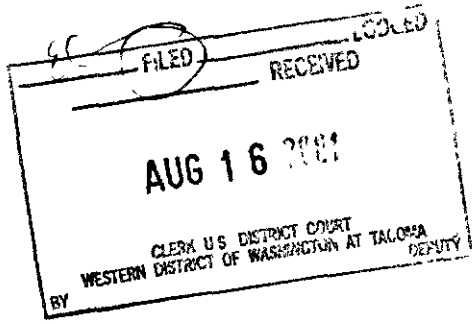

THE HONORABLE FRANKLIN D. BURGESS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

The Arc of Washington State, Inc , et al , Plaintiffs, v Lyle Quasim, et al , Defendants	NO C99-5577 FDB MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF THE CLASS SETTLEMENT AGREEMENT

I. INTRODUCTION

The parties seek preliminary approval of the settlement agreement negotiated by the representatives of the class, the Arc, and the state under Fed R Civ P 23(e) As discussed below, the terms of the settlement agreement represent a fair and reasonable compromise adequate to all concerned parties Therefore, the terms of the settlement class, settlement agreement, and notice to the class members should be approved, and a reasonableness hearing necessary for the final approval of the class settlement scheduled for _____, 2001

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II. BACKGROUND

The class action complaint in this action was filed on November 9, 1999 It alleged, on behalf of three developmentally disabled individuals and an advocacy organization, the Arc of Washington State, by itself and on behalf of its members, that the State of Washington structures and administers its Medicaid program for people with developmental disabilities in ways that violate the Medicaid Act, the Rehabilitation Act, the ADA, and the equal protection and due process clauses of the Fourteenth Amendment The complaint sought declaratory and injunctive relief that would require the state to offer plaintiffs the full range of services available in Intermediate Care Facilities for the Mentally Retarded (ICF/MRs) or Home and Community-based Services (HCBS) operated by Washington State under a federally approved "waiver" under the Medicaid Act with reasonable promptness

ICF/MR programs provide residential services in facility-based settings to people with developmental disabilities who require "active treatment" such as assistance with activities of daily living Most recipients of ICF/MR services in Washington receive them in five state institutions, also referred to as residential habilitation centers or RHCs Washington State also provides funds to some privately-operated, small community-based ICF/MR facilities.

In contrast to ICF/MR programs, waiver programs allow states to waive certain requirements of the Medicaid Act that otherwise would mandate that services to people who are ICF/MR-eligible would be provided services in ICF/MR settings If a state requests and is granted a waiver, the state can offer services to ICF/MR-eligible clients in settings that depart from ICF/MR regulations The parties agree that, in the absence of a court order to the contrary, waiver programs are limited by the terms of the agreement between the state and the federal government as to how many will be served Under the

terms of the federally granted waiver, Washington's primary HCBS waiver program for persons with developmental disabilities (called the CAP or Community Alternatives Program waiver) is currently limited to 9,977 people

The plaintiffs sought to certify, under Fed R Civ P 23(b)(2), a class defined as "all individuals with developmental disabilities in the State of Washington who have applied for, and who qualify for, but are not receiving or have not received with reasonable promptness, Medicaid ICF/MR services for which they are eligible, and individuals who will be similarly situated in the future" (Dkt # 51, at 7)

The Court certified a class defined as "all developmentally disabled persons in the State of Washington who (1) meet the medical and financial requirements for eligibility for ICF/MR services, (ii) have applied for HCBS waiver services, and (iii) have not received HCB waiver services, or not received them with reasonable promptness, and individuals who will be similarly situated in the future" (*Id*, at 6) After the class was certified, the parties made cross-motions for partial summary judgment The class sought a ruling that the state was violating the Medicaid Act and applicable regulations by failing to provide plaintiffs all the services they needed with reasonable promptness The state sought a ruling that it did not violate the Medicaid Act by failing to provide the class HCBS waiver services because its limitation of 9,977 slots was valid under federal law and because the HCBS program was full The Court denied the plaintiffs' motion and granted defendants' motion for partial summary judgment in part It held

1) Eligibility for ICF-MR services does not suffice under the terms of the Washington State Community Alternatives Program and the Medicaid Act to establish entitlement to placement on the HCBS waiver,

2) The Plaintiff class as a whole is not entitled to placement on the HCBS waiver because there is insufficient capacity in that program to accommodate the entire class, and the Medicaid Act does not require the State to create that capacity,

3) 3) Pending resolution of outstanding motions, Plaintiffs may proceed with their Medicaid Act claim to fair hearings, their ADA and Equal Protection claims, and The Arc's claim for additional HCB services for its members currently on the waiver

(Dkt #119, at 11)

The Court's order also noted that the Arc of Washington State, on behalf of its members with developmental disabilities and their guardians, asserted additional claims that some of its members who had already been placed on the HCBS waiver were not provided with all the waiver services to which they were entitled with reasonable promptness *Id* at 10 The Court denied plaintiffs' motion for summary judgment on that issue because plaintiffs' evidence failed to show absence of a genuine issue of material fact *Id.* at 10

Defendants then moved to dismiss the plaintiffs' claim that the cap on the waiver program violated the ADA as interpreted by the Supreme Court in *Olmstead v Zimring*, 522 U S 581, 119 S Ct 2176 (1999) Plaintiffs claimed that by providing a right to ICF/MR services, but not to waiver services, the state was violating the "integration regulation," 28 C F R § 35 130(d), that requires services be provided in the most integrated setting The Court granted defendants' motion, holding

> The Medicaid Act, specifically 42 U S C § 1396n(c)(10), authorizes States to limit their HCBS waiver programs to a subset of the developmentally disabled The State of Washington has chosen to do so, and the ADA does not prohibit this choice Defendants are entitled to judgment as a matter of law on Plaintiffs' ADA claim

(Dkt #132, at 3)

The Court's ruling also denied defendants' motion to dismiss Arc of Washington as a named plaintiff It ruled that Arc had standing, as an advocacy organization, to pursue its claim alleging that the state illegally failed to provide either ICF/MR or HCBS waiver services to its members *Id.* at 4-5 Plaintiffs' motions to modify the class definition to allow the class to pursue a claim for placements in ICF/MR facilities and to amend the order of partial summary judgment on the Medicaid Act claim were denied *Id.* at 5-6

Following a pre-trial hearing on December 22, 2000, the Court issued an order clarifying the unresolved issues left for trial

> [T]he Court finds the following claims properly remain for resolution at trial
>
> A Class Claims
>
> 1) A claim under the Medicaid Act to hearings when applications for placement on the HCBS waiver are denied
>
> 2) A claim under the Equal Protection clause to placement on the HCBS waiver
>
> B Claims by The Arc on behalf of its members
>
> 3) A claim under the Medicaid Act that persons already on the HCBS waiver are not receiving all the services to which they are entitled
>
> 4) A claim under the Medicaid Act that persons eligible for ICF/MR services are not receiving such services with reasonable promptness
>
> 5) A claim under the Medicaid Act that persons eligible for placements in ICF/MRs are entitled to their choice of type of ICF/MR (in particular, that eligible persons are entitled to choose "community residential" ICF/MRs as opposed to the large, state-run institutions like the Fircrest School), and that the State is obligated to provide services of the type chosen with reasonable promptness
>
> Dkt #134, at 2

The Court invited the parties to submit supplemental briefs on five legal issues

1) What sort of hearing (if any) does the Medicaid Act oblige the State to provide to persons who are denied placement on the HCBS waiver?

2) Does the equal protection clause require the State to open the HCBS waiver program to all those persons with developmental disabled persons eligible for institutional care?

3) Once a person is placed on the HCBS waiver, what determines the particular services to which they are legally entitled under the Medicaid Act?

4) What period of time is consistent with the "reasonable promptness" requirement of 42 U S C §1396a(a)(8)? and

5) Once the State determines that a person is eligible for ICF/MR care, does the Medicaid Act require the State to offer that person a choice of type of ICF/MR and provide services in the chosen type with reasonable promptness?

Id.

In a mediation session held on January 6, 2001, the parties agreed, in principle, on the terms of a settlement agreement The settlement provides, in relevant part, that in exchange for the stay of all claims by the settlement class until final dismissal, the state would provide an additional $14 million in DDD funding for fiscal year (FY) 2003, and would carry forward into the 2003-2005 biennium the increased services generated from this enhancement The parties understand and anticipate that new services developed for clients with the initial $14 million during the first year will create a "bow-wave" effect requiring significantly more funds in subsequent years to carry forward the new services for all clients who began receiving those services during FY 2003 Bow waves are frequently created by initial appropriations for new services because assessment, planning and development take time before services are actually delivered Expenditures for those services are typically delayed until later in the fiscal year or biennium Since people enter services across the fiscal year or biennium, more people receive services within available

funds and an increased expenditure is necessary to maintain those services into the subsequent budget period As a result, costs of carrying forward the increased services beyond FY 2003 will be significantly more than $14 million a year, and funds sufficient to continue those new services must be appropriated for the 2003-05 biennium for the case to be dismissed If the parties are unable to reach agreement regarding how the $14 million enhancement for DDD services for FY 2003 will be spent, or if the legislature fails to appropriate the $14 million or directs its spending in a manner inconsistent with the agreement of the parties, either party can move to lift the stay and the case would proceed to trial

In addition to requiring the parties to agree on how the $14 million enhancement in FY 2003 will be spent, the settlement includes a process by which plaintiffs and defendants will meet during the 2001 calendar year to try to reach agreement on an additional enhancement for DDD services for the 2003-2005 biennium The settlement requires the parties to also reach agreement regarding how the additional funds appropriated by the legislature will be spent for service enhancements in the 2003-2005 biennium If the parties are unable to reach agreement regarding the amount of new funding for DDD services for the 2003-2005 biennium or how those funds will be spent, or if the legislature fails to appropriate the agreed amount or directs its spending in a manner inconsistent with the agreement of the parties, either party can move to lift the stay and the case would proceed to trial

The proposed settlement class is defined to include "all DDD clients who are eligible for ICF/MR and/or HCBS waiver services administered by DDD in the State of Washington and who are not receiving all the services they need with reasonable promptness, and those who may become similarly situated in the future prior to December 31, 2006." Thus, the proposed settlement class includes those claims that the Court has recognized belong to the Arc itself and as the representative of its members. Under the proposed settlement the claims of the Arc and its members and the class are identical.

The terms of the settlement agreement were further refined in an additional mediation session held on April 27, 2001. *See* Jones Declaration, at Ex. A (the Settlement Agreement). The settlement agreement provides for the recovery of plaintiffs' attorneys' fees and costs. Costs of litigation of $28,000.79 and attorneys fees of $71,999.21 are payable now. An additional $203,441.04 in attorneys fees will be payable upon legislative appropriation of the agreed amount for fiscal years 2003-05 in the spring of 2003. *Id.* at 12-13. The parties agreed jointly to seek the Court's approval of the Settlement Agreement and the Notice of the Settlement Agreement to class members. *See* Jones Declaration, at Ex. B (proposed notice to class members).

III. ARGUMENT

A class settlement requires Court approval. *See* Fed. R. Civ. P. 23(e). The approval is a two-step process. *See Manual for Complex Litigation*, at §30.41, at 236 (3d ed., 1995). First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation. Second, if the preliminary evaluation does not disclose grounds to doubt its fairness or other deficiencies, the court should direct that notice

under Rule 23(e) be given to the class members of a formal hearing after which the court determines whether the settlement should be approved *Id* at 236-238.

A settlement should be approved if "it is fundamentally fair, adequate and reasonable" *Torrisi v Tucson Electric Power Company*, 8 F 3d 1370, 1375 (9th Cir 1993) (citation omitted) This determination requires

> a balancing of several factors which may include, among others, some or all of the following the strength of plaintiffs' case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status throughout the trial, the amount offered in settlement, the extent of discovery completed, and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement

Id. (citing *Officers for Justice v Civil Serv Comm'n of San Francisco*, 688 F 2d 615, 625 (9th Cir 1982)) *See also Hanlon v Chrysler Corp* , 150 F 3d 1011, 1026 (9th Cir 1998) ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness")

A The Terms of the Settlement Should be Approved

"Settlement is the offspring of compromise, the question is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate, and free from collusion" *Hanlon*, 150 F 3d at 1027 *See also Linney v Cellular Alaska Partnership*, 151 F 3d 1234, 1242 (9th Cir 1998) ("the very essence of a settlement is compromise, a yielding of absolutes and abandoning of highest hopes") (citation omitted)

Under the agreement presented for the Court's approval, the settlement class will benefit from a substantial increase ($14 million) in the DDD budget in FY 2003, whose "bow wave" will require additional funding enhancements of a substantial amount to carry forward the new services into the subsequent biennium In addition, the parties will negotiate another significant increase in DDD funding for the 2003-2005 biennium The

settlement provides for joint decision-making by Arc and DDD as to the allocation of the increased funding

The agreement further provides that in spending the funds, emphasis shall be made on implementing a "choice-driven and self-directed system" that "increase[s] the availability of out-of-parental home residential options" Jones Declaration, Ex A, at 8 This emphasis is consistent with Congressional policy that programs for persons with developmental disabilities should be administered in ways that enable their interaction with non-disabled persons to the fullest extent possible

All factors indicate that the settlement is fair and reasonable If the parties are able to reach agreement, the settlement will achieve a substantial increase of funding for services for the clients of DDD, with an emphasis on community placements At various points in time, plaintiffs can lift the stay and proceed to trial if they become dissatisfied with the level of funding enhancements being proposed by defendants, or enacted by the legislature, or if plaintiffs and defendants do not agree on how the funding enhancements will be spent

In light of the inherent risks of this litigation to both parties, the opinions of two sets of experienced counsel, the support of Arc of Washington State (the nation's oldest advocacy organization for persons with developmental disabilities), and the cost, complexity and time of fully litigating the case, this is a fair and advantageous settlement for both parties

B The Settlement Class Should be Approved

In the settlement context, the Court's threshold task is "to ascertain whether the proposed settlement class satisfies the requirements of Rule 23(a) of the Federal Rules of Civil procedure applicable to all class actions, namely (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation" *Hanlon*, 150 F 3d at 1019

The settlement described above represents an agreement between the state and the settlement class defined as "all DDD clients who are eligible for ICF/MR and/or HCBS waiver services administered by DDD in the State of Washington and who are not receiving all the services they need with reasonable promptness and those who may become similarly situated in the future prior to December 31, 2006" Although it is broader than the class definition pursuant to the Order Granting Plaintiffs' Motion to Maintain Class Action (Dkt # 87, at 2 and 6), the definition of the settlement class is similar to the class definition initially sought by plaintiffs

The parties desire a broader definition of the settlement class in order to achieve full advantage of the agreement between the state and the entire spectrum of Medicaid-eligible DDD clients who will benefit from increased funding, including those who desire ICF/MR services and those who seek placement in the HCBS waiver program, and in recognition of the fact that the class and the members of the Arc as representative plaintiff are substantially identical The settlement class should be approved because it meets all the requirements of Rule 23(a) Indeed, with respect to the original class, the Court has already so ruled with respect to the numerosity, commonality, and adequacy of representation requirements (Dkt # 87, at 4-6)

The presence of Arc of Washington as an additional named plaintiff is sufficient to ensure that "the claims of the representative parties are typical of the claims of the class" Fed R Civ P 23(a)(3) The Arc is a statewide non-profit advocacy organization founded in 1936 that devotes considerable resources to advocating for increased services for people with developmental disabilities. Its statewide membership is approximately 3,000, including individuals with disabilities, their families, and others interested in issues affecting persons with developmental disabilities *See* 6th Declaration of Sue Elliott, Dkt # 116 The Arc's long history as a statewide advocacy organization, as well as its

broad membership, "vitiates any challenge founded on atypicality" *See Hanlon*, 150 F 3d at 1020

C The Notice To The Settlement Class Should be Approved

Finally, the proposed notice to class members is adequate and should be approved Notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward to be heard" *See Torrisi*, 8 F 3d at 1374 (citation omitted) Even though in class actions certified under Fed R Civ P 23(b)(2) individual notice of settlement is not required, *see Franks v The Kroger Co*, 649 F 2d 1216, 1222 (6th Cir 1981), the state has agreed to provide individual notice of the proposed settlement to all DDD clients and their legal representatives in the State of Washington The notice, to be sent by first-class mail, will provide in relevant part

> If you are a client (or the legal representative of a client) of the Division of Developmental Disabilities who is eligible for ICF/MR or HCBS (CAP) waiver services, and if you (or your legal representative) believe that you are not receiving all the services you qualify for and need with reasonable promptness, you may be a member of the settlement class, and you (and your legal representative) should read this notice carefully because it will affect your rights
>
> The following is a general description of the proposed Settlement Agreement
>
> 1 The settlement class, as agreed by the parties, is "all DDD clients who are eligible for ICF/MR and/or HCBS waiver services administered by DDD in the State of Washington and who are not receiving all the services they need with reasonable promptness and those who may become similarly situated in the future prior to December 31, 2006" The Court had previously certified the case as a class action on behalf of "all developmentally disabled persons in the State of Washington who (1) meet the medical and financial requirements for eligibility for ICF/MR services, (ii) have applied for HCB waiver services, and (iii) have not received HCB waiver services, or not received them with reasonable promptness, and individuals who will be similarly situated in the future," but the settlement proposes that this definition be changed to the one the parties are requesting

> 2 The state has agreed to a $14 million funding enhancement for DDD services for fiscal year 2003 This amount will be carried forward to the 2003-05 biennium, and will result in an estimated $24,898,144 in DDD services for each year of that biennium DDD and the Arc will collaborate on how the funds shall be spent, with an emphasis on developing a choice-driven system At least some of the funds will be spent on out-of-home community residential placements If either party is dissatisfied with the negotiations, they may proceed to trial
>
> 3 *In addition, the state will meet with the Arc in the summer* of 2001 to agree on an additional amount of funding for the 2003-05 biennium If either party is dissatisfied with the negotiations, they may proceed to trial
>
> 4 The plaintiffs have agreed to stay all covered claims against the defendants This means that the stay remains in effect until the lawsuit is dismissed or until a trial occurs A trial might occur because of disagreements during negotiations mentioned above, or in the event that the legislature does not appropriate the agreed-upon amounts If the Governor's budget for Fiscal Years 2003-2005 does not incorporate the enhancements for DDD services and the manner of expenditure agreed upon by the parties, or the 2003 Washington Legislature fails to appropriate the amount included in the Governor's budget, any unresolved issues in the case may proceed to trial

Jones Declaration, Ex B, at 6-7

The proposed notice describes the terms of the proposed settlement in sufficient detail to "flush out whatever objections might reasonably be raised to the settlement," *Torrisi*, 8 F 3d at 1375 Therefore, it is adequate and should be approved

IV. CONCLUSION

The parties respectfully request that the Court give preliminary approval of the settlement agreement, settlement class, and notice to the settlement class members, and schedule a fairness hearing for _____, 2001

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