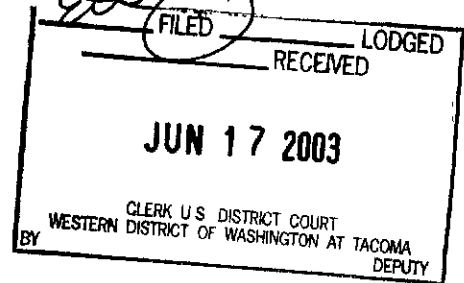


ENTERED
ON DOCKET

JUN 17 2003

By Deputy



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

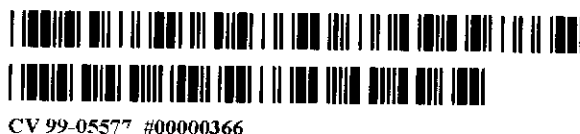
ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS AND
DENYING PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT

INTRODUCTION

Plaintiffs – an advocacy group devoted to promoting services for developmentally disabled persons – allege that the Defendants have violated their civil rights by failing to provide to them with reasonable promptness the benefits to which they are entitled under the Medicaid statute. Plaintiffs allege that they have had to remain on waiting lists for long periods.

Defendants move for dismissal or, alternatively, for summary judgment, and they present several grounds. Defendants assert that the Arc lacks standing, there is a conflict of interest among

ORDER - 1



CV 99-05577 #00000366

366

1 members of the organization, the issues are not ripe, Plaintiffs have failed to exhaust administrative
2 remedies, and abstention is proper

3 For the reasons discussed below, Defendants' motion to dismiss is granted

4 DISCUSSION

5 I. Standing

6 *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) sets forth the elements that must be
7 established to demonstrate standing. Plaintiff must have (1) suffered an injury in fact, (2) that is
8 causally connected to the conduct complained of, and (3) is likely to be redressed by a favorable
9 decision. *Id.* at 560-61. It is "substantially more difficult" to establish standing for a plaintiff who
10 is not himself the object of the government action or inaction challenged. A membership
11 organization has standing to bring suit on behalf of its members only when "(a) its members would
12 otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to
13 the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the
14 participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising*
15 *Comm'n*, 432 U.S. 333, 343 (1977).

16 Plaintiffs argue that the participation of individual defendants is not required because the
17 only issue common to all plaintiffs is the matter of reasonably prompt services for eligible persons.
18 Further, they argue that since they are seeking declaratory and injunctive relief, participation of the
19 individual members is not required.

20 The contention that some individuals are not being assessed or are not receiving services
21 with reasonable promptness implies that some factual issues must be resolved. Plaintiffs allege that
22 Defendants violated Medicaid law, and proof of the manner in which the violation has occurred
23 must be presented. Plaintiffs request injunctive relief requiring Defendants "to offer all plaintiffs
24 who are eligible for waiver services the choice of receiving ICF/DD or home and community-based
25 services that are suitable for their needs within 90 days or some other specifically-defined period."

1 This requires the participation of the individual members in the lawsuit for the determination of
2 certain relevant factual issues. Plaintiffs, therefore, cannot meet the third element for standing
3 under *Hunt Accord, Harris v McRae*, 448 U S 297 (1980)(participation of an organization's
4 individual members was needed to show the regulation's coercive effect and organization lacked
5 standing in the lawsuit). Moreover, the Arc's lack of standing is unaffected by the participation of
6 the named individual plaintiffs with standing. See *Ass'n for Retarded Citizens of Dallas v Dallas*
7 *County Mental Health & Mental Retardation Ctr Bd of Trustees*, 19 F 3d 241, 244 (5th Cir 1994).

8 **II. Conflict of Interest**

9 Defendants contend that the differing interests among the organization members (some on
10 the State's Home and Community Based Waiver program and alleging they are not receiving all the
11 services to which they are entitled, some not on the Waiver and alleging that they have a right to be
12 on the waiver) creates a conflict of interest between the Arc and those members, thus requiring the
13 Arc's dismissal.

14 The Arc argues in response that there is no law that requires unanimity of interest among an
15 organization's members before it may sue, and contends that the Arc speaks with one voice through
16 the actions of its Board.

17 The Plaintiffs' arguments fail to address the obvious, inherent conflict among the parties.
18 The Rules of Professional conduct cited by Defendants speak to the problem of an attorney
19 representing clients with differing interests (RPC 1.7(a)(1) and (b)(1)). It would be problematic to
20 allow the Arc to represent one group of its members, when it purports to represent all
21 developmentally disabled people. This issue is rendered moot with dismissal of the Arc for lack of
22 standing.

23 **III. Ripeness**

1 Defendants argue that this case is no longer ripe for relief as the Defendants are in the
2 process of changing Washington's single CAP (Community Alternatives Program) waiver into
3 several CAP waivers.

4 Plaintiffs argue that it doesn't matter what the program is, Plaintiffs may still bring their
5 claims of entitlement. Moreover, they contend that the current program will be extended until the
6 new programs are approved

7 Plaintiffs' argument overlooks the need for an underlying controversy the need to determine
8 the contours of the State program ultimately being offered, whether Plaintiffs need and are qualified
9 to receive certain services, and whether the services are being provided with reasonable promptness

10 **IV. Failure to Exhaust Administrative Remedies**

11 Defendants point to Washington State law that provides the right of appeal to all individuals
12 who are denied services provided by DSHS' Division of Developmental Disabilities, including
13 services provided through the CAP Waiver program at issue here RCW 71A.10.050(1), WAC 388-
14 825-120 State law also provides for judicial review in state superior court of adverse
15 administrative decisions RCW 34 05 514 Plaintiffs are required to exhaust administrative
16 remedies prior to seeking judicial review RCW 34 05 534 Defendants contend that Plaintiffs have
17 failed to utilize administrative remedies before seeking relief, and that at least as far back as 1996,
18 none of the three named plaintiffs has requested a fair hearing with regard to denial reduction
19 suspension or termination of services to the developmentally disabled

20 Plaintiffs argue that individual participation of Arc members is not necessary, that one Arc
21 family (a plaintiff herein) has pursued an administrative remedy in 1999, but the Administrative
22 Law Judge could not overturn state statutes and regulations blocking access to reasonably prompt
23 service Plaintiffs argue, therefore, that it would be futile to pursue administrative remedies and that
24 it is not necessary to pursue administrative remedies when a Section 1983 claim is involved
25
26

1 Defendants submit DSHS Secretary Dennis Braddock's letter of June 26, 2002 to the
2 Regional Administrator of the U S Department of Health and Human Services wherein he states
3 that "We [DSHS] will not use lack of funding as a defense when a fair hearing concerning access to
4 services is held for a CAP Waiver client " No evidence has been presented that the DSHS is acting
5 contrary to that commitment since June 26, 2002 Defendants also argue that Plaintiffs' futility
6 argument is unavailing because administrative decisions are subject to review in the state superior
7 courts, which do have authority to overturn statutes, and Defendants cite three such cases.

8 Plaintiffs have failed to exhaust their administrative remedies, their arguments to the
9 contrary notwithstanding A system is in place to address Plaintiffs' concerns, and the
10 administrative remedies provided are there to assist the Plaintiffs Far from being futile, the
11 administrative remedies provided allow a program participant to settle a problem more efficiently,
12 and among those with expertise, than proceeding to a different forum entirely, and, the State is
13 provided the first opportunity to address the issues that occur in the program that it is charged with
14 administering

15 V. Abstention

16 Defendants argue that abstention pursuant to *Burford v Sun Oil Co* , 319 U S 315 (1943) is
17 appropriate The doctrine from *Burford* provides that federal courts should abstain from exercising
18 jurisdiction when failing to abstain would create needless conflict with the state's administration of
19 its own regulatory scheme, which in turn would affect issues of substantial local importance that
20 would transcend the federal court case Here, the DSHS has special knowledge and expertise in
21 administering the Waiver program

22 Plaintiffs argue that abstention is not appropriate because this case does not meet the three
23 factors required for abstention under *Burford*: (1) the state has chosen to concentrate suits
24 challenging the actions of the agency involved in a particular court, (2) the federal issues cannot be
25 separated easily from complex state law issues with respect to which state courts might have special

1 competence, and (3) federal review might disrupt state efforts to establish coherent policy *City of*
2 *Tucson v U S West Communications, Inc* , 284 F 3d 1128, 1133 (9th Cir 2002)

3 Plaintiffs argue that none of the above elements are met matters are not concentrated by this
4 state in a particular court, this case is about Federal policy under the Medicaid Act, and Federal
5 review here will clarify the State's obligations under the Medicaid Act.

6 The Supreme Court has implicitly acknowledged the difficulties states have in managing
7 large, federal entitlement programs *Olmstead v Zimring*, 527 U S 581 (1999) addressed the
8 question of whether the proscription of discrimination in the Americans with Disabilities Act
9 (ADA) may require placement of persons with mental disabilities in community settings rather than
10 in institutions The Court answered with a qualified yes, provided treatment professionals
11 determine community placement is appropriate, the affected individual does not object, and the
12 placement can be reasonably accommodated," *taking into account the resources available to the*
13 *State and the needs of others with mental disabilities* " (Emphasis added) The Court recognized
14 that individuals have different needs, may need an institutional setting from time to time, or may
15 always require an institutional setting The Court addressed the "reasonable-modifications
16 regulation" that "allows States to resist modifications that entail a 'fundamenta[l] alter[ation]' of the
17 States' services and programs " *Olmstead*, 527 U S at 604 The Court stated

18 To maintain a range of facilities and to administer services with an even
19 hand, the State must have more leeway than the courts below understood the
fundamental-alteration defense to allow

20 *Olmstead*, 527 U S at 605 Justice Kennedy's concurrence, joined in by Justice Breyer stated in
21 pertinent part:

22 In light of these concerns, if the principle of liability announced by the Court
23 is not applied with caution and circumspection, States may be pressured into
24 attempting compliance on the cheap, placing marginal patients into integrated
25 settings devoid of the services and attention necessary for their condition This
danger is in addition to the federalism costs inherent in referring state decisions
regarding the administration of treatment programs and the allocation of resources to
the reviewing authority of the federal courts. It is of central importance, then, that

1 courts apply today's decision with great deference to the medical decision of the
2 responsible, treating physicians and, as the Court makes clear, with appropriate
deference to the program funding decisions of state policymakers

3 *Id* at 610

4 Bearing the holding of the analogous *Olmstead* case in mind, elements (2) and (3) for
5 *Burford* abstention have been met Moreover, there is provision for appealing administrative
6 decisions in this area to the State courts, so element (1) is also met The Court agrees that the state
7 system, coupled with Washington's public policy interests and concerns in and for the even-handed
8 administration of its limited resources to a population with great and diverse needs, support
9 application of the *Burford* abstention doctrine to this case.

10 CONCLUSION

11 The Plaintiff Arc must be dismissed from this case for lack of standing as the participation
12 of the individual members of this lawsuit is required The Arc may not represent all parties, as there
13 is an inherent conflict of interest among the members of the Arc There is a problem with the
14 ripeness of this lawsuit presently, as the waiver program at issue is in the process of changing into a
15 program constituted of several waivers, therefore, whether the Plaintiffs herein will have any
16 complaints that require redress is unknown, and it is a waste of judicial resources to address the
17 original waiver under these circumstances. The Plaintiffs have admittedly failed to exhaust their
18 administrative remedies It is important for the State to have the opportunity to deal with
19 complaints first, as it administers the program and possesses the expertise Moreover, a
20 complainant who is unhappy with the administrative law judge's decision may pursue the claim in
21 the State court system Finally, abstention is a doctrine that is appropriate to apply in this case, and
22 all the elements for *Burford* abstention are satisfied.

23 NOW, THEREFORE,

24 ////

25 ////

26 ORDER - 7

1 ////

2 ////

3 IT IS HEREBY ORDERED

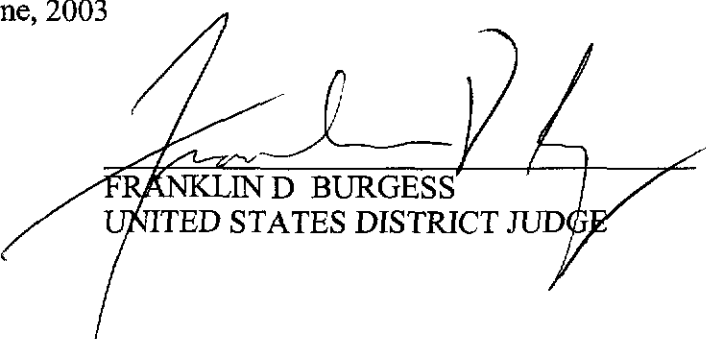
4 (1) Regarding Defendants' Supplemental Motion and Memorandum to Dismiss Pursuant to
5 Order of 4/2/03 in Companion Case of *Boyle et al v Braddock*, or in the alternative, Defendants'
6 Motion for Summary Judgment (Doc # 343), Defendants' Motion to Dismiss (Doc # 343-1) is
7 GRANTED and this cause of action is DISMISSED The alternative Motion for Summary
8 Judgment (Doc. # 343-2) is STRICKEN as MOOT,

9 (2) Plaintiffs' Motion for Partial Summary Judgment (Doc. # 332) is DENIED,

10 (3) Plaintiffs' Stipulated Motion to Extend certain deadlines (Doc. # 364) is rendered MOOT
11 by this Order and is STRICKEN from the Court's calendar;

12 (4) The Clerk is directed to enter Judgment for Defendants in this matter

13
14 DATED this 17 day of June, 2003

15
16 
17 FRANKLIN D BURGESS
18 UNITED STATES DISTRICT JUDGE
19
20
21
22
23
24
25

United States District Court
for the
Western District of Washington
June 17, 2003

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:99-cv-05577

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

Joy Ann Logan-von Wahlde, Esq.
COLUMBIA LEGAL SERVICES
STE 430
625 COMMERCE
TACOMA, WA 98402
FAX 1-253-572-4348

Eleanor Hamburger, Esq.
COLUMBIA LEGAL SERVICES
STE 300
101 YESLER WAY
SEATTLE, WA 98104-2552
FAX 382-3386

Patricia J. Arthur, Esq.
COLUMBIA LEGAL SERVICES
STE 300
101 YESLER WAY
SEATTLE, WA 98104-2552
FAX 464-0856

Daniel S Gross, Esq
WASHINGTON PROTECTION & ADVOCACY SYSTEM
STE 102
180 W DAYTON
EDMONDS, WA 98020
425-776-1199

Stacie Berger Siebrecht, Esq.
WASHINGTON PROTECTION & ADVOCACY SYSTEM
STE 102
180 W DAYTON
EDMONDS, WA 98020
FAX 425-776-0601

Deborah A Dorfman, Esq.
WASHINGTON PROTECTION & ADVOCACY SYSTEM
STE 102
180 W DAYTON
EDMONDS, WA 98020

Andrew M Mar, Esq.
DAVIS WRIGHT TREMAINE LLP
STE 2600
1501 4TH AVE
SEATTLE, WA 98101-1688
FAX 628-7699

Catherine E Maxson, Esq.
DAVIS WRIGHT TREMAINE LLP
STE 2600
1501 4TH AVE
SEATTLE, WA 98101-1688
FAX 628-7699

Roberta Happy Matthiesen Rons, Esq.
ATTORNEY GENERAL'S OFFICE
SOCIAL & HEALTH SERVICES
PO BOX 40124
OLYMPIA, WA 98504-0124
FAX 1-360-438-7400

Edward J Dee, Esq.
ATTORNEY GENERAL'S OFFICE
SOCIAL & HEALTH SERVICES
PO BOX 40124
OLYMPIA, WA 98504-0124
FAX 1-360-438-7400

Lucy Isaki, Esq.
ATTORNEY GENERAL'S OFFICE
PUBLIC COUNSEL
STE 2000, MS TB 14
900 4TH AVE
SEATTLE, WA 98164-1012
FAX 464-6451

Larry A Jones, Esq.
2118 8TH AVE
SEATTLE, WA 98121
FAX 405-3243

Christine Thompson Ibrahim, Esq.
2118 8TH AVE
SEATTLE, WA 98121
206-405-3240

FDB