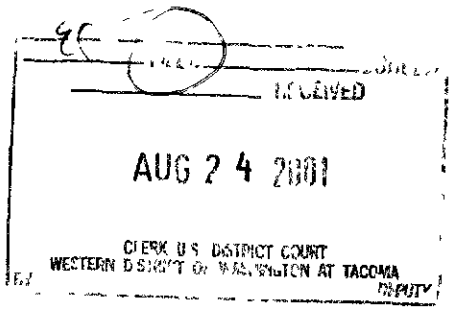
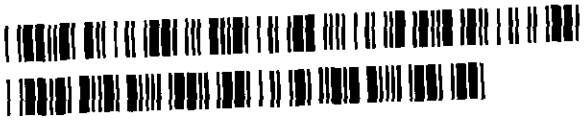
THE HONORABLE FRANKLIN D BURGESS





CV 99-05577 #00000167

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,	No. C99-5577FDB
vs	
LYLE QUASIM, in his official capacity as the Secretary of the Washington Department of Social and Health Services, et al ,	OBJECTIONS TO THE SETTLEMENT AGREEMENT, RELEASE AND ORDER OF STAY PROPOSED BY THE PARTIES
Defendants,	
DARNELL HOOD through his guardian Robie Hood, THEODORE JONES through his guardian Susan Barnett, DUANE BOYLE through his legal guardians Marion and Robert Boyle, and GREGORY KINGERY through his guardians John and Bea Kingery,	
Applicants for Intervention	

I. INTRODUCTION

Darnell Hood, through his guardian, Robie Hood, Theodore Jones, through his guardian Susan Barrett, Duane Boyle, through his guardians Marion and Robert Boyle, and Gregory Kingery, through

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his guardians John and Bea Kingery ("Applicant Intervenors") object to the Settlement Agreement, Release and Order of Stay proposed by the parties and filed with this Court on August 16, 2001 ("Proposed Settlement"). Applicants are developmentally disabled adults who meet the medical and financial requirements for ICF-MR services and are included in the parties' proposed "settlement class." They all have viable claims for services that the Proposed Settlement would unfairly and unreasonably compromise.

The Applicant Intervenors also file herewith a motion to intervene, along with the supporting memorandum, asking the Court to permit them to intervene in this action for the limited purposes of objecting to the Proposed Settlement and to seek class decertification or clarification of the class definition. Additionally, Applicants submit a motion for class decertification, and an accompanying memorandum in support thereof, that more fully sets forth the interests of Applicants. These submissions are incorporated herein by reference. The Applicant Intervenors object to the Proposed Settlement for the reasons that follow.

II. OBJECTIONS

A. The Proposed Settlement Is Not Fair, Adequate Or Reasonable.

To approve the Proposed Settlement this Court must find that it is "fundamentally fair, adequate, and reasonable." *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). This determination should be made balancing some or all of the following factors:

> 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.

Torrisi v. Tucson Electric Power Company, 8 F.3d 1370, 1375 (9th Cir. 1993) (citing *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)). *See also Hanlon v.*

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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") Applying these criteria, the Proposed Settlement is not a fair, adequate or reasonable compromise and therefore should not be approved by this Court.

B. The Proposed Settlement Unfairly and Unreasonably Compromises the Claims of Parties Whose Interests Have Not Been Adequately Represented, Including Claims Not Even Raised in This Litigation.

1. The Proposed Settlement Should Not Be Approved Because It Seeks To Compromise Claims Of Individuals Whose Interests Have Not Been Adequately Represented.

In their Proposed Settlement, the parties ask the Court to substantially broaden the scope of the class as previously certified by redefining it 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" Proposed Settlement at 3 The proposed "settlement class" thus includes eligible developmentally disabled individuals waiting to participate in an HCBS waiver program, those in an ICF/MR facility, and those already participating in an HCBS waiver program The "settlement class" as proposed should not be approved because it does not meet the class certification requirements of Fed R Civ P. 23(a), including especially the requirement that the representative parties must fairly protect the interests of the class.

At the time of filing the representative Plaintiffs were not participants in the CAP-HCBC waiver services program nor were any a resident of an ICF-MR facility seeking community placement. As such, the representative Plaintiffs do not adequately represent the interests of the individuals in the proposed settlement class, who, like the Applicant Intervenors, are entitled to habilitation services as current participants in the CAP waiver program or as residents of an ICF/MR facility As previously

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determined by this Court, individuals not presently in an ICF/MR or participating in the CAP waiver program cannot adequately represent the interest of individuals who are Dkt #119, *see also Prado-Steiman v Bush*, 221 F.3d 1266, 1279 (11th Cir 2000) (class in an HCBS waiver case like the one here was not certified in part because the named representatives did not fairly represent the interests of sub-groups in the proposed class and did not have legal standing to raise class sub-claims); *see also* Applicant Intervenors' Memorandum in Support of Motion for Class Decertification or, Alternatively, to Clarify the Class Definition and Memorandum In Support of Motion to Intervene

Due process requires that before entry of judgment absent class members must be afforded adequate representation *See Hanlon v Chrysler*, 150 F 3d 1011 (9th Cir. 1998) (citing *Hansberry v Lee*, 311 U S 32, 42-43 (1940)) Plaintiffs' counsel do not have authority to compromise the claims of absent class members, whose interests, like the interests of Applicants here, are not fairly and adequately protected by the class representatives *See National Super Spuds v N Y Mercantile Exchange*, 660 F 2d 9 (2d Cir 1991)

Moreover, the organizational Plaintiff, the ARC of Washington, is not a class representative and has representational standing to raise only the claims of its own members *See Sierra Club v Morton*, 405 U S 727 (1972) (representative standing by an organizational plaintiff is limited to the organization's own members and does not encompass similarly situated non-members) None of the Applicant Intervenors are members of the ARC of Washington *See* Declarations of Boyle, Kingery, Hood and Barrett, attached as Exs 1, 2, 3, and 4 to Applicant Intervenors' Memorandum in Support of Motion to Intervene ARC of Washington thus does not adequately protect the claims of the Applicants since it does not have the authority to compromise or even raise the claims of non-members

Because the Proposed Settlement unfairly expands the scope of the class, without the requirements of Fed R Civ P 23 (a) having been met, and seeks to compromise the claims of class

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members whose interests have not been adequately protected by the named class representatives or the ARC of Washington, the Applicants urge this Court not to approve it [1]

2. The Proposed Settlement Should Not Be Approved Because It Compromises Claims For Damages Not Before The Court.

The Applicant Intervenors further object to the Proposed Settlement because it attempts to compromise claims not even raised in this case The Proposed Settlement defines "covered claims"—the claims purportedly resolved by the settlement—to include "any and all past, present or future claims, demands, obligation, actions, causes of action, rights, damages, costs, loss of services, expenses and compensation for pain and suffering, mental and emotional distress " Proposed Settlement at 5 However, Plaintiffs have not even asserted any claims for damages on behalf of the class, or for members of ARC of Washington, having sought only equitable relief Dkt #1 The Proposed Settlement thus unfairly seeks to compromise the damages claims of every member of the settlement class, claims not even before the Court in this lawsuit

The parties' attempt to compromise all past, present or future damages claims of the settlement class is especially unfair and unreasonable because the class in this case was certified pursuant to Fed R Civ P 23(b)(2) and not under (b)(3) See Dkt #87 Class members seeking equitable relief under Fed R Civ P 23(b)(2) do not have a right to "opt out" of the class if they so choose *See* Fed R Civ P 23(c)(2) By contrast, class actions certified pursuant to Fed R Civ P 23(b)(3) require individual notice, not given in this case, and allow class members to "opt out" or request to be excluded

[1] The Proposed Settlement is particularly objectionable because, by redefining the class, the parties admittedly seek to resolve *as class claims* those that the Court has held belong only to the ARC of Washington *See* Memorandum in Support of Motion for Preliminary Approval of the Class Settlement Agreement, Dkt #150 at 8 ([T]he proposed settlement class includes those claims that the Court has recognized belong to 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")

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from the class *See* Fed R Civ P 23(c)(2) Indeed, due process requires that class members in suits for damages certified under Fed R.Civ P. 23(b)(3) be afforded appropriate notice and the right to exclude themselves from the suit *See Phillips Petroleum Co v Shutts,* 472 U S 797 (1985) The Court should thus not approve the Proposed Settlement since it seeks to unfairly compromise the damage claims of members of a Fed R.Civ.P 23(b)(2) class, without providing the notice and opt-out requirements of Fed R Civ P 23 (b)(3) *See Crawford v Equifax Payment Services, Inc* , 201 F 3d 877, 881 (7th Cir 2000) (district court approval of settlement of damage claims was abuse of discretion in part because notice and opportunity to opt out not provided)

C. Weighing Other Relevant Factors, The Proposed Settlement Should Not Be Approved.

In exchange for a broad waiver of rights, the Proposed Settlement offers little more than a promise to ask the Legislature for more funding for DDD services It does not guarantee that more funds will in fact be obtained so that individuals participating in the CAP waiver program, such as Applicants Boyle and Kingery, will be provided the medically necessary services with "reasonable promptness" to which they are entitled under 42 U.S C §1396a(a)(8) and 42 C F R §440 230 Nor does it guarantee funding sufficient to protect the Medicaid rights of individuals who, like Applicants Hood and Jones, reside in ICF/MRs and are entitled to active treatment and "freedom of choice " *See* 42 U S C §1396d(d)(2); 42 U S.C §1396n(c)(2)(C), C F.R §483 440

Moreover, the amount the Defendants have promised to seek is woefully inadequate to meet the needs of the parties' proposed settlement class In the Proposed Settlement the Defendants have promised to ask the Legislature for 14 million dollars for enhanced DDD services in fiscal year (FY) 2003 with a "carry-forward" request made in the 2003-2005 biennium Proposed Settlement at 7-8, *see also* the parties' Memorandum in Support of Motion for Preliminary Approval of the Class Settlement Agreement filed on August 16, 2001, Dkt #150, at 6-7 This is a grossly insufficient amount of new funds to provide adequate relief to either the class as certified by the Court or the broader settlement class the parties now seek to have certified The DDD itself has estimated that at least 28,000 individuals are eligible for DDD services in Washington *See Strategies for the Future* at 7, attached as

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Ex 1 DDD also calculates that 9,000 people require additional services including 4,505 who need residential services *Id* at 2 The total cost of providing required services during FY 2001 as estimated by DDD is 447 million dollars *Id* at 2 Therefore, the 14 million dollars the State now promises to seek from the Legislature in exchange for the compromise of virtually all the legal claims of tens of thousands of people is not adequate

The Proposed Settlement does provide that any party can lift the stay in place in this case and proceed to trial if additional funding is, in fact, not appropriated Proposed Settlement at 6 But this "safety net" is not adequate or fair—the claims of all Medicaid eligible individuals with developmental disabilities are presently stayed, through FY 2005, and no individual class member has any means of redressing ongoing violations of their rights during the stay, while illusive funds are sought through the unpredictable legislative process Indeed, class members who, like Applicants Boyle and Kingery, are pursuing individual relief through the administrative process may actually be prejudiced by this Proposed Settlement if their individual administrative actions are stayed pursuant to the Proposed Settlement *See* Boyle and Kingery Decls attached as Exs 1 and 2 to the Applicants' Memorandum in Support of Motion to Intervene

If this case were to proceed to trial the class members have claims of different strengths Plaintiffs are likely to prevail on at least the claims of the sub-class of individuals who are presently participating in the CAP waiver program (such as Applicants Boyle and Kingery), as well as the claims of the sub-class of individuals who reside in an ICF/MR seeking a community placement (such as Applicants Hood and Jones) *See e g , Olmstead v L C* , 527 U S 581 (1999), *Doe v Chiles*, 136 F 3d 709 (11th Cir 1998), *Boulet v Cellucci*, 107 F Supp 2d 61 (D Mass 2000). It is unreasonable to settle such strong claims in exchange solely for the promise by Defendants to seek additional, indeed inadequate, funding from the Legislature

Finally, the reaction *against* the parties' Proposed Settlement is strong. Washington Protection & Advocacy Systems (WPAS), an organization legally mandated to protect the rights of individuals with developmental disabilities pursuant to 42 U S C §6042, is among the opponents of the Proposed Settlement *See* WPAS Objections (to be filed August 23, 2001) Objectors also include four individuals presently receiving DDD services who have present and possible future legal claims

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regarding the adequacy of services they are receiving *See* Decls of Jones, Hood, Kingery and Boyle, attached to Applicant Intervenors' Memorandum in Support of Motion to Intervene. As stated by Applicant Susan Barrett, mother of T J. Jones, a resident of Fircrest School "The proposed settlement will not address so many problems that exist with services for people like my son . the deal the State has made with ARC is like putting a finger in a dam about to break. It is not adequate to resolve my son's claims against DDD " Barrett Decl , Ex 4 attached to Applicants' Motion to Intervene, at p 3 Similarly, Robie Jones, mother of Darnell Hood, a resident of Rainier School seeking an appropriate community placement and services, states with regard to the Proposed Settlement "I object to it because it will waive my son's legal claims for appropriate services I also don't like it because there is no guarantee that money for more services will be actually given by the Legislature " Hood Decl , Ex. 3 attached to Applicants' Motion to Intervene, at p 3. Dr John Kingery and his wife likewise object to the Proposed Settlement Kingery Dec , Ex 2, attached to Applicants' Motion to Intervene ("We strongly object to this agreement because it does not protect our son's rights It waives claims we have not and do not agree to waive") Such a strong negative reaction to the Proposed Settlement demonstrates its inherent unfairness and unreasonableness

III. CONCLUSION

The Proposed Settlement should not be approved because it is not a fair or reasonable compromise of the claims raised in this case by the class and those raised by the organizational Plaintiff the ARC of Washington The Proposed Settlement attempts to waive or stay the strong claims of the Applicant Intervenors whose interests are not adequately protected by the representative Plaintiffs or by the ARC of Washington For these reasons, Applicant Intervenors Boyle, Kingery, Hood and Jones therefore urge this Court not to approve the parties' Proposed Settlement

Respectfully submitted this ____ day of August, 2001

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