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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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

Plaintiffs,

v.

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

Defendants.

Case No. C99-5577FDB

ORDER GRANTING PLAINTIFFS'
MOTION TO MAINTAIN CLASS
ACTION

Three developmentally disabled persons and an advocacy organization seek declaratory and injunctive relief against defendant State agencies and officials for their alleged failure to provide required Medicaid services with reasonable promptness. Plaintiffs also allege Defendants fail to offer fair hearings when such services are denied. The matter is currently before the Court on Plaintiffs' motion to proceed as representatives of a class pursuant to Fed. R. Civ. P. 23.¹

Plaintiffs ask the Court to certify a class comprising "all individuals with developmental

¹Plaintiffs' request for class certification came in their Memorandum in Opposition to Defendants' Motion to Strike Class Allegations (dkt. # 51). The Court has deemed this request to be a motion for class certification (dkt. # 64) and the issue has been fully briefed by the parties.

1 disabilities in the State of Washington who have applied for, and who qualify for, but are not
2 receiving or have not received with reasonable promptness, Medicaid ICF-MR services for which
3 they are eligible, and individuals who will be similarly situated in the future” (dkt. # 51, p. 7).
4 Plaintiffs’ proposed class definition is unsatisfactory, but the Court will allow the named individual
5 Plaintiffs to represent a more precisely defined class.

6 **I. Typicality and Class Definition.**

7 Fed. R. Civ. P. 23 sets forth five requirements that must be satisfied before individual named
8 plaintiffs may proceed as representatives of a class seeking declaratory and injunctive relief.

9 Maintenance of a class action is proper when:

10 (1) the class is so numerous that joinder of all members is impracticable, (2) there are
11 questions of law or fact common to the class, (3) the claims or defenses of the representative
12 parties are typical of the claims or defenses of the class, . . . (4) the representative parties will
fairly and adequately protect the interests of the class . . . [and (5)] the party opposing the
class has acted or refused to act on grounds generally applicable to the class.

13 Fed. R. Civ. P. 23(a) and 23(b)(2). If the class in this matter were defined as suggested by Plaintiffs,
14 the “typicality” of the named Plaintiffs’ claims would be in doubt. A brief overview of Washington
15 State’s Medicaid programs for the developmentally disabled and the named Plaintiffs’ claims
16 concerning that system will make clear why this is so, and also reveal how the problem may be
17 corrected.

18 Washington State offers Medicaid services to the developmentally disabled through two
19 distinct delivery mechanisms.² First, intermediate care facilities for the mentally retarded (“ICF-
20 MRs”) provide Medicaid services in an institutional setting. See, e.g., 42 U.S.C. § 1396d(d); and 42
21 C.F.R. 440.150(a). ICF-MRs may be operated either by the state or by properly licensed private
22 entities; Washington currently has four state-operated ICF-MR institutions and a number of

23
24 ²The Court is largely dependent on the submissions of the parties for its understanding of
25 Washington’s Medicaid programs. If it has significantly erred in its factual descriptions, it invites
correction by the parties.

1 privately run facilities. From the submissions of the parties, it appears that each private ICF-MR has
2 a smaller patient capacity than the state-run institutions.

3 As an alternative to institutional ICF-MR services, Washington offers “home and
4 community based” services under a waiver program (“HCB waiver”). Federal law frees the HCB
5 waiver program of some, but not all, of the restrictions imposed on ICF-MR services. Although the
6 individual medical and financial eligibility requirements for the HCB waiver program are the same
7 as those for ICF-MR services, the State and the Federal Health Care Financing Administration
8 (HCFA) have negotiated a cap on the number of developmentally disabled persons who may be
9 served under the HCB waiver. The HCB waiver program appears to operate at or close to the cap.

10 Plaintiffs allege, and Defendants do not appear to dispute, that named individual plaintiffs
11 satisfy the medical and financial eligibility requirements for Medicaid ICF-MR services. However,
12 guardians of the named plaintiffs are on record as rejecting either *all* ICF-MR services (Defendant’s
13 interpretation) or *state-run* ICF-MR services (Plaintiffs’ interpretation). See Declaration of Lucy
14 Isaki, Exhibits A, B, and C (dkt. # 76). Named Plaintiffs clearly do desire services through the HCB
15 waiver, and may in the alternative desire *privately operated* ICF-MR services.

16 Abstracting from the issue of fair hearings, named plaintiffs’ legal claim is that they are
17 entitled to the services they desire, but the state either fails to provide them at all or fails to provide
18 them with reasonable promptness. As discussed, the services named plaintiffs desire are HCB
19 waiver services or possibly in the alternative privately operated ICF-MR services. Because
20 Plaintiffs’ proposed class definition assumes class members desire undifferentiated ICF-MR
21 services, there is a mismatch between the potential claims of the class as defined by the Plaintiffs
22 and the claims of the individual named Plaintiffs. In particular, hypothetical class members could
23 advance claims for placement in *state-run* ICF-MRs that are not advanced by the named plaintiffs.
24 Plaintiffs’ claims would fail to be typical of those of the class.

25 The flaw can be cured by greater precision in the class definition. The claims of a class

1 comprised of “all developmentally disabled persons in the State of Washington who i) meet the
2 medical and financial requirements for eligibility for ICF-MR services; ii) have applied for either
3 HCB waiver services or privately operated ICF-MR services; and iii) have not received HCB
4 waiver or privately operated ICF-MR services, or not received them with reasonable promptness,
5 and individuals who will be similarly situated in the future” are prima facie “fairly encompassed” by
6 the claims of the named individual plaintiffs. See, e.g., General Telephone Co. of Southwest v.
7 Falcon, 457 U.S. 147 (1982).

8 Although the above definition resolves the typicality problem, the definition is quite
9 complex. It brings to the surface a legal issue--whether, and within what limits, the State is required
10 to provide those eligible for and desirous of ICF-MR services with a choice of facilities--that neither
11 party has mentioned in their filings.³ Accordingly, the Court will proceed on the basis of a simpler
12 definition: that of a class comprised of “all developmentally disabled persons in the State of
13 Washington who i) meet the medical and financial requirements for eligibility for ICF-MR services;
14 ii) have applied for HCB waiver services; and iii) have not received HCB waiver services, or not
15 received them with reasonable promptness, and individuals who will be similarly situated in the
16 future.” Named plaintiffs’ claims are sufficiently typical of those of members of this class.

17 **II. The Remaining Rule 23 Requirements.**

18 Plaintiffs’ submissions are sufficient to establish that the individually named plaintiffs and
19 the class as defined by the Court satisfy the remaining Rule 23 requirements.

20 1. Numerosity.

21 Defendants implicitly acknowledge the existence of an indeterminate population of adults
22 eligible for ICF-MR services who have applied for HCB waiver services and are not getting them,

23 ³Plaintiffs’ Complaint does allege that individuals eligible for waiver services are guaranteed
24 a choice between those services and ICF-MR services. Complaint at ¶ 52. This is a different issue
25 from whether those eligible for ICF-MR services are guaranteed a choice of providers of those
26 services. Plaintiffs have indicated no desire to litigate the latter issue.

1 or who have to wait lengthy periods for them. See, e.g. Second Declaration of Larry Jones, Exhibit
2 2 (Strategies for the Future) (dkt. # 35). Since the Court has not seen an actual State-maintained
3 waiting list for HCB waiver services, it cannot determine with precision the number of people in the
4 class at any one time. But it stands to reason that individual choices, natural population maturation
5 and migration produce ongoing turnover in class membership. Even without considering
6 unidentifiable future members, the Court is convinced that the class is sufficiently numerous that
7 joinder of all members would be impractical.⁴

8 2) Commonality.

9 The following questions of law are common to all members of the class defined by the
10 Court above: 1) Does the State violate federal law when it fails to provide HCB waiver services to
11 persons who have applied for them and are eligible for ICF-MR services, or when it fails to provide
12 them with reasonable promptness? 2) Does the State violate federal law when it fails to provide
13 class members a fair hearing upon denying them HCB waiver services?

14 3) Representativeness.

15 The Court can discern no potential conflict between the named plaintiffs and absent class
16 members. They are not advancing competing claims to a limited pool of resources available for
17 HCB waiver services, but instead are joined in advancing the claim that the pool of such resources
18 must be made large enough to accommodate all who desire them and are eligible for ICF-MR
19 placements.

20 As for Plaintiffs counsel, they appear to have conducted themselves energetically and with a
21 sufficient degree of competence. The Court is not pleased with the manner in which the
22 certification issue arose, but it believes Plaintiffs' counsel will adequately represent the interests of

23
24 ⁴The Court is also puzzled how Defendants can simultaneously allege that the class is so
25 small that all members could be readily joined and argue that providing services to all members of
26 the class would cost more than \$100 million per year.

1 the class.

2 4) Defendants Have Refused to Act on Grounds Generally Applicable to the Class.

3 Defendants have refused to provide HCB waiver services to members of the class on the
4 grounds that the waiver program is full, and that mere eligibility for ICF-MR services does not
5 establish entitlement to HCB waiver services. If Defendants lose on the merits of this claim,
6 injunctive and declaratory relief would be proper for the class as a whole.

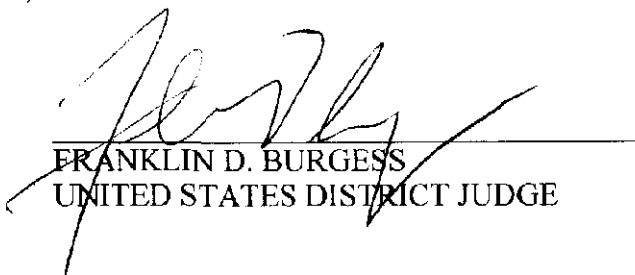
7 **III. Conclusion and Order.**

8 Defendants have requested oral argument on the issue of class certification (dkt. # 85).
9 Pursuant to Local Rule 7(b)(6), oral argument on a motion to certify is discretionary with the Court.
10 The Court has thoroughly considered Defendants arguments, and does not consider oral argument to
11 be necessary.

12 ACCORDINGLY, the Court hereby ORDERS that:

- 13 1) Plaintiffs' deemed motion for class certification (dkt. # 51) is GRANTED, and
14 2) Named individual plaintiffs shall proceed in this action as representatives of a class
15 comprised of all developmentally disabled persons in the State of Washington who i) meet
16 the medical and financial requirements for eligibility for ICF-MR services; ii) have applied
17 for HCB waiver services; and iii) have not received HCB waiver services, or not received
18 them with reasonable promptness, and individuals who will be similarly situated in the
19 future.

20 DATED this 6 day of October, 2000.

21
22 
23 FRANKLIN D. BURGESS
24 UNITED STATES DISTRICT JUDGE
25

car

United States District Court
for the
Western District of Washington
October 5, 2000

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:99-cv-05577

True and correct copies of the attached were mailed by the clerk to the following:

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