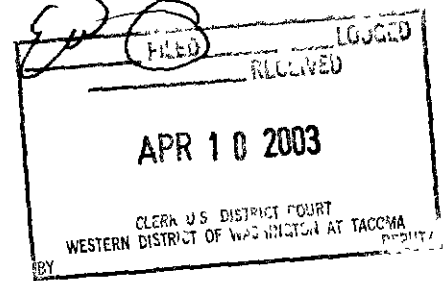


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The Arc of Washington State, Inc , a
Washington corporation, on
behalf of its members, et al,

Plaintiffs,

vs

LYLE QUASIM, in his official
capacity as the Secretary of the
Washington Department of Social
and Health Services, et al

Civil Cause No 99-5577-FDB

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

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ORIGINAL

Law Offices of Larry A Jones
2118 Eighth Avenue
Seattle, Washington 98101
206-405-3240

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COMES NOW Plaintiff the Arc of Washington State, Inc , and moves for summary judgment on behalf of its members, and also on its own behalf, on the first two of the three claims that the Court's order of December 22, 2000 (Dkt 134) set out In that order the Court stated that there were three claims that the Arc could bring on behalf of its members, namely,

1) A claim under the Medicaid Act that persons already on the HCBS waiver are not receiving all the services to which they are entitled

2) A claim under the Medicaid Act that persons eligible for ICF-MR services are not receiving such services with reasonable promptness

3) A claim that under the Medicaid Act that persons eligible for placements in ICF-MRs are entitled to their choice of ICF-MR (in particular, that eligible persons are entitled to choose "community residential" ICF-MRs as opposed to the large, state-run institutions like Fircrest School), and the State is obligated to provide services of the type chosen with reasonable promptness

Dkt 134 at 2

If the Court grants summary judgment to the Arc on the first two claims, the Arc will dismiss the remaining third claim

I. INTRODUCTION

In its order of December 19, 2000, dkt 132 at 6, the Court indicated its willingness to rule for plaintiffs that Medicaid law requires reasonably prompt delivery of medical assistance, but asked for additional facts to meet its concerns about whether Article III requirements had been met. Three days later, the Court issued its order of December 22, 200 The parties then negotiated a settlement ¹

¹Although the Court eventually disapproved the proposed Second Amended Settlement Agreement in December 2002, about \$6 million from the first year of the settlement agreement has in fact already been expended on behalf of the proposed class members
13th Declaration of Sue Elliott at 2

1 | Developmental Disabilities (DDD), Sue Elliott is now the executive director of plaintiff
2 | Arc Id. The Arc's statewide membership of approximately 1,300 includes many
3 | families with members with developmental disabilities who are Medicaid eligible, but
4 | who have been denied Medicaid services with reasonable promptness. Many have
5 | waited for out of home residential services for years Id at 2

6 | The Arc devotes considerable resources to promoting the creation of services for
7 | people with developmental disabilities who are unserved and those who have not
8 | received all the Medicaid services they need, including residential placements outside the
9 | parental home Id. The lack of timely services has often caused severe stress on
10 | individuals with developmental disabilities and their families Id. Moreover, each
11 | individual plaintiff and Arc member who is waiting for services faces the real possibility
12 | that his or her caregiver suddenly will become unable to provide care and support as the
13 | result of incapacitation or death Id. This risk becomes more acute as caregivers age
14 | Id

15 | Many Arc members have family members who are DDD clients and who are
16 | among the more than 10,000 persons already receiving waiver services, but they are not
17 | receiving all the medical assistance that they require, for example, residential services
18 | outside the parental home Id

19 | **1. Some Arc members who are on the HCBS waiver need more services and**
20 | **the State has failed to provide such services with reasonable promptness** The Arc
21 | does not keep its own waiting list of members who have requested Medicaid services for
22 | which they are eligible and have not received them, or have not received them in
23 | sufficient amounts, with reasonable promptness, but this issue is one of the regular
24 | recurring problems for Arc members in recent years. Elliott 13th dec. at 2.

25 | Many Arc members need different waiver services or more hours of service for
26 | their eligible sons and daughters on the HCBS waiver Elliott 13th dec at 3 A few

1 recent cases are illustrative of the problems that Arc members have had being denied
2 needed Medicaid services for which they are eligible

3 One Arc family lives in Clark County Their son is 22 years old He has severe
4 developmental disabilities for example, he is in diapers, he needs to be fed, and he does
5 not talk He is a DDD client He is on the Medicaid HCBS waiver called the CAP
6 waiver and has been since childhood Declaration of Suzanne Gries at 2

7 They first requested out of home residential placement for him from DDD when
8 he was 18 years old Gries dec at 2 The DDD case manager told them that there was a
9 three year waiting list, so they put their name on the list Three years later when he
10 turned 21 years old, they called DDD again, but DDD said there was no money for
11 HCBS waiver residential services They were only offered adult family home services,
12 which is not a HCBS waiver service, and is certainly not designed for persons with
13 severe developmental disabilities Gries dec at 2 They began writing letters to DDD in
14 July 2002, just to make sure that there was plenty of written documentation of their
15 request for residential placement They have written about four times, but DDD has not
16 responded Gries dec at 2

17 Other Arc members have told the Arc that when they are denied services that
18 they need, DDD informed them of their appeal rights, but told them that it would do no
19 good to appeal, because there were no funds available 13th Elliott dec at 3 DDD is
20 largely responsible for misleading families into not making additional requests and not
21 appealing 13th Elliott dec at 3

22 Another Arc family lives in Snohomish County Their son is 12 years old He
23 has severe developmental disabilities for example, his IQ tests less than 60 and he has
24 seizures, in addition to fine and gross motor and vision disabilities He is a DDD client
25 He is on the Medicaid HCBS waiver called the CAP waiver Declaration of Laurie
26 Flood at 2

1 Due to his disability, their son goes into rages of aggressive behavior For
2 example, last Saturday was typical he raged for three hours, beating his head on the
3 ground, trying to bite and scratch his parents, and trying to throw anything he could find
4 at anyone present Two years ago he surprised his mother in the garage between two
5 cars He choked her and she almost fell unconscious Her throat and face were
6 scratched They asked for respite, which is an HCBS CAP waiver service DDD denied
7 the request Flood dec at 2

8 His grandfather also helps handle him and has been attacked, too The family is
9 concerned about the safety of their 10-year old daughter when their son has one of his
10 periodic rages Flood dec at 2

11 They were also told by the DDD case manager that, even though their son is on
12 the HCBS waiver, they could not access waiver services until the family had used up
13 family support, which is a state-only program His mother told DDD that this was not
14 true, because he has a right to the waiver services without DDD erecting any barriers
15 At least two years after they began asking, they still have not received any trained HCBS
16 respite care providers to help them deal with his rages Flood dec at 2

17 An Arc member in King County has a daughter with developmental disabilities
18 who is on the HCBS waiver Declaration of Beverly Waugh at 2 DDD placed her name
19 on the list of persons waiting for residential services in 2000 The family was told by
20 DDD that there was a long waiting list for residential placements and that there was so
21 little additional money being appropriated that there would practically never be a
22 residential placement in a family where both parents were still living. Waugh dec at 2
23 Their daughter still lives at home Waugh dec at 2

24 **2. Some Arc members want ICF-MR services and the State has failed to**
25 **provide such services with reasonable promptness** A majority of Arc members do
26 not want to apply for ICF-MR or institutional services for their family members, but a

1 real minority of Arc members do desire such services, or are willing to accept them 13th
 2 Elliott at 3

3 One recent case is an Arc family from Snohomish County who have a son with
 4 autism Since at least 1998 they have requested an ICF-MR placement for their son
 5 *Declaration of Don Wilkins at 2* The 69 year-old father has been finding it increasingly
 6 difficult to physically care for his son at home, yet in August 2002 the father's
 7 application was turned down again He was told that Frances Haddon Morgan was "not
 8 accepting applications " *Id* Their son was only offered adult family home type
 9 placements in the community, which do not pretend to offer the 24 hour, 7 day a week
 10 care that their son needed *Id* They contacted the Arc which offered counsel and
 11 advice *Id* Only in the last six weeks was their son finally admitted to an ICF-MR *Id*
 12 They wanted far more than 90 days

13 In a second case, an Arc family had a daughter with developmental disabilities,
 14 who was a DDD client and Medicaid eligible *Declaration of Randy Holladay at 1* Her
 15 disabilities are severe enough that they requested out of home residential placement for
 16 her in 1998 and in 1999, which requests were denied *Id* They were told by the DDD
 17 staff that she could not be given a residential placement, because there was no money
 18 available to fund such a placement and that placements were limited to the funds that the
 19 legislature had appropriated DDD eventually admitted that she was disabled enough to
 20 qualify for ICF-MR services *Id*

21 In 1999 they contacted the Arc and requested their assistance in obtaining a
 22 residential placement The Arc provided advice and other support The family pursued
 23 an individual administrative review hearing of DDD's denial of residential placement At
 24 the hearing on June 15, 2000, the family requested either a community residence or an
 25 ICF-MR placement for their daughter *Id* DDD testified at the hearing that, although
 26 their daughter was disabled enough for an ICF-MR, there was no money to fund an out-

1 of-home residential placement, and that there was no ICF-MR available The
 2 administrative law judge ruled that the State had complied with state statutes and
 3 regulations (the limit of its authority) and upheld the denial of services The daughter
 4 continued to live at home until June 2001, when the State finally relented and offered her
 5 a residential placement *Id.* Again, this delay was far more than 90 days, it was years

6 A third case is the named plaintiff Lorianne V Ludwigson of Bellevue, whose
 7 parent-guardians are Arc members Lorianne Ludwigson has had significant
 8 developmental disabilities from birth She has mental retardation in the moderate to
 9 severe range and also has been diagnosed with bipolar disorder Lorianne's parents and
 10 guardian began asking DDD for residential services when she was 18 They were not
 11 only willing to place Lorianne at an ICF-MR facility, but did so, placing her at Fircrest
 12 School in North Seattle in 1998, 1999, and 2000. 4th Ludwigson declaration (dkt 176)
 13 at 1 But defendant DDD only allowed her there temporarily and illegally forced them to
 14 *take her back into the parental home even when the parents wanted her to remain there*
 15 Only in September 2000, after this litigation was filed and more than three years after the
 16 first request for residential services, did the State agree to provide adequate out-of-home
 17 residential services 4th Ludwigson dec (dkt 176) at 1

18 Facts and conditions can change rapidly and there are other Arc members who
 19 need and would choose ICF-MR services, if the current community-based service
 20 operations closed down or no longer were willing to serve their children These include
 21 the Holladay family, Holladay dec at 3, and at least two Arc families in Yakima who
 22 would choose Yakima Valley School, an ICF-MR 13th Elliott dec. at 3

23 **3. The Arc itself (and not just its members) has been harmed** The Arc itself
 24 has a real and substantial organizational interest in the failure of the State to provide
 25 reasonably prompt Medicaid services It expends its resources on addressing that
 26 problem For more than 65 years, the Arc's primary purpose has been to promote the

1 amounts of paid staff time 13th Elliott dec at 5 The Arc staff would instead have time
2 to address other pressing needs of its members, including its basic parent-to-parent
3 support function and providing more education and training to its members on best
4 practices in the field of developmental disabilities 13th Elliott dec at 5 The Arc is truly
5 harmed by the State's continued failure to promptly provide Medicaid services

6

7

B FACTS ABOUT THE STATE'S NEW ADMISSIONS

8 **1. Admissions on claim #1 for HCBS waiver services** In the past, the
9 defendant State regularly denied needed services to persons on the HCBS waiver on the
10 basis that there were insufficient funds appropriated by the legislature 13th Elliott dec
11 at 5 Arc members faced these illegal barriers on behalf of their children who were on
12 the waiver This situation was a factor leading the Arc to file this lawsuit 13th Elliott
13 dec. at 5 Unfortunately, the Arc continues to receive complaints from its members who
14 are on the HCBS waiver that they are not receiving the full services that DDD
15 acknowledges that they need 13th Elliott dec at 5

16 But at least the State has now *promised* to change On September 30, 2002,
17 Linda Rolfe, director of the defendant DDD, put out a memorandum to her subordinates
18 across the state detailing "Changes to Waiver Procedures" that the state was making
19 13th Elliott dec , exhibit 1 In bold print DDD states that

20

21

**We will not use lack of funding as a defense when a fair hearing
concerning access to services is held for a CAP Waiver client.**

22

23

13th Elliott dec , ex 1 at 3

24

The State put out a new policy directive to its staff that declared

25

26

Denial of service for an individual on the CAP Waiver
must be based upon an assessment and planning process
that addresses the individual's current health and welfare
needs When a fair hearing concerning access to services

1 is held for a CAP Waiver client, do not defend the
2 Department's denial of the service based on lack of
funding.

3 In order to make sure the changed policy got through to the case managers, the
4 same point is repeated in a separate, underlined, one sentence paragraph

5 Availability of funding is not a valid reason to deny a
6 needed service to someone on the CAP Waiver

7 13th Elliott dec , ex. 2.

8 Similarly, the Division promulgated what it called *Revision* Memo #03-2002,
9 Attachment A, dated 09-23-02, entitled "**Procedures for Addressing a Current CAP**
10 **[= HCBS] Participant's Request for More or New Services.**" 13th Elliott dec , ex 3
11 The first sentence is Defendants' admission "Persons on the CAP waiver are entitled to
12 services that meet their assessed health and welfare needs and cannot be denied services
13 using lack of funding as a reason " 13th Elliott dec , ex 3

14 **2. Admissions on claim #2 for ICF-MR services** The State has now admitted
15 that it cannot legally block reasonably prompt admission of eligible persons to ICF-MRs
16 Lack of reasonably prompt access to ICF/MR services by Arc members was another
17 factor in the Arc's decision to file this litigation 13th Elliott dec at 5 Arc members
18 were being denied access to such services when the litigation was filed in 1999 and such
19 access continues to be blocked today 13th Elliott dec at 5 Subsequent to complaints
20 by the plaintiff Arc to CMS, the relevant federal agency contacted the defendant State
21 about its noncompliance with ICF/MR standards 13th Elliott dec at 3 and at ex 4,
22 page 21 (It did so in the context of its audit of the HCBS CAP waiver program,
23 because the waiver program is framed as an alternative to the institutional ICF/MR
24 program) As CMS stated,

25 Discussions with Division of Developmental Disabilities
26 personnel, advocates, and others revealed that the State
inappropriately restricted access to ICF/MR services

1 13th Elliott dec , ex 4 at 21

2 The CMS report describes the 1998 state legislation referred to as Senate Bill
3 *6751 as the origin of the barriers to admission to ICF/MR with reasonable promptness*
4 The illegal barriers included “precluding DSHS from offering a person, who qualified for
5 ICF/MR care, admission to an ICF/MR facility unless DSHS offered the person
6 appropriate community support services ” Such community support services were
7 limited to the amount appropriated by the legislature It barred admission if the funds
8 appropriated were exhausted 13th Elliott dec., ex 4 at 21 Thus, the State illegally made
9 admission to an ICF-MR contingent upon the level of State funding for community
10 residential services

11 The CMS audit report continued, stating that

12 These legislative mandates were codified in RCW
13 71A 16 010 DDD Policy 3 03 clearly listed additional
14 limitations on ICF/MR services Among the restrictions
15 included in Policy 3 03 were the person must need
16 services costing between \$253 and \$361 per day, a
17 vacancy must exist at an existing ICF/MR facility, and
18 children, under the age 13 cannot be considered for
19 ICF/MR placement Policy 3.03 also prohibited placing an
20 adolescent (age 13-17) in an ICF/MR facility but this
21 restriction could be circumvented if the DDD Director
22 granted an exception to policy.

23 13th Elliott dec , ex. 4 at 21-22

24 The federal report went on to declare that

25 The limitations described in the previous paragraph clearly
26 violate federal regulations covering Medicaid State Plan
27 services such as ICF/MR care a Medicaid beneficiary in
28 Washington who met the medical necessity criteria for
29 ICF/MR services was entitled to receive the service in the
30 *amount, duration and scope required by their medical*
31 *needs.. .*

32 We do not find a reasonable explanation as to why
33 DDD and the legislature chose this approach to limit
34 access to ICF/MR services *We can only conclude that*
35 *the people involved were not familiar with applicable*
36 *federal requirements ..*

1 13th Elliott dec , ex 4 at 22 (emphases added)

2 The federal report also includes its summary of the State's reply to the federal
3 critique of its denial of access to ICF/MR services

4 The State suggested CMS delete or re-write the
5 recommendation calling for the removal of the regulatory,
6 procedural and other barriers responsible for inhibiting
7 Medicaid clients' access to ICF/MR services *No
8 information was provided contesting the accuracy of the
9 information presented in our finding on ICF/MR services
10 or indicating the State disagreed with the conclusions
11 reached by the CMS reviewers*

12 13th Elliott dec , ex 4 at 31-32 (emphasis added) Thus, the State by its failure to object
13 to the federal finding has admitted that defendants have illegally restricted access to ICF-
14 MR services

15 III. ARGUMENT

16 The Arc is entitled to partial summary judgment first because it meets the "case
17 or controversy" requirement noted in the Court's prior order and second because of the
18 State's new admissions on the substance of the Medicaid law, which support the
19 plaintiffs' contentions and the Court's earlier statements

20 A THE CASE OR CONTROVERSY REQUIREMENT

21 In the fall of 2000 the plaintiff class and the Arc moved for partial summary
22 judgment that ICF-MR services were due with reasonable promptness In its order of
23 December 19, 2000 the Court agreed that "The Medicaid Act, and in particular 42
24 U S C § 1396a(a)(8), clearly obligates states opting into Medicaid to provide medical
25 assistance with reasonable promptness to all eligible individuals " Dkt 132 at 6.

26 However, the Court declined to grant summary judgment to the class because there was
a dispute as to whether the named plaintiffs wanted ICF-MR services The Court ruled

1 that the Arc met the requirements for standing Dkt 132 at 5 However, the Court
 2 denied the Arc's claims on behalf of its members, because at that time the plaintiff Arc
 3 had not provided sufficient evidence "in the record currently before the Court to
 4 convince it that the State has failed to provide ICF-MR services with reasonable
 5 promptness to Arc members who are eligible for, and desirous of, such services " Dkt
 6 132 at 7

7 The Arc's motion for partial summary judgment should now be granted because
 8 any Article III concerns have been satisfied for three reasons First, in the above
 9 recitation of facts, the Arc has now proven its members' desires for ICF-MR services
 10 and the State's failure to provide such services with reasonable promptness Second,
 11 the Arc has now demonstrated its members' desires for additional HCBS waiver services
 12 and the State's failure to provide such services with reasonable promptness Third, the
 13 Arc itself, not on behalf of its members, has now proven that it has a real and substantial
 14 organizational interest in these matters and expends its resources on addressing them it
 15 is adversely affected as long as defendants' illegal practices continue

16 Plaintiffs believe that section II-A above on undisputed facts about Arc members
 17 by itself answers the Court's Article III questions which only asked for additional
 18 evidence about Arc members -- were they really harmed Nevertheless, it may be well to
 19 repeat the basis of associational standing on behalf of members In Hunt v Washington
 20 State Apple Adver Comm'n, 432 U S 333, 343, 97 S Ct 2434, 53 L Ed 2d 383 (1977),
 21 the United States Supreme Court stated that

22 Even in the absence of injury to itself, an association may have
 23 standing solely as the representative of its members the
 24 association must allege that its members, *or any one of them*, are
 25 suffering immediate or threatened injury as a result of the
 26 challenged action of the sort that would make out a justiciable
 case had the members themselves brought suit . . . so long as this
 can be established, and so long as the nature of the claim and of
 the relief sought does not make the individual participation of
 each injured party indispensable to proper resolution of the cause,

1 the association may be an appropriate representative of its
2 members, entitled to invoke the court's jurisdiction
3 Id citing Warth v Seldin, 422 U S at 511 (emphasis supplied) Thus, it only takes one
4 Arc member with a complaint to provide standing to raise an issue

5 What does the record show?

6 **1. Some eligible Arc members desire additional HCBS waiver services and**
7 **the State has not provided such services with reasonable promptness** Sue Elliott
8 frequently hears from Arc members who have been denied reasonably prompt HCBS
9 waiver services to which they are entitled 13th Elliott dec at 5-6 In addition, a few
10 illustrative cases were described in the facts section II A 1 above the Gries case in Clark
11 County, cases where families are misled into not applying or appealing, the Flood case in
12 Snohomish County, and the Waugh case in King County There is far more than one
13 case to provide standing – all were eligible families, all failed to receive HCBS services
14 with reasonable promptness

15 **2. Some eligible Arc members want ICF-MR services and the State has not**
16 **provided such services with reasonable promptness** Sue Elliott has stated that she
17 hears from a minority Arc members who want ICF-MR services to which they are
18 entitled and which they have not received with reasonable promptness 13th Elliott dec
19 at 3 In addition, multiple particular cases were mentioned in section II A 2 above the
20 Wilkins case in Snohomish County, the Holladay case in Whatcom County, the
21 Ludwigson case in King County, and families in Yakima County The Arc has clear
22 standing to advocate for such members There is far more than one case to provide
23 standing – all were eligible families, all failed to receive ICF-MR services with reasonable
24 promptness

25 **3. The Arc itself, not on behalf of its members, has a real and substantial**
26 **organizational interest in the prompt delivery of Medicaid services and expends**

1 **resources addressing them** As noted above, the Arc not only assists its own members,
 2 but all Washington residents with developmental disabilities and their families The Arc
 3 does receive pleas for help and does expend staff time, not only on behalf of its members,
 4 but on nonmembers 13th Elliott dec at 4 Of the many cases that come into Arc offices
 5 across the state, two were mentioned above in section II A 3, namely, a case in Thurston
 6 County and one in King County

7 The Arc would be able to expend its staff time and funds on other pressing
 8 matters if it were not for the State's illegal blocking of access to the reasonably prompt
 9 delivery of Medicaid services, both HCBS waiver services and ICF-MR services 13th
 10 Elliott dec at 5 Associations may have standing to sue in their own right if their own
 11 interests are adversely affected by the outcome of the litigation. Hunt v Washington
 12 State Apple Adver Comm'n, 432 U S 333, 345, 97 S Ct. 2434, 53 L Ed 2d 383 (1977)
 13 (interests of the state Apple commission were themselves affected) Here, the Arc will
 14 save funds that it will be able to expend on its other purposes, if the State ceases to
 15 withhold reasonably prompt Medicaid services to its members and to the nonmembers
 16 that the Arc also serves Of course, this is also the need of those of its members who
 17 are denied such services This nexus of interests coalesces to assure the concrete
 18 adverseness of interests that the Court requires Id

19 Therefore, the Arc has its own separate standing as an association and meets all
 20 Article III requirements to sue for declaratory and injunctive relief to compel the State to
 21 cease its illegal acts

22

23

B THE MEDICAID STATUTE

24

25

26

1. The State now concedes the right to prompt HCBS services. The first
 claim that the Arc has on behalf of its members is "A claim under the Medicaid Act that
 persons already on the HCBS waiver are not receiving all the services to which they are

1 entitled ” Order of 12/20/2002, page 2 The Arc moves for summary judgment on that
2 claim

3 a No state appropriation limits The State now concedes that it cannot legally
4 deny needed services to those already on the HCBS waiver As the four documents
5 from summer 2002 quoted above amply prove, the State’s position has changed It now
6 says, “Availability of funding is not a valid reason to deny a needed service to someone
7 on the CAP Waiver ” 13th Elliott dec , ex 2

8 Defendant DDD’s *prior practice* of denying needed medical services with the
9 illegal excuse that state funds were insufficient is exactly the reason that Arc members
10 who were already on the CAP waiver were not “receiving all the services to which they
11 were entitled,” as the Court’s order put it This is one of the basic claims on which the
12 lawsuit was filed 13th Elliott dec at 5

13 Defendants also now state “ Waiver participants must have access to services
14 that meet their health and welfare needs and that we cannot use lack of funding to avoid
15 delivering needed services ” 13th Elliott dec , ex. 1 at 3 Plaintiffs cannot agree more
16 an individual with developmental disabilities on the HCBS waiver has the right to receive
17 all the waiver services available to meet their “health and welfare needs ” Unfortunately,
18 the State is still not providing them

19 b Reasonable promptness Section 1396a(a)(8) of the Medicaid Act requires
20 that a state Medicaid program provide that medical assistance “shall be furnished with
21 *reasonable promptness* to all eligible individuals ” 42 U S C § 1396a(a)(8) (emphasis
22 added) Reasonable promptness is 90 days according to the United States Court of
23 Appeals for the Eleventh Circuit Doe v Chiles, 136 F.3d at 721-22 (11th Cir 1998)
24 (noting at 714 that the Medicaid regulations give two periods for reasonable promptness,
25 45 days and 90 days in its discussion of timely ICF-MR services) Needed medical
26 assistance through the Medicaid HCBS waiver should be provided within 90 days

1 c Conclusion Given all the above-cited repeated statements of defendants' new
2 position, the Court should grant this summary judgment on the first claim of the Arc on
3 behalf of its members, namely, that once a person is on the HCBS waiver, he or she must
4 receive the services included on the waiver within 90 days to the extent of assessed
5 medical need and without regard to lack of funding

6
7 **2. The State now concedes the right to prompt ICF-MR services.** The
8 second claim that the Arc has on behalf of its members is "A claim under the Medicaid
9 Act that persons eligible for ICF-MR services are not receiving such services with
10 reasonable promptness," Order of 12/20/2002, dkt 134, at 2 The Arc moves for
11 summary judgment on two bases (1) the Court has already ruled in plaintiffs' favor on
12 this point and (2) the State now concedes that it may not block reasonably prompt access
13 to ICF-MR facilities

14 a The Court has already ruled in plaintiffs' favor The Court's order of
15 November 17, 2000 (Dkt #119) declared

16 the parties agree, and the Court finds, that reasonably prompt delivery
17 of Medicaid medical assistance is an individual federal statutory right
18 properly enforceable in an action brought under 42 U S C § 1893 See
e.g., Doe v Chiles, 136 F 3d 709, 719 (11th Cir 1998)

19 Dkt 119 at 4 The case cited by the Court, Doe v Chiles, is a case about ICF-MR
20 services The Arc asks the Court to reaffirm its earlier holding that access to ICF-MR
21 services shall be provided with reasonable promptness

22 b The State now concedes the point There is an additional reason why the
23 Court should grant summary judgment to the Arc on its second, ICF-MR, claim. The
24 state now concedes the point that it may not erect barriers to entrance into its ICF-MR
25 facilities beyond medical eligibility Subsequent to complaints by the plaintiff Arc to the
26 relevant federal agency, CMS contacted defendant State about its noncompliance with

1 ICF/MR standards² 13th Elliott dec , ex 4, page 21 As CMS stated, “Discussions
2 with Division of Developmental Disabilities personnel, advocates, and others revealed
3 that the State inappropriately restricted access to ICF/MR services” (emphasis added)
4 13th Elliott dec , ex 4 at 21

5 The CMS report describes the illegal limits stemming from 1998 state legislation

6 These legislative mandates were codified in RCW
7 71A 16 010. DDD Policy 3 03 clearly listed additional
8 limitations on ICF/MR services Among the restrictions
9 included in Policy 3 03 were the person must need
10 services costing between \$253 and \$361 per day, a
11 vacancy must exist at an existing ICF/MR facility, and
12 children, under the age 13 cannot be considered for
13 ICF/MR placement Policy 3 03 also prohibited placing an
14 adolescent (age 13-17) in an ICF/MR facility but this
15 restriction could be circumvented if the DDD Director
16 granted an exception to policy.

17 13th Elliott dec , ex 4 at 21-22

18 The federal report also includes its summary of the State’s reply to the federal
19 critique of its denial of access to ICF/MR services

20 The State suggested CMS delete or re-write the
21 recommendation calling for the removal of the regulatory,
22 procedural and other barriers responsible for inhibiting
23 Medicaid clients’ access to ICF/MR services *No*
24 *information was provided contesting the accuracy of the*
25 *information presented in our finding on ICF/MR services*
26 *or indicating the State disagreed with the conclusions*
reached by the CMS reviewers.

27 13th Elliott dec , ex 4 at 31-32 (emphasis added) That is, the State failed to disagree
28 with the proposition that the only barrier to reasonably prompt admission to ICF-MR
29 services is if a person fails to meet “the medical necessity criteria for ICF/MR services ”
30 The State had to admit that the various additional criteria and limits contained in state

31 ² It did so in the context of its audit of the HCBS CAP waiver
32 program, because the waiver program is framed as an alternative to
33 the institutional ICF/MR program

1 | legislation were null and void, given the Medicaid contract that the state had signed with
2 | the federal government

3 | c Conclusion The Court should reaffirm the statement contained in its order of
4 | November 17, 2000, Dkt #119 and grant the motion for summary judgment on the
5 | second claim of the Arc on behalf of its members, namely, that a person eligible for ICF-
6 | MR services must be provided those services, if they choose them, with reasonable
7 | promptness, that is, within 90 days

8 |

9 | IV REQUESTED RELIEF AN ORDER IS NEEDED

10 | Despite the State's concessions, the Arc requires a court order that will force the
11 | State to actually act on their written admissions on reasonable promptness to the federal
12 | government The testimony of Sue Elliott, executive director of the Arc, establishes that
13 | absent such an order, the State will continue to deny services illegally According to
14 | Elliott, illegal withholding of HCBS waiver and ICF-MR services continues today, even
15 | after last summer's promises to the federal agency – for respective examples, see the
16 | above descriptions of the denial of HCBS services to Gries and the delay before ICF-MR
17 | services were finally granted to Wilkins 13th Elliott dec at 6

18 | In addition, it appears that, in this time of desperate fiscal condition in state
19 | government, DDD may have been given an order to try to see how it can legally prevent
20 | its HCBS waiver clients from asking for the increased services to which they are entitled
21 | At least, the language of some of assurances given to the federal oversight agency has
22 | been carefully crafted to that end That is, the statement from DDD central office to its
23 | field staff is “We will not use lack of funding as a defense *when a fair hearing*
24 | *concerning access to services is held for a CAP Waiver client*” 13th Elliott dec , ex 1 at
25 | 3 (emphasis added) It may be that DDD intends to force HCBS waiver clients to go to
26 | hearing before DDD will admit that legislative appropriations were inapplicable But it is

1 | wrong to force persons to use a formal hearing process merely to obtain their obvious
2 | legal right

3 | Thus, there are many reasons -- many individual cases -- showing why an order
4 | of this Court is required. By granting a summary judgment order, the Court will give the
5 | Arc, its members, and those it serves, a tool to enforce the State's nominal concessions
6 | to the federal agency that holds the purse-strings

7 |

8 |

V CONCLUSION

9 | The Arc, on its own behalf and on behalf of its members, should be granted
10 | summary judgment on the first two claims laid out in the Court's order of December 22,
11 | 2000.

12 |

April 9, 2003

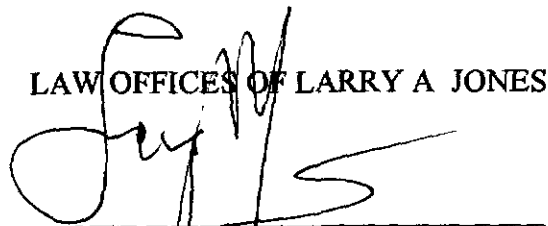
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LAW OFFICES OF LARRY A JONES

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Larry A Jones, WSBA 18948
Attorneys for the Arc of Washington State

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