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 DENYING MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND DENYING MOTIONS TO INTERVENE AND DECERTIFY CLASS

Three developmentally disabled individuals and the ARC of Washington State ("ARC") filed this class action lawsuit in late 1999 against various agencies and officials of the State of Washington, alleging that the State structures and administers its Medicaid programs for the developmentally disabled in ways that violate the Medicaid Act, 42 U.S.C. § 1396 *et seq.*, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and the Equal Protection and Due Process clauses of the Fourteenth Amendment. After the Court designated the named individual plaintiffs as representatives of a class pursuant to Fed. R. Civ. P. 23(b)(2) and resolved several motions for summary judgment, the parties requested a stay of proceedings in order to

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attempt to negotiate a settlement.

The parties have now moved the Court for preliminary approval of a class settlement that entails significant changes in the class definition previously set by the Court. In response, two different groups of applicant intervenors have moved for leave to intervene to object to the proposed settlement and to decertify both the new proposed class and the class as originally defined by the Court. For the reasons explained more fully below, the Court does not believe the proposed settlement class satisfies the requirements of Fed. R. Civ. P. 23(a) and (b)(2). As a consequence, the Court cannot give the settlement its preliminary approval. To the extent the applicant intervenors' motions concern the proposed settlement, they are rendered moot by the Court's rejection of the settlement class. To the extent the applicant intervenors' motions concern the Court's prior class certification decision, they are untimely.

Procedural Background

Although Plaintiffs' complaint raises a variety of claims, this litigation has focused on Defendants' policy and practice of limiting the number of participants in the Medicaid Home and Community Based Services (HCBS) waiver program. Also known as the Community Alternatives Program, or CAP, the State's HCBS waiver program originated as an experimental alternative to the institutional provision of Medicaid services in Intermediate Care Facilities for the Mentally Retarded ("ICF-MRs"). The Medicaid Act allows participating states to impose a numerical limit on the number of persons served by the HCBS waiver, and Washington State has chosen to impose such a limit. The named individual plaintiffs in this action are all developmentally disabled individuals who at the time the complaint was filed had been told they must wait for admission to the CAP because the program was full. The Court first certified these individuals to proceed as representatives of a class comprised of all developmentally disabled persons in the State of Washington who:

i) 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.

Order Granting Plaintiffs' Motion to Maintain Class Action, p. 6 (dkt. # 87). The Court then ruled that eligibility for ICF-MR services does not suffice to establish entitlement to HCB waiver services, and that the numerical limit on the CAP is valid under both the Medicaid Act and the ADA. See Order Denying Plaintiffs' Motion for Partial Summary Judgment (dkt. # 119); and Order Granting Defendants' Motion for Summary Judgment on ADA Claims (dkt. # 132)

Although these rulings narrowed Plaintiffs' claims, they did not dispose of them entirely. The plaintiff class continued to have a claim under the Medicaid Act to hearings when applications for HCB waiver services are denied, as well as a claim under the Equal Protection clause to placement on the waiver. In addition, the Court determined that the ARC, which had not been designated a class representative, had standing to press three claims on behalf of its members: 1) a claim under the Medicaid Act that persons already on the HCBS waiver are not receiving all of the *services to which they are entitled; 2) a claim under the Medicaid Act that persons eligible for ICF-*MR services are not receiving such services with reasonable promptness; and 3) 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. See Order (dkt. # 134).

In response to the Court's orders, the parties negotiated a proposed settlement that is to be binding on a class significantly broader than the class certified by the Court. Under the proposed new class definition, the class includes all clients of the State's Department of Developmental Disabilities ("DDD") "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." See Motion for Preliminary Approval of Class Settlement, p. 2 (dkt. # 149). The proposed class representatives are the three original named individuals and the ARC.

Analysis.

A. Certification of the Proposed Settlement Class

When presented with a proposed settlement class, a trial court must first determine if the class and its representatives satisfy the requirements of Fed. R. Civ. P. 23(a) and (b). See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620, 117 S.Ct. 2231, 2248 (1997); and Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998). Although the existence of a proposed settlement is relevant to the question of class certification, see Amchem, 521 U.S. at 619, the requirements of Rule 23 "designed to protect absentees by blocking unwarranted or overbroad class definitions . . . demand undiluted, even heightened, attention in the settlement context." Id. at 620.

Under Fed. R. Civ. P. 23(a), one or more members of a class can maintain an action as representatives for all class members only if the representatives and the class meet the requirements of "numerosity," "commonality," "typicality," and "adequacy of representation." See, e.g. Hanlon, *150 F.3d at 1019. In addition, the class must satisfy the requirements of either Rule 23(b)(1)(A)* (risk of incompatible standards for the opponent), 23(b)(1)(B) (limited fund), 23(b)(2) (appropriateness of injunctive or declaratory relief), or 23(b)(3) (predominance of common issues of law or fact).

The parties to this action emphasize that the Court previously determined that the three named individual plaintiffs satisfy all of the requirements for maintaining an action under Fed. R. Civ. P. 23(b)(2). See Memorandum in Support of Motion for Preliminary Approval of the Class Settlement Agreement, p. 11 (dkt. # 150). However, the parties fail to understand that this finding was specific to "the class as defined by the Court." See Order Granting Plaintiffs' Motion to Maintain Class Action, p. 4, ln. 19 (dkt. # 87). Because the parties propose a very different

definition of the class, the Court is not bound by its prior finding. Indeed, the very considerations that led the Court to the present class definition counsel against accepting the proposed revision.

Numerosity: The proposed class contains many thousands of present and potential future members, and easily satisfies the requirement that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

Commonality: Under the current class definition, the class includes only developmentally disabled individuals who are waiting for placement on the HCBS waiver.[1] The Court determined that members of this class "are not advancing competing claims to a limited pool of resources available for HCB waiver services, but instead are joined in advancing the claim that the pool of such resources must be made large enough to accommodate all who desire them." Order Granting Plaintiffs' Motion to Maintain Class Action, p. 5 (dkt. 87). In contrast, the parties' proposed class definition encompasses not only 1) persons waiting for placement on the HCBS waiver[2], but also includes 2) persons already on the waiver who claim they are not being provided the waiver services to which they are entitled , and 3) persons in ICF-MRs who claim that they are not getting

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[1]The Court acknowledges that the current class definition could be read as including persons who are already on the HCBS waiver but are waiting for additional waiver services. See, e.g., Plaintiffs' Memorandum in Opposition to WPAS' Objections, p. 6 (dkt. 174). However, the context of the Court's orders concerning class certification makes it clear that the class includes only persons who have not yet been placed on the HCBS waiver. See Order Denying Plaintiffs' Motion for Partial Summary Judgment, p. 8 (dkt. # 119); and Order Granting Plaintiffs' Motion to Maintain Class Action, p. 5 (dkt. # 87). The Court will determine the precise final wording of its class definition at a later date, should it become necessary to do so.

[2]A person unfamiliar with the course of this litigation and the parties' arguments could suppose that persons who are merely waiting for HCB waiver placements are not "eligible"for such services and hence are not included in the parties' proposed class. However, the parties and the Court have consistently distinguished between "eligibility" and "entitlement," and it is clear that the parties intend to include persons merely eligible and waiting for HCB waiver placements in the proposed class. See, e.g., Memorandum in Support of Motion for Preliminary Approval of the Class Settlement Agreement, p. 11 (dkt. # 150).

the ICF-MR services to which they are entitled.[3] The parties simply fail to make any assertions concerning what issues of law or fact these three groups have in common. As a consequence, the parties have failed to carry their burden of showing commonality.

Typicality: Because the ARC of Washington State includes as members persons in each of the three groups discussed above, the claims of all three groups appear to be "fairly encompassed" by the claims of the representatives of the proposed class. See General Telephone Co. of the Southwest v. Falcon 457 U.S. 147 (1982). The parties' proposed class representatives appear to satisfy the typicality requirement of Fed. R. Civ. P. 23(a)(3).

Adequacy of Representation: In order to satisfy the constitutional requirement of due process, absent class members must be afforded adequate representation before they can be bound by a judgment. See Hansberry v. Lee, *311 U.S. 32, 42-43, 61 S.Ct. 115 (1940). The importance of* adequate representation is only heightened when, as here, the members of the proposed class have no right to opt-out. Compare Hanlon, 150 F.3d at 1021 (noting that potential inadequacy of class representation is mitigated when "any class member who wished to do so could opt out of the settlement class").

Typically, the inquiry into the adequacy of representation has two prongs. First, the court must determine whether the named plaintiffs and their counsel have any conflicts of interest with

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[3]The applicant-intervenors represented by the Washington Protection and Advocacy System, Inc. (the WPAS applicant intervenors) claim that the parties' proposed class includes a fourth distinct group: members of a class certified by Judge Bryan in the case of Allen v. Western State Hospital, C99-5018RJB. The Allen class is defined as

> individuals with developmental disabilities 1) who presently reside at Western State Hospital, [or] 2) who have been discharged from Western State Hospital after June 1, 1997, to residential habilitation centers, or community living arrangements funded, operated or licensed by the defendants, and 3) who will be admitted to Western State Hospital in the future.

Memorandum of WPAS Applicant Intervenors in Support of Motion to Intervene, p. 3 (dkt. # 153). The parties' proposed class definition clearly encompasses the Allen class, but at this time the Court takes no position on whether the Allen class must be thought of as a distinct subclass.

other class members. Second, the court must decide whether the named plaintiffs and their counsel will vigorously prosecute the action on behalf of the class. See Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). Here, the Court will address both prongs of the test together.

As previously noted, the proposed settlement class is comprised of at least three different sub-groups of developmentally disabled individuals. Supra, pp. 5-6. Although these groups share an interest in increased State funding of Medicaid services for the developmentally disabled, they are potentially divided by disagreements as to how to allocate such funds. For example, class members waiting for waiver placements presumably want to expand the scope of the program, perhaps even at the expense of reducing expenditures per participant. Class members already on the waiver presumably want an increase in expenditures per participant, perhaps even if this means closing the program to newcomers. Moreover, the subgroups appear to have claims of different strength. See Hanlon, 150 F.3d at 1020 (noting that Amchem mandates heightened scrutiny of representational adequacy when class members have claims of different strength). Although the issue has not been fully briefed for the Court, it appears that persons already on the HCBS waiver have a strong legal claim that the State must do more to meet their needs. On the other hand, persons not currently on the HCBS waiver appear to have a rather weak claim, at least concerning their entitlement to admission to the program.

The parties' proposed settlement does not specify in detail how the potential conflicts among class members are to be resolved. Instead, the proposed settlement provides for a waiver of all class members' claims in exchange for an indeterminate funding increase that will be spent as the state and the ARC agree, without the possibility of court review or the necessity of hearing from dissenting class members. See Settlement Agreement, attached as Exhibit A to Dec. of Larry Jones (dkt. # 151). Essentially, the settlement appoints the ARC and its counsel as limited but abiding guardians of the class. The Court has no reason to question the motivations of the ARC or its counsel, or their commitment to the welfare of all developmentally disabled individuals within

Washington State. But granting the ARC the powers implied by the settlement is simply not consistent with the requirement of adequate representation imposed by Fed. R. Civ. P. 23(a)(4). As the Supreme Court put it in Amchem, although "[t]he class representatives may well have thought that the Settlement serves the aggregate interests of the entire class, ... the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." Amchem, 521 U.S. at 627 (quoting from In re Joint Eastern and Southern Dist. Asbestos Litigation, 982 F.2d 721, 742-43 (2nd Cir. 1992)).

Requirements of Rule 23(b): In addition to satisfying Rule 23(a), a settlement class must also meet the requirements of either Rule 23(b)(1)(A), 23(b)(1)(B), 23(b)(2), or 23(b)(3). Previously, the Court found that the class it had defined qualifed for certification under Rule 23(b)(2) because "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The Court can imagine that this requirement is also met for subclasses of the proposed settlement class, but the parties–perhaps mistakenly relying on the Court's prior ruling-- are completely silent on this issue.

To sum up regarding class certification, the settlement class proposed by the parties fails to satisfy the commonality and adequacy of representation requirements of Fed. R. Civ. P. 23(a). In addition, the parties have failed to show that the class qualifies for certification under any provision of Rule 23(b). In light of the weighty interests at stake in this litigation, the Court is especially reluctant to block a settlement preferred by the parties. Obviously, however, the named parties are not the only ones with interests to consider, and the Court is firmly convinced that neither the State nor its developmentally disabled citizens would be well served by certification of a class sure to be overturned on appeal.

The Court believes that the problems it has identified could be eliminated by the appropriate

definition of subclasses and the addition of parties and counsel to represent those subclasses. Because the proposed class is a product of settlement negotiations, it is not proper for the Court to impose a definition in conformance with Rule 23. The parties must decide for themselves whether they can fashion a mutually agreeable settlement that also adequately protects the interests of absent class members. The Court encourages them to try to do so. In order to facilitate negotiations, the Court will maintain the stay of proceedings and delay issuing a new scheduling order for a short period of time that may be extended should the parties show good cause for such an extension.

B. Fairness of the Proposed Settlement

Because the Court has determined that the proposed settlement class cannot be certified, there is no need to discuss the fairness of the settlement in any detail. The Court will simply note that resolution of its concerns regarding class certification, presumably by dividing the proposed class into subgroups and adding corresponding parties and counsel, would go a long way to convincing the Court of the fairness of any resulting settlement.

C. Motions to Intervene.

Two groups of developmentally disabled individuals, represented respectively by the Washington Protection and Advocacy System, Inc. (WPAS) and Columbia Legal Services (CLS) have moved to intervene in this action. WPAS and CLS have also filed motions to decertify the class and to object to the proposed settlement.

The WPAS and CLS motions are primarily concerned with the proposed settlement and the attendant settlement class which the Court has refused to certify. To this extent they are now moot. Both the CLS and WPAS motions to decertify the class, however, also take aim at the existing class definition.[4] Because only parties can properly present motions for the Court's consideration, the

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[4]The Court can discern only one paragraph in the WPAS memorandum in support of its motion to decertify or modify the class that concerns the existing class definition. See dkt. # 159, p. 11, lns. 21-25. CLS's concerns with the current class are more extensive.

Court need consider these motions to decertify only if it previously grants leave to intervene. Leave to intervene, in turn, is proper only if the applicant is timely. See Fed. R. Civ. P. 24. Interestingly, neither CLS nor WPAS present any argument that their motions for leave to intervene are timely for the purpose of objecting to the Court's decision to certify the existing class, which decision was filed on October 5, 2000. In addition, both WPAS and CLS assert that although informed of the Court's rulings, they had no reason to believe that their interests were affected until they obtained copies of the proposed settlement. Compare WPAS Memorandum in Support of Motion to Intervene, p. 7 (dkt. # 153); and CLS Memorandum in Support of Motion to Intervene, pp. 9-10 (dkt. # 164). The applicant-intervenors' newly discovered objections to the existing class definition are not sufficiently weighty to justify belated intervention. To the extent that there are ambiguities in the scope of the Court's class definition, they will be dealt with at a later date should it become necessary to do so. See footnote 1, supra.

Conclusion.

ACCORDINGLY, the Court hereby ORDERS that:

1) The parties' Motion for Preliminary Approval of Class Settlement (dkt. # 149) is DENIED because the proposed settlement class does not satisfy the requirements of Fed. R. Civ. P. *23(a) and (b)*;

2) Proceedings in this matter shall remain STAYED until November 30, 2001, at which time the Clerk of the Court shall issue a new scheduling order, unless prior to that time the parties show good cause for a continuation of the stay;

3) Motions by the Applicant-Intervenors to Intervene (dkt # 152 and dkt. # 163), and to Decertify the Class (dkt. # 158 and dkt. # 165) are DENIED as MOOT and UNTIMELY.

DATED this 26 day of October, 2001.

FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

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United States District Court
for the
Western District of Washington
October 26, 2001

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:99-cv-05577

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