IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD BOUDREAU, by and through his parents, Edwin and Ann Boudreau, BRIAN BRUGGEMAN, by and through his parents, Kenneth and Carol Bruggeman, FRANCES CORSELLO, by and through her parents, Vincent and Agnes Corsello, ANGELA MOORE, by and through her parents, James and Brenda Moore, LINDA SEMPREVIVO, by and through her parents, Richard and Ruth Semprevivo, individually and on behalf of a class, Plaintiffs, vs. GEORGE H. RYAN, in his official capacity as Governor of the State of Illinois, ANN PATLA, in her official capacity as Director of the Illinois Department of Public Aid, LINDA RENEE BAKER, in her official capacity as Secretary of the Illinois Department of Human Services, MELISSA WRIGHT, in her official capacity as Associate Director of the Office of Developmental Disabilities, Defendants.	FILED JAN 16 3M 2002 MICHAEL W. DOBBINS CLERK, U.S. DISTRICT COURT No. 00 C 5392 JUDGE GRADY MAGISTRATE DENLOW DOCKETED JAN 17 2002

NOTICE OF FILING

TO: Robert H. Farley, Jr., Robert H. Farley, Jr., Ltd., 1155 S. Washington, Naperville, IL 60540
Thomas G. Morrissey, Thomas G. Morrissey, Ltd., 10249 S. Western Avenue, Chicago, IL 60643

PLEASE TAKE NOTICE that on January 16, 2002 we will file with the Clerk of the Circuit Court of Cook County, Illinois, Defendants' Memorandum of Law in Response to Court's Questions, a copy of which is attached hereto and herewith served upon you.

HINSHAW & CULBERTSON

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PROOF OF SERVICE

I, Michel Royce, a non-attorney, certify that I served this notice by faxing a copy to each party to whom it is directed by 5:00 p.m. on the 16 day of January, 2001.

Michael Royce

[x]Under penalties as provided by law pursuant to ILL.REV.STAT.CHAP 110-SEC 1-109 I certify That the statements set forth herein are true and Correct.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD BOUDREAU, by and through his parents, Edwin and Ann Boudreau, *et al.*, individually and on behalf of a class,	)	
Plaintiffs,	)	
vs.	)	**No. 00 C 5392**
GEORGE H. RYAN, in his official capacity as Governor of the State of Illinois, *et al.*,	)	**Judge Grady** **Magistrate Denlow**
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN RESPONSE TO COURT'S QUESTIONS

This hearing does not need to go on forever, and it does not displace trial on the merits. The court's quandary results from Plaintiffs' refusal to commit to any specific basis for the suit and their injection of new legal theories at every turn of the class certification proceedings.

The issues before the court concerning the availability of ICF/DD beds for eligible persons who have applied for residential placement are set forth in Part I. Plaintiffs' seek to make a *de facto* showing that the Illinois Medicaid Plan does not comply with the Medicaid Act provision for an ICF/MR entitlement because vacancies are not available to Medicaid-eligible persons. Part II explains why the issue is *not* simply a comparison of the number of vacancies to the number of applicants, but the more complex problem of whether each person has a legally sufficient ICF/DD vacancy available. With demand heavily skewed towards desirable facilities, where even a small number of vacancies in other facilities remain available for extended periods, it means there is no "critical shortage." The critical shortage is in beds of highly desirable facilities. Part III identifies three class certification issues to which this question pertains: (1) whether the defendants have acted or refused to act on grounds generally applicable to the putative class; (2) whether there are common issues of fact and law; and (3) whether the individual Plaintiffs have standing to assert a claim. Part IV addresses the subtext of the order: management of the class certification hearing.

Introduction. These points *should* be focused only on the grounds for class certification set forth in the Third Amended Complaint and Plaintiffs' Memoranda of Law filed in Support of Class Certification. Our original objection filed on June 1, 2001 began by pointing out that Plaintiffs' Motion lacked the specificity "necessary to any analysis of the class certification issue." Since then, Plaintiffs have repeatedly argued legal theories they did not plead:

- That are placement of mildly impaired individuals in a large ICF/DD facility is inappropriate.
- That a small ICF/DD facility is the factual and legal equivalent of a CILA.
- That family participation and thus geographic proximity to family is required under the "active treatment" provisions of the Medicaid Act and regulations, introduced at mid-hearing through an amended report of a previously undisclosed expert witness, Dr. Susan Parish.
- That the defendants must act in the Plaintiffs' "best interests" 42 U.S.C. §1396a(a)(19),[1] first argued the same day that this court issued its order requesting clarification of the legal issues.

The shifting sands of Plaintiffs' legal theories make it virtually impossible for the court to analyze what class certification issue(s) are being proffered. That is the point. Plaintiffs' approach also prevents Defendants from challenging the legal sufficiency of these new theories injected during the course of the hearing in light of the requirements of 42 U.S.C. §1983 and the 11th Amendment.

Consider the class certification pleadings. The original proposed class definition was:

> All developmentally disabled or mentally retarded individuals in the State of Illinois who are not receiving or have not received Medicaid services for which they are eligible.

After Defendants filed written objections to that proposed class definition, Plaintiffs submitted a revised class definition in their Memorandum of Law in Support of Class Certification:

> All developmentally disabled or mentally retarded individuals residing in the Counties of McHenry, Lake, Kane, Cook, DuPage, Kendall, Grundy, Will and Kankakee, in the State of Illinois, who are eligible to receive Medicaid services and who have not promptly received either Intermediate Care Facility for the Developmentally Disabled (ICF/DD) or Community Integrated Living Arrangement (CILA) placement.

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[1]Plaintiffs quoted only a portion of the "best interests" provision (omitting the mandate for simplicity of administration). Various federal courts after reviewing the regulation in its entirety have repeatedly held that regulation is too vague and amorphous to be enforced through the vehicle of a §1983 action. Defendants are entitled to challenge the legal sufficiency of these new causes of action *before* they are considered.

The only issue in the definition is reasonable promptness. In the Memorandum, Plaintiffs argued an amalgam of two other Medicaid provisions: "statewideness" under 42 U.S.C. §1396a(a)(1) and "comparability" under 42 U.S.C. §1396a(a)(10)(B)(I).[2] Plaintiffs then claimed, at 2, an inability to obtain ICF/DD services "due to a critical shortage of ICF/DD facilities in the nine county area..."

Defendants pointed out that nine of the original ten Plaintiffs never sought placement in an ICF/DD facility, and that the one Plaintiff who did so only sought placement at a particular facility who would not accept him because of medical issues and subsequently turned down a placement at St. Colletta. The court then suggested to Plaintiffs' counsel that they file another amended complaint with "perfect plaintiffs" in order to obviate several of the objections which the defendants raised as to those ten standing to serve as class representatives.

Plaintiffs filed their Third Amended Complaint on September 26, 2001, adding four new class representative Plaintiffs. Plaintiffs did not revise their class definition, nor did they provide the court with any further specification of the issues presented by their Motion for Class Certification before the hearing began. Plaintiffs have not requested leave to amend their proposed class definition or the legal issues to be certified. Therefore, the issues framed for resolution in this hearing can *only* be found in Plaintiffs' June 12th Memorandum, which contains their proposed revised class definition and identifies the legal issues to be resolved at this hearing. This answers the court's first question: Plaintiffs assumed and bear the burden of proving that there is in fact a "critical shortage" of ICF/DD beds in the relevant geographical area and that this results in a lack of statewideness or a lack of reasonable promptness required by the Medicaid Act. The remaining legal theories are not properly before the court. We discuss them below only because the court has consistently overruled our objections to their consideration.

The Seventh Circuit has repeatedly recognized that while notice pleading is allowed under the federal rules, that a party can plead himself out of court by virtue of the theories asserted in his

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[2]Plaintiffs asserted that Medicaid's comparability requirement was violated because of the excess bed capacity in the "southern region of the State of Illinois" and they them compared the number of bed vacancies in that nine county region with the rest of the State as reflected in the May, 2001 ICF/DD vacancy report, Plaintiffs' Memorandum of June 12, 2001, at 3. In effect, Plaintiffs sought to inject one requirement, comparability, into a distinct requirement, statewideness. But "comparability" simply prohibits providing different packages of benefits to persons with the same developmental disabilities.

pleadings and the legal arguments related thereto, *Holman v. State of Indiana,* 211 F.3d 399, 406 (7th Cir. 2000)(claim of one form of sexual harassment in Complaint precluded later assertion of different claim).Plaintiffs are not immune from that rule simply because their pleading is a Motion for Class Certification. If Plaintiffs choose a theory not susceptible of class treatment or not legally cognizable, the motion must be denied.

We begin by laying out the claims on which the Court has heard evidence. By describing them we do not concede that they are properly considered, much less valid.

I. Elements of Plaintiffs' Claims

1. Plaintiff is a person **eligible under Medicaid** for services in an intermediate care facility for the mentally retarded ("ICF/MR"), consisting of the following:

   a. Plaintiff suffers from mental retardation or a related condition (developmental disability);

   b. Plaintiff is over the age of 18;

   c. Plaintiff is not in need of care in a nursing facility; and

   d. Plaintiffs is in need of active treatment so as to be eligible for placement in an ICF/MR.

2. Plaintiff has sought "medical assistance" in the form of ICF/MR benefits (including case management) from a Pre-Admission Screening ("PAS") Agency and has undergone a "Level II" screening covering the points in 1(a) through 1(d) above[3].

3. The recipient and family have diligently sought placement in an ICF/MR, including:

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[3]PAS Agents proceed explore ICF/MR placement options without waiting for individuals to obtain the financial certification of Medicaid eligibility. This has led the court to say that it will look to actual eligibility rather than any determination. However, there are *two* distinct determinations: a financial determination, made by a local DHS office, and a clinical determination, made by the QMRP at the PAS Agent. After a Level I PAS Screening finding that an individual is "probably" developmentally disabled, the PAS Agent begins case management services whether or not the individual is *financially* Medicaid eligible because even if Medicaid supported services are not available, referring the individual to other (state-funded) services is part of the PAS Agent's function. While an individual may seek services before obtaining Medicaid certification (either the financial determination from a local DHS office or the Level II screening clinical determination from the PAS Agent), no one is *legally entitled* to "medical assistance" in the form of services in an ICF/MR under the Medicaid Act until all these prerequisites have been satisfied.

a. The family consistently expressed a willingness to accept an ICF/MR placement when it became available within the geographical area.

b. The family diligently sought to locate a facility that would meet the needs of the Plaintiff, including maintaining consistent communication with the PAS Agent.

c. The family did not place limits, such as on the type, size or reputation of facility or provider to be sought or accepted.[4]

4. The family could not obtain a placement for the recipient in an ICF/MR within the applicable geographical area due to a "critical shortage" of ICF/DD beds.

5. The inability of the family to obtain a placement in an ICF/MR, giving due consideration to the difficulty of locating a "match" between the recipient and the facility, results from a failure of the Illinois Medicaid Plan to comply with one of the legally enforceable requirements of the Medicaid Act listed below.

De Facto Plan Provision Theory. The final element depends on the basis for Plaintiffs' claim that the Plan violates the Act. The memoranda of law submitted by the parties last week indicate that they have widely divergent positions on what may represent a failure of the Illinois Medicaid Plan to comply with the Medicaid Act. It is clear, however, that Plaintiffs do *not* attack any specific provision of or omission from the Plan itself, for they have not identified a single provision of the Plan. Rather, Plaintiffs contend that they can prove that a *de facto* provision of the Illinois Medicaid Plan exists which violates the Medicaid Act. Defendants object to this approach. Plaintiffs seem to have two distinct claims.

First Claim: State Is Required To Provide ICF/MR "Services," First, Plaintiffs claim that contrary to the statutory definition of "medical assistance" as payment for services obtained by the recipient in the market for medical services, Medicaid requires Defendants to ensure the availability of any service that Medicaid funds in the private marketplace[5]. They contend that the statute requires

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[4]A facility that is inappropriate based on objective, compelling clinical concerns could be rejected; otherwise no licensed, Medicaid certified facility within the geographical area could be rejected if this element is to be satisfied.

[5]As Defendants have pointed out, the only aspect of the Medicaid Act that imposes an obligation to ensure that services are available falls into the area of rate-setting. This provision, 42 U.S.C. §1396a(a)(30), is no longer enforceable under §1983, *HCMF Corp. v. Gilmore,* 26 F.Supp.2d 873, 876 (W.D. Va. 1998).

that Medicaid "services" be made available by the State. Since the statute defines ICF/MR as a service that Medicaid will fund, they argue, the State must actually *provide* that service. The existence of what Plaintiffs call a "critical shortage" (see Part II, *infra.*) in the applicable geographical area means that the State's Medicaid Plan does not comply with the Medicaid Act.[6]

Under this claim, if the court accepts the premise that the statute requires Illinois to ensure that there are adequate beds, Plaintiffs would be required present a colorable claim on one of the following grounds. Defendants contend strongly that *none* of these theories is legally sufficient under 42 U.S.C. § 1983 and that suit on each is barred by 11th Amendment sovereign immunity. The first theory requires proof of a *difference* in availability of vacancies between the defined geographical area and the State as a whole. The next two theories require proof of a lack of availability (what Plaintiffs call a "critical shortage"). The final two theories require proof that a placement close to home is necessary to "active treatment" or in the "best interests" of the recipient. The theories are:

I. Plaintiffs' failure to obtain an ICF/MR placement was because the Illinois Medicaid Plan provides for so little availability of ICF/MR facilities in the northeastern nine counties (or other applicable geographical area) that the Plan does not comply with the statewide services requirement of 42 U.S.C. §1396a(a)(1). (Statewideness theory: June 12, 2001 Memorandum of Law)[7]

II. Plaintiffs' failure to obtain an ICF/MR placement was because the Illinois Medicaid Plan provides for an inadequate number of ICF/MR facilities within the applicable geographical area so that it is not possible for most persons seeking ICF/MR placement to find a placement with reasonable promptness, 42 U.S.C. §1396a(a)(8). (Reasonable Promptness theory: Third Amended Complaint).

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[6]It is obvious from an examination of the Illinois Medicaid Plan that it is based on a form from the Department of Health & Human Services. Plaintiffs offer no explanation for why the form does not include any reference to the important subjects of availability of services and geographical proximity.

[7]Mixing metaphors, Plaintiffs also characterize this as a "comparability" theory based on 42 U.S.C. §1396a(a)(10)(B)(i), which provides that each Medicaid recipient in a given category be entitled to comparable services as other recipients in that category. The fact that each person is entitled to ICF/MR benefits satisfies this requirement, however, and Plaintiffs use of this requirement is as a rhetorical device, suggesting that there is an amalgamated obligation of "statewide comparability," which is not the case.

III. Plaintiffs' failure to obtain an ICF/MR placement was because the Illinois Medicaid Plan provides for an inadequate number of ICF/MR facilities within the applicable geographical area and the lack of available vacancies in the applicable geographic area precludes Plaintiff from exercising the freedom of choice guaranteed by the Medicaid Act, 42 U.S.C. §1396a(a)(23). (Freedom of Choice theory: Third Amended Complaint)

IV. Plaintiff's failure to obtain an ICF/MR placement was because the Illinois Medicaid Plan provides for an inadequate number of ICF/MR facilities within the applicable geographical area and Plaintiff has a right under the "active treatment" provisions of the Medicaid Act and regulations to a placement within the applicable geographical area because proximity to the family home is a prerequisite to active treatment.[8] (Active Treatment theory: Hearing Testimony of Dr. Susan Parish)

V. Plaintiff's failure to obtain an ICF/MR placement was because the Illinois Medicaid Plan provides for an inadequate number of ICF/MR facilities within the applicable geographical area and Plaintiff has a right to placement within the applicable geographical area because proximity to the family home is in the best interests of the recipient. (Best Interests theory: January 10, 2002 Memorandum)

Second Claim: State Has Established De Facto Moratorium on ICF/DD Development. Plaintiffs have also contended that Defendants established a *de facto* moratorium on ICF/MR development that artificially limits the supply of ICF/MR beds. This is contrary to the evidence, which is that the Department of Human Services decides about providing a letter of support on a case-by-case basis. The Department does not seek to encourage the development of new ICF/MR's, but rather encourages the development of new CILA facilities. This is in keeping with the consensus view of the disability community about what is in the best interests of persons with developmental disabilities as a whole. Plaintiffs, claiming to represent these same people, contend that because services in an ICF/MR are an entitlement, more such facilities must be developed, and that the actions of the Department have created a "critical shortage" of beds in the nine-county area. Under this claim, Plaintiffs would be required to show the following in addition to the elements above[9]:

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[8]If Plaintiffs do assert a claim that they are entitled to limit the scope of their searches for an ICF/DD placement to a specific size, an analogous element would be inserted here providing that active treatment requires placement in an ICF/DD of a particular identifiable size.

[9]Satisfaction of these additional elements would show that the alleged lack of availability of ICF/DD beds resulted from acts of the Defendants, but it would not overcome Plaintiffs' problem that the Medicaid Act does not require the State to provide services, so the alleged interference of the State in the market for

A. The State of Illinois intervened in the market for ICF/DD beds by imposing a *de facto* moratorium on the development of new ICF/DD's and by causing the elimination of existing ICF/DD beds, to such an extent that the availability of ICF/DD beds was substantially reduced; *and*

B. But for the market intervention by the State of Illinois, Plaintiff would have been able to obtain an ICF/DD placement in the market that would have existed without the market intervention by the State.

II. What Is Wrong With A Simple "Shortage" Analysis

The court asked, "must the Plaintiffs prove that there are in fact fewer vacancies in the relevant geographical area than are necessary to service the number of eligible applicants?" The court may legitimately be concerned with the impact of availability of beds on the ability of Medicaid recipients to obtain their entitlement to ICF/DD Medicaid benefits. It is proper to ask whether Plaintiffs or the class they seek to represent are unable to obtain such benefits because the number of ICF/DD vacancies is too small. But if a number of legally sufficient vacancies are consistently available at ICF/DD's (within the geographical area) that applicants simply will not accept, there is no "shortage." The demand is simply skewed towards more desirable facilities.[10]

Unlike the familiar college placement analogy, where ICF/DD placements are concerned, one option is always under serious consideration: not to place at all. Many people come to the PAS Agent saying that they are seeking a placement, but only for future planning. Others look with some distant date in mind and do not proceed to placement when that time comes. Frequently, an applicant is interested in placement only if *the right provider* has a vacancy. Plaintiffs' calculations disregard these considerations. Also unlike the familiar college placement analogy, certain individuals—such as persons with serious behavioral issues or with significant medical

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ICF/DD beds would still not be actionable under the Medicaid Act.

[10]Provider waiting lists shed no light on the question. Both representatives of the facilities presenting their lists admitted on cross examination that they did not know whether any of the persons on their lists have been found eligible for Medicaid, whether any have had a Level II PAS screen performed and/or whether any have been found to be in need of active treatment. Additionally, Mr. Martin admitted that some of the persons on Clearbrook's list are children who would not be seeking services until some time in the future. Consequently, those waiting lists do not establish the level of demand by "eligible" individuals.

concerns—will *always* be more difficult to place. The number of facilities that are equipped to deal with them will always be fewer.[11]

These are not hypothetical considerations:

- Mr. Jones testified to at least two different distances that he would consider: three hours and one hour (Tr., at 60-62). He then said he might consider a facility in the one-hour range even if its programs were inadequate, if he could compensate for those limitations. (Tr., at 63)

- Mrs. Auer designated a thirty-mile radius (Tr., at 427), but then said she would not rule out something more than thirty miles away. (Tr., at 437) She insisted on ensuring that the facility was appropriate in her own opinion. (Tr., at 444)

- Mrs. Lowrey testified that she had to have a facility within 45 minutes, but that she could only consider such a facility if she looked at it first. (Tr., at 1045-1046). She candidly admitted that it would depend on Sharon's preference. (Tr., at 1046)

- Mrs. Holmes (Doug Wilsmon's mother) said she would consider a facility up to three hours away, but she did not think that would be in Doug's best interest because of the distance. (Tr., at 244) She said she would consider, but not commit to, a facility in Joliet. (Tr., at 253) Before making a decision, she would have to look at the programs provided. (Tr., at 261)

None of the Plaintiffs is simply demanding service as such; all understandably insist on deciding for themselves the adequacy of the facility by their own standards, even if it is licensed and Medicaid certified. Nothing in Plaintiffs' evidence suggests that if an additional ten, fifty or five hundred ICF/MR's meeting only the minimum requirements were available, these or any other Plaintiffs would accept placement in those facilities even if they were just down the block.

This is not just an issue of the "match." Rather, it points up the fact that this is not a simple market. Plaintiffs' largely anecdotal approach to proving a "shortage" is akin to attempting to show discrimination in a disparate impact Title VII class action without considering the limitations inherent in the statistics presented. A simplistic approach to proving a complex phenomenon is akin to presenting no evidence at all. This is not a situation in which a quick look at the case can rely

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[11]This points up the limitations of a model that is based on geographical measurements of any kind. It is simply unreasonable to think that there will ever be facilities with the capacity to handle *all* special needs like these that can be in close geographical proximity to every family. It would be the equivalent of requiring an acute care hospital on every corner.

upon snapshot data or gross societal statistics: to even be probative, Plaintiffs' evidence must consider all relevant factors or it is inherently flawed and cannot be relied upon at all.

III. What The Court Has Before It That Requires Consideration of ICF/DD Availability

Four Basic Elements. To obtain class certification, Plaintiffs must first prove: (1) the number of members of the class must be sufficient to justify class treatment ("numerosity"); (2) the claims they assert must have common issues of fact and law with those of the putative class ("commonality"); (3) plaintiffs' claims must be typical of those of the class ("typicality"); (4) plaintiffs must be adequate representatives of the class ("adequacy of representation"). Fed.R.Civ.Proc. 23(a); *Williams v. Chartwell Financial Services, Ltd.,* 204 F.3d 748, 760 (7th Cir. 2000); *Mungia v. Tony Rizza Oldsmobile, Inc.,* 2001 WL 1104635 (N.D. Ill. Sept. 19, 2001)(Pallmeyer, J.); *Gilmore v. Southwestern Bell Mobile Systems, Inc.,* 2001 WL 1539157 (N.D. Ill. Nov. 30, 2001)(Hart, J.). The adequacy of representation element encompasses several other points: (a) there must not be conflicts among the class representatives and the class they would represent, *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992)("A class is not fairly and adequately represented if class members have antagonistic or conflicting claims."); (b) class counsel must be competent to handle the case, *Greisz v. Household Bank,* 176 F.3d 1012, 1013-1014 (7th Cir. 1999); (c) the class representative(s) must have standing, that is, at the time of class certification, it must be clear that the claim is not be a "clear loser" at the time filed, *County of Riverside v. McLaughlin,* 500 U.S. 44, 50-52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) and at the time class certification is sought, *Robinson v. Sheriff of Cook County,* 167 F.3d 1155, 1158 (7th Cir. 1999).

To come within Rule 23(b)(2), a provision for cases seeking injunctive or declaratory relief and from which individuals may not opt-out, Plaintiffs must prove that the defendants have acted on grounds generally applicable to the class, Fed.R.Civ.Proc. 23(b)(2); *Lemon v. International Union of Operating Engineers, Local 139,* 216 F.3d 577, 580 (7th Cir. 2000)(the rule "operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class...").[12] A class action

[12]Defendants have contended that Plaintiffs' insistence on construction of new ICF/DD facilities, most recently evidenced by their motion for preliminary injunction, disqualifies them from proceeding. Their class is made up of persons who are represented by a number of organizations that have publicly called

must also be manageable and represent the most efficient method of adjudicating the issues, *Williams v. Chartwell Financial Systems, Ltd.,* 204 F.3d 748, 760 (7th Cir. 2000).

The class certification hearing is to determine whether or not these elements are present. "Disputes about class certification cannot be divorced from the merits," *Blair v. Equifax Check Services, Inc.,* 181 F.3d 832, 835 (7th Cir. June 22, 2001). Hence, if there *is* sufficient availability of ICF/DD facilities, then:

1. There is no common basis on which Defendants have "acted or refused to act" towards the putative class on which to base a claim of actionable conduct. Failures to obtain placement may result from a family's unwillingness to consider all available facilities, unreasonable geographic limitations imposed by the family, a temporary and localized lack of available beds, failure of PAS Agent to provide, effective assistance, or any number of other factors. But they could not be a common basis on which the Defendants have acted or refused to act towards the class. *see Patterson v. General Motors Corp.,* 631 F.2d 476, 481 (7th Cir. 1980)(necessity for showing group-based conduct, not individualized grievance).

2. Thus, there can be no common legal issue. Without a lack of available beds, under any of Plaintiffs' theories, there can be no failure of the Illinois Medicaid Plan to meet any of the requirements of the Medicaid Act claimed by Plaintiffs. Plaintiffs' case is entirely dependent on a *de facto* showing, which in turn relies on alleged inadequate ICF/MR bed capacity.

3. The issue is also an element of whether or not the individual class representatives have standing, in the sense that their respective claims are "clear losers" if there *are* available ICF/DD beds. There is no action, individual or class, without a showing of a failure of the Illinois Medicaid Plan to comply with the Medicaid Act. Plaintiffs' efforts to locate a placement and willingness to accept placements that are available are also called into serious question by vacancies at ICF/DD's they have either not sought or not accepted.

IV. Management of the Hearing Process

How We Got to This Point. In *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672, 676 (7th Cir. May 4, 2001) the Court of Appeals concluded that where class issues depended on a factual point affecting subsidiary legal conclusions, which in turn affected the larger class action elements, then consideration of the underlying fact was indispensable.

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for a moratorium on ICF/DD construction that, contrary to Plaintiffs contentions, is not presently in place. Courts recognize that such advocacy organizations may represent legitimate interests of both their members and non-members, *see National Organization of Women v. Scheidler,* 267 F.3d 687, 708 (7th Cir. Oct. 2, 2001)

> ...[I]f some of the considerations under Rule 23(b)(3), such as 'the difficulties likely to be encountered in the management of a class action' overlap the merits—as they do in this case, where it is not possible to evaluate the impending difficulties without making a choice of law, and not possible to make a sound choice of law without deciding whether Bridgeport authorized or ratified the dealers' representations—then the judge must make a preliminary inquiry into the merits.

The subtext to the court's order is "How can the court be required to devote so much time to a class certification motion?" *Szabo* did not require the court to spend weeks in a hearing. The court commented, "Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.... A judge would not and could not accept the plaintiff's assertion as conclusive; instead the judge would receive evidence (if only by affidavit) and resolve the disputes before deciding whether to certify a class." *Szabo,* 249 F.3d at 676. The court analogized class certification to jurisdictional challenges. The usual course of such proceedings calls for each side to submit affidavits and other factual material supporting their position. The court then decides based on the evidence presented, if it can, or decides from reviewing the materials submitted that there are credibility issues requiring live witnesses to resolve the matter.

Defendants urged that course on the court, but Plaintiffs' insisted on proceeding with live testimony.[13] Plaintiffs then called 23 witnesses over a period of more than ten days of testimony. The court may eliminate issues by effectively finding Plaintiffs' evidence on a given point insufficient and may then refuse to hear any more evidence on that issue. But the court does violence to Defendants' right to be heard if, after listening only to Plaintiffs' presentation on a point, it decides that it has heard enough to make a decision. A court cannot know whether the evidence Plaintiffs have presented will remain persuasive without hearing what the Defendants have to say on the subject. It would fundamentally unfair, and unreasonable, to hear more than two full weeks of testimony by witnesses called by Plaintiffs, with the presentation controlled by Plaintiffs' questions, and then conclude, "I've heard enough."

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[13]It is within the court's discretion to accept affidavits or to hear live testimony in resolving a motion. Fed.R.Civ.Proc. 43(e).

The Manageability Problem. In part, the length and breadth of this hearing is an indication of why class certification would be a big mistake. The degree to which individualized issues predominate over group issues becomes apparent as one tries to sort out whether or not there are sufficient vacancies. To begin to answer this question, one must go down to the level of an individual-by-individual analysis of recipient and family preferences; extent and history of the provider search; family circumstances; personal limitations; service needs; geographical location and so forth. Categorizing people into groups will lead to a host of disputes over which group an individual belongs in.

The Courts of Appeals have concluded that a class action is not manageable where, as here, a host of individualized determinations concerning the class members would be required properly to define the class. In *Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001), the court described a class action in which the District Court sought to certify classes arising from different conveyances made at different times in States with different legal standards as "a nightmare of a class action." Plaintiffs here present an ever-increasing list of legal grounds for their claims, and would require consideration of at least hundreds of different individual situations to make out the statistical showing of a "critical shortage" that they claim exists. Same problem.

In *Newton v. Merrill Lynch Pierce Fenner & Smith*, 259 F.3d 154, 191 (3d Cir. 2001), the court noted that manageability "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." In that case, investors sued over alleged violations of the "duty of first execution" in securities sales. The class action was brought under Rule 23(b)(3), and thus included damage claims. Although the court concluded that imputed reliance was appropriate, the necessity for individualized review of damages for each investor affected by the alleged violations precluded class certification because there was no way that the case could be tried. The need for "individualized inquiry into actual injury transformed the exploration of each and every customer's NASDAQ transactions . . . into a mind-boggling undertaking."[14] The

[14]The court balked at the notion of examining each of the 249 instances in which Dr. Zider said his computer program at CAU identified persons who sought residential placement but were unable to obtain placement. Defendants have reviewed each of those 249 instances, and the CAU files demonstrate that the list includes a large number of persons who were not seeking immediate residential placement (or even

plethora of legal and factual issues that Plaintiffs present here, along with the complexity of the subject matter, clearly demonstrates that class treatment is not called for.

Must This Hearing Continue Ad Infinitum? **Absolutely Not.** There are methods of presenting evidence, which Defendants will employ, that will significantly expedite the remainder of this hearing. Principal among them is the use of declarations to establish specific and objective facts. Whenever possible, presentation will be done in an informal manner that will allow the court to obtain and question the information more quickly than would be required for the question-and-answer process of testimony, and allow discussion of legal and factual issues together, as normally occurs in considering motions.

Here are some of the points on which we will present new information:

- There was no Moratorium on ICF/DD Development during the 1990's.[15]
- The "Don Fike" ICF/DD facilities are not about to downsize.
- ICF/DD is proper for high-functioning individuals; if not, they are not eligible for benefits.
- The records of PAS Agents on persons they have been unable to place show that the reason for non-placement is not any "critical shortage."
- The most recent survey of ICF/DD availability for 2001 will show that placements are not impossible because there are not enough vacancies. The length of time vacancies remain open is believed to be inconsistent with a "critical shortage."
- An ICF/DD of any size is different from a CILA.

These matters were brought up in Plaintiffs' presentation. Defendants will be as quick as possible in refuting that misinformation so that the court may make an informed decision on the motion.

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residential placement at all). For all or virtually all of the remaining individuals, there are substantial reasons not associated with a "critical shortage," such as "family changed its mind" that explain why there has been no placement. We expect Plaintiffs will take issue with our summary, and the court will be back to an individual-by-individual review.

[15]Plaintiffs will show, *inter alia,* that in 1996, there were 38 new ICF/DD beds developed; in 1997 there were 53 new ICF/DD beds developed; in 1998 there were 26 new ICF/DD beds developed; and in 1999 there 124 new ICF/DD beds developed (a net increase of 111 for the year). In 2000 there were no changes in the number of ICF/DD beds and in 2001 one facility closed its 6-bed ICF/DD.

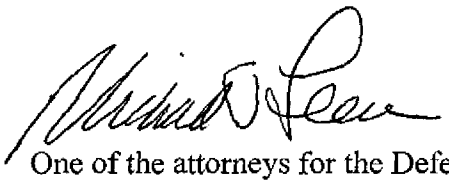
Conclusion

One of the considerations supporting discretionary appeal under Rule 23(f) was that "a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight... [A] grant of class status can propel the stakes of a case into the stratosphere [and] some district judges may be tempted to use the class device to wring settlements from defendants whose legal positions are justified but unpopular." *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). In this instance, Plaintiffs' counsel[16] seek to propel themselves into a position to redesign the State's system for providing free services to persons with mental retardation and developmental disabilities by seeking relief that is contrary to the expressed desires of the disability community: construction of additional ICF/DD facilities.

Dated: January 16, 2002.

Respectfully submitted,

HINSHAW & CULBERTSON

By: 
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[16]It is well-recognized that class actions are lawyers' lawsuits, *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1158 (7th Cir. 1999)(referring to class counsel as the "mover and shaker")