IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JOAN BZDAWKA, by her legal guardian and next friend, RICHARD MILLER; SANDRA EHRLICHMAN, by her legal guardian and next friend, NANCY STEEVES; MARILYN BERDIKOFF, by her legal guardian and next friend, LOIS DEGNER; LENORE CZARNECKI, by her agent and next friend, CAROLYN CETNAROWSKI; and JOHN GORTON, by his agent and next friend, DEBORAK BRUNK, each on their own behalf and on behalf of a class of persons similarly situated,

Plaintiffs,

v. Case No. 04-C-0193

MILWAUKEE COUNTY; WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES; and HELENE NELSON, in her official capacity as Secretary of DHFS,

Defendants.

STATE DEFENDANTS' RESPONSE BRIEF OPPOSING RENEWED MOTION FOR CLASS CERTIFICATION

Plaintiffs have filed a Renewed Motion for Class Certification pursuant to Fed. R. Civ. P. 23 for an order certifying the following plaintiffs' class:

> All Milwaukee County residents with disabilities who now are or will in the future be: (1) eligible for the Family Care program, and (2) appropriate, based on reasonable professional judgment, for residential services in adult family homes ["AFHs"] and community-based residential facilities ["CBRFs"].

Record ("R") 101 at 1.

Defendants Wisconsin Department of Health and Family Services ("DHFS") and Helene Nelson (collectively "the State defendants") submit this response brief, together with the Affidavits of Charles Jones ("Jones Aff."), James Hennen ("Hennen Aff.") and that of the State defendants undersigned counsel, opposing plaintiffs' motion.

ISSUES PRESENTED

1. Have the named plaintiffs established the implied and express requirements for certification of the proposed class pursuant to Fed. R. Civ. P. 23(a)?

This issue requires the resolution of the following sub-issues:

a. Must the request for class certification be denied because the putative class is neither suffering nor threatened with the same injury plaintiffs allegedly face?

b. Is there in fact an identifiable class?

c. Have plaintiffs met their burden of establishing the required elements of Rule 23(a), particularly numerosity and that they are capable of adequately representing the class they seek to represent?

2. Have the named plaintiffs established that they satisfy the elements of Rule 23(b)(2) required for class certification?

STATEMENT OF THE CASE AND OF THE FACTS

On February 7, 2006, this Court filed its Decision and Order granting in part and denying in part the defendants' motions to dismiss the Fourth Amended Complaint (R. 86). As a result of the Court's Decision and Order and plaintiffs' subsequent voluntary dismissal pursuant to a stipulation of the parties of a claim based on the Medical Assistance statute, 42 U.S.C. Title XIX, §§ 1396, *et seq.*, this case now consists of four paired claims for declaratory and injunctive relief

based on the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794.

There are now three remaining named plaintiffs who are representatives of the named class, Joan Bzdawka, Sandra Ehrlichman and Marilyn Berdikoff, who appear by their guardians and next friends. Each of these three named plaintiffs is a developmentally disabled person aged 60 or over who is a recipient of Family Care, a managed care Medical Assistance ("MA") waiver program. These plaintiffs each reside in an AFH or CBRF and attend related day programs operated by Homes for Independent Living ("HIL"), a Family Care provider (*see* R. 51, Fourth Amended Complaint ("Am. Comp."), ¶¶ 80, 82, 91, 93, 101 and 102; *see also* Hennen Aff., ¶ 4). Two other plaintiffs listed as parties in the caption are no longer proper class representatives, according to information discovered by the State defendants in preparing this brief. Plaintiff Lenore Czarnecki has died (Hennen Aff., ¶ 6). In addition, plaintiff John Gorton now resides in a nursing home because his health has deteriorated and his medical needs require treatment in a skilled nursing facility (*id.*). Czarnecki was, and Gorton is, a frail elderly individual and each formerly resided in CBRFs operated by Senior Residential Care of America, Inc. ("SRCA"), another Family Care provider.

Family Care is currently operated by DHFS as a pilot program in five counties, including Milwaukee County, the only county Family Care program involved in this lawsuit (*see* Exhibit 2004, filed with the State defendants' Motion to Dismiss (R. 71)). Under Family Care, elderly persons with long-term care needs and adults who have physical or developmental disabilities may receive comprehensive community-based services (*see gen.* Exhibit 2001, filed with the State defendants' Motions to Dismiss (R. 71) and available on the DHFS website at *http://dhfs.wisconsin.gov/LTCare/Genera/l/Index.htm*). In Milwaukee County, Family Care is

available only for elderly individuals (60 years of age and older), including those with physical disabilities and those with developmental disabilities (*see* Exhibit 2003-D(1), filed with the State defendants' Motion to Dismiss (R. 71)).[1]

As limited by the Court's February 7 Decision and Order, the Fourth Amended Complaint focuses on the Family Care capitated rates paid by the State defendants to the Milwaukee County Care Management Organization ("CMO") and the negotiated rates paid by the Milwaukee County CMO to providers of AFH and CBRF residential and day services during the years 2004 and 2005 (*see* Fourth Amended Complaint at 13-14 (R. 51:2:13-14)).[2] Claims for retroactive relief and alleging discrimination on the basis of age and county of residence in the distribution of long term care benefits have been dismissed, leaving only multiple claims that the defendants discriminated against the named plaintiffs and the class they seek to represent on the basis of their disabilities in violation of the ADA and Rehabilitation Act.

Under the Family Care Program, DHFS pays each participating county's CMO a monthly capitated rate for each individual who enrolls in the program. In exchange for that payment, the CMO is contractually obligated to provide each Medicaid-eligible participant all Medicaid-covered long term care services listed in the participant's individualized service plan ("ISP").

---

[1]A more detailed description of the Family Care program is included in the State Defendants' Brief-in-Chief in support of its Motions to Dismiss the Fourth Amended Complaint (R. 71:3-8).

[2]The Court dismissed all of plaintiffs' claims for retroactive relief, thus eliminating all claims during the period from CY 2000 through 2003 (R. 86:7-8, 22). The original complaint was filed in January 2004 (R. 1:2:1) and the Fourth Amended Complaint includes a claim expressly challenging the adequacy of the 2005 rates paid by DHFS to the Milwaukee County CMO (R. 51:2:13-14).

See Jones Aff., ¶ 3. The Milwaukee County CMO is the Milwaukee County Department on Aging.

The distinctive feature of the Family Care program, which distinguishes it from prior programs to fund long term care for disabled persons, is that it is intended to serve all eligible individuals on a managed care model. The CMO must use the capitated rates received for each member to purchase the most cost-effective care and treatment in order to meet the treatment needs of all eligible individuals. The CMO negotiates the rates it pays to individual providers. The contracts between the CMO and providers renew automatically from year to year, but are subject to mutual renegotiation by mutual consent of the parties. *See* Hennen Aff., ¶ 3.

Additional facts will be discussed as necessary during the course of the argument below.

ARGUMENT

I. THE NAMED PLAINTIFFS HAVE FAILED TO ESTABLISH THE IMPLIED AND EXPRESS REQUIREMENTS FOR CERTIFICATION OF THE PROPOSED CLASS PURSUANT TO RULE 23(A).

A. Plaintiffs have the burden of establishing each of the required elements necessary to support their motion for class certification under Rule 23.

Federal R. Civ. P. 23 requires a two-step analysis to determine whether class certification is appropriate. *See Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th. Cir. 1992). First, Rule 23(a) contains four express requirements, each of which is a prerequisite to class certification. *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 489 (S.D. Ill. 1999). The failure to meet any one of them precludes certification as a class. *Id.* The four requirements are: (1) that the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately

protect the interests of the class. Fed. R. Civ. P. 23(a). It is the moving party's burden to establish that each of the prerequisites of Rule 23 is satisfied. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

In addition—and antecedent to—the express requirements of Rule 23(a) are two implicit requirements: "that the plaintiffs and the class they seek to represent have standing;" and that the proposed class be identifiable, or that the proposed class definition be precise, objective and presently ascertainable. *In re Copper Antitrust Litigation*, 196 F.R.D. 348, 353 (W.D. Wis. 2000) (quoting and citing treatises).

If the threshold requirements of Rule 23(a) are met, plaintiffs must satisfy at least one of the three subdivisions of Rule 23(b). *In re Copper*, 196 F.R.D. at 353. In this case, plaintiffs rely on Rule 23(b)(2) which requires a showing that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Id.*

Once the successive requirements for class certification are met, the decision whether or not to certify the class is vested in the discretion of the district court. *Cf. Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977).

B. Class certification must be denied because the requested class is not limited to persons who have standing to maintain this action on their own behalf.

Decisions on class certification should not be conditioned upon the merits of a case. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78 (1974). Nonetheless, "[t]he determination

whether to certify a class usually should be predicated on more information than the complaint itself affords." *In re Copper*, 196 F.R.D. at 353 (internal quotation omitted). Thus,

> [i]n evaluating a motion for class certification, it is sometimes necessary to probe behind the pleadings to determine whether the interests of absent parties are fairly encompassed within the named [plaintiffs'] claims. . . . Indeed, to protect absent class members *and* defendants, this Court has an affirmative obligation to resolv[e] factual and legal disputes that strongly influence the wisdom of class treatment. . . . Thus, instead of assuming that whatever the plaintiffs allege is true, as it would in testing the legal sufficiency of a complaint under Rule 12(b)(6), the Court may look[ ] beneath the surface of [the] complaint to conduct the inquiries in [Rule 23] and exercise the discretion it confers.

Abram v. United Parcel Service of America, Inc., 200 F.R.D. 424, 427 (E.D. Wis. 2001) (internal quotation marks and citations omitted; italics in original).

Before addressing the specific requirements of Rule 23 (a), two implied prerequisites to class certification must be addressed. *See Clay*, 188 F.R.D. at 490; *Rochford*, 565 F.2d at 977. "Implicit in Rule 23 is the requirement that the plaintiffs and the class they seek to represent have standing." *In re Copper*, 196 F.R.D. at 353. "This is a 'threshold requirement for the maintenance of a federal class action and must be considered in addition to the requirements of Rule 23.'" *Id*., quoting *Rozema v. The Marshfield Clinic*, 174 F.R.D. 425, 432 (W.D. Wis. 1997), and 7B Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure*, § 1785.1 (2d ed. 1986), at 139.

"The definition of a class should not be so broad so as to include individuals who are without standing to maintain the action on their own behalf." *Clay*, 188 F.R.D. at 490. "To have standing to sue as a class representative, the plaintiff 'must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993), quoting *East Texas Motor Freight System Inc. v.*

Rodriguez, 431 U.S. 395, 403 (1977) and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974).

Plaintiffs' brief in support of their renewed motion for class certification ("Brief") advances conclusory arguments that ignore the question of class standing generally and fail to recognize the impact of this Court's February 7, 2006, order recognizing the named plaintiffs' limited standing and construing their numerous ADA and Rehabilitation Act claims in such a way that they survived, at least in part, the defendants' motions to dismiss. Mere eligibility for Family Care benefits alone is not sufficient to justify class standing, as plaintiffs seem to argue; in addition, plaintiffs and the class they seek to represent must "suffer the same injury." *Schlesinger*, 418 U.S. at 216; *Rodriguez*, 431 U.S. at 403; *Falcon*, 457 U.S. at 156. Apart from the conclusory allegations of the Fourth Amended Complaint, which the Court must look behind to evaluate properly the request for class certification, the record, including the affidavits submitted in opposition to the request for class certification and attached discovery documents from plaintiffs themselves, demonstrates plainly that the broad class plaintiffs seek to represent is simply not "suffer[ing] the same injury" the plaintiffs claim to suffer.

Plaintiffs themselves claim no present injury whatever, as this Court has recognized. Each is a Family Care recipient who claims no injury from their present residential placement or any of the other Family Care services they have continuously received for the past several years. They concede that their current placements are fully integrated and the least restrictive possible given their acute physical and developmental limitations. They have suffered no barriers to initial eligibility nor do they allege any difficulty in securing appropriate long term care services in the first place.

Instead, their eight variously stated claims under the ADA and Rehabilitation Act all boil down to semantic variations on a single theme. They claim that the capitated rates paid by DHFS to the Milwaukee CMO during calendar years ("CY") 2004 and 2005 and, in turn, the rates the Milwaukee CMO contracted to pay their residential providers during the same period, were so low that the providers will be forced to terminate their participation in Family Care, thereby forcing plaintiffs personally to move involuntarily to a different residential placement, accompanied, as this Court has found, by real and immediate "trauma and deterioration" (R. 86:8) and "forced . . . move[s] to an institutional setting" (R. 106:3).[3]

Indeed, plaintiffs themselves have fully acknowledged that their numerous claims of discrimination on the basis of disability focus exclusively on the prospect of an involuntary forced move from their present, appropriate placements caused entirely by DHFS' allegedly inadequate capitated rates during CY 2004 and 2005 and the contracted rates paid by the Milwaukee CMO to their providers during the same period. In fact, they have directly said this in responses to interrogatories provided to the State defendants during discovery. In their Amended Response to State Defendants' First Set of Interrogatories served June 7, 2005, plaintiffs stated:

> It is the position of the plaintiffs that *deficiencies in any services* provided to Milwaukee County Family Care recipients . . . *are the result of the state*

[3]In context, the Court's description can only be construed as indicating that plaintiffs face a real and immediate danger of being forced involuntarily into a more restrictive, less integrated institutional setting such as a nursing home (*see* R. 106:3, contrasting plaintiffs' prospective injuries with the facts in *Bill M. ex rel. William M. v. Nebraska Dept. H.H.S.*, 408 F.3d 1096, 1098 (8th Cir. 2005)). Although the Fourth Amended Complaint does not contain these assertions, the Court's interpretation of plaintiffs' claims based on affidavits submitted by plaintiffs' experts effectively amends the Fourth Amended Complaint to include them.

> *defendants' failure to set an adequate capitated rate* for calendar years 2000 through 2005.

See Exhibit E, at 2, attached to the Affidavit of the undersigned (emphasis supplied).

Accordingly, in order for a class to be certified in this matter, the class would have to share the same claimed prospective injury as that accepted by the Court as imminently threatening the plaintiffs in this case—*i.e.*, the real and immediate threat that other Family Care members will be involuntarily moved from their present AFH and CBRF residential placements causing immediate "trauma and deterioration" (R 86:8) and "forced . . . move[s] to an institutional setting" (R 106:3) as a result of inadequate capitated and contract rates paid during CY 2004 and 2005. Settled Supreme Court precedent cited above plainly requires that putative class members must "suffer the same injury" as the named plaintiffs before class standing can be recognized. *See also Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998), quoting *Schlesinger*, 418 U.S. at 216; *Baby Neal For and By Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

The class plaintiffs seek to represent includes all Milwaukee County residents with disabilities who will "now or will in the future" be: (1) eligible for Family Care, and (2) an appropriate candidate for residential services in AFHs and CBRFs (R. 101:1). Quite plainly, the requested class consists primarily if not almost entirely of persons who are not remotely threatened with the same injury plaintiffs claim to face. Because the proposed class improperly includes those who lack standing to bring this action on their own behalf, class certification should be denied. *See Rodriguez*, 431 U.S. at 403; *Schlesinger*, 418 U.S. at 216; *Keele*, 149 F.3d at 592.

C. The requested class is not sufficiently definite because it fails to identify those individuals actually harmed by the defendants' allegedly wrongful conduct.

The other implicit condition contained in Rule 23(a) is that an "identifiable" class must exist. *Gomez v. Illinois State Bd. of Educ.*, 117 F.R.D. 394, 397 (N.D. Ill. 1987). The proposed class definition "must be precise, objective and presently ascertainable." *In re Copper*, 196 F.R.D. at 353 (citations omitted; internal quotation omitted). An identifiable class exists if its members can be ascertained by reference to "objective criteria." *Gomez*, 117 F.R.D. at 397. "A class description is insufficient, however, if membership is contingent on the prospective member's state of mind." *Id.* (citing cases). There are two primary purposes of properly identifying the proposed class. First, a properly identified class alerts the parties and the court to the burdens that such a process might entail; and second, proper identification of the class insures that those individuals actually harmed by a defendant's wrongful conduct will be recipients of the relief eventually provided. *Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981).

Plaintiffs argue that their class definition is appropriate because it identifies objectively who should be included in the class. *See* Brief at 2-3. The class definition offered by plaintiffs serves neither of the purposes the identification of a proper class is supposed to serve. Including persons based on current or future Family Care eligibility and on the individual's appropriateness for a community-based placement does precisely nothing to inform anyone what the case is supposed to be about, nor does it in any way "insure[] that those actually harmed by defendants' wrongful conduct will be the recipients of the relief eventually provided." *Simer*, 661 F.2d at 670.[4]

[4]The fact that the primary beneficiaries of the relief plaintiffs seek would be the providers and not the class of Family Care eligibles or recipients at all is discussed in Section I.D.3., below.

D. Plaintiffs have failed to meet their burden of establishing the required express elements of Rule 23(a), and in particular, have failed to establish numerosity and that they will adequately represent the interests of the putative class.

1. Viewed from the perspective of the number of persons plaintiffs might have standing to represent, plaintiffs have failed to establish the required numerosity.

Plaintiffs argue superficially that, given the number of current and prospective Family Care participants generally and the number of Milwaukee Family Care participants currently residing in AFHs and CBRFs in particular, there are literally thousands of members in the class they seek to represent. Brief at 3-4. And yes, superficially at least, plaintiffs make a plausible argument. Once again, however, they ignore the question of class standing and the more fundamental question of how many people plaintiffs might actually have standing to represent. Looking behind the speculative assertions of the complaint and the equally speculative predictions of harm contained in the affidavits of plaintiffs' experts, the fact is, plaintiffs have failed to demonstrate that there are more than a handful of Family Care participants similarly situated with themselves.

Plaintiffs correctly observe that a potential class size of forty or more is generally sufficient to support certification. *See* Brief at 3, citing *Clarke v. Ford Motor Co.*, 220 F.R.D. 568, 578 (E.D. Wis. 2004). The parties have filed a Factual Stipulation in Connection with Plaintiffs' Motion for Class Certification ("Factual Stipulation") (R. 100). In addition, submitted with this brief are two affidavits which provide direct evidence, based on personal knowledge and review of available records, concerning just how many persons in the class plaintiffs seek to represent appear to have claims similar to those of the plaintiffs. *See* Jones Aff. and Hennen Aff., filed herewith. The Factual Stipulation establishes that the Milwaukee CMO is currently serving approximately 5,800 persons enrolled in Family Care, with

approximately 19% of that total (1080) currently residing in 74 AFHs and 123 CBRFs (R. 100:1; Hennen Aff., ¶ 12).

The affidavits provide further information directly rebutting plaintiffs' dire predictions about providers terminating their contracts with Family Care based on inadequate rates during CY 2004 and 2005 and resulting involuntary transfers of Family Care participants to other facilities as a result of such contract terminations. According to James Hennen, the current Milwaukee CMO contract administrator, during the period from January 1, 2004, to the present, only *one* provider, HIL, has given the CMO the required prior written notice of intent to terminate its contract (Hennen Aff., ¶ 4). HIL is the provider of residential services for the remaining three named class representative plaintiffs in this lawsuit as well as two additional Family Care participants who are not parties to this litigation (*id.*, ¶ 4).

In addition, the Milwaukee CMO is aware of only one Family care residential provider that has notified the CMO verbally that it planned to terminate residential services to two Family Care members living in a group home provided under a contract with the CMO (Hennen Aff., ¶ 5). In that case, which occurred just recently in February 2006, the provider collaborated with Family Care staff to transition these two persons to *more* integrated residential placements with services continuing to be provided by the same agency (*id.*).

In the case of SRCA, which until recently provided residential services to two of the named plaintiffs, Lenore Czarnecki and John Gorton, although SRCA has repeatedly threatened to give written notice of its intent to terminate its Family Care contracts, it has never in fact done so (*id.*, ¶ 6). Moreover, although SCRA serves a substantial number of Family Care clients (70 by current count), those persons have not joined this litigation. (*id.*, ¶ 7).

Thus, evidence submitted by the State and county defendants documents that there have been three Milwaukee County Family Care residential providers who have either taken steps to terminate a small number of Family Care placements or, like SCRA have threatened but never actually done so. In addition, the Affidavit of Gerald Kallas filed by plaintiffs (R. 78) contains the assertion, speculative on its face, that a facility called Bayside Terrace was forced to close "sometime in 2004" allegedly because of the inadequacy of Family Care rates and that "[a]pproximately 100 residents had to be moved to other CBRFs and into nursing homes" (*id.*, at 15).

As the Hennen affidavit plainly demonstrates, however, the actual facts are quite different from Kallas' account (*see* Hennen Aff., ¶¶ 17-18). According to Hennen, documents contained in the Milwaukee CMO files revealed that the Bayside facility consisted of two CBRFs, one licensed for 52 beds and the other for 65 beds. An entity called the Laureate Group purchased the Bayside facility in June 2003 from a previous owner who had a Family Care contract with the Milwaukee CMO. Although Laureate purchased with the intent to operate as a private pay facility, it agreed to continue to provide care through the remaining months of 2003 to the 23 Family Care participants living at Bayside at the time of the purchase (Hennen Aff., ¶ 18).

In December 2003, Laureate gave formal notice that it was terminating its Family Care contract consistent with communications at the time it purchased the facility six months earlier. All 23 Family Care participants were transitioned to other facilities appropriate to their assessed needs (*id.*). At the present time, the 15 remaining Family Care participants from that group reside primarily in other CBRFs (a total of 11 persons), one is currently in a hospice facility, one lives in a residential care apartment, and two moved out of the county and no longer are enrolled in Family Care. None of the former Bayside Family Care residents is currently in a nursing

home. The ages of the former Bayside Family Care residents who died between June 2003 and the present ranged between 78 and 102 years old (*id.*).

In addition to the fact that there is no objective evidence to support plaintiffs' claims that large numbers of Family Care members receiving AFH and CBRF residential services have been or will imminently be transferred to different residential placements as a result of provider dissatisfaction with the CY 2004 and 2005 rates, there is literally no evidence, apart from the examples of the named plaintiffs themselves, that Family Care residents have been subject to or potentially subject to *involuntary*[5] transfers as a result of provider dissatisfaction with Family Care rates.

Family Care participants are provided by the CMO with a grievance procedure and an appeal process to address a participant's dissatisfaction with a placement plan. They may also file a request for a fair hearing with the state Division of Hearings and Appeals ("DHA") to challenge a residential placement that is unacceptable to the participant (Jones Aff., ¶ 6). During the period from January 2004 to the present, DHFS personnel have been able to identify only three instances in which CMO participants have filed CMO grievances or grievance appeals or fair hearing requests with DHA challenging a change of residential placement by the Milwaukee CMO (*id.*, ¶ 7).

One of those complaints concerned a claim that the room and board rate, a cost which is paid by the Family Care recipient and not the CMO, was excessive (*id.*, ¶¶ 5, 7). In the second case, the participant's daughter wanted her mother moved to a nursing home. The CMO

[5]Obviously, if a person transfers voluntarily to a different facility, there would be no ADA or Rehabilitation Act claim, regardless of the level of care, integration or restrictiveness of the placement.

disagreed, since the nursing home would not have been the most integrated setting appropriate to the mother's needs. The result was that the participant remained in her existing residence, a CBRF (*id.*). In the third case, the participant wanted to remain in a particular CBRF close to her daughter, but the CMO disapproved because the participant could not afford the room and board rate charged by the facility. In this third case, the CMO offered the participant an alternative CBRF placement in at least as integrated a setting as the former CBRF (*id.*).

None of the Family Care participants filing grievances, appeals or fair hearing requests complaining of placement decisions during the period from January 2004 to the present complained of being moved involuntarily from an existing placement. Thus, records of the grievance, appeal or hearing mechanisms available to all Family Care participants for airing complaints about placement decisions directly contradict plaintiffs' claims that Family Care participants are being forced out of their AFH or CBRF placements because providers of AFH and CBRF residential or day services are so dissatisfied with the 2004-05 actuarial or provider rates that they are refusing to provide Family Care community-based residential services.

Finally, plaintiffs themselves have admitted, in response to recent discovery interrogatories, that they cannot identify and are not aware of *any* Family Care participants who have been forced to move from an AFH or CBRF into another AFH or CBRF, or into a nursing home, skilled nursing facility or other institution "because that person's first AFH or CBRF provider has either cut the level of services provided or refused to serve Milwaukee County residents with disabilities as a result of the capitated rates paid by DHFS for persons enrolled in the Milwaukee County Family Care program." *See* Exhibit D, at 2, Plaintiffs' Response to State Defendants Third Set of Interrogatories and Second Requests to Produce Documents, served May 15, 2006, attached to Affidavit of the undersigned.

Plaintiffs have now had more than two years since filing this case to identify other persons being imminently threatened with the same injury as they claim in this action. Their recent discovery response concedes that they are unable to identify or locate a single other person who shares their claimed injury. The affidavits of Hennen and Jones directly contradict the speculative assertions of plaintiffs' experts and of plaintiffs' pleadings predicting that numerous Family Care residents will be forced out of their homes and otherwise suffer dire consequences because of the claimed inadequacy of the Family Care rates. In short, plaintiffs have utterly failed to establish that the number of persons suffering the same or comparable injuries to those they fear for themselves warrants class certification.

2. Plaintiffs' claims are not typical of the class they seek to represent.

"'A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.'" *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). Three factors persuaded the court in *De La Fuente* that the plaintiffs had satisfied the typicality requirement: (1) the allegedly unlawful practices "remained essentially unchanged throughout the years in question;" (2) "[a]ll members of the class were subject to the same allegedly unlawful practices;" and (3) these unlawful practices equally affected all members of the class. *Id.* at 232. "The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal*, 43 F.3d at 57.

Given the breadth of plaintiffs' putative class, it is apparent that the relatively idiosyncratic claims of the plaintiffs—all residents of long term care facilities who claim imminent injury personal to themselves based on the allegedly insufficient amount of money paid to their providers for the cost of their care—are hardly "typical" in any ordinary sense.

On the face of it, all three factors identified in the *De La Fuente* case, above, strongly suggest that plaintiffs' multiple challenges to the capitated rates paid by DHFS to the Milwaukee CMO and the contract rates paid by the CMO to plaintiffs' providers lack the typicality required for certification of a class under Rule 23(a)(3). *See De La Fuente*, 713 F.2d at 232. First, DHFS' capitated rates, which are the primary target of plaintiffs' claims and which are revised and federally approved each successive year, have risen substantially during the course of the six-years Family Care has been in existence (*see* Jones Aff., ¶ 10). Secondly, as already pointed out, only about one fifth of the putative class currently resides in CBRFs or AFHs, meaning that approximately 80% of the class is not even arguably subject to the "unlawful practices" about which plaintiffs complain. Similarly, these "unlawful practices," *i.e.*, the rates paid to providers of long term community-based residential services in the Milwaukee County CMO, cannot be said to affect equally "all members" of the putative class. *Cf. De La Fuente*, 713 F.2d at 232.

3. There are strong reasons to doubt that plaintiffs adequately represent the interests of the class they seek to represent.

The "adequacy of representation" requirement of Rule 23(a)(4) has two parts: the adequacy of the named plaintiffs' counsel and the adequacy of representation by the named plaintiffs in protecting the separate and distinct interest of the class members. *Clay*, 188 F.R.D. at 493 (citing cases). The State defendants do not question that plaintiffs' current counsel are

"qualified, experienced, and generally able to conduct the proposed litigation." *Cf. Rozema*, 174 F.R.D. at 439.

In order for plaintiffs themselves to be fair and adequate class representatives, they (1) "must have sufficient interest in the outcome to ensure vigorous advocacy;" and (2) "must not have antagonistic or conflicting interests with other members of the proposed class." *Id.*; *Rosario*, 963 F.2d at 1018. Furthermore, for purposes of determining the adequacy of representation, the stature and personal characteristics of the representatives may be examined. *See Massengill v. Board of Ed., Antioch Community High*, 88 F.R.D. 181, 185 (N.D. Ill. 1980), citing *Amos v. Board of Directors of City of Milwaukee*, 408 F. Supp. 765 (E.D. Wis. 1976). Plaintiffs, "as fiduciaries of the class," are required to "meet the high level of responsibility imposed on every class representative." *Massengill*, 88 F.R.D. at 185. "Adequate representation is the foundation of all representative actions, and embodies the due process requirement that each litigant is entitled to his day in court." *Gomez*, 117 F.R.D. at 400 (internal citation omitted).

The three remaining named plaintiffs are developmentally disabled persons who have been adjudged incompetent to represent their own interests. There is no reason to question the dedication of plaintiffs' guardians to protecting zealously the best interests of their respective wards, and the State defendants do not do so. It is quite another level of dedication, however, to demonstrate commitment to protecting the interests of the entire *class* of Family Care participants that plaintiffs seek to represent. Notwithstanding plaintiffs' conclusory arguments on this point, *see* Brief at 8-9, there are several factors that strongly suggest that plaintiffs' representatives are not prepared or equipped to do so in this case.

Plaintiffs' brief argues that plaintiffs "all feel strongly about getting to the bottom of the funding issue and remaining in their current homes rather than face the trauma of moving and

probable deterioration," pointing to the affidavits submitted by the guardians of plaintiffs Bzdawka and Ehrlichman as evidence of "how strongly they feel about this." *Id.* Again, there is no reason to doubt that the strength of the guardians' concerns *about their wards*, as expressed in the cited affidavits (*see* R:10 and 12). With all due respect, however, there is no evidence that the guardians' dedication extends to protecting the interests of the entire class of Family Care participants they seek to represent. Rather, the respective affidavits speak solely to protecting the personal interests of the individual plaintiffs and the guardians' concern that their wards' lives not be disrupted by having to move from one facility to another (*id.*).

Recently, in fact, plaintiffs were asked to respond to a discovery request for information about the extent to which the plaintiffs' guardians had visited other facilities or otherwise considered alternative facilities that might be suitable placements for the individual plaintiffs. *See* Plaintiffs' Response to State Defendants' Third Set of Interrogatories at 3, attached to the affidavit of counsel as Exhibit D. Plaintiffs responded flatly that the "guardians or agents of the individual plaintiffs did not visit any alternate AFHs or CBRFs or otherwise consider any alternate AFHs or CBRFs for their respective wards. . . . based on the belief that remaining [in their present placements] is necessary to provide the individual Plaintiffs with necessary services and prevent deterioration." *Id.* Again, there is no reason to question the guardians' concern for their wards, but the fact that they will not even visit alternative facilities where other members of the class they claim to represent are living hardly bespeaks any interest, much less advocacy on behalf of, the interests of the class as a whole.

Furthermore, it is impossible to ignore the fact that this entire lawsuit is strong testimony to the plaintiffs' alignment—not with the class they seek to represent—but with the individual financial interests of their respective *providers*. In fact, at the moment, all of the named class

representative plaintiffs are residents of facilities owned by HIL, the only Family Care provider of community-based residential services that has given written notice of its intent to terminate its Family Care contract during the period covered by this litigation, CY 2004-05. The providers, whose own financial interest in this litigation is obvious, and not the plaintiffs or their guardians, have been and continue to be the most vocal force behind this litigation. Lincoln Burr and Dr. Gerald Kallas, two of the experts on whose testimony plaintiffs rely, have each submitted voluminous affidavits decrying the Family Care capitated rates and the contract rates paid to providers by the Milwaukee CMO (R:78, 79). Burr and Kallas are the CEOs of HIL and SRCA, respectively.[6] HIL and SRCA, of course, are the two facilities in which the original plaintiffs have resided.

Indeed, it is the financial interests of these few providers in securing higher Family Care rates, both across-the-board from the State defendants and on an individual basis from Milwaukee County, that are the focus of the primary relief requested in this lawsuit, that of increased Family Care rates. A cynical person might suggest that this lawsuit has been and continues to be driven by the financial interests of two providers who have not hesitated to use highly vulnerable individuals in their care as the stalking horses for this litigation. Although these two providers appear to be dissatisfied with the rates they receive from the Milwaukee CMO, the CMO continues to receive almost daily contacts from other providers interested in joining the Family Care network; has developed contracts with new providers to serve

[6]State defendants' counsel have repeatedly requested that plaintiffs provide them with information required by Fed. R. Civ. P. 26(a)(2)(B) concerning the compensation arrangements between plaintiffs and their experts. *See* letters dated October 6 and November 16, 2004, and April 27, 2005, contained in Exhibits A-C, attached to the affidavit of the undersigned. To date, plaintiffs have never provided this information.

Family Care members at rates lower than those charged by comparable HIL facilities; and has expanded its contracts with five existing Family Care providers who wished to expand their Family Care participation (Hennen Aff., ¶ 8).

Not only does the close alignment of the named plaintiffs with their providers suggest a conflict of interest between the plaintiffs and the class of Family Care participants they seek to represent, but the form of financial relief sought—increased rates for providers of long term residential services—necessarily conflicts with the interests of the class of Family Care participants as a whole. The Jones Affidavit explains:

> Under the terms of the federal approvals that permit DHFS to operate Family Care, DHFS is required to make capitated payments to CMOs at a level no higher than that which the independent actuary finds is actuarially sound, and DHFS is not permitted to supplement those payments. Therefore, if the Milwaukee County CMO were directed by court order to raise its payment rates to certain residential providers, the share of the total capitated payments available for services for participants who do not reside in facilities operated by those certain providers, as well as for participants who do not reside in a residential care facility, would decrease.

Jones Aff., ¶ 12.

The Hennen affidavit further explains the direct effect on the Milwaukee CMO of an order requiring that particular residential providers be paid higher rates:

> In order to fulfill its mandate to serve all eligible individuals with funding derived from a fixed capitated rate and to provide the maximum level of services to all Family Care members, the CMO contracts with service providers are based at least in part on an assessment of comparative cost-effectiveness. The CMO must provide for the needs of all Family Care members, only 19% of whom currently require services in an AFH or a CBRF. A requirement that the CMO contract with every available residential provider and pay the rates that each provider demands based on the provider's claimed costs, irrespective of a reasonable assessment of comparative cost effectiveness of the provider's services to Family Care members, would divert limited available funds from providing necessary services to other Family Care members.

Hennen Aff., ¶ 13.

In short, to the extent the primary relief sought would benefit particular Family Care providers or a limited class of Family Care providers, plaintiffs are pursuing relief that may fairly be characterized as antagonistic to the interests of the class they seek to represent as a whole. There is nothing inherently questionable about seeking such relief on plaintiffs' own behalf. However, doing so under the guise of protecting the interests of the class as a whole is strong evidence that plaintiffs are pursuing interests that are antagonistic to the class they seek to represent. *See Rosario*, 963 F.2d at 1018.

This record simply fails to support plaintiffs' claims that they are equipped to represent adequately the class of Family Care participants as a whole.

II. INJUNCTIVE RELIEF WITH RESPECT TO THE CLASS AS A WHOLE IS NOT APPROPRIATE.

Plaintiffs seek to proceed as a class under Fed. R. Civ. P. 23(b)(2) which declares that class certification under that section is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Two basic requirements must be satisfied under Fed. R. Civ. P. 23(b)(2): (1) the party opposing the class must have acted in a consistent manner toward members of the class so that its actions may be viewed as part of a pattern of activity; and (2) final injunctive or corresponding relief must be appropriate. *Edmondson v. Simon*, 86 F.R.D. 375, 382-83 (N.D. Ill. 1980) (citations omitted).

To be certified under Fed. R. Civ. P. 23(b)(2), the interests of the class members must be "cohesive and homogeneous." *Lemon v. Intern. Union Operating Eng'rs, Loc. 139*, 216 F.3d 577, 580 (7th Cir. 2000). Although the rule itself is silent regarding whether Fed. R. Civ. P. 23(b)(2) certification is permissible when the plaintiffs request individualized

relief (most commonly, monetary damages), the prevailing rule in the Seventh Circuit is that Fed. R. Civ. P. 23(b)(2) will not support certification of a case that demands relief that requires judicial inquiry into the particularized merits of each individual's claim. *Id.* at 580-81. *Id.* For these reasons, "'Rule 23(b)(2) may not be invoked in a case requiring significant individual liability or defense issues which would require separate hearings for each class member in order to establish the defendants' liability.'" *Clay*, 188 F.R.D. at 495, *quoting Arch v. American Tobacco Co., Inc.*, 175 F.R.D. 469, 482 (E.D. Pa. 1997).

Apart from the concerns, addressed above, that the interests of the class members are not "cohesive and homogeneous," at least with respect to the relief sought in this litigation, the State defendants advance two objections to whether final injunctive or corresponding relief is appropriate in this case. *Cf. Edmonson*, 86 F.R.D. at 382-83.

First, plaintiffs' emphasis on the funding and rates for Family Care obscures the fact that it is the rights of the individual Family Care recipients that are at issue in this case. Those interests in living in the least restrictive most integrated setting are necessarily protected on an individual case-by-case basis. The Milwaukee County CMO has a placement team which continuously monitors vacancies in AFHs and CBRFs for Family Care members who may be in need of such placements, and numerous vacancies currently exist. The Milwaukee County CMO will not move a Family Care member unless there is a placement available in an appropriate facility which will satisfy the member's plan of care and provide care and treatment in the most integrated setting commensurate with the member's needs, with due consideration for continuity of care and the member's social relationships (Hennen Aff., ¶¶ 9-10). Indeed, the Family Care program includes a grievance, appeal and hearing process that is specifically designed to protect

those interests, so that a broad injunction requiring that the defendants refrain from violating the ADA or Rehabilitation Act is, as a practical matter, redundant in this context.

Moreover, the U.S. Supreme Court has long held that a federal court "cannot issue a general injunction against all possible breaches of the law" and, as a result, has a duty to avoid "a sweeping injunction to obey the law." *Swift & Co. v. United States*, 196 U.S. 375, 396 and 401 (1905). A court order requiring a defendant to obey a law that the defendant already has a general duty to obey is no more than a redundancy unless it is directed at some specific threat of a future illegality. *See United States v. Turner*, 601 F. Supp. 757, 769 (E.D. Wis. 1985). "Such 'obey the law' injunctions cannot be sustained." *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 898 (5th Cir. 1978); *see also Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996) ("appellate courts will not countenance injunctions that merely require someone to 'obey the law.'"). The injunctive and declaratory relief sought by plaintiffs in the present case with respect to the purported class as a whole is clearly inappropriate under this standard.

CONCLUSION

For the reasons discussed above, the State defendants respectfully submit that plaintiffs' Renewed Motion for Class Certification must be denied.

Dated this 26th day of May, 2006.

PEGGY A. LAUTENSCHLAGER
Attorney General

s/Maureen McGlynn Flanagan
MAUREEN MCGLYNN FLANAGAN
Assistant Attorney General
State Bar #1013639

s/Mary E. Burke
MARY E. BURKE
Assistant Attorney General
State Bar #1015694

Attorneys for Defendants
Wisconsin Department of Health
and Family Services and Helene Nelson

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
Fax: (608) 267-2223
Telephone: (608) 266-1780 (Flanagan)
Email: flanaganmm@doj.state.wi.us
Telephone: (608) 266-0323 (Burke)
Email: burkeme@doj.state.wi.us

flanaganmm\nelson\pleadings\brief - dhfs resp re class cert 052606.doc