

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**HUNTINGTON DIVISION**

BENJAMIN H., by his next friend, Georgann H.,  
DAVID F., by his guardian, Carolyn B.,  
LORI BETH S., by her next friend, Janie J.,  
THOMAS V., by his next friend, Patricia V., and  
JUSTIN E., by his next friend, Sherry E.,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 3:99-0338

JOAN OHL, Secretary of the Department  
of Health and Human Resources,

Defendant.

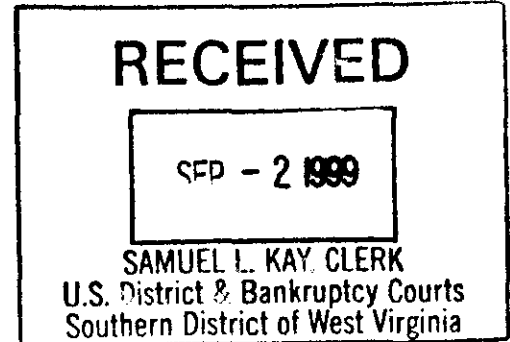
**MEMORANDUM OF DEFENDANT, JOAN OHL, IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

This case involves individuals currently on wait lists for an eligibility determination for the Mentally Retarded/Developmentally Disabled (MR/DD) waiver program. According to the evidence at the hearing held on June 30 and July 1, 1999, 337 of these individuals have been screened by the behavioral health centers for placement on the MR/DD waiver program. According to the Plaintiffs' evidence, another 234 individuals have been placed on a wait list without any formal screening.<sup>1</sup> All the five named plaintiffs were Medicaid recipients who were receiving services while on the wait list.<sup>2</sup>

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<sup>1</sup>The first time the defendant learned of this wait list was at this hearing. The defendant does not have any further information regarding these individuals. Apparently, they have been placed on secondary wait lists without any evaluation.

<sup>2</sup>Pursuant to the temporary injunction order, all five have been evaluated by OBHS and certified for the MR/DD waiver program.



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## **ARGUMENT**

Under Rule 23(a) of the Federal Rules of Civil Procedure, the four (4) pre-requisites for a class action which the Plaintiffs must satisfy are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the class representative parties are typical of those of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

### **1. Size of the Class.**

As of the June 30, 1999 hearing, there were 337 individuals on a wait list for the MR/DD waiver program. However, the Office for Behavioral Health Services (hereinafter, OBHS) did not make an eligibility determination for these individuals. The Defendant presented evidence that the denial rate by OBHS is 5% - 10%. Additionally, the Plaintiffs present evidence of an additional 234 people on another wait list; however, these individuals have not even been through a formal screening process by the behavioral health centers and, therefore, it is likely the denial rate for these individuals will exceed the normal 5% - 10%.

Basically, the Defendant does not know how many individuals currently on the wait lists are eligible for the MR/DD waiver program. After the new application process is implemented and the defendant receives information regarding the individuals on the wait lists, the Defendant will have a precise number. At this time, the Defendant does not even know who is on the unofficial wait lists. Also, the Plaintiffs have requested the class be limited to Medicaid beneficiaries who are eligible for the level of services funded under the ICF/MR service and/or the MR/DD service. This would limit the putative class further as not

all individuals on the wait list are necessarily Medicaid beneficiaries. The eligibility requirements for the MR/DD waiver are currently less restrictive than those for Medicaid in general. Again, the Defendant is without the necessary information about the wait lists to know how much further this will reduce the putative class.

The number of individuals in the putative class should be limited to the individuals currently on the wait lists. The current problems with the MR/DD application process will not affect future individuals as the defendant is in the process of addressing these issues. Also, the Plaintiffs estimate an additional 1,875 children will age-out of the school system over the next five years. There are several problems with this argument. First, there is no indication how this figure was derived by the Plaintiff and, therefore, appears to be completely speculative. Second, of the number of children currently in special education programs, it is impossible to know how many are eligible for the ICF/MR services or MR/DD waiver services. Finally, every year since the waiver program began, children have aged-out of the school system and there has not been a problem accommodating them.

Therefore, the individuals in this case should be limited to those individuals currently on the wait list as any other figure is too speculative. Even the number of individuals on the wait list exceeds the number of the putative class as requested by the Plaintiffs. The class is not so numerous that joinder is impracticable and thus, Fed. R. Civ. P. Rule 23(a)(1) is not satisfied.

## **2. Commonality.**

Fed. R. Civ. P. Rule 23(a)(2) requires there be “questions of law or fact common to the class.” In this case, the putative class members do not share commonality of law or fact.

Some of the individuals may be in or may become an emergency case while others may need services at some point in the future, but are only on the wait list in the planning stage. Some individuals may be receiving services while on the wait list while others are in an ICF/MR. Some individuals will require more care than others and thereby require increased expenditures. This can impact the program's cost neutrality required by 42 U.S.C.A. Section 1396n(c)(2)(D) and 42 C.F.R. 441.302(e) & (f). DHHR must show

that the agency's actual total expenditures for home and community-based and other Medicaid services under the waiver and its claim for FFP in expenditures for the services provided to recipients under the waiver will not, in any year of the waiver period, exceed 100 percent of the amount that would be incurred by the State's Medicaid program for these individuals, absent the waiver in -

- (1) A hospital;
- (2) A NF;
- (3) An ICF/MR.

42 C.F.R. 441.302(f).

If the cost neutrality of the program is not maintained, HCFA may refuse to grant a waiver or terminate one if a waiver has already been granted. 42 C.F.R. 441.302.

Moreover, pursuant to the Court's preliminary injunction order, the five named Plaintiffs have been certified for placement on the waiver program. They may not have a continued interest in representing the class as their objective has now been achieved and, therefore, no longer have a common interest with the putative class. There is not commonality in the putative class and thus, Fed. R. Civ. P. Rule 23(a)(2) is not satisfied.

**3. Typicality.**

Fed. R. Civ. P. Rule 23(a)(3) requires "the claims of the class representative parties are typically of those of the class." Again, as in the commonality discussion, the putative class representative parties are not necessarily typical of other class members' claims. Also, the ages of the representative parties range only from 5 - 31. Thus, Rule 23(a)(3) has not been met.

**4. Adequacy of Representation.**

Rule 23(a)(4) requires "the representative parties will fairly and adequately protect the interest of the class. Again, as in the two previous discussions, the putative class representatives and the other class members' interests may be antagonistic to one another. Thus, Rule 23(a)(4) has not been met.

**CONCLUSION**


The Plaintiffs cannot satisfy the requirements of Rule 23(a) and Defendant respectfully requests the Motion for Class Certification be denied.

Respectfully submitted,

DEPARTMENT OF HEALTH AND  
HUMAN RESOURCES,

By Counsel

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Defendant.


**CERTIFICATE OF SERVICE**

I, Kimberly L. Stitzinger, Assistant Attorney General, counsel for the West Virginia Department of Health and Human Resources, hereby certify that I have served a true and accurate copy of the foregoing **Memorandum of Defendant, Joan Ohl, in Opposition to Plaintiffs' Motion For Class Certification**, by regular U.S. mail, first-class postage prepaid this 2<sup>nd</sup> day of September, 1999 to the following:

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