

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

NANCY MARTIN, et al.,	:	
	:	Case No. 2:89-CV-362
Plaintiffs,	:	
	:	Judge Edmund A. Sargus
v.	:	
	:	Magistrate Judge King
ROBERT TAFT, et al.,	:	
	:	
Defendants.	:	

**MOTION FOR LEAVE TO INTERVENE AND OBJECTIONS OF
CHAMPAIGN RESIDENTIAL SERVICES, INC. TO PROPOSED CONSENT ORDER**

While neither a member of the proposed class nor an *amici curiae* association or group that has participated in this case (and thus, not following within either the July 7, 2004 Order of this Court or the July 20, 2004 Order of Magistrate Judge King), Champaign Residential Services, Inc. is an Ohio corporation that has a interest in the proposed Consent Decree as an Intermediate Care Facility for the Mentally Retarded (“ICF/MR” provider), and desires to object formally to the proposed settlement.

Champaign Residential Services, Inc. respectfully requests that this Court, therefore, allow it to be heard on the matter and consider its comments regarding the proposed Consent Order presented by the parties for settlement of this lawsuit. As a Medicaid provider in Ohio it has a constitutionally-protected property interest in the right to receive reimbursement from the State of Ohio pursuant to R.C. section 5111.12 and 5111.22 and 42 U.S.C. section 1296a(a)(13)(A), and its interest may “not be diminished absent due process of law.” *Ohio Academy of Nursing Names v. Barry*, 56 Ohio St.3d 120, 130 (1990). Ohio has recognized that health care providers have a constitutionally protected interest in the Medicare and Medicaid

programs, and that health care providers are entitled to some form of hearing before being finally deprived of that interest. *Barry* at 126. The Court's prior orders, however, do not afford health care providers with the opportunity to be heard and some form of hearing. Accordingly, per its constitutionally-protected rights Champaign Residential Services, Inc. hereby moves the Court for an Order granting it leave to intervene as an *amicus* party to this action and accept its accompanying objection to the proposed Consent Order.

In the alternative, if leave to intervene is not granted, Champaign Residential Services, Inc. hereby requests the right to comment and object to the proposed Consent Order and respectfully requests that the Court accept and consider the attached objection as filed on August 31, 2004.

Respectfully submitted,

s/ Elizabeth J. Watters

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**OBJECTIONS AND COMMENTS OF CHAMPAIGN
RESIDENTIAL SERVICES, INC. TO PROPOSED CONSENT ORDER**

CRSI Is An Interested Party To The Settlement

Champaign Residential Services, Inc. ("CRSI") provides services for individuals with challenges in the State of Ohio. CRSI is a non-profit corporation organized by concerned citizens and parents to provide community supports for individuals with mental retardation and developmental disabilities ("MR/DD") challenges. In fact, it is the largest non-profit provider of services to MR/DD individuals in the State of Ohio with **855 residential consumers in 28 counties as of July of 2004**. Although CRSI is certified as an Intermediate Care Facility for the Mentally Retarded, of the nearly 1,000 customers that CRSI serves on a regular basis, **only 89 – less than 15% -- of CRSI's residential consumers are in the ICR/MR program.**

It is governed by a seventeen-member volunteer board of trustees made up of parents, advocates and individuals concerned about citizens with MR/DD, including an individual with MR/DD. It was incorporated August 24, 1976, with a stated purpose, "to promote, plan, and provide services that support citizens with disabilities."

Currently, CRSI employs a staff of over 1200 and provides services in over 30 counties in Ohio. Services are based on the needs of the individuals and can range from 24 hours a day to only a few hours each week. These services include home health supports, group home services, assistance in daily living, money management, leisure time/recreation, transportation, advocacy, ancillary, medical assistance, management services and other supports. Recently, CRSI began servicing as a supporting organization for Ben-el Children Services. CRSI also provides mental health/family support counseling services for over 300 children in Logan and Champaign counties.

CRSI recognizes the individuality of each consumer. Therefore, personal choice remains the most important consideration and determines all supports which surround the life of the consumer. Service supports range from assistance with daily living skills to social/recreational experiences and advocacy for the rights of individuals with disabilities. Trained staff provides services in Medicaid certified ICF/MR funded homes, in addition to individualized support in either a Supported Living or Community Based Waiver environment. CRSI's corporate office is located in Urbana, Ohio and has satellite offices located in Madison, Clark, Defiance, Miami, Allen, and Franklin Counties.

While it is likely that plaintiffs will respond to CRSI's objection by asserting that CRSI has a financial incentive in opposing this settlement, as indicated above, less than fifteen percent (15%) of the individuals serviced by CRSI are in the ICF/MR program. It is true that ICF/MRs, including CRSI, will realize a significant economic injury through the loss of their current rights to participate and receive reimbursement under Ohio's Medicaid program as certified ICF/MR providers, but it is also true that the economic injury to CRSI is not as significant as with other providers. It is not a financial incentive that has motivated CRSI to file this objection. Instead, CRSI objects to the Consent Order because CRSI firmly believes the proposed settlement is fundamentally unsound and untenable, and hurts its clients and residents.

Objections And Concerns Regarding The Proposed Consent Order

It is CRSI's belief that the settlement proposed by the parties for approval by the Court in this case, which allows the ICF/MR program to be eliminated before the establishment of an alternative program with comparable resources, ignores the desires and concerns of guardians and creates a dangerous situation that threatens the due-process rights and necessary protections of the alleged Martin class members. There is absolutely no guidance in the proposed Order

with regard to the alternative “waiver” funding mechanism that will replace the current ICF/MR benefit, and many facilities may shut down in the interim. This lack of specificity in the Consent Order means that class members would be required to give up a legally protected entitlement without any guarantee or commitment on the part of Defendants that the alternative waiver will provide for the same level of services they are currently entitled to under the ICF/MR program.

Further, by eliminating the rights of Medicaid beneficiaries to their entitlement under the Medicaid program to ICF/MR services, the proposed Consent Order would reduce choice and services for persons with MR/DD with potentially disastrous results. The abolishment of legally protected entitlements for the mentally retarded, the elimination of choice for guardians and the lack of a tested and viable alternative program with comparable funding should not be acceptable to this Court or any concerned citizen of the State of Ohio.

Finally, CRSI questions the certification of the class in this lawsuit in light of the apparent conflicting interests of class members as well as questions whether the proposed Consent Order – agreed to by the State of Ohio, Defendants and the State Ohio Legal Rights Services (“OLRS”) – was fairly negotiated and is fair to the entire class. Although the class of plaintiffs in this case includes all mentally retarded or developmentally disabled Ohioans, it also has a recognized “subclass” of individuals who are Medicaid recipients. As a result, the class is clearly divided on its face into Medicaid and non-Medicaid recipients. The class is also divided into members who are residents of ICF/MR’s and those who are not. With regard to the individuals that CRSI services, nearly fifty percent (50%) of those individuals have given up the waiver slot they received for an ICF/MR placement and are satisfied to receive, instead, services in the community. These individual – nearly 450 – may not want to return to the waiver system

(and many of them have so indicated to CRSI), and certainly have interests and views that are opposite to plaintiffs.

CRSI therefore, strongly urges this Court to reject the proposed Consent Order and find that it is not fair, adequate or reasonable to the class member, providers or in accordance with public interest.

The Proposed Consent Order Eliminates Choice

It is CRSI's understanding that plaintiffs filed this lawsuit on the basis of ensuring that individuals with MR/DD received choices in services and better services. This is an admirable and worthy goal that CRSI supports. However, CRSI's reading of the proposed settlement is that the Consent Order will result in an elimination of the ICF/MR program from the State Medicaid plan, and then the defendants must seek the establishment from the U.S. Department of Health and Human Services of a waiver to provide services to current and future residents of the existing ICFs/MR. This means that ICF/MR funding will be immediately eliminated under the proposed Consent Decree with nothing else in place. The request for the replacement, which is an optional program that the Department of Health and Human Services is not required to approve, then comes sometime after -- when exactly is unknown. There is no assurance that comparable services will be available for each and every class member. The only assurance that exists, in fact, is that the proposed settlement would eliminate for Medicaid beneficiaries the right to receive services under a clear entitlement contained in the Medicaid Act, 42 U.S.C. § 1396a.

This is clearly a loss of choice for class members, both in terms of loss of services and loss of choice of the setting in which those services will be rendered. There will be a reduction and elimination for class members in their choice to receive services in an ICF/MR provider, and

class members will be deprived of their right to receive such services in institutional and/or residential settings, regardless of what the class member and/or guardian believes is right for that person given their particular needs. The loss of these Medicaid entitlements, and their attending due process rights commensurate with such entitlements, flies in the face of the purported basis for this lawsuit and places class members in a worse position than had the case never been filed. The Medicaid ICF/MR benefit obligates the State of Ohio to provide all qualified individuals with reasonable promptness all of the services mandated under federal law. 42 CFR 483.410 *et seq.* Those entitlements include housing, active treatment, habilitation services, therapies, medications, physician services, nutritional services and nursing services. *Id.* By moving this Court to accept the proposed settlement on behalf of the certified class, plaintiffs are obligating all class members to give up these entitlements. There is no tradeoff and no benefit received by class members in exchange for the forfeiture of their entitlements.

While it is believed that OLRs will argue that the Consent Order preserves the “choice” of class members, the actual language of the proposed Order reveals just the opposite. As written, the “choice” preserved by the Consent Order ends on December 31, 2008. Consent Order ¶ 12. The choice that MR/DD individual in Ohio presently have as mandated by 42 U.S. C. § 1396a(a)(23) for ICF/MR services, however, has no end. Additionally, the Consent Order makes no mention about preserving or enhancing the amount of services for each resident, just ensuring that each resident will be able to choose the setting in which to have services provided to them. Consent Order ¶ 1c. Under ICF/MR services, on the other hand, Medicaid eligible individuals have a right to all ICF/MR services that they need as reflected in their habilitation plans, and have the right to waive their ICF/MR slot, if they so desire. There is no statement in

the proposed Consent Order about ensuring that all services called for in habilitation plans will be provided – merely that services that are provided must be listed on the plan

Accordingly, CRSI believes that it is undeniable that the proposed Consent Order eliminates the entitled benefits of individuals with MR/DD in the State of Ohio and eliminates their choices with regard to those benefits.

OLRS Representation of the Whole Class

As indicated above, CRSI also questions the fairness of the proposed Consent Order, particularly in light of the known conflicting interests of class members. As this Court is aware, the class of plaintiffs in this case is defined as “all mentally retarded or developmentally disabled Ohioans who are, or will be, in need of community housing services which are normalized, homelike and integrated, and a subclass who, in addition to being members of the class, are or will be, Medicaid recipients.” Yet, this class is clearly divided on its face into Medicaid and non-Medicaid recipients. The class is also divided into members who are residents of ICF/MR’s and those who are not. Yet, the Ohio Legal Rights Service negotiated the proposed Consent Order for both the Medicaid subclass and other class members, and without regard to the fact that some members are residents of ICF/MR’s who want to stay in those facilities and others are not. There was not separate counsel for the subclass within the class and there was no attempt to ensure structurally the fair and adequate representation for the diverse groups and individuals affected. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627 (1997). The adversity among the subgroups of the class in this case requires that “the members of each subgroup cannot be bound to a settlement except by consent given by those who understand that their role is to represent solely the members of their respected subgroups.” *In re Joint Eastern and*

Southern Dist. Asbestos Litigation, 982 F.2d 721, 742-43 (1992). That did not happen in this case and the conflicts of the both the class and counsel remain.

Additionally, as indicated above, with regard to the individuals that CRSI services, nearly fifty percent (50%) of those individuals have given up the waiver slot they received for an ICF/MR placement and are satisfied to receive, instead, services in the community. These individual – nearly 450 – may not want to return to the waiver system (and many of them have so indicated to CRSI), and certainly have interests and views that are opposite to plaintiffs. CRSI does not understand how the Ohio Legal Rights Services could have negotiated on their behalf.

Conclusion

The choice of community placements should exist for people with disabilities – not the providers, not the Court and not plaintiffs. It should not come at the expense of the desires of guardians, those who would chose an ICF/MR placement, and at the expense of the people who require the services in an ICF/MR. By proposing the elimination of the ICF/MR program, the proposed Consent Order harms those it was designed to help and eliminates the desired result of “choices” for individuals with MR/DD.

For all of these reasons, the proposed Consent Order is not fair, adequate or reasonable, or in conformance with public policy. Champaign Residential Services, Inc. respectfully

requests that the Court deny the motion to approve the Consent Order.

Respectfully submitted,

s/ Elizabeth J. Watters

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 31, 2004 a true and correct copy of the foregoing Motion to Intervene and Objections of Champaign Residential Services, Inc. was filed electronically. Notice of this filing will be served via the Court's CM/ECF system on this 31st day of August, 2004 to all counsel of record. Parties who do not receive notice of this filing by operation of the Court's electronic filing system may access this filing through the Court's system.

s/ Elizabeth J. Watters

Attorney