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 DENYING APPROVAL OF SECOND AMENDED SETTLEMENT AGREEMENT

The parties have responded to the Court's Order to Show Cause of May 21, 2002 (Doc. #282) by filing a "Joint Memorandum Re Order To Show Cause," in which the parties assert that the Second Amended Settlement Agreement will provide the requisite cause for preliminary approval of the settlement and the scheduling of a fairness hearing. The Parties have presented the proposed Second Amended Settlement Agreement for the Court's review, and the Washington Protection and Advocacy System (WPAS)(an organizational plaintiff in *Allen et al. v. Western State Hospital, et al.*C99-5018RJB), Columbia Legal Services (CLS)(on behalf of Applicants for

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Intervention), and the Hoisingtons (Plaintiffs in a case from Eastern Washington) have filed objections to that proposed settlement.

The Court has reviewed the Second Amended Settlement Agreement, the Parties' arguments in favor of the Second Amended Settlement Agreement, the objections filed by WPAS, CLS, and the Hoisingtons, and concludes that the Second Amended Settlement Agreement should not be approved.

THE PARTIES' SECOND AMENDED SETTLEMENT AGREEMENT

In summary, the Parties' changes to the Amended Settlement Agreement, which result in this Second Amended Settlement Agreement (SASA), are set forth in their "Joint Memorandum Re Order To Show Cause" and are as follows: (1) elimination of the b3 class, which the Parties contend will resolve the Court's concerns regarding typicality and representativeness of the named plaintiffs; (2) narrowing of the "covered Claims" provision (only those equitable and injunctive claims that were the subject of the complaint failure to provide Intermediate Care For the Mentally Retarded (ICF/MR) and Home and Community Based Services (HCBS) Community Alternatives Program (CAP)(for persons with developmental disabilities) Waiver services with reasonable promptness, and violations of federal and state laws); (3) Exclusion of the Marr class, (4) substantial changes to the notice to class members.

The Parties also address other issues raised by the Court. (1) Funding beyond 2005: there is no guarantee, but the Arc believes that once new residential services are created, those funds are routinely carried forward into future years; (2) Absence of a broad declaration of legal rights: Plaintiffs believe that the Court has already ruled that Medicaid services including ICF/MR services, must be provided with reasonable promptness (Ord. of November 17, 2000 (Doc. # 119); (3) declaration of rights under the CAP waiver is a moot issue as the waiver expired June 30, 2002 and the waiver is a contract between the state and federal governments, which Plaintiffs believe the state will seek to renew with the federal government in order to phase in the five Home and Community

Based Services waivers that will replace it. Also, Plaintiffs assert that dropping the CAP waiver has resulted in the State already adopting the legal principle that once a person is on a waiver, he or she gets whatever that waiver offers with reasonable promptness (the declaration of legal rights Plaintiffs would seek at trial); and (4) the State's contribution pursuant to the settlement is approximately 50%.

The Parties elaborate upon these changes and urge the Court to preliminarily approve their "Amended Settlement Agreement" in their "Joint Motion and Memorandum For Preliminary Approval of Amended Settlement Agreement."

OBJECTIONS TO THE SASA

Objections to the Parties' Joint Memorandum in support of the SASA have been filed by the Washington Protection and Advocacy System (WPAS) (a plaintiff in the *Allen* case), Columbia Legal Services representing Applicant-Intervenors, and Richard Sterling Hoisington and his parents, who are plaintiffs in a case from the Eastern District of Washington.

Washington Protection and Advocacy System's Objections

The WPAS requests that the Court deny the parties' request to preliminarily and otherwise approve the SASA, including its definition of new subclasses and counsel, reject the revised Proposed Notice, and lift the stay on the underlying proceedings. First, WPAS contends that the proposed revised subclasses fail to meet the requirements of Fed. R. Civ. P. 23(a) due to the insurmountable conflicts within the proposed settlement class and subclasses. The first problem that the WPAS discusses is that the inherent conflicts between the subgroups within the class is not cured by the current subclass definitions, which are not materially different from the initial proposed settlement class; the only difference is added class counsel and representative plaintiffs. Moreover, the relief the SASA provides to class members is the same as that in the first proposal: the provisions for new services remains relatively minuscule compared with the vast number of individuals waiting for services. There is no assurance that all class members will obtain relief, and

there is no process for determining who will get services. Therefore, the class members will find themselves competing with each other to get services, thus creating insurmountable conflicts within the class. The "covered claims" section of the SASA further exacerbates the conflict, because all class members, regardless of which subclass they are in or whether they actually obtain relief or not, must "fully release" all of their equitable and injunctive relief claims under the SASA for an indefinite period of time. The Parties have failed to show that their proposed redefinition meets all of the requirements of Fed. R. Civ. P. 23(a) and (b)(2).

Next, the WPAS argues that the revised "Notice of Proposed Settlement of Class Action" is inadequate and should not be approved because it is inaccessible to the class members: individuals with developmental disabilities, many of whom do not have guardians or families involved in their care to assist them in overcoming any difficulty they might have in understanding the Notice. Thus, the notice does not satisfy due process requirements.

Finally, the WPAS argues that the proposed SASA is not fair, reasonable, or adequate:

(1) The "covered claims" provision is fundamentally unfair, as it barters away class members' rights in an overly broad claim waiver and does not ensure that all class members will obtain relief.

(2) A balancing of the meager and speculative benefits of the SASA against the waiver of a panoply of rights for an indefinite period of time demonstrates that the SASA is not fair, reasonable, and adequate. The WPAS goes on to discuss in detail this argument as to the subclasses (A & B), and the *Allen* and *Marr* class members.

(3) The Parties grossly mischaracterize the inadequate benefits provided by the SASA. The SASA addresses funding levels only for fiscal years 2003-2005 and does not actually require the State to seek funding past fiscal year 2005.

(4) The WPAS contends that the Plaintiffs have failed to investigate the case sufficiently in order to judge its merits; for example, although they are aware of the Center for Medicare and

Medicaid Services (CMS) audit of the CAP waiver program, the Plaintiffs have not sought copies of this report.

(5) Plaintiffs' counsel's representation has been inadequate as demonstrated by their failure to provide a definition of class members' rights (the only individuals who are guaranteed benefits under the SASA are the named plaintiffs and plaintiffs' counsel), and they have offered legal and factual explanations that unnecessarily grossly undermine their case ("Plaintiffs' statement that the State 'has already adopted this legal principle in practice,' (Dkt. 296 at 5-6) is tantamount to an admission that this robust legal claim is without factual support.") (WPAS Br. at p. 18.)

Objection of Applicants for Intervention

The Applicants for Intervention urge the court to reject the request for preliminary approval of the SASA and to permit the claims of persons who are participating in the state's Home and Community Based Waiver program for persons with developmental disabilities to proceed in *Boyle v. Braddock*, Cause No. C01-5687FDB. The Applicants for Intervention discuss the SASA's infirmities as follows:

(A) It does not meet the standards under Fed. R. Civ. P. 23(a) and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997)(decertification of settlement class upheld due to lower court's failure to analyze the proposed settlement under the Fed. R. Civ. P. 23(a) requirements).

1. There is inadequate representation when one looks at the impact of the proposed remedy and resolution as well as the class definition; the *Amchem* case is instructive as the deficits in the proposed settlement therein, that was rejected, are similar to those in this case. The appellate court held that the class conflicts prevented the proposed settlement class from meeting the adequacy of representation standard. The proposed settlement class members are asked to give up their entitlement to Medicaid services in exchange for a "chance," akin to a mere lottery ticket at getting covered, needed services. The SASA is virtually unchanged by the addition of proposed counsel and subclass representatives who have merely "rubber stamped" the original scheme.

2. The Parties have not demonstrated that the proposed subclass representatives meet the requirements of adequacy of representation, commonality and typicality under Fed. R. Civ. P. 23(a). Unlike all other proposed class members, the named plaintiffs get more than a "chance" at services. Two will continue to receive services for at least three years, and the other will receive services as soon as the settlement is approved. (SASA ¶ 8.1)

3. The proposed SASA does not meet the standards of minimally adequate notice, as required for due process. For example, the SASA's impact is unclear as to those who leave their ICF-MR facility for community placement and it is unclear as to the *Allen* and *Marr* class members.

(B) The SASA definition of "covered claims" creates the incentive for individual plaintiffs to pursue damage actions in order to protect their rights under the Medicaid Act and other "covered claims."

(C) The SASA fails to clarify the legal rights of persons who are participating in the state's Home and Community Based Waiver program for persons with developmental disabilities. While the Plaintiffs respond to this concern that no statement of legal rights is required because the Court has found that reasonably prompt delivery of Medicaid services is a federal statutory right, the SASA would stay and waive the rights of proposed settlement class members to enforce this requirement.

The Parties characterization of the waiver as a contract between the State and Federal governments is incorrect, argue the Applicants for Intervention; the Parties improperly relied on *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (E.D. Mich 2001), which asserted that the Medicaid program was a "contractual arrangement" between the State and Federal governments; this case was recently reversed and remanded by the Sixth Circuit on all issues relied on by the Parties herein. *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002)(holding that, as a Federal law the Medicaid Act is the supreme law of the land and not merely a contract).

The Applicants for Intervention also dispute the Parties' contention that the state is already operating the CAP waiver program under the legal principle that a person on a waiver gets that waiver's offering with reasonable promptness. They also dispute the claim that the Center for Medicaid and Medicare Services (CMS) will effectively enforce the rights of persons on the CAP waiver.

(D) Contrary to the Parties' contention, the budget proviso authorizing Division of Developmental Disabilities (DDD) funding does not include any language that prevents the funds from being spent if the settlement is not approved.

(E) The SASA's definition of "covered claims" exceeds the claims raised in the initial complaint. Waiving unpled claims raises a potential for abuse, and on this basis the SASA should not be approved.

(F) The SASA improperly limits the grounds for individuals to seek administrative review of Division of Developmental Disabilities (DDD) decisions and may prevent judicial appeal of administrative decisions.

Objection of the Hoisingtons

Richard Sterling Hoisington and his parents object to the preliminary approval of the SASA because the Stay associated with the SASA may bar the Hoisingtons from receiving the immediate, preliminary injunctive relief that the United States District Court for the Eastern District of Washington has ruled they are now entitled to receive. Richard is a participant in Washington State's Medicaid Community Alternative Program (CAP) Waiver. The Hoisington's lawsuit under 42 U.S.C. § 1983 in the Eastern District of Washington asserts violation of their rights under the Federal Medicaid Act and the Fourteenth Amendment. While the Defendants in the Hoisington's case moved for a stay pending the outcome of *Arc. v. Quasim*, the Court denied the motion with leave to renew. The Hoisington's fear is that Richard may be considered a member of "Subclass B" and that their case will be stayed along with all the "covered claims." Thus, the Hoisingtons fear

being placed in the position of being denied immediate relief in either the *Arc* lawsuit or their own, where the Court has already found them to be entitled to the relief they requested.

RESPONSES TO OBJECTIONS

Plaintiffs' Response

Entitlement to Services: The contention that there is no entitlement ot services or that the entitlement is limited to the funds appropriated in the SASA is untrue – they point to a Division of Developmental Disabilities Waiver update of May 6, 2002, which states in the "status" section that persons on the Waiver are "entitled" to those services for which the person can demonstrate a "need," and this is how Plaintiffs understand Defendants' position now. Disputes may be addressed at a hearing, from which there is an appeal (SASA at 2:11B)

Adequate Representation: All class members get some relief: subclass A have the right to ICF/MR services, if they wish; subclass B (on the CAP waiver) have right to all those services demonstrated to be needed to meet their needs. Enhancements are limited to funds that when carried forward to full fiscal years promise more than $100 million per year, but no more; that is not the same as saying that the clients will not receive all that they are legally entitled to, which defendants now concede.

Proposed Notice: The specific language of the proposed notice may be modified to satisfy the Court.

Defendants Response

Rule 23(a) Requirements are Met: The conflict among class members is addressed through the creation of subclasses. *Amchem* is distinguishable (settlement class here is not as "sprawling.") Money damages are not sought, and there is not a giant, single class, but discrete subclasses.

Adequacy of Representation/No Process: Such process by which class members will receive services exists in federal and state statutes and regulations, *e.g.*, RCW 71A.16.020 "Eligibility for Services – Rules."

SASA is Fair, Reasonable, & Adequate: Sufficiency of funds; the settlement does not specifically guarantee that all class members' needs will be met, but the law does not require or guarantee that each recipient of Medicaid will receive that level of health care precisely tailored to his or her needs. Medicaid is a particular package of health care services, and if individuals can demonstrate they have unmet needs that are required under Medicaid, they may pursue remedies administratively. Furthermore, DDD has taken the official position in response to CMS that DSHS will not use lack of funding as a defense when a fair hearing concerning access to services is held for a CAP Waiver client.

Different Treatment of Subclasses: Assuming *arguendo* that the subclass of persons already on the waiver have a stronger legal position than those not already on the waiver, the subclass on the waiver benefits from the settlement's provision of the certainty of specific sums being allocated to their class via enhancement sums, versus the uncertainty of any enhancements being appropriated in the absence of a settlement.

Assuming any class conflict, this should not bar class litigation of common interests. There are two common issues here: (i) whether the state violates federal law when it fails to provide HCBS waiver services to persons who have applied for them and are eligible for ICF/MR services, or when it fails to provide them with reasonable promptness; and (ii) whether the state violates federal law when it fails to provide class members a fair hearing upon denying them HCBS waiver services.

"Covered Claims" Provisions: The argument that this provision is overly broad fails to recognize that the Parties narrowed the covered claims to exclude money damages and that the State specifically agreed that this settlement does not bar individuals from requesting or appealing from individual hearings for individual services determinations, and it does not bar them from requesting ICF/MR services or from appealing a denial of such services. The objections also overlook the power of the Court to enforce its own order or judgment; thus, should a class member amend his

separate complaint to include a damage claim, and if he were to prevail, he could seek injunctive relief to enforce the judgment.

Regarding the argument that unpled claims raise a potential for abuse, the Complaint asserted that both the ADA and the Rehabilitation Act form a legal basis for eligible developmentally disabled individuals to choose HCBS waiver services rather than institutional care; the Complaint alleged violation of reasonable promptness rights under the ADA, and requested injunctive relief requiring defendants to offer all eligible plaintiffs the choice of institutional or home and community based services, a choice guaranteed by the waiver program and various statutes.

Class Members' Rights Are Defined by Law: The argument that the SASA does not clarify the legal rights of those on the waiver is addressed above in the section dealing with the "process." Failure to include clarification of rights is no different than settlements that do not include any admission of liability, and failure to include injunctive or declaratory relief was bargained for in the settlement process and does not undermine the SASA. While injunctive relief is not included in the settlement, the case cannot be dismissed unless the state provides substantial enhancements for DDD services in the years ahead, projected to be $370 million dollars by 2006.

Revised Notice: The notice incorporates all three suggestions from the Court. The argument that the developmentally disabled cannot understand the notice fails to acknowledge that such persons have the protection of guardians or attorneys who will review the notice on their behalf. The Parties are amenable to incorporating changes in the notice.

Regarding persons who could become future class members when they leave a facility seeking community placement, the argument is not logical, because future class members become present class members at the time they apply for benefits.

Allen and *Marr* Classes: These classes are excluded, and this is a non-issue. (SASA § 2.3)

The $14 Million Dollar Supplemental Appropriation: The defendants are aware that they can spend this amount, but their choice of whether or not to spend it now turns on whether there is preliminary approval of the settlement agreement.

Class Members May Appeal Individual Determinations: Section 2.11(B) states that nothing in the SASA prevents any individual from requesting an administrative hearing or an appeal from an individual service determination based on individual needs and an assertion that the individual meets state eligibility requirements.

Defendants' Response to the Hoisingtons' Objections: The Hoisington's lack any status to object to the settlement herein, as they are neither parties, intervenors, or applicant-intervenors. If the SASA is approved, the Hoisingtons will have both the District Court and the administrative process to pursue their claims.

DISCUSSION AND CONCLUSION

Plaintiffs were untimely when they raised the matter of class certification in response to Defendants' Motion To Strike Class Allegations. The Plaintiffs' efforts since then, which the Court has indulged overly long, highlights the improvident nature of the Court's allowing Plaintiffs to maintain this cause as a class action and denying Defendants' motion to strike.

The Court has considered the SASA, the Parties' arguments in favor of it, and the objections to it, as well as having reviewed the files in this case, and concludes that it cannot approve the SASA. The objections set forth above highlight the aspects of the SASA that render it problematic. Moreover, the Court is concerned that the SASA holds the potential to keep the Court embroiled in the program about which Plaintiffs complain for the foreseeable future and perhaps beyond. (See ¶¶ 4.16, 4.17) Finally, the SASA comes perilously close to manipulating a substitution of this Court for the Legislature.

When this case was first filed, the Plaintiffs stated, among other things, in the Joint Status Report in response to the inquiry about the nature and complexity of this case:

> This is a class action lawsuit. Other than that fact, plaintiffs assert that the case is legally and factually simple, comparatively speaking. It is involves [*sic*] one primary statute, the Medicaid Act, and its application to the facts. Plaintiffs expect to be able to prove that members of the class have waited for long periods of time without receiving Medicaid services. Plaintiffs assert that this is all they need to prove.

(JSR, pp. 2-3) From this simple beginning, the SASA would have this Court placing its imprimatur on budgetary decisions that are the ultimate responsibility of the Legislature.

The SASA speaks of the amount of new, additional funding for developmental disability and of how this appropriation will be spent (requiring quarterly reports to the Plaintiffs regarding progress in meeting terms of the SASA. (SASA, p. 8, ¶ 4.1(B)) Nevertheless, the Legislature still has some discretion:

"neither DSHS nor the Legislature is restricted from exercising discretion in applying funds generated by savings and efficiencies with DDD to the allocations set forth below, where the funds can be demonstrated as resulting from such cost savings, as opposed to a redirection of maintenance level appropriations for DDD. Neither DSHS nor the Legislature shall be restricted from implementing budget reductions in program areas unrelated to the allocations set forth below, including but not limited to state residential habilitation centers and DDD administrative costs."

(SASA, p. 8, ¶ 4.1(B)) The SASA further acknowledges that "the Governor and Legislature retain full power and authority to determine levels of state appropriations for all services provided through DSHS, and that this agreement is limited to stating the terms and conditions that must be met to trigger the dismissal clause (paragraph 4.9) of this Amended Settlement Agreement." (SASA, p. 12, ¶ 4.1(C)(6)) It is difficult to see what real benefit this agreement provides to the putative class/subclasses other than to afford the hope of an "appropriate" Legislative response to the court-approved SASA.

The SASA states what the named plaintiffs will receive if the SASA were approved, but nothing is said about the other class members; this fact points out the problem with the class representatives adequately representing the putative class/subclasses. This case is not the classic type of case that is amenable to treatment as a class action; Plaintiffs have failed to demonstrate that the requirements of Fed. R. Civ. P. 23 have been met.

Therefore, for these reasons and those elaborated upon by WPAS, CLS, and the Hoisingtons, the Second Amended Settlement Agreement will not be approved, the class earlier allowed to proceed is decertified, the stay on the underlying proceedings is lifted, and this case will go forward as an ordinary case.

ACCORDINGLY,

IT IS ORDERED:

1. The Parties' Joint Motion and Memorandum for Preliminary Approval of Amended Settlement Agreement [*i.e.* the Second Amended Settlement Agreement] (Doc. # 233) is DENIED, the previously certified class is herewith DECERTIFIED, and this case will henceforth proceed as a regular case and will no longer proceed as a class action;

2. Plaintiffs' Motion to Confirm Subclass Counsel (Doc. # 288) is DENIED;

3. Motions of Washington Protection and Advocacy System and of Defendant Quasim To Exceed Page Limitation (Doc. #s 311 and 318) are GRANTED;

4. Motion of Applicant-Intervenors To Intervene in this cause of action (Doc. # 212) is DENIED;

5. Motion of Applicant-Intervenors To Compel Disclosure of Draft Federal Review of Washington State's Home and Community Based Waiver Program for Persons with Developmental Disabilities (Doc. # 292) is rendered MOOT by the denial of Applicant-Intervenors motion to intervene and is STRICKEN from the Court's calendar;

6. The STAY earlier entered in this matter and continued by Order entered October 26, 2001 (Doc. # 191) is LIFTED;

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6. The Clerk is directed to send an Order for Joint Status Report to the Parties in order that trial and pretrial dates may be set in this matter.

DATED this 2 day of December, 2002.

FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

dk

United States District Court
for the
Western District of Washington
December 3, 2002

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:99-cv-05577

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