



Fact Sheet

System Reform in a Single Stroke: *Wal-Mart* and Its Implications for Class Actions on Behalf of Persons with Disabilities

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I. Introduction

Courts have long recognized class actions as an important vehicle for protecting civil rights, issuing decisions which have fundamentally reformed the systems responsible for the delivery of services and supports to persons with disabilities. Yet the Supreme Court's recent decision in *Wal-Mart v. Dukes*, 131 S.Ct. 2441 (2011), and its restrictive commonality test under Rule 23(a)(2) of the Federal Rules of Civil Procedure is emboldening state defendants to vigorously oppose this prong of class certification. As a result, there is an increasing amount of litigation designed to test the parameters and potential impact of the *Wal-Mart* decision across a spectrum of class action cases. As this new line of jurisprudence reverberates through the disability community, *Wal-Mart* is demanding a careful rethinking of legal strategies employed by class counsel in the context of system reform litigation for persons with disabilities.

II. The Central Themes of *Wal-Mart*

In *Wal-Mart*, the Supreme Court considered "one of the most expansive class actions ever," and its implications for class certification standards under Fed. R. Civ. P. 23.¹ At issue was the lower court's decision certifying a class of 1.5 million female employees in 3,400 Wal-Mart stores nationwide. 131 S.Ct. at 2547.² The plaintiffs claimed that supervisor discretion in the company's hiring

¹ For additional discussion of the *Wal-Mart* decision, see TASC's November Q&A by Sarah Somers and Jane Perkins.

http://tascnow.com/tasc/images/Documents/Publications/Q_A/2011/NHeLP_QA_Class_Actions_NHeLP_FINAL.pdf

² In 2004, the district court originally certified a Rule 23(b)(2) class defined as follows: "all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004),

and promotion decisions resulted in employment discrimination based on gender. Ultimately, the plaintiffs' contention that a corporate culture institutionalized and enabled gender bias failed to persuade the majority that the commonality requirements of Rule 23(a)(2) were met.³

In a 5-4 decision, the Court concluded that plaintiffs' claims of bias did not stem from a general policy or uniform practice of the defendants. Nor did Wal-Mart supervisors appear to operate with a common mode in their discretionary decisions concerning pay and promotion. 131 S.Ct. at 2552, 2554-55. Rather, Justice Scalia's majority opinion echoes the Ninth Circuit's dissent, characterizing the plaintiffs' claim as an attempt to sue about "literally millions of employment decisions at once."⁴ It holds that without a central or "common contention" of law or fact capable of class wide resolution, commonality requirements cannot be met. *Id.* at 2551. As the majority explains, a central or common contention is present when a "...determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* The majority's reversal also reflects a considerable lack of deference to the lower court's findings regarding Rule 23(a) requirements, raising questions regarding its fidelity to the abuse of discretion standard applicable at this stage of review.⁵

This articulation of Rule 23(a) requirements arguably represents a departure from the "low bar" traditionally set for commonality, which has been satisfied by either a common question of law *or* a common set of facts. It also appears to dampen the likelihood of satisfying this standard by a simple recitation of a common legal injury. *Id.* at 2551. Instead, it appears that the plaintiffs must demonstrate a common contention that results in a common injury which can be redressed by a common remedy for all class members. Arguably, there also must be a common cause for the injury and not an individualized application or decision that results in the harm to each class member.

Although purporting not to reach the question of typicality, the Court's analysis also calls into question the extent to which the named plaintiffs were sufficiently typical of the class as a whole.⁶ Since commonality and typicality tend to merge in the analysis of class certification, differences between named plaintiffs' claims, contentions, injuries, and circumstances, and those of the class, will likely prompt

modified on rehearing by the 9th Circuit, *en banc*, *sub nom.* *Wal-Mart v. Dukes*, 603 F.3d 571 (9th Cir. 2010).

³ Another unique factor influencing the Court's decision was the nature of the alleged Title VII violation and the limited ability to discern whether the defendant's alleged actions met the requisite level of intent required for employment discrimination claims.

⁴ 603 F.3d at 652

⁵ Erwin Chemerinsky, *New Limits on Class Actions*, 47 JTLATRIAL 54 (Nov. 2011).

⁶ The Court noted that "[class members] held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed." *Id.* at 2557 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d at 652 (Kozinski, J. dissenting)).

more aggressive opposition to the typicality prong of Rule 23(a)(3), including potential discovery requests, from defendants seeking to avoid certification.

A unanimous Court also rejected the use of Fed. R. Civ. P. 23(b)(2) as the appropriate vehicle for considering damage claims of class members, dismissing the plaintiffs' argument and the Ninth Circuit's approach that asks whether the injunctive claims predominate over damage claims.⁷

While the facts surrounding the Wal-Mart case can be readily distinguished from most class action, system reform cases brought on behalf of persons with disabilities, the Court's legal analysis clearly will inform how future class action cases are plead, argued and defended. At a minimum, it will necessitate greater vigilance on the part of P&A advocates, in order to preserve longstanding interpretations of Rule 23 in civil rights cases.

The Court's analysis in *Wal-Mart* suggests several defenses that are likely to be raised in class action litigation on behalf of persons with disabilities, all of which may make a finding of commonality and typicality more challenging. Each of the following defenses arguably undermines the common contention, the common cause, or the common injury suffered by plaintiff class members:

- 1) the different types and severity of disabilities among class members, as well as their various levels of need for support (akin to the different jobs, seniority, and types of discrimination alleged by Wal-Mart employees);
- 2) the different professionals responsible for making individual decisions affecting class members (like the many different Wal-Mart supervisors);
- 3) the different justifications for treating class members differently, based upon professional discretion and/or clinical judgment (similar to the discretion exercised by different supervisors in individual promotion decisions); and
- 4) the individualized decision-making process used by the defendants, such a person-centered planning or clinical reviews, that in turn determines their different actions and responses to class members' claim (as with the different review processes used at different Wal-Mart stores in different regions).

⁷ The majority denies suggestions that it has conflated the standards of 23(a)(2) and 23(b)(3), stating that its consideration of "dissimilarities" was not to determine if common issues predominated among the class, but rather whether there existed "[even] a single [common] question." *Id.* at 2556. However, its definition of "the common question" in this context, and its rigorous examination of differences, suggest otherwise. *Id.* at 2551-2552.

One way to overcome these defenses post-*Wal-Mart* is to ensure that the complaint and class motion identifies common contentions, causes, injuries, and solutions to the violations of class members' rights. These common causes or injuries must override or marginalize the individual differences between class members as well as the defendants' intervening responses to those individuals' circumstances.

III. The Aftermath of *Wal-Mart*

Since the Supreme Court issued its decision on June 20, 2011, the majority's analysis and resulting application of the commonality standard has garnered significant attention from class action lawyers and academics.⁸ In addition, there is an emerging body of case law examining the *Wal-Mart* decision in a variety of contexts – employment and labor law, contracts, consumer protection, products liability, securities fraud, insurance benefits, and constitutional violations in child welfare systems. While primarily occurring in the context of Rule 23(b)(3) class actions, these cases illustrate how courts in various circuits are viewing *Wal-Mart's* unique facts, applying its articulation of commonality, and determining the amount and type of evidence necessary to satisfy standards for class certification.

Post *Wal-Mart* cases can be organized into several categories: (1) employment discrimination cases, where there must be significant proof of intent in order to establish common causes for common injuries; (2) commercial cases which either apply the *Wal-Mart* analysis to find common questions based upon general policies, or distinguish *Wal-Mart* based on the legal claims at issue; (3) cases examining the admissibility and treatment of expert evidence at the class certification stage; and (4) cases challenging systemic conditions in public agencies. Clearly, the last category is most relevant to P&A litigation.

First, several district courts, including those in New York and California, have considered the type and quantum of evidence required to support class certification and establish "significant proof" in the context of Title VII employment cases. See, *Ramos v. Simplex Grinnell*, 2011 WL 2471584 (E.D.N.Y., June 21, 2011) (granting certification for New York state employees seeking unpaid prevailing wages for public construction projects);⁹ *Artis v. Deere Co.*, 276 F.R.D.

⁸ See, e.g., Erwin Chemerinsky, *New Limits on Class Actions*, 47 JTLATRIAL 54 (Nov. 2011); Andrew J. Task, *Wal-Mart v. Dukes: Class Actions and Legal Strategy*, 2011 CATOSCTR 319 (2011); Apalla U. Chopra and David Lowe, *Class Action Litigation and Arbitration after Wal-Mart v. Dukes and AT&T v. Concepcion*, Practising Law Institute, Litigation and Administrative Practice Course Handbook Series, November, 2011. Additional discussion of, and links to court documents in, *Wal-Mart v. Dukes* can be found at the Supreme Court of the United States blog, www.scotusblog.com/case-files/cases/wal-mart-v-dukes/

⁹ In *Ramos*, fifteen current and former public employees persuaded the court that they, and more than 400 other putative class members, were subject to a common policy under which the employer failed to distinguish and pay for covered work that they performed, despite the defendants' purported lack of uniform procedures. *Id.* at *3-4. The court found sufficient

348 (N.D. Cal., Aug. 8, 2011)(granting plaintiff's request for pre-certification discovery in a nationwide class action alleging gender discrimination in hiring).¹⁰ Compare, *Cruz v. Dollar Tree Stores, Inc.*, 2011 WL 1585055 (N.D. Cal., Apr. 27, 2011)(refusing to certify a class of California store managers alleging improper job classification denied them overtime wages and other benefits).

Second, courts have applied *Wal-Mart's* commonality standard in other commercial contexts and concluded either that the existence of general policies or practices were present,¹¹ or that the specialized nature of the claims at issue could be easily distinguished from *Wal-Mart*. For instance, cases alleging security fraud and work violations under the Fair Labor Standards Act involve claims where class certification generally is appropriate, provided that the common elements of the legal claims are sufficiently plead in the complaint and motion.¹²

Third, courts continued to examine the admissibility and treatment of expert testimony at the class certification stage, generally leaning against the imposition

statistical and anecdotal evidence to bridge the "conceptual gap" between individual claims and the existence of a class of persons who had suffered the same injury. *Id.* at *5.

¹⁰ In *Artis*, the plaintiff proposed certification of a class of hundreds of former and current female applicants, as well as future and deterred applicants to Deere's Equipment Operations divisions, alleging discriminatory hiring practices based on gender. 276 F.R.D. at 350. The defendants opposed a request for class discovery on privacy grounds, but also argued that individualized information of this kind was irrelevant to class certification, given *Wal-Mart's* requirement that the plaintiff identify bias in a company-wide evaluation method or provide significant proof of a general policy of discrimination. *Id.* at 351. The court concluded that it is well within its discretion to afford the plaintiff an opportunity to present evidence as to whether a class action is maintainable and to "ultimately satisfy her burden of establishing that a class action is proper under Rule 23." *Id.* at 352.

¹¹ In *Johnson v. General Mills, Inc.*, 2011 WL 4056208 (C.D. Cal., Sept.12, 2011), the court denied a motion for decertification, finding that class members were allegedly misled by a common advertising campaign with a unitary message, and their injuries allegedly arose from a common practice or policy of the manufacturer. The court noted that, for purposes of establishing commonality, it is sufficient to show the existence of shared legal issues, even with divergent factual predicates, or a common core of salient facts coupled with disparate legal remedies within the class. *Id.* at *2 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). See also, *Connecticut Ret. Plans and Trust Funds v. AMGEN, Inc.*, 2011 WL 5341285, *4-6 (9th Cir., Nov. 8, 2011)(affirming certification of a class of investors alleging securities fraud, concluding that the required elements of the fraud-on-the-market presumption were uncontested and distinguishing the substantive legal claims before it from those addressed in *Wal-Mart*).

¹² District courts have been reluctant to apply *Wal-Mart* to class actions under the Fair Labor Standards Act, noting that the FLSA requires only that class members be "similarly situated." See, e.g. *Butcher v. United Airlines, Inc.*, No. 09-11681 (D. Mass., July 22, 2011); *Jasper v. C.R. England, Inc.*, No. 08-05266 (C.D. Cal., June 30, 2011); *Spellman v. American Eagle Express*, No. 10-1764 (E.D. Pa., July 21, 2011); *Creely v. HCR ManorCare, Inc.*, 2011 WL 3794142 (N.D. Ohio, July 1, 2011); *Pub. Employees' Ret. Sys. v. Mississippi, et al, v. Merrill Lynch, Co., Inc., et al.*, 2011 WL 3652477 (S.D.N.Y., August 22, 2011)(granting class certification and distinguishing *Wal-Mart* in the context of securities fraud litigation) *cf.*, *MacGregor v. Farmer's Ins. Exch.*, 2011 WL 2981466 (D.S.C., July 22, 2011); see also, Apalla U. Chopra and David Lowe, *Class Action Litigation and Arbitration after Wal-Mart v. Dukes and AT&T v. Concepcion*, Practicing Law Institute, Litigation and Administrative Practice Course Handbook Series, November, 2011.

of the strict evidentiary standards required by *Daubert*.¹³

Finally, in several recent cases seeking to reform state service systems, the defendants have invoked a range of arguments highlighting differences among purported class members, including differences between class members' individual conditions and needs, the different professionals' responding to those needs, the individualized nature of those responses, and the different harms suffered by class members.

For instance, in *D.L. v. District of Columbia*, 2011 WL 5559927 (D.D.C., Nov. 16, 2011), the plaintiffs alleged that the defendant school district failed to identify, locate, evaluate, and offer special education and related services to students of various disabilities as they transitioned from early intervention services to the public school system, thus depriving them of a Free and Appropriate Public Education (FAPE).¹⁴ *Id.* at *1-2. After years of litigation, class certification, discovery, and rulings on summary judgment, the defendants filed a motion to decertify the class only weeks before a bench trial to determine remaining liability. *Id.* at *2-3.

Despite the presence of multiple alleged reasons for class members denial of FAPE -- or what the defendants characterized as multiple "bundled allegations" -- the court re-affirmed the appropriateness of its initial certification order, concluding that there may be different ways in which the common injury comes about, but those reasons need not be common to all members of the class as long as the basic injury (denial of FAPE) is common. *Id.* at 7. However, the court did divide and separate class claims for prospective injunctive relief from those seeking monetary damages, citing *Wal-Mart*. Yet neither the varying impact of

¹³ *In re Zurn*, 644 F.3d 604 (8th Cir. 2011) examined the extent to which something less than a full blown application of *Daubert* can constitute the "rigorous analysis" required to satisfy Fed. R. Civ. P. 23. The court considered recent and long-standing Supreme Court decisions on class certification, as well as precedent within its own circuit, concluding that "expert disputes 'concerning the factual setting of the case' should be resolved at the class certification stage only to the extent 'necessary to determine the nature of evidence that would be sufficient, if plaintiff's general allegations were true, to make out a prima facie case for the class.'" *Id.* at 611 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)). At least one other court appeared to endorse the Eighth Circuit's approach, although ultimately it concluded that the proffered expert report was so unreliable as to fail even a more "relaxed" application of the evidentiary standards. *Fosmire v. Progressive Max Ins. Co.*, 2011 WL 4801915 (W.D. Wash., Oct.11, 2011) (denying certification of class of motorists where the named plaintiff failed to satisfy typicality and adequacy standards and excluding as unreliable an expert report based on another expert's data and methodology). See also, *Smith v. Ceva Logistics U.S., Inc.*, 2011 WL 3204682 (C.D. Cal., July 25, 2011). For general information on *Daubert* evidentiary standards and the admission of expert evidence, see 29 Fed. Prac. & Proc. Evid. § 6266.

¹⁴ The certified class included "All children who are or may be eligible for special education and related services, who live in, or are wards of, the District of Columbia and (1) whom defendants did not identify, locate, evaluate or offer special education services to when the child was between the ages of three and five years old, inclusive, or (2) whom defendants have not or will not identify, locate, evaluate or offer special education and related services to when the child is between the ages of three and five years old, inclusive." *Id.* at *2.

these alleged violations on individual class members, nor their different, individualized entitlements to compensatory education and monetary damages, defeated a finding of predominance for purposes of Rule 23(b)(3). *Id.* at 9. While interesting in its treatment of a highly individualized and fact specific legal claim, the point in time at which the court considers the implications of the *Wal-Mart* decision makes it distinguishable from most class certification decisions or subsequent appeals heard early on in the litigation process and without the benefit of extensive discovery and prior liability determinations.

In *Connor B. v. Patrick*, 272 F.R.D. 288 (D. Mass. 2011), the plaintiffs alleged a series of constitutional violations on behalf of approximately 8,500 youth in the custody of Massachusetts' child welfare agency. In February 2011, the court certified a class of "all children who are now or will be in the foster care custody of the Massachusetts Department of Children and Families as a result of abuse or neglect." *Id.* at 291.¹⁵

In the wake of *Wal-Mart*, the state defendants filed a motion to decertify, arguing that there were different types of alleged harm at issue, caused by individual social workers who exercise wide discretion in determining the best interests of children, and that each challenge to these professional decisions required a separate assessment of the child's individual needs. *Connor B.*, 2011 WL 5513233 *4 (D. Mass., Nov. 10, 2011). As a result of these dissimilarities, the defendants maintained there was no "glue" for, or common answer to, these alleged violations, preventing the establishment of a common question under Rule 23(a)(2). *Id.* at *5. Similarly, the defendants alleged that the plaintiff class had failed to meet the requirements of Rule 23(b)(2), because no single injunction or declaratory judgment could provide the kind of individualized relief required by a class of youth with different service, placement and visitation needs. *Id.* at *5-6.

The court was not persuaded by either argument. Relying on its prior certification analysis, it concluded that the discretion of social workers acting on behalf of individual class members did not defeat commonality, especially where clearly articulated, overarching, system violations were the alleged causes of class members' injuries and placed all children in the class at risk of harm.¹⁶ In addition, the court held that any new restrictions on Rule 23(b)(2) related only to

¹⁵ The underlying certification decision includes a detailed discussion of the extent of a trial court's responsibility to employ a rigorous analysis in determining that the prerequisites of Rule 23(a) have been satisfied. The court found that it had discretion to decide whether it needed to go beyond the pleading and conduct additional discovery, concluding that in the instant case, plaintiff's detailed pleadings and factual bases for the alleged constitutional violations were sufficient to establish commonality. 272 F.R.D. at 293-294. The plaintiffs' underlying complaint can be found at www.childrenrights.org.

¹⁶ These alleged system violations included excessive caseloads, an insufficient array of foster care placements, inadequate supervision and monitoring of private providers, an incomplete and unevenly distributed array of services, and inadequate case worker and supervisor training. *Connor B.*, 2011 WL 5513233, *1.

claims for monetary relief, and did not preclude injunctive relief designed to remedy “structural infirmities within a unified child welfare system” designed to benefit the class as a whole. *Id.* at *4-5, 7. Most significantly, the district court declined to accept the defendants' contention that *Wal-Mart* had changed the law for all class actions, concluding instead that it had “provided guidance on how existing law should be applied to expansive, nationwide class actions...” *Id.* at *3.¹⁷

In *Churchill v. Cigna Corp.*, 2011 WL 3563489 (E.D. Pa., Aug. 12, 2011), the plaintiffs alleged the inappropriate denial of certain types of treatment for Autism Spectrum Disorder (ASD), including Acquired Behavior Analysis (ABA). *Id.* at *1. The court ultimately granted class certification “as to the modified class of former Cigna beneficiaries whose claims for reimbursement for ABA treatment given to children with ASD were denied by Cigna.”¹⁸ *Id.* at *4-5. In addressing commonality, the court distinguished *Wal-Mart* as inapposite, noting that Cigna “indisputably has a national policy of denying coverage for ABA to treat ASD,” and “pursuant to that policy, all Subclass A members were denied coverage for ABA.” *Id.* at *4. As a result, the plaintiffs had identified common claims regarding the propriety of that coverage restriction as well as “common answers apt to drive the resolution of the litigation.” *Id.* at *3 (citing *Wal-Mart*, 131 S. Ct. at 2551). The court concluded that the answer to this question will result in class-wide relief capable of resolving each class members' legal claims regardless of their different entitlements to, or ability to benefit from, ABA therapy. *Id.* at *4. After adjusting the class definition to address concerns of typicality and adequacy of representation, the court went on to certify a Rule 23(b)(3) class of former Cigna beneficiaries, reasoning that the class was sufficiently cohesive, and individual members' various types of ASD or specific treatment needs did not defeat a finding of predominance or the superiority of class treatment. *Id.* at *6.

Another child welfare class action case brought against the Texas Department of Children and Families is now on appeal in the Fifth Circuit. In *M.D. v. Perry*, the lower court certified a class of approximately 12,000 youth who are, or will be, in Permanent Managing Conservatorship (PMC), a subset of the Texas child welfare population.¹⁹ In an *amicus* brief authored by the Massachusetts Attorney General, a cohort of 14 state attorneys general argue, *inter alia*, that under *Wal-Mart's* “clarified” standard for class certification, an overly broad class of thousands of youth with unique circumstances and requiring individualized agency responses cannot assert a common contention. Nor could a discrete

¹⁷ Because *Connor B.* and *D.L.*, addressed the claim that *Wal-Mart* fundamentally modified the commonality standard under Rule 23(a), and were raised in the context of a de-certification motion, these decisions may have less persuasive impact on courts considering a class motion at the outset of a case.

¹⁸ The plaintiff's proposed definition included a second subclass – those who did not make a claim for ABA therapies “in light of” Cigna's policy. Certification for this subgroup was denied. *Id.* at *1.

¹⁹ *M.D. v. Perry*, No. 11-40789 (S.D. Texas, filed Apr. 5, 2011), 2011 WL 2173673 *1 (June 2, 2011), *appeal docketed*, No. 2:11-CV-84), *argued* (December 3, 2011).

injunction provide relief to each and every class member.²⁰ Specifically, *amici* and the state defendants assert that substantive and procedural due process claims alleged by the class are so fact intensive that they are “inherently inconsistent with class-based litigation.” Even if such treatment was appropriate, *amici* argue that the plaintiffs failed to offer the kind of “significant proof” required by *Wal-Mart*, relying instead on generalized, unsubstantiated assertions unsupported by evidentiary submissions.²¹

Amici also proffer several public policy arguments, which can be expected to resurface in similar litigation across the country. They broadly challenge the certification of large, non-heterogeneous class actions that seek “top-to-bottom” system reform, claiming that such classes: 1) present extraordinary discovery burdens on States, creating undue settlement pressures; 2) lead to overly detailed decrees which expand the scope and duration of litigation; 3) create insuperable difficulties for ending litigation; and 4) pose serious federalism concerns, resulting in costly and intrusive system reforms. In response, appellees assert that the court did not abuse its discretion in certifying the plaintiff class, that its analysis was sufficiently rigorous to determine that the standards for commonality and typicality were met, and that their claims are systemic in nature and therefore capable of class-wide resolution. Appellees also distinguish the facts and the legal context from the *Wal-Mart* decision, while reasserting long standing arguments in support of class treatment in similar civil rights litigation.²²

These child welfare cases, and the state defendants' concerted arguments against certification, have important parallels to the types of class actions traditionally brought by disability advocates. They strike directly at the themes of difference among class members and named representatives, as well as the type of individualized treatment decisions common in ADA/discrimination, institutional conditions, and other systemic reform class action cases on behalf of persons with disabilities. They likewise illustrate the importance of specific and detailed pleadings, and where possible statistical and other data sources evidencing the illegal policy or practice within the state system, the common violations resulting in class members' injuries, and the common remedial actions necessary to redress those violations.

IV. The Long Line of Cases Addressing the Commonality and Typicality Requirements for Persons with Disabilities.

In ADA, institutional conditions, and other system reform cases on behalf of

²⁰ The brief of the states of Alaska, Arizona, Colorado, Hawaii, Idaho, Maryland, Michigan, Nebraska, New Hampshire, Nevada, Rhode Island, Utah and Washington as *amici curiae* in support of appellants is available at 2011 WL 4947267 (5th Cir., Oct. 7, 2011).

²¹ While the plaintiffs counsel include the same systemic allegations alleged in their Massachusetts case, *Connor B.*, this similarity arguably supports the defendants' characterization of a cookie cutter approach to system reform which resembles the ‘trial by formula’ approach criticized by the *Wal-Mart* majority. 131 S.Ct. at 2560-61.

²² Appellees' opposition is available at 2011 WL 5154991 (5th Cir., Oct. 20, 2011).

persons with disabilities, courts have consistently employed an analysis of commonality and typicality requirements that acknowledges individual differences but does not deem them determinative of class certification. While *Wal-Mart* may invigorate this analysis, it should not fundamentally disrupt or modify it. Nor should it preclude class certification simply because of inherent differences between individuals with disabilities.

Rule 23(a)(2) of the Fed. R. Civ. P. requires that the proposed class must have at least one common factual or legal issue, the resolution of which will affect all or a significant number of putative class members. Traditionally, the commonality requirement “has been liberally construed and ‘those courts that have focused on Rule 23(a)(2) have given it permissive application so that common questions have been found to exist in a broad range of contexts.’”²³ In particular, courts have broadly applied the rule to class actions where injunctive and declaratory relief is sought.²⁴ Class actions are particularly appropriate where governmental policies and practices have a broad impact upon a class of recipients and are challenged as discriminatory under federal law. See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 700-703 (1979); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994); *Assoc. for Disabled Americans v. Amoco Oil*, 211 F.R.D. 457, 463 (S.D. Fla. 2002) (“Plaintiffs’ allegations of common discriminatory practices of ADA noncompliance, as a matter of law, satisfy the requirement that the representative plaintiffs share at least one question of fact or law with the grievances of the putative class”). *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (commonality found when class of individuals with different disabilities and accommodation needs alleged similar discriminatory practice and were impacted by the same governmental inaction).²⁵

Where a court can identify a common question of fact or law, including a common

²³ *Tyrrell v. Toumpas*, 2010 WL 174287 *4 (D. N.H., Jan. 14, 2010) (quoting *In Re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F. 3d 6, 19 (1st Cir. 2008) see also, *Rodriguez v. Carlson*, 166 F.R.D. 465, 472 (E.D. Wash. 1996). As many courts have noted, “[t]he threshold of ‘commonality’ is not high.” *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 181-183 (3d Cir. 2001); *Faherty v. CVS Pharmacy Inc.*, 2011 WL 81078 *2 (D. Mass., Mar. 9, 2011) (commonality rule aimed in part at “determining whether there is a need for combined treatment and a benefit to be derived there from”).

²⁴ See, e.g., *Anderson v. Dep’t of Pub. Welfare*, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998) (“Commonality is easily established in cases seeking injunctive relief”); *Marisol A. v. Guilliani*, 929 F. Supp. 662, 691 (S.D.N.Y. 1996) (“Injunctive actions ‘by their very nature often present common questions satisfying Rule 23(a)(2)’”); See also, 7A Wright, Miller, & Kane, *Federal Practice and Procedure*, § 1763 at 201 (3d ed. 2005).

²⁵ See also, *Mulligan v. Choice Mortgage Corp. USA*, 1998 WL 544431 *3 (D. N.H., Aug. 11, 1998) (“Because the class need share only a single legal or factual issue at this stage of the analysis, the commonality prerequisite ordinarily is easily established.”); *Conner B.*, 2011 WL 693223 at * 3 (“Commonality is easily satisfied in part because ‘there need be only a single issue common to all members of the class”) (quoting *Natchitoches Parish Hosp. Serv. Dist. V. Tyco Int’l, Ltd.*, 247 F.R.D. 253, 263-64 (D. Mass. 2008); *Duhaim v. John Hancock Mutual Life Ins. Co.*, 177 F.R.D. 54, 63 (D. Mass. 1997) (“This commonality requirement is a ‘low hurdle’ easily surmounted.”)(quoting *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992)).

defense, class certification is appropriate. *Smilow v. Southwestern Bell Mobile Systems*, 323 F.3d 32, 39 (1st Cir. 2003). However, there is no requirement that “all questions of law and fact involved in the dispute be common to all members of the class.” *Arnold*, 158 F.R.D. at 448-49. Nor does Rule 23(a)(2) require all putative class members to share identical facts or claims; rather, the Rule requires only “that complainants’ claims be common and not in conflict.” *Hassine v. Jeffes*, 846 F.2d 169, 176-77 (3d Cir. 1988); *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992). See also, *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001) (“[T]hat some of the plaintiffs may have different claims, or claims that may require some individualized analysis, is not fatal to commonality”). Only where there are *no* common questions of fact or law should certification be denied. See *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972).

Commonality does not require that each class member must be identically situated. *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) (factual distinctions among plaintiffs not relevant where legal theories are similar). Since commonality refers to the defendant’s conduct towards the class, it is not defeated by the presence of individual differences among class members. See *Curtis v. Comm’r, Maine Dep’t. of Human Servs.*, 159 F.R.D. 339, 341 (D. Me. 1994) (“Where a question of law refers to standardized conduct of the defendant towards members of the proposed class, commonality is usually met”).²⁶ Similarly, commonality does not demand that all questions of law or fact be common to the class. See William B. Rubenstein, et al., *1 Newburg on Class Actions*, § 3.20 (2011).

For these reasons, when the class shares a common legal theory, challenges a common pattern or practice, or can be remedied through a common injunction, certification is appropriate. See, e.g., *Gagnon v. Comm’r. New Hampshire Dept. of Health and Human Servs.*, 1999 WL 813953 (D. N.H. Aug. 31, 1999) (certifying class of all persons whose conditional discharge is revoked and are, or may be, involuntarily confined to New Hampshire Hospital or other facilities without a hearing); *Risinger ex rel. v. Concannon*, 201 F.R.D. 16, 20 (D. Me. 2001) (commonality requirement satisfied where class challenged common pattern of failing to provide needed evaluations and services, and challenge did not require court to make individualized determinations of eligibility); *Boulet v. Cellucci*, 107 F. Supp. 2d 61, 81 (D. Mass. 2000) (class of persons with mental retardation who were waiting for community support services shared a common legal theory that such services were not being provided with reasonable promptness, despite differences in medical and support needs of each individual); see also, *Califano*, 442 U.S. at 682, 702-703 (certification of a nationwide class of social security beneficiaries is not improper where nationwide relief is appropriate).

²⁶ See e.g., *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985); *overruled on other grounds, Green v. Mansour*, 472 U.S. 64 (1985); *Fields v. Maram*, 2004 WL 1879997 * 7, n.8 (N.D. Ill., Aug. 17, 2004); *Raymond v. Rowland*, 220 F.R.D. 173, 179 (D. Conn. 2004); *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 2001 WL 920060 *3 (D.N.H., Aug. 3, 2001) (“The reality that differing fact patterns underlying the claims of individual class members will not necessarily prevent a finding of commonality, so long as class members have at least one issue in common”).

The third component of Rule 23(a) requires that the representatives' claims for relief be typical of the claims of the absent class members. Most courts agree that, "[l]ike the commonality requirement, the typicality requirement is not demanding." *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463, 467 (W.D. La. 1995); *Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 194 (W.D. Tex. 1998) (ADA challenge to municipal authority's policies and practices does not seek a determination of each class member's claim for accommodations and satisfies the typicality standard). As acknowledged by the Supreme Court, it is a standard whose analysis often merges with commonality. *Wal-Mart*, 131 S. Ct. at 2551, n.5.

The typicality requirement does not demand a complete identity between the legal claims of a representative and each member, so long as the named plaintiffs' claims share the "essential characteristics" of class members' claims, and their claims arise from the same event, practice, or course of conduct, such that adjudication of the individual claims will necessarily involve the decision of common questions affecting the class. William B. Rubenstein, et al., 1 *Newberg on Class Actions*, §3.29 (5th Ed.) (Nov. 2011). For this reason, typicality is achieved when the class representatives generally "possess the same interest and suffer the same injury" as other unnamed class members. *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). See also, *Jones v. Shalala*, 64 F.3d 510, 514 (9th Cir. 1995); *California Rural Legal Assistance v. Legal Services Co.*, 917 F.2d 1171, 1175 (9th Cir. 1990), modified, 937 F.2d 465 (9th Cir. 1991).

Courts have liberally applied the typicality requirement, consistent with these principles. *Griffin v. Burns*, 570 F.2d 1065, 1073 (1st Cir. 1978) (even if not all class members were aggrieved by contested voting practice, typicality does not require such precision); *Hutchinson v. Patrick*, No. 07-30084-MAP (D. Mass., Sept. 26, 2007, October 4, 2007) (certifying a class of Medicaid eligible persons with acquired brain injuries who reside in, or are eligible for admission to, nursing or rehabilitation facilities); *Bryson v. Stephen*, No. 99-CV-558-SM (D.N.H., June 26, 2000) (certifying class of persons with acquired brain injuries who are institutionalized or at risk of institutionalization); *Rolland v. Cellucci*, 52 F. Supp. 2d 231, 242 (D. Mass. 1999) (certifying class of adults with mental retardation and other developmental disabilities, who reside in nursing homes or who are or should be screened for admission to nursing facilities); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 326 (D. Mass. 1997) (class of learning disabled students challenging university's special needs program satisfied standards for certification, despite having different disabilities and needing different types of accommodations).

Courts also have repeatedly held that typicality requirements are met when the plaintiffs' claims "arise from the same event or practice or course of conduct that gives rise to the claims of other class members" and are "based on the same legal theory." See, e.g., *Tyrrell v. Toumpas*, 2010 WL 174287 *5 (D.N.H., Jan. 14, 2010) (citing *Garcia-Rubiera*, 570 F.3d at 460); *In re Tyco Int'l, LDT.*, 2006 WL 2349338

*2, 6 (D.N.H., Aug. 15, 2006) (citing *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 204-05 (D. Me. 2003)).

Thus, a strong similarity of legal claims or factual occurrences will satisfy the typicality requirement, even where there are substantial differences between and among individual class members. See *Appleyard v. Wallace*, 754 F.2d at 958 (class certification appropriate where "the similarity of the legal theories shared by plaintiffs and the class at large is so strong as to override whatever factual differences might exist and dictate a determination that the named plaintiffs' claims are typical of those members of the putative class").

Rule 23(a)(3) should be satisfied where the harms experienced by the named plaintiffs give rise to legal claims that are typical of the proposed class. The fact that the named plaintiffs have different medical or psychiatric needs, enter the mental health system in different ways, or require different service combinations does not defeat a finding of typicality. See *Rolland*, 2008 WL 4104488 *5; see also, *D.G. v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) ("[T]ypicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances")

Where the defendants – through their actions and inactions - are needlessly institutionalizing the named plaintiffs or placing them at risk of institutionalization, typicality is established precisely because the proposed class also is denied the services required to prevent or reduce their risk of unnecessary institutionalization. *Curtis*, 159 F.R.D. at 341 ("The typicality requirement is satisfied because . . . the representative Plaintiff is subject to the same statute and policy as the class members").

Finally, the named class members must have a personal interest in the litigation and seek a remedy which is reasonably related to the harm experienced by all class members. *Risinger*, 201 F.R.D. at 22 (finding typicality where plaintiffs invoke the same legal provisions, allege the same system deficiencies and seek the same relief). Yet the named plaintiff need not be identical to the class in circumstances or experience. See *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) ("...cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims...") Similarly, where the named plaintiff's legal theories do not conflict with those of the class, and their claims are "comparably central" to the claims of the unnamed class, the requirements for typicality under Rule 23(a)(3) are satisfied. *Conner B.*, 272 F.R.D. 288, (citing *Baby Neal*, 43 F.3d at 57).

While *Wal-Mart* does not fundamentally alter these principles, it does require disability advocates to adjust their practice and to prepare for specific and rigorous challenges to the commonality and typicality requirements of Rule 23(a). It also will necessitate greater attention to the pleading standards for Rule

23(b)(2), since the common facts or legal claims in *Olmstead* cases are often directly and factually intertwined with the requisite showing that the defendant has acted or refused to act on grounds generally applicable to the class. To the extent that courts continue to distinguish *Wal-Mart's* unique facts and adhere to established standards for certification under Rule 23(a) and 23(b)(2), advocates should be successful in limiting its potential negative applications. However, the reverberations of this decision across federal jurisprudence and within disability cases can be expected to continue for years to come.

V. The Impact of *Wal-Mart* on System Reform Litigation for Persons with Disabilities.

In this shifting landscape of class certification, many legal principles remain substantially unchanged. First, the party moving for class certification carries the affirmative burden of demonstrating that the applicable requirements of Rule 23 have been satisfied. Fed. R. Civ. P. 23.²⁷ Second, district courts must conduct a rigorous analysis of the class certification factors.²⁸ Third, courts discharge this responsibility with considerable discretion and are subject to reversal only for abuse of discretion or the incorrect application of law.²⁹ Finally, despite its analysis in the context of *Wal-Mart*, the Supreme Court majority continues to assert that, for purposes of establishing commonality, “even a single question will do.” 131 S.Ct. at 2556. See also, William B. Rubenstein, et. al., 1 *Newberg on Class Actions*, §3.29 (5th Ed.)(Nov. 2011)(citations omitted).

Yet despite this continuing legal foundation, several questions have emerged: How significant is the burden of proof for plaintiffs to satisfy the Rule 23 criteria? How much overlap is there between the evidence required at the class certification stage and a trial on the merits, beyond the establishment of a *prima facie* case? What degree of difference among class members' circumstances and needs will defeat the cohesion required for a “common contention?” How will requests for discovery and presentation of expert testimony be treated at the certification stage? How much deference will be afforded to a lower court's findings and conclusions in this area?

As disability advocates contemplate these questions in the context of prospective class action cases, the following strategic decisions should be carefully

²⁷ See e.g., *Wal-Mart*, 131 S.Ct. at 2551 (“Rule 23 does not set forth a pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions or law or fact, etc.”)(emphasis in the original); *Connecticut Ret. Plans and Trust Funds v. Amgen*, 2011 WL 5341285 *4 (9th Cir., Nov. 8, 2011)(“As the party seeking class certification, Connecticut Retirement “bears the burden of demonstrating that the requirements of Rules 23(a) and (b) are met.”)(citing *United Steel, et al, v. Conoco Phillips Co.*, 593, F.3d 802 (9th Cir. 2010).

²⁸ See *General Tel. Co. of Sw*, 457 U.S. at 160-161; see also, *Wal-Mart*, 131 S.Ct. at 2551(rejecting the dissent's attempt to distinguish *Falcon*).

²⁹ See I-14A Moore's Man. Fed. Prac. & Proc. 14A.44 (Matthew Bender 1997). See also, *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1090-91 (9th Cir. 2010).

considered, in order to limit risks for denial of certification.³⁰

1) Distinguishing *Wal-Mart*

The employment discrimination and damage claims at issue in *Wal-Mart*, and specifically the requisite intent associated with those claims, is one obvious basis for distinguishing the Supreme Court's commonality analysis.³¹ While it is unlikely that *Wal-Mart* can be limited to cases that combine injunctive and damage claims, the sheer size and obvious lack of homogeneity of the class – millions of class members experiencing discrimination at the hands of thousands of the defendant's agents in hundreds of locations – provides another basis for limiting the impact of this decision.

Class actions that challenge governmental policies and practice and seek only injunctive relief -- such as those alleging violations of the integration mandate where discrimination arises from segregation -- have long been cited as appropriate for class certification under Rule 23(a) and (b)(2). Such cases may be distinguished from the individual violations that must be proven in private discrimination cases.³² *Olmstead* cases typically involve a single state, focusing on specific facilities and government agencies responsible for the provision of institutional and community-based services to persons with disabilities. Unlike *Wal-Mart*, these limiting factors should facilitate the presentation of proof and allow courts to draw the inferences needed to establish both common questions and a common solution to the violation at issue. However, state defendants will attempt to analogize all ADA discrimination claims to *Wal-Mart's* Title VII claims, suggesting similarities between the Court's concerns in *Wal-Mart* and the presence of multiple treatment teams, making decisions on behalf of hundred of persons with varying clinical needs and circumstances. Advocates must be prepared to convince a court that it need not assess the appropriateness of hundreds of individual discharge decisions. Instead, it should focus on the common cause of the unnecessary segregation: the lack of appropriate supports

³⁰ Since these issues often are contextual, they are analyzed with respect to two common class action cases brought by P&As: (1) an ADA community integration claim on behalf of institutionalized persons with disabilities, and (2) a constitutional challenge to unnecessary restraint.

³¹ See e.g., *Connor B.*, 2011 WL 5513233 *4 (concluding *Wal-Mart's* rationale for a rigorous analysis of commonality overlapping with the merits of plaintiffs' claims does not apply where the "alleged violations flow from structural infirmities within a unified child welfare system and where there is no requisite showing of common intent."); *D.L.*, 2011 WL 5559927 *7 ("Defendants' liability in this case does not hinge on their state of mind when they denied disabled children a FAPE, or on any particular cause. Therefore, while defendants are correct that 'class members' denial of a FAPE occurred for a multitude of different reasons,' the reasons for that common injury do not also have to be common to all members of the class.")(citing *Youngblood v. Family Dollar Stores, Inc.*, 2011 WL 459755, *4 (S.D.N.Y., Oct. 4, 2011)).

³² Yet in other cases, this focus on the elements and standards of proof led to arguments that the plaintiffs' purported legal claims are so individualized or fact intensive as to be "inherently inconsistent with class-based litigation." See Brief of *Amici Curiae* for the Appellees, *M.D. v. Perry*, *infra*.

in integrated settings. Similarly, advocates must explain that the establishment of community-based alternatives to institutional care will benefit all class members, allowing them to access individualized services consistent with their needs, as determined by an individualized transition planning process. In this context, community-based services present a common remedy capable of resolving a class wide injury.

2) Clearly defining the class

In crafting class definitions, P&As must be careful to ensure that the named plaintiffs and the purported class members suffer a central or common injury, even if that injury occurred for different reasons. Variations in the degree and impact of those injuries, or even the presence of additional types of harm, should not preclude certification, provided the injuries can be shown to result from the same illegal policy or practice by the defendants.³³ Where multiple types of violations are occurring in the context of common legal claims, it may be helpful to focus on the more singular or overarching systemic problem, both to solidify the presentation of a common injury and to propose a set of remedial actions capable of curing the violation.

While it may be a repeated theme in an *Olmstead* complaint, P&As should avoid class definitions which require an individualized assessment to determine inclusion, such as all persons ‘unnecessarily institutionalized.’ Such language always risked empowering state treatment professionals to determine class composition. Now any approach which suggests the need for a highly individualized and fact-intensive inquiry is susceptible to arguments that class treatment is inappropriate because of individual discretion in treating professionals, lack of cohesion within the plaintiff class, or the inability to evaluate and cure individual legal violations in a single stroke.

A difficult question in all *Olmstead* cases is whether to limit the class to persons currently segregated or to include individuals at risk of institutionalization. The addition of imprecise concepts like "at risk" will invite even more objections post-*Wal-Mart*. If the group is included, some of the named plaintiffs must have conditions and experiences consistent with this claim, including severity of need, immediacy of risk, and extended or repeated periods of segregation. Additionally, their circumstances must be explained by a lack of community-based services sufficient to prevent their institutionalization, so as to establish the existence of a common remedy.

A similar concern is raised by cases involving the illegal use of restraint or seclusion, where common injury requirements would suggest a class who experienced ‘inappropriate’ restraint or "unnecessary" restrictions on liberty that

³³ See *Baby Neal*, 43 F.3d at 58 (“Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice.”)

otherwise fail to satisfy emergency standards. Such a class is vulnerable based on the very fact-specific nature of each class member's circumstances, the individualized clinical judgment employed at the time of restraint, and the potential variation in harm experienced by class members. In such cases, plaintiffs are more likely to succeed with certification when the conduct at issue represents a common practice of restricting individuals' freedom of movement. For instance, a general policy or practice of authorizing room plans in non-emergency situations could constitute illegal seclusion, resulting in systemic legal claims of deprivation of liberty or denial of access to treatment impacting all institutionalized persons who are subject to the illegal policy.

3) Carefully selecting the named plaintiffs

Defendants are increasingly likely to focus on differences among the named plaintiffs after *Wal-Mart*, including the nature and severity of their disabilities, their support needs, and their factual circumstances or experiences within the service system. While this presents risks in the determination of typicality and adequacy of representation, it also creates the potential for burdensome discovery, a stay of all merits discovery, and the conversion of certification proceedings into mini-trials on the merits of plaintiffs' legal claims. For all these reasons, the selection of the named plaintiffs will necessitate a more thorough factual investigation and more detailed pleadings, in order to establish their appropriateness as class representatives.

The selection of named plaintiffs intersects directly with, and is largely dependent on, the scope of the class. The named plaintiffs must be representative of the entire class. When there are critical differences amongst class members that directly affect common contentions, common injuries, and common remedies, it will be difficult to sustain a single class with the same representatives. Use of subclasses – often a disfavored strategy that emphasizes differences and adds complexity – may be required. Each subclass must have its own representative. For instance, in a case challenging the lack of community supports for institutionalized adults and children, a subclass of youth who can assert an IDEA claim is probably necessary. Similarly, a statewide *Olmstead* case on behalf of persons in several state facilities may face less certification obstacles if there are subclasses for each facility. At a minimum, there must be a class representative from each facility.

In *Olmstead* cases that include an at risk group, identifying appropriate named plaintiffs who share a common injury (possible institutionalization) and a common cause for that injury is particularly challenging. For instance, a plaintiff may present with significant risks or repeated, short term hospitalizations attributable to suicidality. If the intervention of a mobile crisis team could have prevented the hospital admissions, such a plaintiff may be representative of the class of persons unnecessarily institutionalized. If not, the resulting in-patient admissions could be considered necessary, reasonable and therefore, less likely to arise

from the same course of conduct giving rise to the claims of class members whose admissions or extended hospitalization could have been prevented with appropriate community supports.

4) Describing common legal claims and systemic violations

After *Wal-Mart*, it is no longer sufficient merely to allege a common legal violation, without closely tying that violation to: 1) a central injury for the plaintiffs, 2) a common course of conduct by the defendants, and 3) the availability of a class-wide resolution. 131 S.Ct. at 2551. For this reason, it is important to describe with particularity the nature of the defendants' conduct and how those policies or practices result in a single injury to, and a common legal claim for, the purported class. See, e.g., *Steward v. Perry*, No. 5:10-cv-1025 (W.D. Tex, filed Dec. 20, 2010)(alleging violations of the PASSAR provisions of the Nursing Home Reform Amendments based on a documented failure to conduct screenings or to deliver specialized services); *Rosie D. v. Patrick*, 410 F.Supp.2d 18 (D. Mass. Jan. 26, 2006)(the absence of medically necessary home-based behavioral health services constituted a violation of the Early Periodic Screening, Diagnosis and Treatment provisions of the federal Medicaid Act); *Hutchinson v. Patrick*, No. 07-30084-MAP (D. Mass., Sept. 26, 2007, Oct. 4, 2007)(certifying a class of institutionalized persons with brain injuries who are segregated due to the state's decision not to create integrated settings for persons with these disabilities.).

For instance, an *Olmstead* class may claim that unnecessary institutionalization is a direct result of the state's failure to plan, fund, and provide integrated, community-based services. In the absence of an explicit, discriminatory government policy, such a claim can and should be bolstered by existing state data, reports, proposals, budget requests, internal and external evaluations of the existing service system, reviews of state resources and spending, DOJ findings letters, and any other specific information describing the scope of systemic violations and their impact on proposed class members. It will be critical to identify the state's pattern and practice of failing to provide community services necessary to avoid prolonged and repeated institutionalization. A robust pleading and evidentiary record at the certification stage should provide the kind of "significant proof" required to demonstrate satisfaction of Rule 23 requirements, while helping insulate the lower court's findings from appellate review.

5) Describing proposed systemic remedies that redress the legal violations

Rather than relying solely on the existence of a common legal claim or violation, plaintiffs must be prepared to discuss the feasibility of class-wide injunctive relief. It will be important to emphasize the degree to which a common answer or set of actions can redress alleged systemic violations. Class counsel should be prepared to discuss with specificity exactly how the resolution of a common

violation will benefit the class as a whole, even though individual class members may access the remedy in different ways.

In *Olmstead* cases, the plaintiff class shares a common legal right to avoid unnecessary institutionalization and to receive services in the most integrated setting appropriate to their needs. The establishment of an array of community-based supports produces a class-wide remedy which benefits all persons who may be institutionalized or at risk of institutionalization, regardless of their need for a particular combination of services. Courts need not consider individual class members treatment needs as part of determining liability, deferring this determination to a service planning process.

Finally, in any ADA/class action case on behalf of persons with disabilities, class counsel must stress the important and virtually unbroken line of court precedents affirming the appropriateness of class treatment in civil rights cases, particularly when purported class members are among the most disenfranchised and segregated members of society.³⁴

6) Discovery, delay and evidentiary standards

Advocates should anticipate potential delays at the certification stage, as more state defendants request stays to conduct fact discovery concerning the named plaintiffs and the purported class. Such a request could include all of the plaintiffs' treatment records, clinicians' opinions on service needs, guardians' views on community placement, former service experiences and providers, as well as information not in the custody or control of the plaintiff's counsel, such as other state agency's Preadmission Screening and Resident Review ("PASRR") procedures or documentation regarding the delivery of specialized services in specific private or county nursing facilities.

While requiring more investigation and fact development in the pre-filing stage, detailed pleadings can enable courts to exercise discretion under *Falcon* and allow for a rigorous analysis and application of Rule 23 requirements without resorting to additional fact discovery at the certification stage. Where possible,

³⁴ Courts have long recognized that certification under subsection (b)(2) of Rule 23 is particularly important in, and an appropriate vehicle for, civil rights actions. See, e.g., *Yaffe*, 454 F.2d at 1366 (Rule 23(b)(2) is "uniquely suited to civil rights actions"); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983); *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980); *Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982); *Hawkins v. Comm'r of the New Hampshire Dep't. of Health and Human Servs.*, 2004 WL 166722 *4 (D. N.H., Jan 23, 2004) ("Classes certified under Rule 23(b)(2) 'frequently serve as the vehicle for civil rights actions and other institutional reform cases,' including cases alleging deficiencies in government administered programs such as Medicaid.") In cases involving persons with mental disabilities who challenge the necessity of their confinement and segregation, the elements of Rule 23(b)(2) are satisfied, and class certification is appropriate, specifically because it is a civil rights class action seeking declaratory and injunctive relief which would benefit the entire class. This is exactly the type of litigation that the Federal Rules Advisory Committee anticipated would be certified under Rule 23(b)(2). See Advisory Committee Notes to Revised Rule 23, 39 F.R.D. 69, 102 (1966).

these pleadings should reference supporting evidence that lend credibility to, and establishes a factual foundation for, class claims. Experts engaged in the investigation and pre-filing stages of litigation may produce reports in anticipation of certification, executed consistent with the evidentiary rules applied to trial testimony, including reliance on data collection and methodologies sufficient to satisfy the 'relaxed' application of *Daubert* applied post-*Wal-Mart*.

For example, the restraint data maintained at facility, state and federal levels, federal and local licensing reviews, and accreditation reports can help concretize the scope and seriousness of systemic restraint violations, and will be especially important in cases where states or their facilities have a general policy employing restraint only as a last resort. Detailed fact investigations, combined with stories of individual experiences and case reviews by treatment experts can: 1) demonstrate the pervasive nature of the alleged violations; 2) call into question the appropriateness of judgments by defendants' treatment professionals; and 3) help to convey the profound psychological and physical harms that flow from restraint. However, plaintiffs' counsel should be prepared for requests to discover the medical and treatment records of all named plaintiffs. This discovery could then be used to undermine the singularity of their injuries, to raise doubts about the typicality of their experience, and to question the compatibility of such individualized, fact-specific claims, with class-wide resolution or relief.

VI. Conclusion

In light of *Wal-Mart*, advocates must prepare for more emboldened challenges to the commonality and typicality prongs of class certification, particularly when classes contain individuals with different disabilities or needs, the assessment of which involves individualized professional judgment. In such cases, P&As must pay careful attention to a range of issues in their preparation for litigation, as well as the pleadings and arguments required to support class certification.

There also must be a greater emphasis on both the common cause and the common solution or series of actions needed to remedy alleged violations. However, by employing long standing legal arguments for class treatment in these cases, and making careful strategic decisions in shaping the class definition, plaintiff selection and pleading of common injuries and legal claims, disability advocates should be able to preserve this important vehicle for system reform.