device, the possible expense to the plaintiffs, and the likelihood that judicial economy will be served. Berry v. Town of Danvers, 34 Mass. App. Ct. 507, 515 (1993); Sniffin v. Prudential Ins. Co. of Am., 11 Mass. App. Ct. 714, 724-25 (1981).

Typically, a case meets the “superiority” test if it “presents a classic illustration of the policies of judicial efficiency and access to courts that underlie the class action suit: it aggregates numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court.” Weld, 434 Mass. at 93. Superiority is the most difficult criterion to assess in this case.

This case includes a prayer for declaratory relief. If the Court reaches the merits, it would likely enter a declaration as to “the legality of the administrative practices and procedures.” See G. L. c. 231A, §2.¹ A declaration against the Commonwealth’s agents under § 2 inures to the benefit of all affected persons who deal with the Commonwealth.²

¹ Under G. L. c. 231A, §2, the declaratory judgment procedure:

... may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated; ... For the purpose of this section practices or procedures mean the customary and usual method of conducting municipal, county, state agency or official business.

² The applicable statute provides:

... when a decree has already been entered declaring an administrative practice or procedure as defined in section two to be illegal, and a person not a party to the original action involving said practice or procedure is adversely affected by the same or similar practice or procedure by the same agency, said person may seek relief under this

In many cases, therefore, it is not necessary to become a named party or class member to enforce any declaration the Court may enter in this case. All remedies, up to and including contempt, are available to all affected persons.³

That relief is not always sufficient, as the Declaratory Judgment Act itself recognizes.

G.L. c. 231A, § 8 (paragraphs 2 and 3) states:

Nothing set forth in this section shall bar the bringing of a class action for declaratory relief pursuant to the new [sic] rules of civil procedure.

Following entry of a final decree or order favorable to the petitioner or petitioners in a class suit, any member of said class thereafter aggrieved by any violation of said order or decree shall be entitled to compel compliance therewith by instituting contempt proceedings in said class suit.

A declaratory judgment would generally suffice to resolve questions of law that arise on essentially undisputed facts. Some of the issues in this case fit the bill. The Court does not need a class action to declare whether the differing treatment of men and women in section 35 is facially unconstitutional. The same would be true of a claim that commitment to a DOC institution, without more, is unlawful, but it is not clear that the plaintiffs actually make this claim – they agreed at the hearing that it may be possible to resolve the issues in this case

chapter by filing a petition for contempt against the agency or agent continuing said practice or procedure after the entry of said decree.

G.L. c. 231A, § 5 (second paragraph) (emphasis added).

³ It is true that G.L. c. 231A, § 8 (paragraphs 2 and 3) states:

Nothing set forth in this section shall bar the bringing of a class action for declaratory relief pursuant to the new rules of civil procedure.

Following entry of a final decree or order favorable to the petitioner or petitioners in a class suit, any member of said class thereafter aggrieved by any violation of said order or decree shall be entitled to compel compliance therewith by instituting contempt proceedings in said class suit.

The Court cannot imagine (and the parties have not argued) how class action status in this case would give any class member greater rights under § 8 than he or she already would have under § 5.

without legislation of the sort that now keeps women out of DOC custody. See St. 2016, c. 8, §§ 1 to 4.

Other questions in this case involve hotly disputed facts. While DOC contends that this case is a facial challenge to Section 35's treatment of men in the DOC system, it appears that the thrust of this case - apart from the facial distinction between housing civilly committed men and women in DOC facilities for substance abuse treatment - involves contested facts about the application of Section 35, and the existence or non-existence of certain alleged practices. Those facts will probably take the most time and effort for the parties and the court. Because this case will likely require resolution of factual disputes regarding what practices and policies exist, the Court asked the plaintiffs how class action status in this case would give any class member greater rights under § 8 than he or she already would have under § 5.

Their answer was:

- Class action status is preferable to the possibility of multiple lawsuits in various counties of the Commonwealth;
- Relief in the nature of institutional reform is easier to manage in a class action;
- Discovery would be easier and less costly, as plaintiffs' counsel would have an attorney-client relationship with the class members whose confidential information is in the defendants' files.
- Plaintiffs' counsel would be in a position to consult with individual class members to assess more completely and fairly precisely what the defendants' practices are, how those practices affect individuals and what strategies and forms of relief best serve the class.
- Class action is preferable to joining all affected parties, as required by G.L. c. 231A, § 8.

Each of these points is persuasive.

The first bullet is the simplest. As the plaintiffs point out, there is a real possibility that other plaintiffs may file their own suits raising the same legal issues regarding the same conditions at MASAC. Given the number of civil commitments to MASAC, the severity of

the allegations and the significant loss of freedom involved, the proliferation of lawsuits is a serious risk. If that risk materializes, efficiency would probably dictate motions to consolidate the matters, resulting in delay, duplicative efforts by parties and the court, and complications arising from a lack of coordinated representation. Indeed, the plaintiffs point to recent over the recent amendment to DOC regulation establishing visitation policies, which was challenged in four different lawsuits in three counties and were only recently consolidated in this "Suffolk D" session.⁴ A class action is far superior to that likely scenario.

The second bullet is closely related to the first. While a declaration of facial illegality might well warrant declaratory relief without the need for a class action, this case likely turns upon questions of "as applied" illegality. If there are grounds for relief, the necessary changes are best managed in a single lawsuit, for the benefit of all patients in affected facilities. The possibility of multiple plaintiffs seeking their own relief raises the prospect of differing priorities and even inconsistent requests. Since there is only one DOC, any negotiated or court-ordered changes must be coordinated and articulated with a single voice.

The third and fourth bullets, above, are also highly persuasive. There is no way to resolve disputes over the existence of policies and practices without delving into the facts to discover what the defendants' policies and practices (patterns) are. Discovery into particular cases will shed light on what policies exist, and which of the events observed so far by named plaintiffs and other specifically named persons are aberrations, exceptions to a rule; or simply responses to unique circumstances. One major advantage of class action status is the creation

⁴ See Marie Lyons v. Thomas A. Turco, III, Suffolk Civil No. 1884-3974-F [originally Charles Malein Meas v. Thomas A. Turco, III, Middlesex Civil No. 1881-0529]; Mac Hudson, et al. v. Thomas A. Turco, III, Suffolk Civil No. 1884-860 - F; Nigel Vaughn, et al. v. Thomas A. Turco, III, Suffolk Civil No. 18-3973-F; and Mary Todd, et al. v. Thomas A. Turco, III, Suffolk Civil No. 18-3972 -F [originally, Norfolk Inmate Council Legal Advisory Committee, John E. Stote, Vincent Rivera and Cornelius Brown v. Commissioner of Corrections, Thomas A. Turco, III, Massachusetts Department of Correction, Sean Medeiros, Superintendent (MCI-Norfolk), Worcester Civil No. 1885-275].

of an attorney-client relationship between plaintiffs' counsel and class members, with all the fiduciary duties and duties of confidentiality that come with that relationship. That relationship would have immediate benefits, as it would permit production of treatment records without the need for the costly and time-consuming redactions that may even reduce the informational value of the documents. The attorney-client relationship may also have longer-term benefits in fashioning any necessary relief.⁵ A class action is therefore superior to the costs, delays and impediments to full disclosure that would result from limiting the plaintiffs to a declaratory judgment.

Moreover, Section 35 commitments arise quickly, affecting new individuals all the time, and are often resolved quickly. Requiring resort to the Court each time an individual problem arises becomes less and less efficient as the numbers rise. The transient nature of the claims can weigh in favor of finding a class action superior. Cf. Gonzalez v. Comm'r of Correction, 407 Mass. 448, 452 (1990) (Even if the named plaintiffs' case is moot, the Court may certify a class in "a case involving named plaintiffs . . . whose claims are likely to recur but are so transient by their very nature they are likely to become moot before a court reasonably can rule on a certification motion").

The Court has also considered other approaches short of full class action certification at this time. It has for instance, considered whether to proceed first with the declaratory judgment portion of the case, and continue to the other, fact-intensive

⁵ For instance, as part of settling a federal class action claim, the district court authorized the plaintiffs to issue subpoenas - pursuant to 45 CFR 164.512(e)(1) - to retail pharmacy services to obtain names and addresses of consumers who purchased the product at issue, and how much they paid. In re Relafen Antitrust Litig. v. Smithkline Beecham Corp., 2004 U.S. Dist. LEXIS 29834, *17-19 (D. Mass. Nov. 24, 2004) (prohibiting the plaintiffs from obtaining any information beyond that which was included in the order, requiring that the information be held confidential and only used as part of the administration of the settlement of the case, and the plaintiffs would destroy the information after the case was completed). *Id.* at 19.

issues later, only if necessary. That approach would likely delay resolution (including any necessary relief) in a case where harm from alleged violations occurs daily. It also would result in piecemeal adjudication that may not allow the most efficient, timely or fruitful implementation of a remedy, if warranted. For instance, if the Court were to declare that some aspects of MASAC operations violate the law and leave other claims for the future, DOC would not know which portions of its existing procedures could remain in place and serve as a foundation for a future, fully compliant program. The disadvantages of a phased approach therefore outweigh the advantages.

The Court has also considered whether any alternative approach would achieve the discovery and class-consultation benefits in the short term, leaving the question of full class certification for the future. Massachusetts has no equivalent to Fed. R. Civ. P. 23(g)(3), which authorizes interim designation of class counsel. On the other hand, the Massachusetts version of Rule 23 “provides judges and parties with greater flexibility” than the federal rule, when it comes to the timing of certification and issuance of certain orders before certification. See Weld v. Glaxo Wellcome, Inc., 434 Mass. 81, 87 n. 8 (2001) (class action for invasion of privacy and misappropriation of private medical information).⁶ One tool available “at any stage of an action” is to “impose such terms as shall fairly and adequately protect the interests of the class . . .” Mass. R. Civ. P. 23(d). Massachusetts also provides for the possibility of decertification if future developments show that class action status is not actually

⁶ In some respects, the mere allegations of class action status affects the conduct of the lawsuit even prior to class certification. See Wolf v. Commissioner of Public Welfare, 367 Mass. 293, 298 (1975) (“During the interim between the plaintiff’s assertion that she brought the suit in a representative capacity and the court’s certification or refusal to certify the class, the judge should have treated the suit as a class suit for the purposes of dismissal or compromise.”). Plaintiff’s counsel thus already has undertaken some obligations to the class, at least if contemplating dismissal or compromise.

superior and, for instance, full relief can be granted through declaratory relief. That is, class certification is not necessarily permanent. Since the Court finds, on the present record, that class certification is superior, it will not speculate on whether future events may favor a different approach. There will be time enough to consider those events, and any adjustments or supplemental orders, if they ever arise.

For all these reasons, I find that a class action is the superior means of adjudicating this case.

II.

The Motion also satisfies the additional components of the Rule 23 test for class certification, which the defendants contest only briefly or not at all.

1. Numerosity. The class meets the requirement in Rule 23(a)(1) that “the class is so numerous that joinder of all members is impracticable. There is no debate here. The numbers who are subject to the defendants’ practices is well into the thousands. While an exact number is not presently available, the Court therefore finds sufficient numerosity to certify the class described above. Cf. In re Relafen Antitrust Litigation, 218 F.R.D. 337, 342 (D. Mass. 2003). Joinder of all these present and former applicants would be impracticable, in that it would be highly unwise or imprudent. Sniffin v. Prudential Ins. Co. of America, 11 Mass. App. Ct. 714, 723-24 (1981).

2. Common Questions of Law and Fact. The defendants contest the commonality requirement, relying primarily on the same rationales advanced with respect to the predominance requirement.

The Court has already listed the common questions above, in discussing “superiority.” For the same reasons, the case therefore involves common questions of law and fact. The defendants’ practices raise common questions involving the

construction and application of Section 35 in light of equal protection, due process and handicap discrimination laws. The case also involves common questions of fact regarding how, in practice, the Department's policies and practices implement or fail to implement the DOC's duties regarding civilly committed individuals. The class members are all subject to the same overall practices and procedures of MASAC. See Salvas, 452 Mass. at 366, 370 ("all members of the class were unarguably the beneficiaries of identical terms of employment"; evidence that "all of the class members . . . were subject to the identical terms and conditions" of employment).

3. Typicality. The plaintiffs' claims must be "typical of the claims . . . of the class." Mass. R. Civ. P. 23 (3). That requires "'a sufficient relationship between the injury to the named plaintiff and the conduct affecting the class,' and [that] the claims of the named plaintiff and those of the class 'are based on the same legal theory.'" Weld, 434 Mass. at 87. The named plaintiffs all have been civilly committed to MASAC pursuant to Section 35. Their claims appear typical of others who have faced the same conditions at MASAC.

However, the defendants correctly point out the lack of factual allegations regarding SSTC, which is run by a non-party, the Hampden County Sheriff. The absence of the Sheriff is also a potential problem in formulating relief. Nothing in the pleadings or papers filed in connection with the Motion suggests that the plaintiffs are in a position to advocate regarding conditions at SSTC. Indeed, at the hearing, the most that the plaintiffs could say was that one of the named plaintiffs has been at SSTC. Details on that commitment and on the facts concerning SSTC are sparse. Perhaps the complaint could be amended to make adequate allegations regarding that

facility, and if necessary, to bring in the Hampden County Sheriff. As framed, however, the complaint would, at most, support relief against the state parties prohibiting them from transferring any class member to SSTC – a remedy that some potential class members might not support, particularly if they live in Western Massachusetts. The court does not find that the plaintiffs' claims are typical of those civilly committed to SSTC at this time.

4. Fair and Adequate Protection of the Class's Interests. The plaintiffs must show that they and their counsel "will fairly and adequately protect the interests of the class." Mass. R. Civ. P. 23(a)(4). There can be no doubt that proposed class counsel are well-qualified and experienced in prison and mental health litigation arising under the constitution. The defendants not challenge the adequacy and competence of class counsel.

So far as appears, the plaintiffs have sufficient personal incentive to prosecute this case. See generally Smith and Zobel, Massachusetts Rules Practice, § 23.7, 6 Mass. Practice Series, p. 339-340 (2006). Their diligence in doing so to date proves their adequacy as class members. In any event, the Court stands ready to intervene in the unlikely event that any future deficiency appears on this score (*id.*) by issuing an order under Mass. R. Civ. P. 23(d), quoted above. It may also "order entry of judgment in such form as to affect only the parties to the action and those adequately represented." There is no appreciable threat that inadequate representation will harm absent parties, either now or in the future.

The court is not yet persuaded that the present plaintiffs can adequately represent patients at SSTC. As noted in the "typicality" discussion above, these named plaintiffs

appear to have little or no connection with SSTC. Lacking that experience and foundation for claims about SSTC, they are not adequate representatives to speak for those who are civilly committed there.

5. Predomination of Common Questions: Finally, “questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . .” Mass. R. Civ. P. 23(b). “The predominance test expressly directs the court to make a comparison between the common and individual questions involved . . .” Salvas, 452 Mass. at 363. “Class certification may be appropriate where common issues of law and fact are shown to form the nucleus of a liability claim, even though the appropriateness of class action treatment in the damages phase is an open question.” Salvas, 452 Mass. at 364. See also Weld, 434 Mass. at 91-93.

Here, it is obvious that the predominant legal issues concern the legality of the defendants’ practices at MASAC. While individuals have certainly experienced different specific events and treatment, the basic questions are whether certain practices exist and, if so, whether they are legal. Individual circumstances are relevant only to the extent that they show, or fail to show, a pattern or practice. Those patterns or practices therefore raise common questions of law or fact common to all class members.

III. CLASS DEFINITION.

Citing numerous paragraphs of the complaint, DOC contends (Opp. at 15) that “[s]o far as appears from their Complaint and affidavits, the named Plaintiffs are all individuals who were committed to MASAC solely because, at the time of their commitments, there was no bed-space available to accommodate them at MATC.” At the hearing, however, it turned out that the plaintiffs do not know whether they were committed to MASAC because of

unavailable bed space at MATC or because they need strict security. Section 35 does not require the court to make a finding on that point in all cases, and it does not appear that the committing courts always make such a finding. Nor is it practicable to limit the class to those who were committed to MASAC because of inadequate bed space at DPH and DMH facilities, where the orders of commitment provide no basis for making that distinction for the named plaintiffs and, presumably, for any other members of the class. In these circumstances, the court will not adopt an unworkable class definition.

To be sure, different legal analysis may well apply to persons committed to MASAC due to lack of space, as opposed to those who require strict security. For that reason, perhaps subclasses may be appropriate at some point in the future. For present purposes, it is enough that individuals in both situations are civilly committed and therefore may not be punished, whether or not some of them require strict security. Because Massachusetts has no rule requiring an early certification decision, "it may not invariably be improper to delay defining the class with precision until the time of judgment." Cleary v. Comm'r of Pub. Welfare, 21 Mass. App. Ct. 140, 147 n. 14 (1985). See also Mass. Gen. Hosp. v. Rate Setting Comm'n, 371 Mass. 705, 713 (1977) (no error to enter judgment without ruling on class-certification).

DOC also challenges the inclusion of SSTC patients in the class definition. For reasons stated above (in connection with the class representation issue), the court is not prepared to certify a class regarding conditions at SSTC. It is possible that, with additional allegations, patients at SSTC might be a proper subclass. At this point, however, the court defines the class to include only those men committed to DOC facilities under G.L. c. 123, § 35. It appears likely that DOC keeps sufficient records about its patients' criminal or pre-trial+ commitments to make this definition workable. The reference to DOC facilities is meant to

exclude (at this time) county facilities like SSTC, even if operated under a memorandum of understanding with DOC.

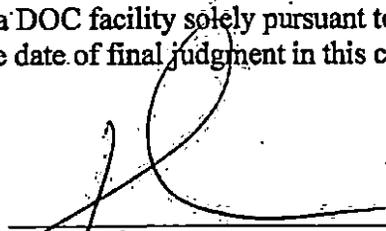
The court also agrees with the defendants that it would be inappropriate to include within the class those who are dually committed, i.e. those who are committed under both Section 35 and who also are held awaiting trial on pending criminal charges. Dual commitments raise different issues, because those patients are subject to restrictions arising from the criminal charge, and the alternative placement may be jail. For that reason, the court has inserted the word "solely" into the plaintiffs' proposed class definition, thereby excluding dual commitments from the class. Indeed, it appears that women who are dually committed may be held at MCI-Framingham, which means that dually committed males arguably have a much weaker claim of gender discrimination than those committed solely under Section 35.

CONCLUSION

For the above reasons, the Individual Named Plaintiffs' Motion for Class Certification is **ALLOWED**. The Court certifies the following class:

All men placed or housed in a DOC facility solely pursuant to G.L. c. 123, § 35 from July 2, 2019 through the date of final judgment in this case and including the named plaintiffs.

Dated: July 2, 2019



Douglas H. Wilkins
Associate Justice, Superior Court