UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

S.S., a minor, by his mother, S.Y., on behalf of himself and other similarly situated students, the PARENT/PROFESSIONAL ADVOCACY LEAGUE, and the DISABILITY LAW CENTER Plaintiffs, v. CITY OF SPRINGFIELD, MASSACHUSETTS; SPRINGFIELD PUBLIC SCHOOLS, Defendants.	NO. 3:14-cv-30116

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

"[The Public Day School] is really sub par and I just feel like the expectations for [children there] are much lower . . .. [We should] just shut [the Public Day School] down . . .. The counselor is totally unwilling to make an individualized sheet or to use a visual schedule. Nothing is individualized. So frustrating. How can we actually defend this place? Really."

- September 2015 Email from a Springfield behavior specialist to Springfield's Supervisor of Clinical and Behavioral Services

"In my experience as a professional educator, I have never heard such consistently and vividly negative characterizations by parents of their children's school."

- Education expert Dr. Peter Leone

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I. INTRODUCTION

In Springfield's public schools, children with mental health disabilities do not receive the same educational opportunities offered to children without disabilities. They are needlessly segregated, against their families' wishes, in a separate school. This separate school—called the Public Day School—provides an education that Springfield's own education professionals call "sub-par" compared to Springfield's regular, "neighborhood" public schools.

Springfield's treatment of children with mental health disabilities is illegal. Under Title II of the Americans with Disabilities Act, 42 U.S.C §§ 12131-65, and its implementing regulations, 28 C.F.R. §§ 35.001-.999 (collectively the "ADA"), Defendants City of Springfield and its Public Schools (collectively "Springfield") are required to provide children with disabilities educational opportunities equal to those provided to their peers without disabilities. *See* 28 C.F.R. § 35.130(b)(1)(ii). The ADA also prohibits Springfield from unnecessarily segregating students because of their disabilities. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599, 607 (1999), 28 C.F.R. § 35.130(d). Further, the ADA mandates that Springfield make the reasonable modifications necessary to provide an equal education for children with mental health disabilities, in integrated settings. *See* 28 C.F.R. § 35.130(b)(1)(iii).

In violation of the ADA, Springfield:

1. "Afford[s] [the student class] an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others," 28 C.F.R. § 35.130(b)(1)(ii);

2. "Provide[s] [the student class] an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others," 28 C.F.R. § 35.130(b)(1)(iii);

3. Fails to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d), which the Attorney General has defined as "a setting that

enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible," 28 C.F.R. pt. 35, App. B, p. 674;

4. Fails to "make reasonable modifications . . . necessary to avoid discrimination," 28 C.F.R.§ 5.130(b)(7); and

5. "[U]tilize[s] criteria or methods of administration … [t]hat have the . . . effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities," 28 C.F.R. § 35.130(b)(3)(ii).

Plaintiffs do not seek monetary damages. They are not demanding, in this proceeding, that the Court create individualized education programs for class members. Rather, Plaintiffs seek, on behalf of affected children, a declaration and an injunction requiring Springfield to comply with the ADA by providing the school-based behavior services ("SBBS") required to eliminate these ADA violations. To that end, Plaintiffs have asked[1] the Court to certify a class of all students with a mental health disability[2] who are or who have been enrolled in the Public Day School, and who are not being educated in a neighborhood school.[3] Plaintiffs' First Amended Complaint, ECF no. 55 ("FAC") ¶ 39.

Courts have certified classes in virtually every ADA cases like this one. And for good reason. While no two children in the class are identical, each class member has a disability and has suffered the same injuries as a result of the same Springfield policies and practices. S.S.'s

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[1] Plaintiffs filed a motion for class certification on October 16, 2015. ECF no. 96. Preliminary briefing was filed in October and November 2015. ECF nos. 97, 101. This supplemental briefing, which follows initial discovery, has been contemplated throughout the case. *See* Scheduling Orders, ECF nos. 137, 150.

[2] A "mental health disability" is a mental or emotional impairment that substantially [?? ask Kathy] limits one or more major life activities, including developing and maintaining relationships. *See* FAC ¶ 90.

[3] We use "neighborhood school" as shorthand for the schools in which Springfield educates children without a mental health disability. *See* FAC ¶¶ 1, 2.

claims, in these core ways, are typical of those of the class. There is no conflict preventing him from pursuing relief on the class's behalf. Further, a class action and injunction are the most efficient and equitable way to remedy the class's injuries. The Court should, accordingly, certify the proposed class.

II. FACTS

While only limited discovery has occurred, the record[4] demonstrates why class certification is warranted.

A. An Expert Review Finds Springfield Is Systematically Failing Children With Mental Health Disabilities.

From January through May of 2016, Peter Leone, a Professor at the University of Maryland and nationally recognized authority in the education of children with mental health disabilities,[5] conducted a review of Springfield's treatment of the student class. *See* Leone Rpt.

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[4] The record includes a statement from Plaintiffs' Expert, Peter E. Leone, Ph.D. ("Leone Rpt."), attached as Exhibit A to the Declaration of Peter E. Leone, Ph.D.; other declarations including those of parents of students and a student in the proposed class; of Christine Griffin, Executive Director of Plaintiff Disability Law Center ("DLC"); of Lisa Lambert, Executive Director of Plaintiff Parent Professional Advocacy League ("PPAL"); and of Patrick Sparks, Attorney-in-Charge, Committee for Public Counsel Services Youth Advocacy Division; data and documents produced by Defendants; publically available data and documents; and the FAC.

[5] Dr. Leone is an expert in special education and in providing educational programs and services for children and adolescents with mental health disabilities. Leone Rpt. ¶¶ 2-7, and Ex. 1, attached to Leone Rpt. In conducting his review, Dr. Leone reviewed the records for a statistically valid, randomly selected sample of 24 class members and interviewed 12 of these students and/or their families. Leone Rpt. ¶¶ 8-9, 12. In addition, Dr. Leone reviewed the Springfield school records of an additional 16 students who were not randomly selected but who had consented to participate in Dr. Leone's review, including Plaintiff, S.S. and N.D., a constituent of PPAL and DLC whose experiences are described in the FAC. *See* Leone Rpt. ¶ 18; FAC ¶¶ 74-83, 86. Dr. Leone interviewed the families of 7 of the 16 students, including S.S.'s parents. Leone Rpt. ¶ 18. Dr. Leone also reviewed Springfield's policies and procedures, other documents and data and 130 redacted Individualized Education Programs ("IEPs"). Leone Rpt. ¶¶ 22-28.

Dr. Leone's findings include:

- "[C]hildren [in the student class] need a common set of services . . . 'SBBS'." Leone Rpt. ¶ 30.
- "[T]he class could successfully be educated in an integrated setting in their neighborhood schools if afforded appropriate SBBS." Leone Rpt. ¶ 32.
- "For every student who was placed in the Public Day School from the neighborhood schools [whose records I reviewed], the records show that [Springfield] failed to provide appropriate SBBS in the neighborhood schools prior to the student's transfer to the Public Day School." Leone Rpt. ¶ 38.
- "[T]he children placed in the [Springfield] Public Day School receive an inferior education and are denied services, activities, and supports that [Springfield] students who are educated in their neighborhood . . . schools routinely receive." Leone Rpt. ¶ 33.
- "[P]lacing children in the Springfield Public Day School contributes to the poor academic and social outcomes experienced by the class." Leone Rpt. ¶ 94.
- "The evidence I reviewed . . . supports the conclusion that placement of children in the [Springfield] Public Day School makes their mental health disabilities worse." Leone Rpt. ¶ 98.

Moreover, Dr. Leone contends that, even if SBBS were provided, sending the student class to the Public Day School would still be inappropriate and unequal, because:

- "Segregated education is inherently unequal." Leone Rpt. ¶99.
- Segregation in the Public Day School "deprives [the student class] of . . . the normalizing experiences of childhood." Leone Rpt. ¶ 98.
- Segregation in the Public Day School "contributes to children's feelings of inadequacy and inferiority." Leone Rpt. ¶ 97.
- Segregation in the Public Day School "increases the likelihood that these children will . . . experience stigma and isolation as they age." Leone Rpt. ¶ 97.

B. <u>Springfield Systemically Fails to Provide SBBS to Class Members</u>

Dr. Leone explains that there is a professional consensus that students like those in the student class require SBBS to be successfully educated in neighborhood schools, and to have the same opportunity to learn, advance from grade to grade, and graduate as students without

disabilities. Leone Rpt. ¶ 41. Dr. Leone also attests that SBBS are essential to affording equal educational opportunity to students such as those in the class and to enabling them to be educated in neighborhood schools. Leone Rpt. ¶¶ 41-42, 68-69.

SBBS are provided routinely by school systems. *See* Leone Rpt. ¶ 41. The essential components of SBBS include: (a) a comprehensive assessment, including determination of the purpose and triggers for the child's behavior; (b) a school-based intervention plan that relies on positive support, social skills building, a care coordinator, and adjustments as needed to the curriculum or schedule; (c) training for school staff and parents in implementing the plan; and (d) coordination with non-school providers involved with the child. FAC ¶ 60; Leone Rpt. ¶ 30.

Dr. Leone found that Springfield failed to provide SBBS in the neighborhood schools to *every* student whose records he reviewed. Leone Rpt. ¶¶ 38, 50-52. Dr. Leone also found that Springfield "systematically denies students in the class the SBBS they need to enjoy equal educational opportunity and to be educated in neighborhood schools." Leone Rpt. ¶ 42; *see also* ¶ 71 (Class members' behavioral problems "went unaddressed or were ineffectively addressed in neighborhood schools"). The result is that children, whose mental health disabilities are treatable, are allowed to suffer and decline. *See* Leone Rpt. ¶ ¶ 59, 65, 68-69. Eventually, many of these children are transferred to the Public Day School, where their mistreatment continues. *See* Leone Rpt. ¶¶ 77, 83-84. According to Dr. Leone, Springfield's "response to students' mental health needs suggests that one size fits all" and Springfield's practices "harm[] all students in the class." Leone Rpt. ¶ 54.

1. <u>Springfield Fails To Provide Meaningful Assessments.</u>

A comprehensive assessment is an essential part of SBBS. Without such assessments, Springfield is unable to provide SBBS, with the result that students are removed from

neighborhood schools and placed in the Public Day School. Leone Rpt. ¶¶ 30, 31, 43.

Dr. Leone found that Springfield does not provide the student class with comprehensive assessments to determine, among other things, the purposes of and antecedents to their behaviors. Leone Rpt. ¶ 43. Springfield's assessments of children with mental health disabilities, when they are completed, are cursory and filled with boilerplate language. *See* Leone Rpt. ¶¶ 47-49. Indeed, Springfield maintains a list of stock phrases in both English and Spanish for use in student's Individualized Education Programs ("IEPs"). *See* Declaration of Matthew Bohenek ("Bohenek Decl.") Ex. 1 at SPS-Adm-041866, and its overburdened professionals are asked to "copy/paste." Bohenek Decl. Ex. 2 at SPS-Adm-042162.

That is not the same as providing SBBS, and professionals in Springfield schools have recognized as much. For example:

- Springfield's former Chief of Pupil Services described the staff in one neighborhood school as having "[n]o understanding of special education or behavioral assessments. No understanding of problem solving." Bohenek Decl. Ex. 3 at SPS-Adm-0930050.

- Springfield's Elementary Behavior Specialist and a Public Day Elementary School Counselor express concern that a particular child has not been in a neighborhood school "long enough to determine appropriate placement" but that the school is "anxious to unload" the child to the Public Day School anyway. Bohenek Decl. Ex. 4 at SPS-Adm-042443.

- One of Springfield's Special Education Supervisors complains that the principal of a neighborhood elementary school had attempted to place a child in a segregated setting "when she never even referred [the student] for an evaluation." Bohenek Decl. Ex. 5 at SPS-Adm-014076. The same supervisor remarked that it was "unbelievable" that the principal of an elementary school could be so deficient in following accepted practices. *Id.*

- Springfield's Supervisor of Clinical and Behavioral Services criticizes the neighborhood school staff for repeatedly requesting transfers of students with mental health disabilities to the Public Day School without first attempting to provide them with SBBS, stating that "I feel like these requests come at us all the time!" Bohenek Decl. Ex. 6 at SPS-Adm-082737.

- A Springfield special education team leader expressed her dismay that the counselor for

> a student with a mental health disability at a neighborhood school told the student's parent that the student "did not require an IEP, nor a 504 [plan], she willfully and intentionally misbehaves, doesn't appear depressed or demonstrates any signs of PTSD or emotional impairments," but nonetheless seeks to transfer the child to the Public Day School, which is specifically for children with disabilities. "YIKES . . . YIKES . . . YIKES . . .," she concluded. Bohenek Decl. Ex. 7 at SPS-Adm-082754-082761 (capitalization in original).

Similarly, students and parents complain that, instead of identifying and effectively addressing the needs of the student class, the neighborhood schools simply give up on them and shuttle them off to the Public Day School. Bohenek Decl. Ex. 8, Declaration of D.S. ("D.S. Decl.") ¶¶ 5, 6 (Springfield did not try to determine if child's behavioral problems were due to child's disability, and did not assess child's needs or reach out to child's mental health providers in the community); Bohenek Decl. Ex. 9, Declaration of P.R. ("P.R. Decl.") ¶7 (neighborhood school did not have the staff to meet child's mental health needs and instead simply transferred him to Public Day School); Bohenek Decl. Ex. 10, Declaration of A.P. ("A.P. Decl.") ¶ 5 (Springfield would not let child stay in the neighborhood school and told child's mother that it did not have the types of services the child needed); and Bohenek Decl. Ex. 11, Declaration of J.C. ("J.C. Decl") ¶ 5 (neighborhood school did not have the types of services that child needed); *see also* Bohenek Decl. Ex. 12, Declaration of Christine Griffin, Executive Director of the Disability Law Center, the protection and advocacy system for Massachusetts ("Griffin Decl.") ¶ 16 (Springfield "school staff often push students to segregated schools rather than work with families and children to help the students stay in integrated neighborhood school settings."); Bohenek Decl. Ex. 13, Declaration of Lisa Lambert, Executive Director of the Parent/Professional Advocacy League ("Lambert Decl.") ¶ 13 (Springfield "does not provide students with supports and services that's would help them be successful and to make progress in the most integrated setting.").

2. Springfield's Intervention Plans are Inadequate.

The second component of SBBS is an individualized plan that relies on positive support, social skills building, a care coordinator, and adjustments as needed to the curriculum or schedule. Leone Rpt. ¶ 30; FAC ¶ 60. Dr. Leone found this lacking as well. As he wrote, "Springfield does not provide effective intervention plans that rely on positive support, social skills training, a care coordinator, and necessary curriculum or schedule adjustments." Leone Rpt. ¶ 43; *see also* Lambert Decl. ¶13; Griffin Decl. ¶15.

While Springfield uses behavioral intervention plans ("BIPs"), Dr. Leone found "a uniform failure by [Springfield] to . . . develop[] and implement[] effective [BIPs]." Leone Rpt. ¶ 50. The service plans for class members "often repeat the same boilerplate language in one plan after another. Some files include documents with an incorrect name of the child and references in the plans that appear to have been developed for another child." Leone Rpt. ¶ 54.

Again, the initial record bolsters Dr. Leone's conclusions:

- After reviewing the BIP of a student with a mental health disability at a neighborhood middle school, a Springfield special education team leader remarks "I saw a copy of the BIP this morning, and boy oh boy . . . it is not comprehensive…"). Bohenek Decl. Ex. 7 at SPS-Adm-082754-082761.

- Springfield's Supervisor of Clinical and Behavior Services expresses concern about a BIP, describing it as "a crazy lame BIP w [sic] no documented interventions for a kid this intense." Bohenek Decl. Ex. 14 at SPS-Adm-083709.

- Springfield describes the Public Day School as a last resort, to be employed when other efforts have failed. But Springfield's former Director of Pupil Services complains to the Superintendent that staff are attempting to place two children at the Public Day School even though there was "no BIP, nothing in the way of intervention…" at the neighborhood school. Bohenek Decl. Ex. 15 at SPS-Adm-057195.

- Springfield's administrators find employees "just [] cutting and pasting" from a template BIP. Bohenek Decl. Ex. 16 at SPS-Adm-093101.

- An employee remarks about a child that "[t]here is a BIP but his incentive plan is the same one that the entire class is on and is not specifically tailored to his needs."

Bohenek Decl. Ex. 17 at SPS-Adm-042398.

- Springfield asks personnel to write behavioral plans for children whom they have never met. When a counselor objects that "I have never met the student or had the opportunity to observe him, so [creating a BIP] would be rather difficult," supervisors suggest workarounds—but not that the counselor actually meet with the student. *See* Bohenek Decl. Ex. 18 at SPS-Adm-042258; Ex. 19 at SPS-Adm-042335 to 37.

- When an administrator at one of the neighborhood schools attempts to refer children with mental health disabilities to the Public Day School, a principal observes that the neighborhood school had "NO evidence that the Interventions and strategies noted to reinforce replacement behaviors in the Behavioral Intervention Plan (BIP) were implemented or monitored." Bohenek Decl. Ex. 20 at SPS-Adm-012390 (capitalization in original); *see also* Ex. 21 at SPS-Adm-044370 (A school adjustment counselor writes in November, "[Student] has a BIP from last Spring, which I have been told was never implemented.").

- After reviewing a report critical of Springfield's practices, one behavior specialist remarks that she "[r]eally can't argue with any of this. . . . The only problem now is how to get staff to do this as there are not enough behavioral specialists in the district." Bohenek Decl. Ex. 22 at SPS-Adm-039050; *see also* Bohenek Decl. Ex. 23 at SPS-Adm-039040 (According to Springfield's intervention and supports coordinator, developing adequate plans might overwhelm staff: "behavior specialists might get an influx of behavior observations and would have to provide more support to the schools.").[6]

3. Springfield Fails To Provide Adequate Training.

The third component of SBBS is training for school staff and parents in implementing the intervention plan. Leone Rpt. ¶ 30. Dr. Leone found that Springfield fails to train parents and staff to provide consistent interventions for the students in support of the school's intervention plan. *See* Leone Rpt. ¶ 43. Springfield's internal emails refer to training as "an area which is currently a weakness." Bohenek Decl. Ex. 25 at SPS-Adm-025238. An administrator notes that

[6] In some instances, the limited supports available at the neighborhood school are improperly used as punishment. Bohenek Decl. Ex. 24 at SPS-Adm-042746 ("This has been an on-going concern at Commerce [High School]. SEBS needs to be utilized proactively, not as punishment. This has not always been the case and leads to a lot of frustration with SEBS staff . . . .The SEBS teachers tell me that administration calls them to come to get students who are in violation of the Code of Conduct."). "SEBS" is an acronym for Social Emotional Behavior Support Program offered at some neighborhood schools.

staff needs "[m]ore hands on and functional training" concerning BIPs. *Id.*; *see also* Bohenek Decl. Ex. 26 at SPS-Adm-044197 (Springfield's Elementary Behavior Specialist states, "She is not the only new [School Adjustment Counselor] that has gotten 0 training about procedures in the district. We will just fill in gaps when they become evident.").[7]

4. Springfield Does Not Coordinate Care.

The fourth component of SBBS is coordination with non-school providers who are involved with the child. Leone Rpt. ¶ 30; FAC 60. Dr. Leone found that Springfield "engaged in little to no coordination with outside providers." Leone Rpt. ¶ 43. Indeed, when Springfield's own mental health professionals have sought to coordinate mental healthcare for students, administrators have often rebuffed that effort, claiming that the burden of coordination rests on parents. In one telling example involving a child from the sample group, a Springfield behavior specialist asks a colleague to invite the child's "team," including his Department of Children and Families (DCF) caseworker, to a behavioral assessment meeting. The colleague refuses, averring "[i]t is the parent's responsibility to invite any outside agencies." Bohenek Decl. Ex. 32 at SPS-Adm-010681. In subsequent correspondence, a supervisor agrees with the behavior

[7] Springfield school staff also lack training in punitive approaches to behavior, such as restraints, that staff turns to instead of SBBS. *See* Bohenek Decl. Ex. 27 at SPS-Adm-041721 (email from the Public Day High School Assistant Principal identifying three teachers who "still need Initial [restraint] training"); Ex. 28 at SPS-Adm-092884 (discussing teacher discipline of a teacher who is "not [] trained" in restraint techniques). Emails suggest that *none* of the staff at one middle school may be trained on restraint methods despite concerns about a student who "has the potential to lose it" and instructions to restrain the student as needed. Bohenek Decl. Ex. 29 at SPS-Adm-092557 to 59 (lack of policy and training discussed in response to concern raised by reading coach that she is "[n]ot sure if the staff here is trained for this type of situation. . . what if she had to be restrained in the classroom"). The result of this inadequate training is that students are injured. Bohenek Decl. Ex. 30 at SPS-Admin-092367 ("her son was restrained in school, had bruises around his neck and face and a burn abrasion behind his ear"); Ex. 31 at SPS-Adm-043404 (grandmother raised concerns about bruise on grandchild's chest following a "full security hold" at the Public Day School's elementary campus).

specialist that although it would be a "[b]est practice" for the district to coordinate care, "technically we're not obligated." Bohenek Decl. Ex. 33 at SPS-Adm-010718. On another occasion, in response to direction not to reach out to parents directly because of a lack of resources, a coordinator of testing says "[i]t sounds to me like you are saying that this is their [the parents'] proverbial problem and not ours." Bohenek Decl. Ex. 34 at SPS-Adm-034696.

C. SBBS Would Allow The Class To Succeed In Neighborhood Schools.

Dr. Leone is "confiden[t]" that with SBBS, "the class could successfully be educated in an integrated setting in their neighborhood schools"—that is, in the schools where their peers and friends without disabilities are educated. Leone Rpt. ¶ 32, *see also* ¶¶ 68, 69; *see also* Griffin Decl. ¶¶ 12-13; Lambert Decl. ¶¶9, 11. None of the children in Dr. Leone's review "stood out as having extraordinary challenges," and "[a]ll experienced behavioral and academic challenges similar to those faced by countless other students with whom I have worked and who have been educated successfully in neighborhood schools." Leone Rpt. ¶ 70.

D. Springfield Mandates Transfer to the Public Day School.

Every child in the class was transferred to the Public Day School. While parents—most of them without any resources to fight back—acquiesce to their children's placement in the Public Day School, they are not given a choice. A.P. Decl. ¶ 6 ("The SPS staff did not give me any other options so I felt I had no other choice"); J.C. Decl. ¶ 6 ("The SPS staff did not give my mom and me any other options. SPS did not give me any other choice but to go to [the Public Day School] even though I did not want to go to school there."); D.S. Decl. ¶ 8 ("[Springfield] told me that we did not have a choice and that [my child] had to attend [the Public Day School], explaining that [my child]'s behavior problems required him to. . . "); Bohenek Decl. Ex. 35, Declaration of M.P. ("M.P. Decl.") ¶10 ("[Springfield] assigned [L.P.] to the [Public Day

School]. I was not given any other choice . . . "); P.R. ¶12 ("[Springfield] told me that we did not have a choice and that J.R. had to attend [the Public Day School]").

In sum, Springfield "push[es] students to segregated schools rather than work with families and children to help the students stay in integrated neighborhood school settings." Griffin Decl. ¶ 14.

E. The Public Day School Provides An Inferior Education.

Dr. Leone found that, on a variety of metrics, the Public Day School is inferior to Springfield's neighborhood schools. *See* Leone Rpt. ¶ 33 ("the children placed in the [Springfield] Public Day School receive an inferior education"); Leone Rpt. ¶ 80 ("[t]he inferior education provided in the Public Day School").

1. Families Recognize The Public Day School As Inferior.

With alarming frequency, students and their families describe the Public Day School as a "jail" or "prison." Leone Rpt. ¶ 83; *see also* ¶¶ 76, 77; P.R. Decl. ¶ 13. They describe a placement in the Public Day School as akin to a finding of "juvenile delinquency." *See e.g.*, A.P. Decl. ¶ 6. All commented on the inferior services and/or extracurricular activities at the Public Day School. *See* Leone Rpt. ¶ 77; D.S. Decl. ¶17; M.P. Decl. ¶¶ 11-13; P.R. Decl. ¶¶ 16-18; A.P. Decl. ¶¶ 7-8.; J.C. Decl. ¶¶ 7-10. Dr. Leone reported that "[i]n my experience as a professional educator, I have never heard such consistently and vividly negative characterizations by parents of their children's school." Leone Rpt. ¶ 83.

Not surprisingly, nearly every family with a child at the Public Day School says that they would prefer for the child to be educated in a neighborhood school. *See* Leone Rpt. ¶ 95; *see also* A.P. Decl. ¶¶ 11-12; J.C. Decl. ¶ 14; D.S. Decl. ¶¶ 20-21, M.P. Decl ¶¶ 11, 14, 15; P.R. Decl. ¶¶ 14, 20; Griffin Decl.¶ 14; Lambert Decl. ¶ 12.

2. The Public Day School Offers Inferior Academics.

Academically, students in the Public Day School do not have the same opportunity to learn and to graduate that is afforded their peers without a disability in Springfield's neighborhood schools. *See* Leone Rpt. ¶¶ 41, 75. Dr. Leone found, "[T]he children placed in the [Springfield] Public Day School receive an inferior education and are denied services, activities, and supports that [Springfield] students who are educated in their neighborhood … schools routinely receive." Leone Rpt. ¶ 33; *see also* ¶ 75 ("Class members receive inferior educational services …."); ¶ 85 ("S.S.'s academic experience in the Public Day School is typical of the class members I reviewed and was dramatically below that which would be considered minimally acceptable by professional standards.").

Students enrolled in the Public Day School lack access to courses available to students in Springfield's neighborhood schools. Leone Rpt. ¶ 34. The Public Day School also requires fewer credits for graduation, meaning students in the class receive about one semester less of education than their peers in the neighborhood schools. *See* Bohenek Decl, Ex. 36; Leone Rpt. ¶ 34.

The inferiority of the education at the Public Day School is reflected in the students' shockingly low standardized test scores. Leone Rpt. ¶ 80 (citing Massachusetts Department of Elementary & Secondary Education's ("DESE") annual MCAS testing data for the 2014-15 school reporting that MCAS Science and "Tech/Eng" test were rated as 93% failing, 7% in need of improvement, and 0% proficient or advanced as compared to state-wide averages for 8th graders of 18% failing, 40% in need of improvement, and 42% proficient or advanced).

3. The Public Day School Has Inferior Extracurricular Activities.

Public Day School students also lack access to nearly all of the after-school clubs and

after-school activities available to students at Springfield neighborhood schools, such as art, poetry, boys and girls club, snowboarding, and cultural groups. Leone Rpt. ¶¶ 81, 86. Unlike their peers in neighborhood schools, the vast majority of high-school-age Public Day School students are not able to play intramural or inter-district sports. *See* Leone Rpt. ¶ 81-82; *see also* J.C. Decl. ¶¶ 9-10 (denied opportunity to play baseball at Public Day School); A.P. Decl. ¶ 7 (same); D.S. Decl. ¶ 17; M.P. Decl. ¶ 13.

4. The Public Day School Has Inferior Facilities.

Physical facilities at the Public Day School are inferior to neighborhood school buildings. Leone Rpt. ¶ 78. Springfield itself seems to recognize the inferiority of the Public Day School facilities: the district budget displays pictures that purport to be of the Public Day School campuses but are instead pictures of newer, better buildings. Leone Rpt. ¶ 78.

In December, the Principal of the Public Day Schools outlined the following issues with the Public Day Middle School: "Broken Windows in several classrooms. . . Unregulated heating throughout the building. (extremely cold on Monday's. I experienced this myself . . . and am very concerned for upcoming winter). . . [and] [h]oles in walls in classrooms." Bohenek Decl. Ex. 37 at SPS-Adm-056508. A school adjustment counselor at the Public Day School asked whether she should be concerned about: "The front closet that has the red tiles (which were previously identified with asbestos) is where staff stores the student's belongings, such as coats, phones, etc. The students' belongings are stored here all day long every day on top of these asbestos tiles." Bohenek Decl. Ex. 38 at SPS-Adm-056751.

5. The Public Day School is Not Therapeutic.

The Public Day School "makes [students'] mental health disabilities worse." Leone Rpt. ¶ 98. Contrary to Springfield's description of it to parents, it is not a therapeutic learning

environment. FAC ¶ 3. Students are punished for behavior that is symptomatic of their emotional and behavioral disabilities. Leone Rpt. ¶ 84. And the Public Day School is staffed by personnel that "doesn't get it" and "has no business there" according to Springfield's own Supervisor of Clinical and Behavioral Services and Behavior Specialist. Bohenek Decl. Ex. 39 at SPS-Adm-045721.

"Parents repeatedly stated that the Public Day School campuses were punitive environments that exacerbated their children's mental health problems." Leone Rpt. ¶ 76; *see also* A.P. Decl. ¶9 (her child "was often punished as part of a group punishment for misbehavior on the part of other students"); J.C. Decl. ¶¶ 11-12 (same); D.S. Decl. ¶¶ 12-14; ("After [my child] was placed in the [Public Day School], I became concerned with my child's safety . . . . [My child's outside of school] therapist recommended that [Springfield] change my child's placement. . . . [It] has been a very chaotic school environment for my child"); P.R. Decl. ¶18 ("[the Public Day School] is not helping J.R. with his behavioral problems.); M.P. Decl. ¶ 11 ("the staff at [the Public Day School] . . . threatened my child with court or probation.").

Dr. Leone observed that the Public Day School punishes children for behavior resulting from their disabilities by repeatedly suspending, restraining, or isolating them. Leone Rpt. ¶ 50. Dr. Leone reported, "These actions by [Springfield] are inappropriate. They constitute . . . punishment for a disability." Leone Rpt. ¶ 50. The Public Day School suspends children disproportionately frequently. Leone Rpt. ¶ 79 (citing the 2014-15 DESE data showing that the district suspension rate for Springfield was 8.7 % while the suspension rate for students attending the Public Day School high school campus was 38.6% and for the Public Day School middle school campus the rate was 36.8%); *see also* Griffin Decl. ¶17; Lambert Decl. ¶ 14. Students drop out due to the inferior education and punitive climate of the Public Day School. *See also*

J.C. Decl. ¶¶ 11-13; A.P. Decl. ¶¶ 9-10; *see also* Bohenek Decl. Ex. 40, Declaration of Patrick Sparks ¶ 17 (noting the increased numbers of school based arrests of students in the PDS due to, among other things, decreased educational support).[8]

6. The Needless Segregation of Class Members Results in an Inherently Inferior Education.

Dr. Leone found that the placement of class members in the segregated Public Day School inherently deprives them of an equal education opportunity. Leone Rpt. ¶¶ 93, 99. Their involuntary segregation at the Public Day School causes the students to be unnecessarily stigmatized and isolated, and contributes to their feelings of inadequacy and inferiority. Leone Rpt. ¶¶ 96, 97. It restricts their exposure to students without disabilities in a normal educational setting, and hence their ability to learn from and to interact with peers without disabilities. Leone Rpt. ¶ 97. It also increases the likelihood that these children will continue to experience stigma and isolation as they age. Leone Rpt. ¶¶ 35, 96, 97. It deprives them of the opportunity to benefit from peer role models and the normalizing experiences of childhood. Leone Rpt. ¶ 98.

Unsurprisingly, class members want to be educated in neighborhood schools, and their families overwhelmingly share that desire. Leone Rpt. ¶ 95, *see also* D.S. Decl. ¶¶ 20-21 ("I truly hate sending my child to [the Public Day School]. . . . I would very much like for [my child] to attend one of [Springfield's] neighborhood high schools with services to meet his needs.

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[8] The overall drop-out rate for the Public Day School is more than *five* times greater than the Springfield Public Schools District overall. *See* DESE School Profiles, Springfield Public Day High School 2014-2015 Student Dropout Rate Report, available at http://profiles.doe.mass.edu/dropout/default.aspx?orgcode=02810550&orgtypecode=6&leftNavId=15627& (last visited July 8, 2016) and Springfield Public Schools 2014-15 Student Dropout Rate Report, available at http://profiles.doe.mass.edu/dropout/default.aspx?orgcode=02810000&orgtypecode=5&leftNavId=15627& (last visited July 8, 2016) (reporting that for the 2014-2015 school year the overall drop-out rate for students at the Public Day School was 27.2 %. compared to a 5.1% overall drop-out rate district-wide).

. . . "); A.P. Decl. ¶ 12 ("I would also very much like for J.C. to go back to school at one of [Springfield's] neighborhood high schools. I never want him to return to the [Public Day School]."); J.C. Decl. ¶ 14 ("I would very much like to return to school if I could go to a [] neighborhood high school. I never want to go back to the [Public Day School]."); M.P. Decl. ¶ 15 ("I do not want my child to continue at the [Public Day School]."); P.R. Decl. ¶ 20 (same); Griffin Decl. ¶ 14 (parents prefer to have their children educated in neighborhood schools with appropriate services); Lambert Decl. ¶ 12 (same).

F. S.S. is Typical of the Proposed Class.

"S.S.'s experience is typical of students in the class." Leone Rpt. ¶ 55; *see also* ¶ 37 ("the experience of the named plaintiff, S.S., closely resembles that of the other children in the class"). Like other members of the class, S.S. is a child with a mental health disability, who was placed in the Public Day School because Springfield lacks appropriate SBBS. *See* Leone Rpt. ¶¶ 37, 56-60. Like other members of the class, S.S. could be educated in a neighborhood school with SBBS. Leone Rpt. ¶¶ 33, 37, 39.

Springfield transferred S.S. to the Public Day School when he was in the fifth grade. Leone Rpt. ¶ 60. S.S. did not receive SBBS while in Springfield's schools. Leone Rpt. ¶¶ 37c, 56, 87. Moreover, Springfield "engaged in a pattern of punishing S.S. for behavior that was a result of his disability." Leone Rpt. ¶ 87.

S.S. received an inferior education at the Public Day School. Leone Rpt. ¶ 37e ("While at the Public Day School [S.S.] received unequal and substandard academic opportunities."). At the Public Day School, S.S. was not offered a normal academic curriculum. Leone Rpt. ¶ 85. Despite his interest in art and theater, S.S. had no ability to engage in these activities at the Public Day School (as it lacks arts programming) and was not offered any opportunity to gain

exposure to the arts in the neighborhood schools. Leone Rpt. ¶ 86. S.S.'s academic performance has been well below his potential and significantly less that he would have achieved in a neighborhood school with SBBS. Leone Rpt. ¶ 85.

III. LEGAL ARGUMENT

Class certification in this case should be uncontroversial. Courts around the country routinely certify classes in similar ADA cases.[9] *See* Appendix 1 (listing cases certifying classes

[9] The virtually unbroken and extensive line of decisions in ADA and similar cases supports class certification here. Certifying the class here is also fully consistent with the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Since 2011, courts have cited *Wal-Mart* in support of class certification in Title II and other ADA cases. *See, e.g.*, *Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 265-67 (D.N.H. 2013) *("Kenneth R.")* (certifying class of individuals with a mental health disability who were—or were at serious risk of being—institutionalized where "[s]ubstantial evidence suggests that the State's policies and practices have created a systemic deficiency in the availability of community-based mental health services, and that that deficiency is the source of the harm alleged by all class members"); *O'Toole v. Cuomo*, Order 13-cv-04166-NGG-MDG (E.D.N.Y. Nov. 20, 2013) (certifying class of adults with serious mental illness who were consigned to substandard board and care homes because they lacked access to community services), attached as Appendix 2; *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 295-96 (D. Mass. 2011) ("*Connor I*") (certifying a class of foster children who alleged systemic deficiencies, although the harm suffered by unnamed class members differed from the harm experienced by named plaintiffs); *Van Meter v. Harvey*, 272 F.R.D. 274, 282-84 (D. Me. 2011) (certifying class where plaintiffs alleged a systemic problem with state screening procedures for nursing facilities and sought systemic relief); *Steward v. Janek*, No. 5:10-CV-1025-OLG (W.D. Tex. May 20, 2016) (certified class of certain individuals with intellectual and developmental disabilities residing in, in the future will reside in, or should be screened for admission to nursing facilities), *pet. for appeal under Fed.R.Civ.P 23(f) pending, Steward v. Janek*, No. 16-90019 (5th Cir. June 6, 2016), attached as Appendix 3; *O.B. v. Norwood*, No. 15 C 10463, 2016 WL 2866132 (N.D. Ill. May 17, 2016) (certifying a class of Medicaid-eligible children under 21 in Illinois who have been approved for but are not receiving in-home shift nursing services); *Williams v. Conway*, 312 F.R.D. 248 (N.D.N.Y. 2015) (certifying a class of all present and future deaf and hearing-impaired prisoners denied rights and privileges accorded to all other prisoners.); *Dunakin* v. *Quigley*, 99 F. Supp. 3d 1297 (W.D. Wash. 2015) (certified class of nursing home residents with intellectual and developmental disabilities), *pet. for appeal under Fed. R. Civ. P. 23(f) denied, Dunakin v. Quigley*, No. 15-80076 (9th Cir. Aug. 10, 2015); *Thorpe v District of Columbia*, 303 F.R.D. 120 (D.D.C. 2014), *leave to appeal denied, In re District of Columbia*, 792 F.3d 96 (D.C. Cir. 2015) (certifying a class of individuals with physical disabilities in, or at risk of

in ADA matters).

The student class satisfies each of Rule 23(a)'s four requirements: (1) Numerosity: the class is so numerous that joinder of all members is impracticable; (2) Commonality: the claims of the class share common questions of law or fact; (3) Typicality: the claims of the named representative are typical of those of the class; and (4) Adequacy: the named representative would vigorously represent the class. *See Griffin v. Burns*, 570 F.2d 1065, 1072 (1st Cir. 1978).

Rule 23(b)(2) is also satisfied. Springfield has acted or refused to act on grounds generally applicable to the class as a whole, and Plaintiffs seek declaratory and injunctive relief to benefit the class as a whole. Indeed, civil rights actions, like this one, "'against parties charged with unlawful, class-based discrimination are prime examples' of what [Rule 23] (b)(2) is meant to capture." *Wal-Mart*, 564 U.S. 338, 361 (2011) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

Finally, undersigned counsel meet the requirements of Rule 23(g).

A. <u>The Record Is Sufficient For Class Certification.</u>

This case has been litigated for nearly three years. The claims have survived a motion to dismiss. The record supporting class certification includes declarations, exhibits from document discovery, and the report of a nationally-recognized expert specifically focused on the issues of

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institutionalization in, nursing facilities who lacked access to community services); *see also N.B. v. Hamos*, 26 F. Supp. 3d 756 (N.D. Ill. 2014) (granting class certification in action seeking injunctive relief for violations of Title II based on the denial of community-based services); *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012) (certifying a class of persons with developmental disabilities in segregated employment workshops, rejecting defendants' claims that class members' different abilities and needs precluded certification); *Gray v. Golden Gate Nat'l Recreational Area*, 866 F. Supp. 2d 1129, 1142 (N.D. Cal. 2011) (certifying a class of persons with mobility and/or vision disabilities denied programmatic access due to barriers at certain park sites).

commonality and typicality. The cases do not require more to certify a class.

Importantly, the Supreme Court has rejected any requirement that plaintiffs prove the merits of their legal claims before a class is certified. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194-95 (2013). In *Amgen*, the Court made clear there should be no "mini-trial" on the merits to determine whether a class is worthy of certification. *Id.* at 1201. To the contrary, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc.*, 133 S. Ct. at 1194-95 (citing *Wal-Mart*, 564 U.S. at 351 n.6); *see also* Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision.").

B. The Claims Satisfy Rule 23(a)

1. The Class Is So Numerous That Joinder Is Impractical

"The class is so numerous that joinder of all members is impracticable." Rule 23(a)(1). At the September 23, 2015 status conference, Defendants largely conceded that the proposed class satisfies the numerosity requirement. Transcript of Initial Scheduling Conference Before Magistrate Judge Robertson, September 23, 2015, 13:8-9 ("There's more than 40 people. I know that. I don't think numerosity is the issue.") Insofar as numerosity is contested, the court may take judicial notice that it would be "impracticable" under Rule 23(a)(1) to join more than 200 separate children with disabilities, many of whom come from impoverished backgrounds and lack resources to file separate actions.

Requiring joinder would create hurdles without changing the factual questions, the legal issues, or, if Plaintiffs are successful, the scope of relief. It would be a waste of this Court's and the parties' resources.

2. The Claims Share Common Questions of Law and Fact.

This case meets both parts of the commonality test in *Wal-Mart v. Dukes*, 564 U.S. 338 (2011).

First, Plaintiffs' claims "depend upon …common contention[s]," and allege that members of the Student Class have "suffered the same injur[ies]." *Id.* at 350. Essentially, Plaintiffs contend, in Dr. Leone's words, that Springfield's systemic denial of SBBS "harms all students in the class." *See* Leone Rpt. ¶ 54. Specifically Plaintiffs allege that, by denying SBBS to the class, Springfield:

1. "Afford[s] [the student class] an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others," 28 C.F.R. § 35.130(b)(1)(ii);

2. "Provide[s] [the student class] an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others," 28 C.F.R. § 35.130(b)(1)(iii);

3. Fails to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d), which the Attorney General has defined as "a setting that enables individuals with disabilities to interact with non- disabled persons to the fullest extent possible," 28 C.F.R. pt. 35, App. B, p. 674.

4. Fails to "make reasonable modifications . . . necessary to avoid discrimination," 28 C.F.R.§ 35.130(b)(7).

5. [U]tilize[s] criteria or methods of administration . . . [t]hat have the . . . effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities," 28 C.F.R. § 35.130(b)(3)(ii).

Second, the Class's "common contention[s] . . . [are] capable of classwide resolution." *Wal-Mart*, 564 U.S. at 350. Either Springfield has violated the ADA by failing to provide SBBS to the class or it has not. And "determination of [the] truth or falsity" of that question "will resolve an issue that is central to the validity of each [class member's] claims in one stroke." *Id.*

These circumstances create a textbook example of commonality. "To begin with, class suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1763 (2016). And in injunctive cases by individuals with disabilities challenging the adequacy of public services under the ADA, courts almost always find commonality. And courts have certified classes in *every* recent ADA case alleging, as Plaintiffs do here, that a public entity violated the ADA by denying individuals with disabilities the services they need to avoid being segregated from their peers. *See* n.9, *supra*.

By way of example, the court in *Kenneth R.*, certified a statewide class of plaintiffs institutionalized for psychiatric treatment at two different facilities. The *Kenneth R.* class alleged that New Hampshire violated the ADA by failing to provide particular community-based services—just as the class here alleges that Springfield violates the ADA by not providing SBBS in the neighborhood schools. *Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 265-67 (D.N.H. 2013). In finding Rule 23(a)(2) satisfied, the *Kenneth R.* court saw "common questions susceptible to common answers" including—as is the case here—"whether there is a systemic deficiency in the availability of community-based services, and whether that deficiency follows from the [defendant's] policies and practices[.]" *Id*. at 267.

Another court reached the same conclusion in a more recent ADA case, *Steward v. Janek*, No. 5:10-CV-1025-OLG (W.D. Tex. May 20, 2016), *pet. for appeal under Fed.R.Civ.P 23(f) pending*, *Steward v. Janek*, No. 16-90019 (5th Cir. June 6, 2016). *Steward* was brought by individuals with disabilities alleging that they were denied services needed to live in the community with their peers instead of in segregated nursing facilities. Considering a record similar to that here, the *Steward* court found that the class was bound by common

questions of law and fact, such as whether nursing home placement could be avoided through community-based services. *Id*., at 14.

As in *Kenneth R.* and *Steward* (and many other ADA class actions, *see, e.g.*, n.9 *supra*), Springfield's "practices plaintiffs challenge here all pertain to a discrete set of . . . services[.]" *Kenneth R.*, 293 F.R.D. at 268. Springfield "may fail individual class members in unique ways, but the harm that the class members allege is the same"—a denial of particular services that compromises their rights under the ADA. *Steward*, at 14. These claims meet Rule 23(a)(2).

3. S.S.'s Claims Are Typical of the Class.

"Typicality" under Rule 23(a)(3) "tend[s] to merge" with "commonality. *Wal-Mart*, 564 U.S. at 349 n.5. As the Court's statement suggests, Rule 23(a)(3) is satisfied here for much the same reason that Rule 23(a)(2) is satisfied. Named plaintiff S.S. "possess[es] the same interest and suffer[ed] the same injury as the class members." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation marks omitted). S.S., like every other member of the class, alleges that Springfield violated the ADA by failing to provide SBBS at the neighborhood schools. As a result, S.S., like every other member of the class, was removed from, and denied the opportunity to be educated in, a neighborhood school. Accordingly, S.S.'s claims are typical of the class under Rule 23(a)(3).

It does not matter that the class is not composed of identical clones. "If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002). Courts in this Circuit have recognized that typicality exists whenever 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." *Tyrell v. Toumpas*, No. 09-cv-243-JD, 2010 WL

174287, at *5 (D.N.H. Jan. 14, 2010) (quoting *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009)); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 326 (D. Mass. 1997) (class representatives' claims typical of a class of over 400 students with different disabilities because class representative and class members were subject to the same discriminatory policy and practice); *Connor I*, 272 F.R.D. at 296-97; *Rolland v. Cellucci*, No. CIV A 98-30208-KPN, 1999 WL 34815562 at, *7 (D. Mass. Feb. 2, 1999) (typicality present in ADA case although "individual class members may have somewhat different needs, or may have entered the [segregated placements] through different processes").[10] The claims here fit neatly into the typicality standard.

4. S.S. Will Fairly And Adequately Represent The Class's Interests.

Rule 23(a)(4) is rarely at issue in injunctive actions against public defendants and its requirements are met here. S.S. and the other named Plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Rule 23(a)(4) is aimed at avoiding "conflicts that are fundamental to the suit and that go to the heart of the litigation[.]" Newberg on Class Actions § 3:58 (5th ed.); *see also Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) (quoting Newberg). Here, "the interests of the representative party will not conflict with the interests of any of the class members[.]" *Andrews v. Bechtel Power Corp.*, 780

[10] *See also Serventi v. Bucks Technical High Sch.*, 225 F.R.D. 159, 165 (E.D. Pa. 2004) ("Named plaintiffs and class members were all unable to access the vocational education services of the only public vocational school that serves their school districts, and thus were unable to take advantage of the range of vocational programs that were available to students who were not disabled. Therefore, the typicality requirement of Rule 23(a)(3) is satisfied."); *Marisol A. v. Giuliani*, 929 F. Supp. 662, 691 (S.D.N.Y. 1996) (certifying class under ADA: "Where, as here, an action challenges a pattern of activity, the named plaintiffs can represent class members who suffer different injury 'so long as all the injuries are shown to result from the practice.'") (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994)).

F.2d 124, 130 (1st Cir. 1985). Accordingly, Rule 23(a)(4) is satisfied.

C. Class Resolution is Appropriate Under Rule 23(b)(2)

"Rule 23(b)(2) was intended for civil rights cases" like this one. *In re District of Columbia*, 792 F.3d 96, 102 (D.C. Cir. 2015). The Supreme Court has stated that civil rights actions "'against parties charged with unlawful, class-based discrimination are prime examples' of what [Rule 23] (b)(2) is meant to capture." *Wal-Mart*, 564 U.S. at 361 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)); *see also* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1776 (3d ed. 2005) (stating that a Rule 23(b)(2) class suit "is a uniquely appropriate procedure in civil-rights cases, which generally involve an allegation of discrimination against a group as well as the violation of rights of particular individuals"); *Hawkins ex rel v. Comm'r of the New Hampshire Dept. of Health and Human Servs.*, No. Civ. 99-143-JD, 2004 WL 166722 at *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") (quoting *Baby Neal*, 43 F.3d at 58-59); *see also Baby Neal*, 43 F.3d at 57 ("Indeed, (b)(2) classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct.").

Rule 23(b)(2) is satisfied here because "the party opposing the class has acted or refuse[d] to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 441 (7th Cir.

2015). Here, Plaintiffs allege systemic civil rights violations and asks only for injunctive relief requiring Springfield to provide SBBS in neighborhood schools.

It is immaterial that, if the class wins and receives the requested relief, individual class members might *subsequently* seek additional individualized relief in separate proceedings, such as their IEP hearings. "[T]he fact that the plaintiffs might [later] require individualized relief does not preclude certification of a class for common equitable relief." *Chicago Teachers*, 797 F.3d at 442.

D. Class Counsel Should Be Appointed Pursuant to Rule 23(g)

Proposed class counsel described their qualifications in connection with the initial motion for class certification. ECF no. 97. In the three years this case has been ongoing, no member of the class, defendant, or other person, has objected to counsel's adequacy. This record is sufficient to appoint class counsel. *See, e.g.*, *Reid v. Donelan*, 297 F.R.D. 185, 194 (D. Mass. 2014) (Ponsor, J.), (appointing class counsel where "counsel have already devoted significant resources to this case, [] no evidence suggests that their level of commitment will diminish[,] and [n]o cogent argument can be made that Plaintiff's counsel do not satisfy the relevant requirements or . . . cannot adequately represent the interests of the class").

In further support, attorneys from the Center for Public Representation and the Bazelon Center for Mental Health Law have submitted affidavits attesting to their qualifications and experience. Bohenek Decl. Ex. 41, Declaration of Robert D. Fleischner, and Ex. 42, Declaration of Ira A. Burnim. Information regarding attorneys at Morgan Lewis is available at www.morganlewis.com. *See* Fed. R. Civ. P. 23(g)(1)(c).

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court certify a class consisting of: All students with a mental health disability who are or have been enrolled in Springfield Public Day School who are not being educated in a Springfield neighborhood school. In addition, Plaintiffs respectfully request that the Court appoint CPR, the Bazelon Center, and Morgan Lewis as co-class counsel.

Dated: July 15, 2016

Respectfully submitted,

S.S., a minor, by his mother, S.Y., on behalf of himself and other similarly situated students, the PARENT/PROFESSIONAL ADVOCACY LEAGUE, and THE DISABILITY LAW CENTER,

By their Attorneys,

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CERTIFICATE OF SERVICE

I, Matthew T. Bohenek, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on July 15, 2016.

/s/ Matthew T. Bohenek
Matthew T. Bohenek, Esq.