

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ELIZABETH M., et al.,)	
)	
)	Case No. 8:02-CV-585
Plaintiffs,)	
)	
vs.)	PLAINTIFFS' BRIEF IN
)	SUPPORT OF MOTION FOR
RON D. ROSS, in his official capacity)	CLASS CERTIFICATION
as the Director of Nebraska Health and)	
Human Services System, et al.,)	
)	
)	
Defendants.)	

The representative Plaintiffs, Elizabeth M.; Selena T., by and through her legal guardian, Carolyn Tankersley; Jennifer H.; Juliana W.; Penny G.; Ethel H.; Mary W.; Robin H.; Theresa L.-R.; Sara M.; Tamika S., by and through her legal guardian, Sandra Tani; Pam B.; Caroline C., by and through her legal guardian, Theda Carter; Jolene B.; and Susan Z., by and through their respective attorneys Bruce G. Mason, Michael J. Elskan, and Matt D. Schulz, all of Nebraska Advocacy Services, Inc., which serves as the designated protection and advocacy system for individuals with developmental disabilities and mental illnesses, have moved this court for an order certifying this as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The proposed class consists of all women who were subjected to rape, sexual assault, sexual harassment, sexual exploitation, and physical assault, during all material times, while in the care and custody of Nebraska Health and Human Services System (NHHSS) as residents at one or more of the NHHSS residential mental health facilities; and all women who are currently, or in the future will be, in the care and custody of the NHHSS and placed as residents at one or more of the NHHSS residential mental health facilities.

INTRODUCTION

This is a civil rights action by women, all of whom are or were in the custody and care of the Nebraska Health and Human Services System (NHHSS) and residents at one or more of the NHHSS residential mental health facilities, who have a mental illness, and some who have a co-occurring developmental disability, physical disability, and/or a chemical dependency. (Complaint ¶¶ 4-19). These women are requesting declaratory and injunctive relief from a pattern and practice, known and tolerated by the Defendants and their agents and employees, of repeated rape, sexual assault, sexual exploitation, and sexual harassment by male staff members and male residents upon these women.¹ (*See*

¹ **A. Exhibit 10 of class certification, referencing Exhibit 46 from depositions (NRC Listing of J15 Sexual Abuse queries):**

1. 02/11/02: Male initiator Ronald L. and female victim Sophia W.
2. 05/10/02: Male initiator David C. and female victim Linda B.
3. 07/03/02: Male Initiator Ernest G. and female victim Kimberly H. (representative plaintiff in pending case).
4. 08/27/02: Male initiator Paul J. and female victim Tamica S. (representative plaintiff in pending case).
5. 10/18/02: Male initiator Adrian C.-M. and female victim Barbara E.
6. 10/19/02: Male initiator Adrian C.-M. and female victim Sara M. (representative plaintiff in pending case).
7. 12/31/02: Male initiator Tom H. and female victim Annette M.
8. 01/25/03: Male initiator John C. and female victim Charlene R.-W.
9. 02/13/03: Male initiator Tom H. and female victim Hattie W.
10. 03/25/03: Male initiator Hugh S. and female victim Linda B.
11. 06/06/03: Male initiator Keith W. and female victim Teresa J.
12. 06/14/03: Male initiator James W. and female victim Carey P.
13. 11/16/03: Male initiator Donald McC. and female victim Kelly S.
14. 11/30/03: Male initiator Brian M. and female victim Angela L.
15. 02/01/04: Male initiator George K. and female victim Nancy S.
16. 06/16/04: Male initiator Kurt B. and female victim Sharon J.
17. 07/14/04: Male initiator Franklin F. and female victim Brenda J.
18. 08/02/04: Male initiator Russell F. and female victim Trisha B.
19. 08/16/04: Male initiator Tim M. and female victim Kelly S.
20. 08/20/04: Male initiator Matthew T. and female victim Margaret S.
21. 08/24/04: Male initiator Abraham D. and female victim Tannisha B.
22. 09/02/04: Male initiator Thomas Z. and female victim Sharla P.
23. 09/07/04: Male initiator Robert T. and female victim Kelly S.
24. 09/08/04: Male initiator Tyree W. and female victim Kristin A.
25. 09/15/04: Male initiator Ceaser J.-L. and female victim Trisha B.
26. 10/15/04: Male initiator Rafael F. and female victim Evelyn C.
27. 10/23/04: Male initiator Tracy L. and female victim Michelle S.
28. 12/29/04: Male initiator Micah R. and female victim Candice M.

B. Exhibit 10 of class certification, referencing Exhibit 2 from depositions, HRC Sexual Abuse Incidents Listings: Note, pursuant to the consent decree in the *Caroline C.* case, HRC maintained a separate ward (Ward 34) for female residents who were on acute status and not in the process of transitioning back into the community until sometime around March 2005. This would mean that any sexual abuse incidents involving female residents would either have involved female residents in the transition program (Ward 37) or would have occurred during the period where the female resident was off of the female ward and, presumably, been subject to such staff oversight provided while off ward. To this end, this listing identifies whether the incident involved a resident who is not Ward 37 and, to the extent that is shown in the listing, the location of such incident.

1. 02/07/01: Male initiator Andrew S. touched stomach of female Ward 34 resident Rebecca S. standing line at unknown location.
2. 02/08/01: Male initiators William B. and Christian K. tickled and placed arm around female Ward 34 resident Bessie M. while walking in tunnel to programs.
3. 03/16/01: Male initiator Robert L. kissed female Ward 34 resident Naomi S.-F. at unknown location.
4. 03/30/01: Male initiator Mark H. kissed female Ward 34 resident, and representative plaintiff, Selena T. at library.
5. 04/03/01: Male initiator Michael J., not part of the Ward 37 transition program, hugged unidentified female resident from unknown ward at unknown location.
6. 5/18/01: Male initiator Matthew S. hugging female Ward 34 resident Dasha McG.
7. 5/31/01: Residents of Ward 37, male Matthew S. (same individual who was the initiator of the 05/18/01 incident) and female Nichole K., observed hugging and kissing.
8. 06/25/01: Two incidents on the same day involving same male initiator Franklin F. either hugging or touching the same female Ward 34 resident Carol L.
9. 07/01/01: Two male initiators, from Ward 36 and not in transitional program of Ward 37, Michael J. and James C., making advances towards female resident from Ward 37 transitional program Sheila H.
10. 09/17/01: Male Ward 33 initiator Eddy A.-D. groped female Ward 37 resident.
11. 09/19/01: Male Ward 37 initiator Eddy A.-D. hugged and groped female Ward 37 resident Marcia B.
12. 11/16/01: Male initiator Timothy G. propositions female Ward 34 resident Bonney P. at unknown location.
13. 03/12/02: Male initiator Casey R. touches arm and stomach of female Ward 34 resident Terri R. at unknown location.
14. 05/31/02 Male Ward 37 initiator Ruben R. touches female Ward 37 resident Kassay V. in stairway.
15. 06/05/02: Male Ward 37 initiator Ruben R. (same individual identified as initiator of 05/31/02 incident) observed kissing female Ward 37 resident Rhonda R.
16. 06/27/02: Male initiator Michael S. grabbed female Ward 34 resident Rachelle S. at unknown location.
17. 07/27/02: Male non-transition Ward 36 initiator Franklin F. touches female transition Ward 37 resident Linda G. on elevator.
18. 10/26/02: Male initiator Paul J. touches female Ward 34 resident Cynthia H. at unknown location.
19. 11/03/02: Male initiator Robert S. hugs female Ward 34 resident Cynthia H. at leisure time group location.
20. 01/31/03: Male Ward 37 initiator Myron T. touches female Ward 37 resident Trisha B.
21. 05/24/03: Male Ward 37 initiator Robert P. touches female Ward 37 resident Dawn M.
22. 05/27/03: Male Ward 37 initiator Kek Y. touches two female Ward 37 residents, Tina G. and Dawn M., while in medication line.
23. 05/29/03: Male non-transition Ward 36 initiator Eddy A-D kisses and exposes self to female Ward 37 resident Rhonda R.
24. 06/04/03 Male initiator Franklin F. attempts to kiss female Ward 34 resident Betty S. at unknown location.
25. 10/30/03: Male Ward 37 initiator Harold T. placed arm around shoulders of female Ward 37 resident Victoria S. and on same day same male initiator used cane to tap bodies of female Ward 37 residents Barbara H. and Danyl H.
26. 11/03/03: Male Ward 37 initiator Harold T. uses cane to tap buttocks of female Ward 37 resident Danyl H.
27. 04/30/04: Male Ward 37 initiator Elliot R. kissed female Ward 37 resident Jennifer H.
28. 05/30/04: Male Ward 37 initiator Edward R. groped female Ward 37 resident Arlene H.
29. 06/12/04: Male initiator, listed as "Ward 2N," Keith W. groped female resident, also listed as "Ward 2N," (this is after the elimination of the female acute Ward 34) Julie G.
30. 06/12/04: Male initiator, listed as Ward 2N, Pablo R. sexually assaulted female Ward 37 resident Arlene H.
31. 06/20/04: Male Ward 37 initiator Scott R. groped female Ward 37 resident Arlene H.

C. Exhibit 10 of class certification, referencing Exhibit 9 from depositions, LRC Abuse/Neglects List:

1. Incident 24,859 on 01/15/01: Male adolescent residential unit (PSYR) initiator Jordan G. rubbed buttocks of female PSYR resident Brandy P.-B.
2. Incident 24,947 on 02/14/01: Male PSYR initiator Matthew S. rubbed breasts of PYSR resident Kristin B.
3. Incident 25,481 on 05/09/01: Male adolescent inpatient unit (PSYA) initiator Drew H. groped buttocks underneath clothing of female PYSYA resident Kristin B.
4. Incident 25,482 on 05/09/01: Male PSYA initiator Matthew S. groped breasts of female PYSYA resident Stephanie B.
5. Incident 25,484 on 05/18/01: Male PSYA initiator Kyle S. groped breasts of female PSYA resident Krystal B.
6. Incident 25,485 on 05/20/01: Male PSYA initiator Kyle S. gropes breasts, places penis in hand of female PYSYA resident Krystal B.
7. Incident 25,596 on 06/04/01: Male PSYA resident Tilman F. has "consensual (sic) sex" with female PSYA resident Aimee A.
8. Incident 25,597 on 06/04/01: Male PSYA resident Lucas P. has "consensual (sic) sex" with female PSYA resident Kelsey S.

9. Incident 25,606 on 06/14/01: Male PSYA resident Derrick D. kissing female PYSA resident Aimee A.
10. Incident 25,634 on 07/16/01: Male PSYA resident Andrew B., with the knowledge of staff member Rick L. and without intervention to prevent this behavior, repeatedly kissed PSYA resident Melissa B.
11. Incident 25,641 on 07/24/01: Male Community Transition Program (CTP) initiator Gary P. gropes female CTP resident Mary S.
12. Incident 25,666: Male PSYA initiator Matthew S. kissed female PSYA resident Stephanie B.
13. Incident 25,754 on 08/06/01: Male staff member David M. sexually assaults female Short Term Care (STC) resident, and representative plaintiff, Penny G.
14. Incident 25,837 on 08/08/01: Unidentified male staff member alleged to have touched the breasts of female PSYA resident Ruby S.
15. Incident 25,920 reported on 8/11/01: Male STC initiator Charles F. sexual assault of female STC resident, and representative plaintiff, Plaintiff Elizabeth M about two weeks prior to report.
16. Incident 25,931 reported 08/21/01: Male staff member Dana D. "touching inappropriately" female resident Ruby S. since 08/14/01.
17. Incident 26,471 on 10/16/01: Male PSYA initiator Herbert S. exposes himself to female PSYA resident Holly McP.
18. Incident 26,500 on 10/28/01: Male PSYA initiator Frank C. gropes breast of female PSYA resident Holly McP.
19. Incident 27,147 on 03/29/02: Male staff member alleged to have sexually assaulted female PYSA resident Norma R., assertion within listing that Norma R. has history of similar unfounded allegations.
20. Incident 28,062 on 07/01/02: Female STC resident Tiffany B. indicates dad abused sexually during past visits, without indicating whether these assaults occurred when the father visited on LRC grounds or when resident was off-grounds with father.
21. Incident 28,257 on 06/14/02: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Mary W., historical incident report regarding assaults from 2001.
22. Incident 28,258 on 06/21/02: Male staff member David M. sexually assaults female STC resident Tiffany B., historical incident report regarding assaults from 2001.
23. Incident 28,260 on 06/27/02: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Robin H., historical incident report regarding assaults from 2001.
24. Incident 28,261 on 06/29/02: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Jennifer H., historical incident report regarding assaults from 2001.
25. Incident 28,263 on 07/02/02: Male STC initiator Adam A. sexually harasses and touches leg of female STC resident, and representative plaintiff, Robin H.
26. Incident 29,160 on 07/25/02: Male PSYA initiator Derrick D. fondles female resident Kirsten B., but notation further asserts that "after review appeared to be fabricated."
27. Incident 29,162 on 08/04/02: Male STC initiator Christopher D. touches buttocks of female STC resident Angela P.
28. Incident 28,182 on 09/25/02: Male CTP initiator Joshua H. poked buttocks, with pool stick, of female CTP resident, and representative plaintiff, Elizabeth M.
29. Incident 29,188 on 11/04/02: Male PSYA initiator Kyle G. exposes genitalia to female PSYA residents Johnish B. and Tashay R.
30. Incident 31,045 on 12/17/02: Male STC initiator K.W. sexually harasses and then exposes self to female STC resident Doretta U. in the presence of male STC resident Robert F.
31. Incident 31,046 on 12/13/02: Male STC initiator Richard S. fondles female STC resident, and representative Plaintiff, Penny G.
32. Incident 31,048 on 12/17/02: Male STC initiator R.S. attempts to fondle female STC resident, and representative Plaintiff, Penny G "again." See Incident 31,046 above, referencing Penny G. and Richard S.
33. Incident 31,061 on 11/19/02: Male STC initiator Gary P. fondling female STC resident Cordelia A.
34. Incident 31,062 on 12/21/02: Male STC initiator Jose F. exposed himself to female STC resident Rene B.
35. Incident 31,094 on 02/18/03: Male initiator, employee Steven E., sexual assault of female CTP resident Dominica A.
36. Incident 31,111 on 04/19/03: Male PSYA initiator John F. sexually harassing female PSYA resident Holly S.
37. Incident 31,113 on 04/27/03: Male PSYA initiator Mick C. exposed self to female PSYA residents, but only Merari T. specifically identified as having such exposure.
38. Incident 31,115 on 04/28/03: Male PSYA initiator Mick C. sexually harassed female PYSA resident Katelyn S.
39. Incident 32,038 on 06/09/03: Male STC initiator Efrain O.-L. sexually harassed female STC resident, and representative plaintiff, Robin H.
40. Incident 32,050 on 06/25/03: Male PSYR initiator Matt S. groped female PSYR resident Amanda J.
41. Incident 32,816 on 07/29/03: Male STC initiator Andre H. groped and sexually harassed female STC resident Kayleen P.
42. Incident 32,817 on 08/07/03: Male STC initiator James C. touched buttocks of female STC resident Debra D.
43. Incident 32,820 on 08/27/03: Male PSYR initiator Casino G. groped buttocks and breasts of female PSYR

also Complaint ¶¶ 38-148). Many of these women residents were known, or should have been known, to the Defendants as being highly vulnerable to sexual predators.

(Complaint ¶¶ 149-158). Yet, the Defendants failed to adequately protect the Plaintiffs from sexual assaults, exploitation, and harassment and failed to provide the Plaintiffs with mental health programs and services designed to identify, treat, and ameliorate the consequences of their history of physical, emotional, and/or sexual trauma. (Complaint ¶¶ 159-176).

These women are further requesting declaratory and injunctive relief from a pattern and practice, known and tolerated by the Defendants, of failing to substantially meet their obligations to provide both a safe, therapeutic environment and to provide trauma treatment for women in the NHHSS Regional Centers and in the community pursuant to their obligations under federal law, including, *inter alia*, the Americans with

resident Daytil J.

44. Incident 32,826 on 09/09/03: Male STC initiator Myron P. sexually harassed female STC resident Lorena S.
45. Incident 32,823 on 09/25/03: Male initiator, employee Wesley W., sexually harassed female STC resident Julie O. Notation indicates employee was terminated.
46. Incident 33,039 reported on 11/17/03: Male STC initiator John B. sexually harassing female STC resident April R.
47. Incident 33,276 on 01/18/04: Male STC initiator James C. rubbed up against female STC resident April R.
48. Incident 33,285 reported on 1/12/04: Male initiator, former employee by time of report, John W. kissing of female STC resident Jenna H.
49. Incident 33,657 on 02/15/04: Male PSYA initiator Kristopher H. attempted to touch buttocks of female PSYA resident Michaela R.
50. Incident 33,658 on 02/26/04: Male PSYA initiator Glenn N. sexually harassed female PSYA resident Crystal A.
51. Incident 33,660 on 02/18/04: Male STC initiator David M. touched buttocks of female STC resident Lauri J.
52. Incident 33663 on 02/09/04: Male STC initiator Terry C. sexually harassed, touched buttocks of female STC resident Sulathia H.
53. Incident 33668 on 03/08/04: Male STC initiator Ervin A. sexually harassed female STC resident Diana W.
54. Incident 33,672 on 03/24/04: Male PSYA initiator Glenn N. touched breast of female PSYA resident Crystal A.
56. Incident 33,673 on 03/10/04: Male STC initiator Samuel D. unwanted physical contact with, and sexual comments to, female STC resident Heather M.
57. Incident 33,573 reported on 04/23/04: Male STC initiator Kenneth H. sexually harassed female STC resident Laura S.
58. Incident 34,223 on 07/09/04: Male STC initiator Matthew H. slapped buttocks of female STC resident Melissa R.
59. Incident 34,224 on 07/09/04: Male STC initiator Matthew H. sexually harassed (for several weeks, unreported) and then finally, date reported, slapped buttocks of female resident Peggy H.
60. Incident 34,225 reported 07/09/04: Male STC initiator Roger I. sexually harassed Elizabeth H. for several weeks.

Disabilities Act, 42 U.S.C. § 1201 et seq., as amended, and Section 504 of the Rehabilitation Act, 42 U.S.C. § 794 et seq. (Complaint ¶¶ 168-176).

The representative Plaintiffs are further requesting declaratory and injunctive relief from a pattern and practice, known and tolerated by the Defendants, of unconstitutional conduct, which became the representative policy and/or practice of the NHHSS. (Complaint ¶¶ 197-200). Examples of this are illustrated in instances where representative Plaintiffs were sexually assaulted by male residents whom the Defendants knew had previously committed sexual assaults at NHHSS mental health facilities, as well as in instances where the representative Plaintiffs were sexually assaulted, exploited, or harassed by male staff members at NHHSS mental health facilities.² (*See also*

² **A. Exhibit 46 from depositions, NRC Listing of J15 Sexual Abuse queries.**

1. 07/03/02: Male Initiator Ernest G. and female victim Kimberly H. (representative plaintiff in pending case).
2. 08/27/02: Male initiator Paul J. and female victim Tamica S. (representative plaintiff in pending case).
3. 10/18/02: Male initiator Adrian C.-M. and female victim Barbara E.
4. 10/19/02: Male initiator Adrian C.-M. and female victim Sara M. (representative plaintiff in pending case).

B. Exhibit 10 of class certification, referencing Exhibit 2 from depositions, HRC Sexual Abuse Listings:

1. 03/30/0103/30/01: Male initiator Mark H. kissed female Ward 34 resident, and representative plaintiff, Selena T. at library.
2. 5/31/01: Residents of Ward 37, male Matthew S., same individual who was identified as initiator of the 05/18/01 incident, and female Nichole K., observed hugging and kissing.
3. 07/01/01: Incident involving two male initiators, from Ward 36 and not in transitional program of Ward 37, Michael J. and James C., making advances towards female resident from Ward 37 transitional program Sheila H where Michael J. was involved in earlier incident on 04/03/01 at HRC.
4. 06/05/02 Male Ward 37 initiator Ruben R., same individual identified as initiator of 05/31/02 incident, observed kissing female Ward 37 resident.
5. 07/27/02: Male non-transition Ward 36 Franklin F. initiator, who had multiple incidents on 06/25/01, touches female transition Ward 37 resident Linda G. on elevator.
6. 05/29/03: Male non-transition Ward 36 initiator Eddy A.-D., who had been involved in multiple incidents in September, 2001, kisses and exposes self to female Ward 37 resident Rhonda R.
7. 06/04/03 Male initiator Franklin F., with multiple previous incidents of predatory behavior, attempts to kiss female Ward 34 resident Betty S. at unknown location.
8. 11/03/03: Male Ward 37 initiator Harold T. uses cane to tap buttocks of female Ward 37 resident Danyl H., behavior he had engaged in less than one week previous involving same female resident.

C. Exhibit 10 of class certification, referencing Exhibit 9 from depositions, LRC Abuse/Neglects List:

1. Incident 25,485 on 05/20/01: Male PSYA initiator Kyle S., same individual identified in Incident 25,484, gropes breasts, places penis in hand of female PYSYA resident Krystal B.
2. Incident 25,666: Male PSYA initiator Matthew S., same individual identified in Incident 25,484, kissed female PSYA resident Stephanie B.
3. Incident 25920 report on 8/11/01: Male STC initiator Charles F. sexual assault of female STC resident, and representative plaintiff, Plaintiff Elizabeth M.
4. Incident 25,754 on 08/06/01: Male staff member David M. sexually assaults female Short Term Care (STC) resident, and representative plaintiff, Penny G.
5. Incident 25,754 on 08/06/01: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Penny G.

Complaint ¶¶ 38-165). In one instance, a male staff member who raped, sexually assaulted, and sexually abused numerous Plaintiffs had a felony criminal record and an employment record involving sexually inappropriate behavior resulting in termination from that employment prior to his hiring at one of the NHHSS facilities.³ In many of the cases, the women had a prior history of sexual exploitation and vulnerability, creating a heightened need for protection from those charged with their care. (Complaint ¶ 154).

6. Incident 25,920 reported on 8/11/01: Male STC initiator Charles F. sexual assault of female STC resident, and representative plaintiff, Plaintiff Elizabeth M about two weeks prior to report.

7. Incident 28,257 on 06/14/02: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Mary W., historical incident report regarding assaults from 2001.

8. Incident 28,258 on 06/21/02: Male staff member David M. sexually assaults female STC resident Tiffany B., historical incident report regarding assaults from 2001.

9. Incident 28,257 on 06/14/02: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Robin H., historical incident report regarding assaults from 2001.

10. Incident 28,257 on 06/14/02: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Jennifer H., historical incident report regarding assaults from 2001

11. Incident 28,263 on 07/02/02: Male STC initiator Adam A. sexually harasses and touches leg of female STC resident, and representative plaintiff, Robin H.

12. Incident 28,182 on 09/25/02: Male CTP initiator Joshua H. poked buttocks, with pool stick, of female CTP resident, and representative plaintiff, Elizabeth M.

13. Incident 29,160 on 07/25/02: Male PSYA initiator Derrick D. fondles female resident Kirsten B., but notation further asserts that “after review appeared to be fabricated.”

14. Incident 31,046 on 12/13/02: Male STC initiator Richard S. fondles female STC resident, and representative Plaintiff Penny G.

15. Incident 31,048 on 12/17/02: Male STC initiator Richard S. attempts to fondle female STC resident, and representative Plaintiff, Penny G again.

16. Incident 31,061 on 11/19/02: Male STC initiator Gary P. fondling female STC resident Cordelia A.

17. Incident 31,115 on 04/28/03: Male PSYA initiator Mick C. sexually harassed female PYSYA resident Katelyn S.

18. Incident 32,038 on 06/09/03: Male STC initiator Efrain O.-L. sexually harassed female STC resident, and representative Plaintiff, Robin H.

19. Incident 32,050 on 06/25/03: Male PSYR initiator Matt S. groped female PSYR resident Amanda J.

20. Incident 33276 on 01/18/04: Male STC initiator James C. rubbed up against female STC resident April R.

21. Incident 33,672 on 03/24/04: Male PSYA initiator Glenn N. touched breast of female PSYA resident Crystal A. These are the same initiator/victim to the incident 33,658 on 02/26/04.

³**A. Criminal history data:** Exhibit 11 of class certification, Prior Arrest Record of David H. Murray from presentence investigation produced consistent with the Court’s order of January 19, 2005.

B. Employment history data: Exhibit 10 of class certification, referencing page 9 of Exhibit 21 from depositions, section (C)(3)(b) of Centers for Medicare and Medicaid Services report on survey of 7/24/02 headed “Documentation supporting finding of Immediate Jeopardy.”

C. Exhibit 10 of class certification, referencing Exhibit 9 from depositions, LRC Abuse/Neglects List:

1. Incident 25,754 on 08/06/01: Male staff member David M. sexually assaults female Short Term Care (STC) resident, and representative plaintiff, Penny G.

2. Incident 28,257 on 06/14/02: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Mary W., historical incident report regarding assaults from 2001.

3. Incident 28,258 on 06/21/02: Male staff member David M. sexually assaults female STC resident Tiffany B., historical incident report regarding assaults from 2001.

4. Incident 28,257 on 06/14/02: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Robin H., historical incident report regarding assaults from 2001.

5. Incident 28,257 on 06/14/02: Male staff member David M. sexually assaults female STC resident, and representative plaintiff, Jennifer H., historical incident report regarding assaults from 2001.

Further, in several instances, NHHSS mental health facilities failed to investigate resident grievances or follow their own personnel policies and procedures as required by Neb. Rev. Stat. § 28-372 (1995 and Cum. Supp. 2002).⁴ Additionally, the Defendants continue in their failure to provide adequate treatment and in their failure to properly protect these women while in their custody and care, in violation of numerous laws including, *inter alia*, the Americans with Disabilities Act, 42 U.S.C. § 1201 et seq., as amended, and Section 504 of the Rehabilitation Act, 42 U.S.C. § 794 et seq., as amended. (n. 5). The fact that the representative Plaintiffs were subject to rape, physical assaults, sexual assaults, sexual exploitation, and sexual harassment while in the custody and care of the Defendants has caused these Plaintiffs on-going physical, emotional, and psychological damage. (Complaint ¶ 165). All women at NHHSS residential mental health facilities are subject to this same failure to protect them from harm, and failure to provide appropriate treatment for their mental health needs.

⁴ **A. Exhibit 5 of class certification, Deposition of John Kroll**, 76:18-78:14 (failure to comply with documentation procedures requiring director of departments to dictate progress note relative to a history of violence or serious threats).

B. Exhibit 5 of class certification, Deposition of John Kroll, 84:7-86:11 (multiple failures to report rape as a “sentinel event,” in light of reporting requirements regarding sentinel events reflected in Exhibit 10 of class certification, referencing Exhibit 53 of depositions).

C. Exhibit 10 of class certification, referencing pages 2-5 of Exhibit 21 from depositions, section (A) of **Center Centers for Medicare and Medicaid Services report on survey of 7/24/02 headed “Documentation supporting finding of Immediate Jeopardy.”**

D. Exhibit 10 of class certification, referencing pages 8-12 of Exhibit 23 from depositions, Section B (Surveyor 10405) of **Center Centers for Medicare and Medicaid Services report on survey of 12/18/03.**

E. Example LRC history. Exhibit 10 of class certification, referencing Exhibit 30 Policy RI-11, Lincoln Regional Center Administrative Policies and Procedures regarding Abuse and Neglect requires appropriate documentation relative to incidents “Sexual Abuse” as defined by that policy. Lincoln Regional Center had notice of incidents of sexual abuse by one employee against at least three separate residents of STC during the summer of 2001 by September 3, 2001 as indicated by Exhibit 10 of class certification, referencing page 2-5 of Exhibit 21 from depositions, Centers for Medicare and Medicaid Services report on survey of 7/24/02. A review of the abuse/neglect reports for the period from 2001, indicates that only one abuse/neglect report was issued with respect to that employee’s sexual predation, as documented by Exhibit 10 of class certification, referencing Exhibit 9 from depositions, LRC Abuse/Neglects List, Incident 25,754 on 08/06/01. Indeed, it was not until almost a year later that LRC acted to generate “historical” abuse/neglect reports concerning that same employee’s sexual abuse of residents at the facility, as documented by Exhibit 10 of class certification, referencing Exhibit 9 from depositions, LRC Abuse/Neglects List: Incident 28,257 on 06/14/02; Incident 28,258 on 06/21/02; Incident 28,260 on 06/27/02; and, Incident 28,261 on 06/29/02.

ARGUMENT

Constitutional and Statutory Scheme

The Plaintiffs, women with mental illnesses and developmental disabilities, allege that the Defendants deprived them of their constitutionally protected rights under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States. (Complaint ¶ 2). Additionally, the Plaintiffs allege that the Defendants deprived them of their rights under the laws of the State of Nebraska, and under the Americans with Disabilities Act, 42 U.S.C. § 1201 *et seq.*, as amended, and Section 504 of the Rehabilitation Act, 42 U.S.C. § 794 *et seq.*, as amended. *Id.* Specifically, such rights include the right to be free in their persons from sexual and physical abuse; to have their bodily integrity not violated; to be afforded treatment programs specially designed to meet their unique needs with reasonable accommodations for their various disabilities; to receive activities, services, support, and assistance, including discharge planning and a comprehensive system of community mental health residential facilities designed to identify, treat, rehabilitate, and ameliorate their mental illnesses and disabilities; and to be afforded the due process and equal protection of the laws. (Complaint ¶¶ 149-200).

In particular, the Plaintiffs argue that the Defendants' acts and omissions constitute an intentional and invidious discrimination based upon the Plaintiffs' gender by allowing male residents and male staff members privileges and federally protected rights, while denying female residents the same privileges and federally protected rights. (Complaint ¶¶ 197-200).

The representative Plaintiffs further allege the following causes of action: (1) that the Defendants, due to their special relationship with the Plaintiffs, have a duty to protect

the women at NHHSS mental health facilities from physical, emotional, and psychological harm, and that the Defendants failed in this duty; and (2) that the Defendants, by their acts and omissions, failed to provide appropriate, essential services necessary for the identification, treatment, habilitation, rehabilitation, and amelioration of the Plaintiffs' mental health needs. (Complaint ¶¶ 149-200). Examples include, but are not limited to: the failure to provide certain services, such as appropriate and effective nursing care, medical care, academic instruction, occupational therapy, social and independent living skills training, recreational therapy, vocational training, appropriate identification of trauma histories, appropriate treatment for people who have experienced trauma, rehabilitative testing, psychological testing, psychiatric care, individualized training, meaningful physical education, discharge planning, and the provision of a system of community based mental health residential facilities designed to meet the individual needs of the Plaintiffs; and (3) that the Defendants have violated provisions of The Americans with Disabilities Act, 42 U.S.C. § 1201 et seq., as amended, and Section 504 of the Rehabilitation Act, 42 U.S.C. § 794 et seq., as amended, entitling the Plaintiffs to certain services, protections, and procedures while in the Defendants' care and custody, including reasonable accommodations for their disabilities and services designed to meet their unique needs. (Complaint ¶¶ 159-200).

I. This Case Should be Permitted to Proceed as a Class Action Pursuant to the Provisions of Rule 23(a) of the Federal Rules of Civil Procedure.

A. Standard of Review.

Although not an appellate case, and thus not technically subject to a "standard of review," there are a number of principles which Federal District Courts are required to

consider in any motion for class certification. First, in considering a motion for class certification, a court may not consider the factual merits or the strengths or weaknesses of the Plaintiffs' underlying claims. *Caroline C., et al., v. Dale Johnson, et al.*, 174 F.R.D. 452, 459 n.7 (D.Neb. 1996) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Kirkpatrick v. J.C. Bradford and Co.*, 827 F.2d 1267 (11th Cir. 1987); *Redditt v. Miss. Extended Care Centers*, 718 F.2d 1381 (5th Cir. 1983); and *Anderson v. City of Albuquerque*, 690 F.2d 796 (10th Cir. 1982). Additionally, for purposes of a motion for class certification, the substantive allegations of the complaint must be accepted as true. *Id.* (citing *Lockwood Motors, Inc. v. General Motors Corp.*, 162, F.R.D. 569, 573 (D.Minn. 1995); and *Jensen v. Eveleth Taconite Co.*, 139 F.R.D. 657, 659 (D.Minn. 1991). Thus, any arguments the Defendants may make relating to the Plaintiffs' underlying claims must be considered irrelevant to the motion to certify the class. Moreover, all of the substantive allegations of the Plaintiffs' complaint, for purposes of the motion for class certification, this Court must summarily accept as true.

Additionally, District Courts hold "broad discretion in determining whether or not to certify a class under Rule 23." *Caroline C.*, 174 F.R.D. at 459 (citing *Lockwood Motors, Inc., v. General Motors Corp.*, 162 F.R.D. 569, 573 (D. Minn. 1995) and *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 873 (8th Cir. 1977)). Ultimately, certification of a class depends on the unique circumstances of each individual case, and "must depend upon a careful balance between the convenience of maintaining a class action and the need to guarantee adequate representation to the class members." *Caroline C.* 174 F.R.D. at 459 (citing *Wright Stone Container Corp.*, 524 F.2d 1058, 1061 (1975)). As will be demonstrated below, the balance in this case weighs heavily in favor of class

certification. Any alternatives to a class action in this matter prove seriously unmanageable. Moreover, particularly given the makeup of the class members, and their relative lack of sophistication, certification of the class represents, by far, the most effective way to guarantee adequate representation to the class members.

B. The Four Factors Delineated Under Rule 23(a) of the Federal Rules of Civil Procedure are Amply Satisfied in this Case, and the Class is Well Defined.

The Plaintiffs herein comply with the requirements of Federal Rule of Civil Procedure 23(a). Plaintiffs allege that the class which they seek to represent consists of “all women who were subjected to rape, sexual assault, sexual harassment, sexual exploitation, and physical assault, during all material times, while in the care and custody of Nebraska Health and Human Services System (NHHSS) as residents at one or more of the NHHSS residential mental health facilities; and all women who are currently, or in the future will be, in the care and custody of the NHHSS and placed as residents at one or more of the NHHSS residential mental health facilities.” This case consists of approximately 1,000 women who are, and have been, affected by the inadequate provision of mental health services at the NHHSS residential mental health facilities, including at least 100 who have been subjected to rape, sexual assaults, sexual exploitation, sexual harassment, physical assaults, and lack of appropriate treatment while in the care and custody of the NHHSS, and all women who were subjected to rape, sexual assault, sexual harassment, sexual exploitation, and physical assault, during all material times, while in the care and custody of Nebraska Health and Human Services System (NHHSS) as residents at one or more of the NHHSS residential mental health facilities.⁵ (*See also* Complaint ¶¶ 117-148). Additionally, the class consists of all women who are currently, or in the future will be, in the care and custody of the NHHSS and placed as residents at one or more of the NHHSS residential mental health facilities

⁵ **A. Information relating to the 1000 women generally who are, and have been, affected by the inadequate provision of mental health services at the NHHSS residential mental health facilities:**

1. Exhibit 10 of class certification, referencing Exhibit 1 from depositions (Hastings Regional Center statistical data, calendar years 2001-2004): Total of 563 female admissions.

2. Exhibit 10 of class certification, referencing Exhibit 8 from depositions (Lincoln Regional Center statistical data, calendar years 2001-2004): Total of 544 female admissions.

3. Exhibit 10 of class certification, referencing Exhibits 42 through 45 from depositions (Norfolk Regional Center): This regional center did not provide specific statistical data for residents for the 2001 through 2004 that was marked as an exhibit for the depositions. However, utilizing the data regarding admissions to Norfolk, Exhibits 42 through 45 from depositions, and counting the number of names in which the first name is considered typically to be a female name (e.g. Mary, Sharon, etcetera...) there would have been at least 400 female admissions during this time period).

B. Information relating to the minimum of 100 women specifically who have been subjected to rape, sexual assaults, sexual exploitation, sexual harassment, physical assaults, and lack of appropriate treatment while in the care and custody of the NHHSS: *See* note 1 *supra*, and accompanying text (well over 100 specific incidents listed).

and who are, or will be in the future, affected by the policies, practices, and treatment of the NHHSS at its residential mental health facilities. *Id.*

Regarding the definition of the class, it is well defined, and class members are readily ascertainable. First, as far as the women who have actually been raped, sexually or physically assaulted, harassed or exploited while placed at the NHHSS facilities, such women are easily classified. Second, the subclass of women who are, or will be, in the custody and care of the Defendants at the NHHSS residential mental health facilities in the future is also well defined. Specifically on this point, a litigant “need not wait to bring a failure to protect claim against officials until she has actually been assaulted.” *Caroline C.* 174 F.R.D. at 460-61 (citing *Baby Neal For and By Kanter v. Casey*, 43 F.3d 48, 56 (3rd Cir. 1994)). Moreover, courts have routinely certified “classes composed, in part of persons who will be subject to a policy or practice that may in the future subject them to harm.” *Id.* at 461 (citations omitted). Thus, in addition to meeting the four factors delineated under Rule 23(a) of the Federal Rules of Civil Procedure (discussed below), the proposed class, as a whole is readily identifiable and well defined.

1. The Class is So Numerous that Joinder is Impracticable.

The representative Plaintiffs have satisfied the first requirement under Rule 23(a)(1) that “the class is so numerous that joinder of all members is impracticable.” Federal Civil Judicial Procedures and Rules, 121 (rev. ed., West 2002). This requirement stresses the word, “impracticable,” and thus does not mean that joinder must be impossible. *Caroline C. by Carter v. Johnson*, 174 F.R.D. 452, 462 (D.Neb. 1996); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993); *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 574 (D. Minn. 1995). In addition, there is no set number of proposed class members at which joinder becomes impracticable. *Id.* For example, a court may certify a class even if it is composed of as few as fourteen members. *Grant v. Sullivan*, 131 F.R.D. 436, 446 (M.D. Pa. 1990). Further, as courts have noted, “A leading treatise concludes, based on prevailing precedent, that the difficulty in joining as few as 40 class members should raise the presumption that joinder is impracticable.” *Caroline C.*, 174 F.R.D. at 463; *Robidoux*, 987 F.2d at 936, citing 1 Herbert B. Newberg, Newberg on Class Actions: A Manual for Group Litigation at Federal and State Levels, §3.05, at 141-42. This presumption has become the prevailing precedent in the numerosity requirement, and a plaintiff class that is at least as large as 40 should *alone* meet the test of Rule 23(a)(1). *Lockwood*, 162 F.R.D. at 574.

In addition, actions brought on behalf of possible future class members presumptively make joinder impracticable. *Ellis v. Naval Air Rework Facility, Alameda Cal.*, 404 F. Supp. 391, 396 (N.D. Cal. 1975) *rev'd on other grounds*, 608 F.2d 1308 (9th Cir. 1979). Finally, other factors bearing on the impracticability of joinder include the lack of knowledge and sophistication of the class members, their need for protection, and the disproportionately high cost of maintaining separate actions. *Gordon v. Forsyth County Hospital Authority*, 409 F. Supp. 708, 717 (M.D.N.C. 1975), *modified*, 544 F.2d 748 (4th Cir. 1976). *See also, Robidoux*, 987 F.2d at 936 (“Consolidating in a class action what could be over 100 individual suits serves judicial economy.”).

In this case, the proposed class includes approximately 1,000 women, in the custody of the Defendants at all material times, affected by the lack of provision of

mental health services at the NHHSS residential mental health facilities.⁶ The class includes at least 100 women who have been subjected to physical assaults, sexual assaults and rapes at each of their respective institutions.⁷ In addition, since the initial filing in this case, sexual assaults, harassment, and exploitation have continued to occur at the NHHSS residential mental health facilities.⁸ Thus, the class is significantly larger

⁶ **A. Exhibit 10 of class certification, referencing Exhibit 1 from depositions (Hastings Regional Center statistical data, calendar years 2001-2004):** Total of 563 female admissions.

B. Exhibit 10 of class certification, referencing Exhibit 8 from depositions (Lincoln Regional Center statistical data, calendar years 2001-2004): Total of 544 female admissions.

C. Exhibit 10 of class certification, referencing Exhibits 42 through 45 from depositions (Norfolk Regional Center): This regional center did not provide specific statistical data for residents for the 2001 through 2004 that was marked as an exhibit for the depositions. However, utilizing the data regarding admissions to Norfolk, Exhibits 42 through 45 from depositions, and counting the number of names in which the first name is considered typically to be a female name (e.g. Mary, Sharon, etcetera...) there would have been at least 400 female admissions during this time period).

⁷ See notes 1 and 5 *supra*, and accompanying text (well over 100 specific incidents listed).

⁸ **A. Exhibit 10 of class certification, referencing Exhibit 46 from depositions (NRC Listing of J15 Sexual Abuse queries):** The following incidents all occurred after the filing of the Complaint in this action):

1. 12/31/02: Male initiator Tom H. and female victim Annette M.
2. 01/25/03: Male initiator John C. and female victim Charlene R.-W.
3. 02/13/03: Male initiator Tom H. and female victim Hattie W.
4. 03/25/03: Male initiator Hugh S. and female victim Linda B.
5. 06/06/03: Male initiator Keith W. and female victim Teresa J.
6. 06/14/03: Male initiator James W. and female victim Carey P.
7. 11/16/03: Male initiator Donald McC. and female victim Kelly S.
8. 11/30/03: Male initiator Brian M. and female victim Angela L.
9. 02/01/04: Male initiator George K. and female victim Nancy S.
10. 06/16/04: Male initiator Kurt B. and female victim Sharon J.
11. 07/14/04: Male initiator Franklin F. and female victim Brenda J.
12. 08/02/04: Male initiator Russell F. and female victim Trisha B.
13. 08/16/04: Male initiator Tim M. and female victim Kelly S.
14. 08/20/04: Male initiator Matthew T. and female victim Margaret S.
15. 08/24/04: Male initiator Abraham D. and female victim Tannisha B.
16. 09/02/04: Male initiator Thomas Z. and female victim Sharla P.
17. 09/07/04: Male initiator Robert T. and female victim Kelly S.
18. 09/08/04: Male initiator Tyree W. and female victim Kristin A.
19. 09/15/04: Male initiator Ceaser J.-L. and female victim Trisha B.
20. 10/15/04: Male initiator Rafael F. and female victim Evelyn C.
21. 10/23/04: Male initiator Tracy L. and female victim Michelle S.
22. 12/29/04: Male initiator Micah R. and female victim Candice M.

B. Exhibit 10 of class certification, referencing Exhibit 3 from depositions (HRC Sexual Abuse Incidents Listings): The following incidents all occurred after the filing of the Complaint in this action):

1. 01/31/03: Male initiator Myron T. and female victim Trisha B.
2. 05/24/03: Male Ward 37 initiator Robert P. and female victim Dawn M.
3. 05/27/03: Male Ward 37 initiator Kek Y. touches two female victims Tina G. and Dawn M.
4. 05/29/03: Male initiator Eddy A-D and female victim Rhonda R.
5. 06/04/03 Male initiator Franklin F. and female victim Betty S.
6. 10/30/03: Male initiator Harold T. and female victims Victoria S., Barbara H., and Danyl H.
7. 11/03/03: Male initiator Harold T. and female victim Danyl H.
8. 04/20/04: Male initiator Elliot R. and female victim Jennifer H.
9. 05/30/04: Male initiator Edward R. and female victim Arlene H.
10. 06/12/04: Male initiator Keith W. and female victim Julie G.
11. 06/12/04: Male initiator Pablo R. and female victim Arlene H.
12. 06/20/04: Male initiator Scott R. and female victim Arlene H.

than classes joined in other cases. Furthermore, the class is far larger than the size proposed by Newberg, and endorsed in *Robidoux* and *Lockwood*, to raise the presumption of meeting the numerosity requirement. 987 F.2d at 936; 162 F.R.D. at 574. Additionally, as noted in *Ellis*, the proposed class includes potential future members, thus making joinder impractical. 404 F. Supp. at 396 (Since there is no way now of determining how many of these future plaintiffs there may be, their joinder is impracticable.” *Id.* (emphasis added)).

It should also be pointed out that the specific numbers of women directly subjected to sexual assaults, harassment, and exploitation at the NHHSS facilities is, based on the evidence available to date, most likely substantially larger than what is even known at this time. For instance, there are sexual assaults that have been reported to the facilities, yet are not properly reflected in the facilities’ official documentation.⁹ Additionally, the Defendants have not provided records for 2005, and many of the records provided for the respective facilities do not include the entirety of 2004.¹⁰ Moreover, the numbers of women who have undergone traumatic experiences in the past, and have not received appropriate treatment for such trauma while in the care and

C. Exhibit 10 of class certification, referencing Exhibit 9 from depositions (LRC Abuse/Neglects List. The following incidents all occurred after the filing of the Complaint in this action):

1. Incident 31,048 on 12/17/02: Male initiator RS and female Penny G.
2. Incident 31062 on 12/21/02: Male initiator Jose F. and female Rene B.
3. Incident 31,094 on 02/18/03: Male initiator/employee Steven E. and Dominica A.
4. Incident 31,111 on 04/19/03: Male initiator John F. and female Holly S.
5. Incident 31,113 on 04/27/03: Male initiator Mick C. and female Merari T. and others.
6. Incident 31,115 on 04/28/03: Male initiator Mick C. and female Katelyn S.
7. Incident 32,038 on 06/09/03: Male initiator Efrain O.-L. and female Robin H.
8. Incident 32,050 on 06/25/03: Male initiator Matt S. and female Amanda J.
9. Incident 32,816 on 07/29/03: Male initiator Andre H. and female Kayleen P.
10. Incident 32,817 on 08/07/03: Male initiator James C. and female Debra D.
11. Incident 32,820 on 08/27/03: Male initiator Casino G. and female Daytil J.
12. Incident 32,826 on 09/09/03: Male initiator Myron P. and female Lorena S.
13. Incident 32,823 on 09/25/03: Male initiator/employee Wesley W. and female Julie O.
14. Incident 33,039 reported on 11/17/03: Male initiator John B. and female April R.
15. Incident 33,276 on 01/18/04: Male initiator James C. and female April R.
16. Incident 33,285 reported on 1/12/04: Male initiator/employee John W. and female Jenna H.
17. Incident 33,657 on 02/15/04: Male initiator Kristopher H. and female Michaela R.
18. Incident 33,658 on 02/26/04: Male initiator Glenn N. and female Crystal A.
19. Incident 33,660 on 02/18/04: Male initiator David M. and female Lauri J.
20. Incident 33663 on 02/09/04: Male initiator Terry C. and female Sulathia H.
21. Incident 33668 on 03/08/04: Male initiator Ervin A. and female Diana W.
22. Incident 33,672 on 03/24/04: Male initiator Glenn N. and female Crystal A.
23. Incident 33,673 on 03/10/04: Male initiator Samuel D. and female Heather M.
24. Incident 33,573 reported on 04/23/04: Male initiator Kenneth H. and female Laura S.
25. Incident 34,223 on 07/09/04: Male initiator Matthew H. and female Melissa R.
26. Incident 34,224 on 07/09/04: Male initiator Matthew H. and female Peggy H.
27. Incident 34,225 reported 07/09/04: Male STC initiator Roger I. sexually harassed Elizabeth H. for several weeks.

⁹ See note 4, *supra*. Additionally, although numerous representative plaintiffs specifically alerted LRC staff of sexual assaults (See Complaint ¶¶ 59-61, 38-41, 46-48, 72-74), the LRC incident reports do not list these complaints (See Exhibit 10 of class certification, referencing Exhibit 9 from depositions (listing no complaints from Juliana W., and failing to list the David M. reported assaults for Elizabeth M., Selena T., Ethel H. respectively).

¹⁰ See Exhibit 10 of class certification, referencing Exhibit 3 from depositions (Hastings Regional Center Sexual Abuse Incidents Listing, providing information only up to 10/19/04); Exhibit 10 of class certification, referencing Exhibit 9 from depositions (Lincoln Regional Center Abuse and Neglect Listing, providing information on up to 07/07/04); and Exhibit 10 of class certification, referencing Exhibit 46 from depositions (Norfolk Regional Center J-15 Sexual Abuse Listings, providing information only up to 11/07/04).

custody of the Defendants, are substantial.¹¹ This is due to the fact that the policies and procedures at the three residential mental health facilities operated by the Defendants fail substantially, either in identifying such women; or if identified, in providing adequate treatment for their underlying trauma.¹² (See also Complaint ¶¶ 172, 173, 175, 137, 138, 139, 140, 142, 143, 145, 146, 147, 154, 155, 103, 104). This constitutional failure by the Defendants stands in stark contrast to the overwhelming professional standard of knowledge and care as to the importance of trauma in the sequelae of mental illness. For instance, a majority of adults diagnosed with Borderline Personality Disorder (81%) at some point in their pasts, experienced some form of a significant traumatic experience. Ten (10) out of sixteen (16) of the representative Plaintiffs, or over 60 % have diagnoses of Borderline Personality Disorder or Post Traumatic Stress Disorder (Complaint ¶¶ 5, 6, 7, 11, 12, 13, 15, 17, 18, and 19).¹³ In fact, over two hundred (200), or over 20% of the women in custody in the Defendant's residential mental health facilities have these two diagnoses.¹⁴ Additionally, high numbers of health risk factors, exhibited by the representative plaintiffs and significant numbers (between 200 to 300) of the class members, ranging from severe obesity, to self-mutilation (cutting), to drug and alcohol abuse, have a high correlation to past histories of trauma in those women demonstrating such risk factors.¹⁵ Simply put, the more risk factors that are present in the representative Plaintiffs, and similarly situated female class members, the more likely it is that they have experienced at least one significant traumatic event earlier in life. The evidence

¹¹ Fifty to seventy percent of all women and a substantial number of men treated in psychiatric settings have histories of sexual or physical abuse or both. Carmen, E., Rieker, P., & Mills, T. (March 1984) "Victims of Violence and Psychiatric Illness." *Am.J. Psychiatry*, 141:3; Bryer J.B., Nelson, B., Miller, J.B. & Krol, P. (November 1987). "Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness." *Am.J Psychiatry*, 144:1426-1430; Craine, L.S., Henson, C.E. Colliver, J.A., et al. (1988). "Prevalence of a History of Sexual Abuse Among Female Psychiatric Patients in a State Hospital System." *Hospital and Community Psychiatry*, 39: 300-304; Jennings, Ann, compiler., "The Damaging Consequences of Violence and Trauma: Facts, Discussion Points, and Recommendations for the Behavioral Health System (2004) *National Technical Assistance Center for State Mental Health Planning (NTAC), National Association of State Mental Health Program Directors (NASMHPD) under contract with the Center for Mental Health Services (CMHS), Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services*, 41-43. See also: M. Harris & Landis, editors, *Sexual Abuse in the Lives of Women Diagnosed with Serious Mental Illness* (Netherlands: Harwood Academic Publishers, 1997); Judith Herman, *Trauma and Recovery* (New York: Basic Books, 1997) 96-115.

¹² See notes 10-15 *supra* and *infra*, and accompanying text.

¹³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)* Fourth Edition, Text Revision (Washington: American Psychiatric Association, 2000) 706-710 (**301.83 Borderline Personality Disorder**); 463-468 (**309.81 Posttraumatic Stress Disorder**).

¹⁴ Exhibit 10 of class certification, referencing Deposition Exhibits 4, 11, and 42.

¹⁵ *Id.*; See: Jennings, "The Damaging Consequences of Violence and Trauma: Facts, Discussion Points, and Recommendations for the Behavioral Health System (2004), *supra.*, 3-7; 13-14; In adults, the rates for co-morbid Posttraumatic Stress Disorder (PTSD) and substance abuse disorders are two to three times higher for females than males, with 30% to 57% of all female substance abusers meeting the criteria for PTSD. Women's increased risk for co-morbid PTSD and substance dependence is related to their higher incidence of childhood physical and sexual abuse. Additional studies support that trauma sequelae must be addressed concurrently to permit successful treatment of dual diagnosis of mental illness and substance abuse. Maxine Harris, *Trauma Recovery and Empowerment* (New York: The Free Press, 1998) and H. Alverson., Alverson, M., Drake, R.E. (2000) "Addictions Services: An Ethnographic Study of the Longitudinal Course of Substance Abuse Among People with Severe Mental Illness," *Community Mental Health Journal*, Vol. 36 No. 6, 557-569; L.M. Najavits, Weis, R.D., & Shaw, S.R. (1997) "The Link Between Substance Abuse and Posttraumatic Stress Disorder in Women: A Research Review" *American Journal on Addictions*, 6: 273-283. There is a significant relationship between childhood sexual abuse and various forms of self-harm later in life, i.e. suicide attempts, cutting, and self-starving. Jennings, "The Damaging Consequences of Violence and Trauma: Facts, Discussion Points, and Recommendations for the Behavioral Health System (2004), *supra.*, 41-42; B.A. Vand der Kolk, Perry, J.C. & Herman, J. L. (1991) "Childhood Origins of Self-Destructive Behavior. *American Journal of Psychiatry* 148: 1665-1671.

establishes that there are at least between 200 to 300 women at the three facilities who demonstrate a high number of these risk factors.¹⁶ Yet, most, if not all, of these women neither have been identified by the Defendants in their residential facilities as having histories of trauma, nor have they received treatment designed to ameliorate the effects of such trauma (Complaint ¶¶ 172, 173, 175, 137, 138, 139, 140, 142, 143, 145, 146, 147, 154, 155, 103, 104).

Finally, the proposed class consists of women with various degrees of mental disabilities. (Complaint ¶¶ 4-19 and p. 2). This understandably affects the knowledge and sophistication of the potential class members, and increases their vulnerability and need for protection; both factors listed in *Gordon* that should be considered in terms of meeting the numerosity requirement. 409 F. Supp. at 717. Furthermore, the lack of knowledge and sophistication that the potential class members face reduces their likelihood of being able to pursue individual actions. *Caroline C.*, 174 F.R.D. at 463. Therefore, this group of representative plaintiffs is precisely what class actions are designed to protect. *Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986). Also, as stated in *Gordon*, the maintenance of separate actions in this case would be disproportionately high in cost. 409 F. Supp. at 717. Judicial economy dictates a single class action rather than numerous separate actions.

In summation, the class in this case of approximately 1,000 women affected by the mental health treatment at NHHSS facilities and the class of women at NHHSS mental health facilities who have been subjected to rape, sexual assault, sexual harassment, and sexual exploitation is sufficiently large to make joinder impracticable. Additionally, the probability of future class members, the lack of sophistication, and the enhanced vulnerability of potential members, as well as the disproportionately high cost of maintaining separate actions makes joinder impracticable. For these reasons, the requirement of Rule 23(a)(1) has been met. As discussed previously, certification of a class depends on the unique circumstances of each individual case, and “must depend upon a careful balance between the convenience of maintaining a class action and the need to guarantee adequate representation to the class members.” *Caroline C.* 174 F.R.D. at 459 (citing *Wright Stone Container Corp.*, 524 F.2d 1058, 1061 (1975)). The balance in this case weighs heavily in favor of class certification. Any alternatives to a class action in this matter prove seriously unmanageable. Moreover, particularly given the makeup of the class members, and their relative lack of sophistication, certification of the class represents, by far, the most effective way to guarantee adequate representation to the class members.

2. There are Questions of Law and Fact Common to the Class.

The commonality requirement under Rule 23(a)(2) is satisfied because the named Plaintiffs share common questions of law and fact with the grievances of the prospective class. It should be noted that this requirement can be met by the existence of a *single* common issue, and does not require that the claims of class members be identical. *Caroline C.*, 174 F.R.D. at 464 (citing *Paxton v. Union National Bank*, 688 F.2d 552, 561 (8th Cir. 1982); *See also Boulet v. Cellucci*, 107 F. Supp.2d 61, 81 (D. Mass. 2000). For example, only one common question of law or one common question of fact is necessary and, thus, Courts have described this requirement as “easily met.” *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d. Cir. 1994); *Lockwood*, 162 F.R.D. at 575. Class members need not

¹⁶ Exhibit 10 of class certification, referencing Deposition Exhibits 4, 11, and 42.

have all suffered actual injury, and the demonstration that all members of the class are subject to the same harm will suffice. *Baby Neal*, 43 F.3d at 56. Furthermore, “injunctive actions, by their very nature often present common questions satisfying Rule 23(a)(2).” *Baby Neal*, 43 F.3d at 57, citing 7A Charles A. Wright et al., Federal Practice and Procedure § 1763, at 201 (1986). *See also*, *DeBoer v. Mellon Mortgage Company*, 64 F.3d 1171, 1174 (8th Cir. 1995) (“Declaratory and injunctive nexus is sufficient to establish the requisite commonality.” *Id.*).

This case more than meets the requirement of Rule 23(a)(2), as common questions of both law and fact abound. Common questions of fact include, but are not limited to, the Plaintiffs’ status of having a “disability” or “handicap” within the meaning of the ADA, 42 U.S.C. §12101 et seq., as amended, and section 504 of the Rehabilitation Act, 29 U.S.C. § 794, as amended, respectively, and whether the Defendants knew, or should have known, that staff members and certain male residents of NHHSS facilities had histories of sexual exploitation of vulnerable women. (Complaint ¶¶ 191-196 and 149-158). Further, all persons in the proposed Plaintiff class suffered from the Defendants’ failure to provide services adequately designed to meet the Plaintiffs’ mental health and safety needs, with accommodations for their developmental and habilitative needs as secured by the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., as amended, and § 504, 29 U.S.C. § 794 et seq., as amended. *Id.* Plaintiffs also suffered from the Defendants’ failure to protect the Plaintiffs against rape, sexual abuse, sexual exploitation, sexual assault, sexual harassment, physical harm, and/or emotional harm while in the Defendants’ care and custody. (Complaint ¶¶ 159-167). Finally, the Plaintiffs experienced further re-traumatization through the Defendants’ failure to either provide or adequately monitor mental health trauma treatment for the Plaintiffs after their discharge from the facilities into community programs or upon re-entry into the Defendants’ facilities. (Complaint ¶¶ 168-176).

Common questions of law are also prevalent in this case. Such common questions include, but are not limited to, whether the Defendants’ patterns and practices violated the duties imposed upon them by the special relationship with the Plaintiffs, and whether these acts or omissions constitute a breach of the duty to protect the Plaintiffs from emotional, mental, psychological, sexual, and physical harm. (Complaint ¶¶ 159-167). Also included is the question of whether the Defendants’ patterns and practices violated the duties imposed upon them by the special relationship with the Plaintiffs, and whether these practices violated the rights ensured to the Plaintiffs by Constitutions of the United States and the State of Nebraska; and the statutory provisions of the United States and the State of Nebraska. *Id.* Further, there is the question of whether the Defendants violated their duties to protect the bodily integrity, privacy, and self-autonomy of the Plaintiffs in the Plaintiffs’ pursuit of their freedom of expression and right to treatment, rehabilitation, habilitation, and amelioration of their mental illnesses. (Complaint ¶¶ 159-175). Finally is the question of whether the Defendants violated their duties to protect and secure to the Plaintiffs, their constitutional and statutory rights under numerous laws including, *inter alia*, the Americans with Disabilities Act, 42 U.S.C. § 1201 et seq., as amended, and Section 504 of the Rehabilitation Act, 42 U.S.C. § 794 et seq., as amended. (Complaint ¶¶ 191-200).

In addition to the many common questions of law and fact present in this case, this is also an action for declaratory and injunctive relief. (Complaint p. 2). As Courts

have frequently noted, injunctive actions, by their very nature, often present common questions, satisfying Rule 23(a)(2).” *Caroline C.* 174 F.R.D. at 464 (citing *Baby Neal*, 43 F.3d at 57 (quoting 7A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 1763, at 201)); *See also DeBoer*, 64 F.3d at 1174 (8th Cir. 1995). In this case, injunctive relief is sought, and no individualized inquiry into damage awards will be necessary. (Complaint p. 2)

Moreover, as was the case in *Caroline C.*, common questions of law and fact abound in this present action. *Caroline C.*, 174 F.R.D. at 464. In *Caroline C.*, the Plaintiffs, as in the case at bar, alleged that the policies and practices of the Defendant officials (at the HRC) increased the risk of sexual assaults at the facility and violated the Americans with Disabilities Act, the Rehabilitation Act, and Constitutional provisions. (*compare* *Caroline C.*, 174 F.R.D. at 464 *with* Complaint ¶¶ 149-200). Based on these allegations, combined with the definition of the class, the Court in *Caroline C.* determined that the commonality requirement had been met. *Caroline C.*, 174 F.R.D. at 464. In making this determination, the Court noted that “As all members of the class... are or will be subject to the defendants’ policies and practices while they are residents at (the defendants’ facilities), it is quite clear that ‘the course of conduct giving rise to a cause of action affects all class members.’” *Id.* (quoting *Lockwood*, 162 F.R.D. at 575). This action almost identically mirrors the situation presented in *Caroline C.*, at least as it relates to the rationale for class certification. Here, the proposed plaintiff class is defined as “All women who were subjected to rape, sexual assault, sexual harassment, sexual exploitation, and physical assault, during all material times, while in the care and custody of Nebraska Health and Human Services System (NHHSS) as residents at one or more of the NHHSS residential mental health facilities; and all women who are currently, or in the future will be, in the care and custody of the NHHSS and placed as residents at one or more of the NHHSS residential mental health facilities.” Furthermore, as in *Caroline C.*, the plaintiffs herein are alleging that the policies and practices of the Defendant officials increased the risk of sexual assaults at the facility and violated, *inter alia*, the Americans with Disabilities Act, the Rehabilitation Act, and numerous Constitutional provisions. (*compare* *Caroline C.*, 174 F.R.D. at 464 *with* Complaint ¶¶ 149-200). Thus, as in *Caroline C.*, there exist ample common questions of law and fact in the present action, and the “commonality” requirement of F.R.C.P. 23(a)(2) is amply satisfied.

3. The Claims of the Representative Plaintiffs are Typical of the Claims of the Class.

The “typicality” requirement of F.R.C.P. 23(a)(3) is satisfied in this case because the class representatives have suffered deprivations affecting the entire class and all members of the class would benefit from the Plaintiffs’ actions. Typicality is met when either the claims of the representative Plaintiffs emanate from the same event, or when the claims are based on the same legal theory as the claims of the class members. *Caroline C.*, 174 F.R.D. at 465; *Lockwood*, 162 F.R.D. at 575. If all the members of the purported class would be benefited by the Plaintiffs’ action, then the requirement *has been met*. *Ellis*, 404 F. Supp. at 396; *Baby Neal*, 43 F.3d at 57-58.

Additionally, a strong similarity of legal theories satisfies the requirement, despite any substantial factual differences that may exist between any or all individual plaintiffs and the members of the proposed class. *Caroline C.*, 174 F.R.D. at 465; *Lockwood*, 162

F.R.D. at 575; *Baby Neal*, 43 F.3d at 58. In particular, when an action challenges a policy or practice, the named Plaintiffs suffering one particular injury from the practice can represent a class suffering other injuries when those injuries emanate from the same practice. *Baby Neal*, 43 F.3d at 58; *Caroline C.*, 174 F.R.D. at 465.

In this case, typicality is met under *either* test. The claims emanate from the same events, and the claims are based on the same legal theories as the claims that could be raised by the proposed class members. The deprivations and violations of rights in this case stem from the Defendants' deficient policies and practices related to the duty to protect those women within their custody from harm, and in a failure to meet the treatment rights of those within their custody. (Complaint ¶¶ 149-200). As stated in *Baby Neal* and *Caroline C.*, the harm, such as the Defendants' failure to provide appropriate mental health treatment to the women in this case, resulted from the Defendants' policies and practices and all members of the class are harmed by these practices. *Baby Neal*, 43 F.3d at 58; *Caroline C.*, 174 F.R.D. at 465.

The class consists of approximately 1,000 women who are harmed by the failure to protect, and by the treatment policies of NHHSS as applied at NHHSS mental health facilities.¹⁷ The representative Plaintiffs' claims arise out of the same policies, procedures, practices, and deprivations of the Defendants that affect the class as a whole. (Complaint ¶¶ 149-200). Furthermore, the claims also emanate from the same legal theories regarding the deprivation of certain Constitutional rights, and the breach of a duty to protect and provide mental health treatment. *Id.*

Finally, as articulated in *Ellis*, and *Baby Neal*, the actions of the Plaintiffs will benefit the class as a whole. *Ellis*, 404 F. Supp. at 396-397; *Baby Neal*, 43 F.3d at 58. On the basis that the deprivations and violations of rights alleged by the Plaintiffs stem from the same deficient policies and practices, any successful action by the Plaintiffs will necessarily benefit the entire class through the avoidance of further deprivations and violations.

Because the representative Plaintiffs have suffered deprivations and violations of rights emanating from the same events and legal theories, and because the actions of the Plaintiffs would benefit the class as a whole, the typicality requirement of F.R.C.P. 23(a)(3) has been amply met, and this case should be certified as a class action.

4. The Representative Plaintiffs will Fairly and Adequately Protect the Interests of the Class.

The "adequacy of representation" requirement of F.R.C.P. 23(a)(4) is amply met in this case for two reasons. First, the Plaintiffs' interests in this case are coextensive with the interests of the remainder of the class. Second, the Plaintiffs' attorneys are fully competent to prosecute this case as a class action. Under F.R.C.P. 23(a)(4), there are two factors which must be met: (1) The representatives' interests must be coextensive and not antagonistic to the interests of the remainder of the class, so that their goals and viewpoints will not diverge, and (2) the representatives and their attorneys must be able and willing to prosecute the action competently and vigorously. *Lockwood*, 162 F.R.D. at 576; 5 Matthew Bender, *Moore's Federal Practice*, §23.07 (2002).

In respect to the first requirement, because this case involves deprivations of constitutional and statutory rights based on the Defendants' policies and practices, this

¹⁷ See note 5, *supra*.

requirement is met. (See Complaint ¶¶ 149-200). The attempt to require the Defendants to bring NHHSS policies and practices up to constitutional and statutory requirements is coextensive, and in no way antagonistic, to the interests of the proposed class. Additionally, there is absolutely no evidence of collusion, or of conflicting claims among members of the class. *See Ellis*, 404 F. Supp. at 397. (“Adequacy of Representation” requirement met when there was no evidence of conflicting claims).

In respect to the second requirement, the representative Plaintiffs are willing and able to proceed with the action, and the Plaintiffs’ counsel are fully competent to prosecute the class action. In its role as the designated protection and advocacy system for individuals with developmental disabilities or mental illness, Nebraska Advocacy Services, Inc., (hereinafter “NAS”) has the authority and duty to pursue legal, administrative, and other approaches as may be necessary, to protect and advocate for the rights of those persons within the State of Nebraska who are, or who may be eligible for treatment, services, or habilitation due to their disabilities.¹⁸ NAS has represented hundreds of clients in individual actions, and has represented class members in the past to secure rights and entitlements for Nebraska citizens who have developmental disabilities or mental illness.¹⁹ Additionally, three full-time attorneys, two case advocates/paralegals, and two part time law clerks have been assigned by NAS to prosecute this action.²⁰ The attorneys have a combined 36 years representing clients with developmental disabilities and mental illnesses, and one of them has previously prosecuted class actions.²¹

In summation, the claims of the representative Plaintiffs are coextensive with the claims that could be raised by the proposed class. Additionally the representative Plaintiffs’ claims are in no way antagonistic to those of the class. Finally, the representative Plaintiffs’ counsel are fully competent to prosecute this case as a class action, and the representative Plaintiffs are willing and able to proceed in vigorously pursuing the claims and the interests of the class. Based on these considerations, the requirements of F.R.C.P. 23(a)(4) are amply met, and this case should be certified as a class action.

C. In Addition to The Four Factors Delineated Under Rule 23(a) of the Federal Rules of Civil Procedure, The Requirements of Rule 23(b) are also amply met in this case.

In addition to satisfying the requirements of F.R.C.P. 23(a), the Plaintiffs also amply meet the requirements of F.R.C.P. 23(b). Specifically, the Plaintiffs meet the separate requirements of 23(b)(2) and 23(b)(1)(B) respectively. Moreover, it should be noted that in order to fully qualify for class certification under Rule 23(b), it is only necessary that one of the 23(b) categories be met. In this case, the Plaintiffs amply qualify in that they meet the requirements of more than one of the 23(b) categories.

Federal Rule of Civil Procedure Rule 23(b) provides, in part, that:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

¹⁸ Exhibit 12 of class certification, Affidavit of Bruce G. Mason.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

(1) the prosecution of separate actions against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;... Federal Civil Judicial Procedures and Rules, 121, (rev. ed., West 2002).

The Plaintiffs in this action amply satisfy the criteria of Rule 23(b)(2) and the criteria of Rule 23 (b)(1)(B).

Regarding F.R.C.P. 23(b)(2), in this case, the party opposing the class has acted and refused to act on grounds generally applicable to the class as a whole, making injunctive relief appropriate to the class as a whole. (Complaint p. 2 and ¶¶ 149-200). The requirement of F.R.C.P. 23(b)(2) “is almost automatically satisfied in actions primarily seeking injunctive relief.” *Caroline C.*, 174 F.R.D. at 467 (quoting *Baby Neal*, 43 F.3d at 58 (emphasis added)). This injunctive class provision is especially applicable to civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons. *Baby Neal*, 43 F.3d at 58. Additionally, “Rule 23(b)(2) was enacted in part for the specific purpose of assuring that the class action device would be available as a means of enforcing the civil rights statutes.” *Caroline C.*, 174 F.R.D. at 467 (quoting 3B *Moore’s Federal Practice* ¶ 23.02[2.6], at 23-44; and Newberg, *Class Actions* § 4.11, at 4-37). The rule does not

require that the Defendants act identically with respect to every member of the class. *Baby Neal*, 43 F.3d at 58. Rather, all that is required is that the Defendants' challenged conduct or policy has general application to the entire class. *Id.*

In this case, the deprivations of constitutional and statutory rights affect and apply to all current and future women who are and will be in the custody of the Defendants at NHHSS mental health facilities. (Complaint p. 2). The Plaintiffs in the case at bar seek to redefine the relationship between the Defendants and the entire class. *Id.* This is exactly what the plaintiffs sought in *Caroline C. Caroline C.*, 174 F.R.D. at 467. In that case, on this very basis, the Court held that because "plaintiffs seek to redefine the relationship between the defendants and the entire class, certification under Rule 23(b)(2) is appropriate. *Caroline C.*, 174 F.R.D. at 467 (citing *Baby Neal*, 43 F.3d at 59). Furthermore, in *Caroline C.*, the plaintiffs sought only injunctive and declaratory relief. *Caroline C.*, 174 F.R.D. at 467. As such, the Court in that case found that the case "clearly falls within the parameters of the injunctive provision of Rule 23(b)(2)." *Id.* (emphasis added). As in *Caroline C.*, the case at bar is a civil rights action seeking only injunctive and declaratory relief for a large group of women, including potential future class members.²² (See also Complaint p. 2). Such circumstances necessarily make injunctive relief appropriate to the class as a whole, thus clearly meeting the requirement of Rule 23 (b)(2).

Alternately, the requirement of Rule 23(b)(1)(B) is also amply met in this case. Although actions involving injunctive and declaratory relief that affect the interests of an entire class are most frequently brought under Rule 23(b)(2), they may also be brought under other sections of Rule 23 as well. *Caroline C.*, 174 F.R.D. at 467. Rule

²² See note 5 *supra*, and accompanying text.

23(b)(1)(B) allows for certification where “adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest.” F.R.C.P. 23(b)(1)(B). In *Caroline C.*, the Court held that certification was appropriate under *both* Rule 23(b)(2) *and* Rule 23(b)(1)(B). *Id.* In making its determination regarding Rule 23(b)(1)(B), the Court in *Caroline C.* looked at the fact that the plaintiffs were seeking changes in the policies and practices of the defendants, and explained that such changes “would affect absent members of the class, because they are or will be subject to those policies and practices.” 174 F.R.D. at 467. In precisely the same way, the Plaintiffs in this action are seeking changes in the policies and practices of the Defendants. (Complaint pp. 53-59). Thus, individual adjudications in this matter would affect the class members because they are or will be subject to those policies and practices. Overall, this is precisely the type of action that is typically handled as a class action, and can best be handled as a class action. *See generally, Baby Neal*, 43 F.3d 48; *Caroline C.*, 174 F.R.D. at 467. Therefore, in addition to meeting the requirements of Rule 23(b)(2), the Plaintiffs amply meet the requirements of Rule 23(b)(1)(B) as well, and class certification is appropriate under both sections.

D. Notice to Class Members is Not Required for Class Actions Maintained Under Federal Rules of Civil Procedure 23(b)(2) or 23(b)(1)(B). However, Should this Court Desire Notice, Reasonable Methods are Available.

While notice to class members is required in class actions maintained under F.R.C.P. 23(b)(3), notice to class members is *not* required for class actions brought under F.R.C.P. 23(b)(2) or 23(b)(1)(B). (*compare* F.R.C.P. 23(c)(2)(B) (requiring notice for actions maintained under F.R.C.P. F.R.C.P. 23(b)(3)) *with* F.R.C.P. 23(c)(2)(A) (stating, “For any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class.” *Id.* (emphasis added)). However, if this Court deems any notice desirable or warranted, such notice could easily be accomplished by statewide newspaper publication in the Omaha World Herald. Additionally, as to future class members, on the

basis that the NHHSS will be the first to have knowledge of potential future members, notice could be provided via publication/posting at the NHHSS mental health facilities implicated in this action.

CONCLUSION

For the reasons stated above and those set forth in the complaint filed herein, the Plaintiffs respectfully submit that this action should be certified as a class action pursuant to F.R.C.P. 23. The Plaintiffs amply meet all four of the requirements set forth under Rule 23(a). Additionally, while only one section of Rule 23(b) need be met, the Plaintiffs fully meet the criteria of both Rule 23(b)(2) and Rule 23(b)(1)(B). Finally, notice to the class members is not required for class actions certified pursuant to Rule 23(b)(2) or 23(b)(1)(B). However, if this Court deems any notice desirable or warranted, such notice could easily be accomplished as described above. Thus, all of the requirements of F.R.C.P. 23 for class certification are amply met in this matter, and this case should accordingly be certified as a class action.

Respectfully submitted this 18th day of March, 2005.

ELIZABETH M., et al., Plaintiffs.

By: s/Bruce G. Mason

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2005 I electronically filed the foregoing Plaintiffs' Brief in Support of Motion for Class Certification with the clerk of the court using the CM/ECF system which sent notification of such filing to Douglas D Dexter, Assistant Attorney General, Frederick Coffman, Assistant Attorney General, Bruce G. Mason, Michael J. Elsken, and Matt D. Schulz, attorneys for Plaintiffs.

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