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 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT.

Three developmentally disabled individuals and an advocacy organization have brought this class action seeking declaratory and injunctive relief against various agencies and officials of the State of Washington. Plaintiffs allege that Defendants have structured and administered the State's 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, 42 U.S.C. § 12101 *et seq.*, and the Equal Protection and Due Process clauses of the Fourteenth Amendment. The matter is before the Court on the parties' cross motions for summary judgment on Plaintiffs' claims under the Medicaid Act.[1]

Plaintiffs' central Medicaid Act claim is that eligibility for institutional care funded by Medicaid suffices to create an entitlement to reasonably prompt delivery of alternative, non-

[1]Plaintiffs' motion to modify the class definition, Defendants' motion for summary judgment dismissing Plaintiffs' ADA claims, and Defendants' motion to dismiss the advocacy organization will each be addressed in separate orders.

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institutional Medicaid services. Because the Court finds the State has imposed an additional eligibility requirement for receipt of non-institutional services that the Plaintiff class does not meet, and because this additional eligibility requirement is valid under the Medicaid Act, it will deny Plaintiffs' claim and grant in part Defendants' motion for summary judgment. However, Plaintiffs advance other claims under the Medicaid Act that cannot be resolved on summary judgment.

I. Background.

A brief overview of the State of Washington's Medicaid programs for the developmentally disabled will help place the issues here in context. Under the Medicaid Act, states have the option of obtaining federal funding for the provision of medical assistance to the developmentally disabled. Originally, such funding could only be used to deliver services to clients residing in "Intermediate Care Facilities for the Mentally Retarded," or ICF-MRs. Although ICF-MRs are by definition "institutions," see 42 U.S.C.§ 1396d(d), they may be run either by the state or properly licensed private entities. The State of Washington currently maintains four state-run ICF-MRs (known as Residential Habilitation Centers, or RHCs) and licenses a number of privately operated ICF-MRs (known as "ICF-MR community residential facilities"). Each of the privately operated ICF-MRs has a smaller client capacity than does the smallest RHC.

In the 1980s, Congress began enacting legislation designed to encourage experimentation with non-institutional provision of Medicaid services to the developmentally disabled. See 42 U.S.C. § 1396n. As the law currently stands, any state which so chooses may submit a proposal for a "Home and Community Based Services waiver" (HCBS waiver) to the Federal Health Care Financing Administration (HCFA). Upon approval by the HCFA, a waiver allows the state to provide federally funded Medicaid medical assistance to the developmentally disabled in non-institutional settings, unencumbered by some of the rules governing provision of services in ICF-MRs. See 42 U.S.C. § 1396n(c)(3). Federal law expressly allows the HCFA to approve waiver applications that provide for a cap on the number of individuals served by the waiver. 42 U.S.C. §

1396n(c)(10).

The State of Washington operates an HCBS waiver program for the developmentally disabled known as the Community Alternatives Program (CAP). Joint state-federal contributions to the program fund a wide range of services for the non-institutionalized developmentally disabled. These services include various habilitation programs designed to enhance clients' life skills, as well as programs such as Intensive Tenant Support, which provides funds for attendants and other supports necessary to allow developmentally disabled individuals to live on their own or in small groups.

From the inception of the CAP waiver, the State has requested, and the HCFA has approved, a limit on the number of persons who can be served by the program. The present limit is 9,977. Although there is some controversy about whether the waiver program is currently full, there is no dispute that there is significant excess demand for waiver slots.[2] Many more developmentally disabled individuals desire CAP waiver services than can be accommodated within the numerical cap, and the State manages the excess demand with the help of waiting lists. See, e.g., Corrected Declaration of Don and Sheryl Ludwigson, Exhibit A (dkt. # 110). Some developmentally disabled persons have been waiting for years for CAP services.

II. Claims of the Named Individual Plaintiffs and of the Class they Represent.

The three named individual plaintiffs assert two distinct claims under the Medicaid Act. First, they claim they are eligible for placement on the HCBS waiver by virtue of their uncontested eligibility for ICF-MR services. Second, they claim they are entitled to fair hearings when their

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[2]Plaintiffs had conceded that the waiver program operated at or near its capacity until they were given access to the "Washington State CAP Waiver Simulated Audit Report" in September, 2000. On the basis of the Audit Report, Plaintiffs now argue that the program is not full, or more precisely, that the State does not know whether the program is full or not. Plaintiffs Reply on Motion for Partial Summary Judgment, p. 7 (dkt. # 88). Plaintiffs do not contend, however, that there is room under the cap for all those persons Plaintiffs claim are eligible for waiver services.

applications for the HCBS waiver are denied. In a prior ruling, the Court authorized the named individuals to proceed with these claims as representatives of a class composed 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" (dkt. # 87).[3]

A. Eligibility for Placement on the HCBS Waiver.

The "eligibility" that Plaintiffs seek to establish is not a mere right to be considered for placement on the HCBS waiver. Instead, because 42 U.S.C. § 1396a(a)(8) explicitly states that Medicaid funded medical assistance "shall be furnished with reasonable promptness to all *eligible* individuals" (emphasis added), Plaintiffs' claim to "eligibility" amounts to a claim to entitlement to receipt of HCB services.

As a preliminary matter the parties agree, and the Court finds, that Medicaid services provided through the HCBS waiver are "medical assistance" to which the requirements of 42 U.S.C. § 1396a(a)(8) apply. See 42 U.S.C. § 1396n(c)(1) (stating that "a State plan . . . may include as 'medical assistance'. . . home and community based services" approved by the Secretary of the Department of Health and Human Services). Moreover, the parties agree, and the Court finds, that reasonably prompt delivery of Medicaid medical assistance is an individual federal statutory right properly enforceable in an action brought under 42 U.S.C. § 1983. See, e.g., Doe v. Chiles, 136 F.3d 709, 719 (11th Cir. 1998). Accordingly, the sole legal issue relevant to Plaintiffs' first claim is whether eligibility for ICF-MR services suffices as a matter of law to establish eligibility for (and entitlement to) placement on the HCBS waiver.

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[3]The phrase "HCB services" used by the Court in this definition refers to the *same* services as are provided on the "HCBS waiver." The Court will use these phrases more or less interchangeably.

Resolution of this issue depends in the first instance on the terms of the application for renewal of the waiver that the State of Washington filed with the HCFA in 1998. The HCFA approved the application on April 13, 1999, and its terms are binding on the State as a matter of federal law. See, e.g., King v. Fallon, 801 F.Supp. 925, 928 (D. R.I. 1992) (noting that "[a]fter receiving HCFA's approval, the State Plan cements the State's commitments under federal law"). If those terms established that eligibility for ICF-MR services suffices to create eligibility for, and entitlement to, placement on the HCBS waiver, that would be the end of the matter. The Court is aware of no federal law that would prevent it from giving such terms their full effect. However, if the terms set forth in the state's application do not equate eligibility for ICF-MR services with entitlement to placement on the HCBS waiver, then the Court must take an additional step and rule on the conformity of the additional eligibility requirements with the Medicaid Act.

Washington State's "Request for Third Renewal of Home and Community Based-Services, Waiver #0050.90.R1" (hereinafter "Renewal Request") is a lengthy and complicated document. Certain passages in it lend some support by negative implication to the claim that eligibility for ICF-MR services suffices to establish eligibility for placement on the HCBS waiver. The introductory overview (pages DDD-00002424 through 00002432), Appendix C-1 (pages DDD-00002563 through 00002565), and Appendix D (pages DDD-00002577 through 00002586) discuss eligibility at length but are silent about the existence of relevant eligibility criteria beyond eligibility for admission to an ICF-MR. However, these sections do *not* explicitly state that ICF-MR eligibility suffices to create eligibility for HCB services.[4] More importantly, Appendix G unambiguously

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[4]A key passage from the introductory overview states: "This waiver is requested in order to provide home and community-based services to individuals who, but for the provision of such services, would require [placement in an] . . . Intermediate care facility for mentally retarded or persons with related conditions (ICF/MR)." Renewal Request, p. DDD-00002424. The passage does *not* state that the waiver is requested to provide HCB services to *all* such individuals. By implication, the waiver is designed to serve some subset of the ICF-MR eligible.

states that no more than 9,977 persons may be placed on the waiver at one time. Washington State clearly intended, and the HCFA approved, a limtation on the number of persons entitled to placement on the HCBS waiver.

In interpreting the Renewal Request, the Court must give considerable weight to the State's intent, and this is best done by considering the availability of space under the numerical cap as a requirement that must be satisfied to establish eligibility for HCBS waiver placement. In so holding, the Court agrees with a District Court in Massachusetts, which when confronted with a similar claim to services under that states' waiver program determined that "[t]he cap on waiver services is simply a constraint on eligibility. . . . Individuals who apply after the cap has been reached are not eligible . . . ." Boulet v. Celluci, 2000 WL 1030398 (D. Mass. 2000) at *13-14.

Defendants have consistently asserted that Washington State operates its HCBS waiver at or near capacity. However, the Washington State CAP Waiver Simulated Audit Report (hereinafter "Audit Report"), recently disclosed by order of this Court, casts some doubt on Defendants' assertion. According to the Audit Report, the State has listed a small number of dead persons as recipients of waiver funds. More generally, the Audit Report suggests serious deficiencies in the State's Medicaid record keeping procedures. Arguably, the Audit Report suffices to establish a genuine issue of fact concerning the availability of space on the waiver for any particular applicant.

However, the existence of a genuine issue of fact concerning the availability of space on the waiver for any particular applicant does not suffice to establish a genuine issue of fact concerning the availability of space on the waiver for the entire plaintiff class. Plaintiffs have plausibly contended that the class numbers in the thousands, far exceeding the number of openings in the HCBS waiver that may be reasonably inferred from the Audit Report. There is no genuine issue of fact concerning lack of space for the entire plaintiff class, and consequently, if the terms of Washington's waiver request are consistent with the Medicaid Act, Plaintiffs' claim that eligibility for ICF-MR services suffices to establish an entitlement to HCB services fails as a matter of law.

The terms of the waiver renewal are consistent with two key passages in the Medicaid Act. First, 42 U.S.C. § 1396a(a)(10) states that "[t]he Secretary shall not limit to fewer than 200 the number of individuals in the State who may receive home and community-based services under a waiver under this subsection." Plaintiffs properly point out this establishes a floor, not a ceiling, for the size of a waiver program, and argue that the HCFA has never turned down a waiver request on the grounds that it proposed to serve too many people. What matters here, however, is not what the HCFA *might* do, but rather the legal import of what the State and the HCFA acting together have done. At the request of the State, the HCFA has limited the CAP waiver to serving 9,977 persons. Clearly, both the State and the HCFA acted in conformity with § 1396a(a)(10) in respectively requesting and approving this limit.

Secondly, 42 U.S.C. § 1396n(c)(2)(C) provides that the HCFA shall not approve a waiver unless the State gives assurances that "individuals who are determined to be likely to require the level of care provided in . . . [an] intermediate care facility for the mentally retarded are informed of the *feasible* alternatives, *if available under the waiver*, at the choice of such individuals, to the provision of . . . services in an intermediate care facility" (emphasis added). The italicized phrases would be meaningless if the Medicaid Act were construed as creating an entitlement to placement on the HCBS waiver for all those eligible for services in an ICF-MR. Such a construction should be avoided unless it is expressly compelled by other passages in the Medicaid Act.

There simply are no such passages, nor does this Court find any prior judicial rulings that support Plaintiffs' claim that the Medicaid Act requires provision of waiver services to all those eligible for ICF-MR placement. Plaintiffs' reliance on Lewis v. New Mexico Dept. of Health, 94 F.Supp.2d 1217 (D. N.M 2000), is misplaced, for that decision simply holds that persons *on* a waiver program must be given services reasonably promptly in accordance with 42 U.S.C. §1396a(a)(8). It does not hold that all persons eligible for ICF-MR placements are eligible for, and

entitled to, placement on the HCBS waiver regardless of the availability of space under a cap. On the other hand, it is well established that "Congress intended to give the States maximum flexibility in operating their waiver programs," Skandalis v. Rowe, 14 F.3d 173, 181 (2nd Cir. 1994), and that "flexibility" includes the ability to base eligibility determinations on the availability of funding. See, e.g., Beckwith v. Kizer, 912 F.2d 1139, 1143 (9th Cir. 1990) (upholding a state's right to refrain from expanding a waiver program on the grounds that doing so would be too costly); and Boulet v. Cellucci, 2000 WL 1030398 (D. Mass. 2000) (explicitly approving use of availability as an eligibility requirement). Washington State's decision to place a limit on the number of persons it will serve with its HCBS waiver program is consistent with the Medicaid Act. Because the Plaintiff class will not fit under this limit, Plaintiffs' claim that eligibility for institutional services suffices to establish an entitlement to waiver services fails as a matter of law.

In the reply brief in support of Plaintiffs' motion for summary judgement, Plaintiffs' counsel apparently attempts to avoid the force of the foregoing arguments by referring to inadequacies in the State's record keeping that allegedly place the state "in no position to raise a genuine factual dispute about *plaintiffs' claims that they are in the waiver program.*" Plaintiffs' Reply on Motion for Partial Summary Judgment, p. 7 (dkt. # 88) (emphasis added). Having scrutinized Plaintiffs' complaint and the various affidavits submitted by the guardians of the named individuals, the Court can find no evidence that the named individual plaintiffs have in fact claimed to be on the waiver. The named Plaintiff's claim is that they are *eligible* to be on the waiver and improperly rejected by the State. They cannot without amending their complaint and submitting revised affidavits take the shortcut of claiming that the State has in fact already placed them on the waiver but improperly forgotten them.[5]

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[5]Lest this be read as encouraging Plaintiffs to amend their complaint, the Court notes that in addition to it being rather late for any such amendment, it believes Plaintiffs make a logical error in

B. Entitlement to Fair Hearings.

Although Plaintiffs' complaint raises a Medicaid Act claim to fair hearings when applications for HCBS waiver placements are denied, and this claim is mentioned in Plaintiffs' memoranda supporting summary judgment, the accompanying affidavits and other submissions fail to make a sufficient case that such hearings are in fact denied. Defendant's reply brief in support of their cross motion for summary judgment (dkt. # 106) briefly discusses a Due Process claim to hearings, but simply ignores the Medicaid Act claim. Because neither party has satisfied the requirements imposed on the movant by Fed. R. Civ. P. 56, summary judgment for either party is inappropriate.

C. Other Potential Claims of the Individual Plaintiffs and the Class.

In pleadings filed after Defendants had responded to Plaintiffs' motion for summary judgment, Plaintiffs' counsel has belatedly suggested that the named individual plaintiffs were advancing a third claim under the Medicaid Act: a claim that their eligibility for ICF-MR services entitles them to their choice of type of ICF-MR placement, and in particular to placement in a community ICF-MR. This claim is not properly presented to be resolved on summary judgment. The Court will defer ruling on the propriety of allowing Plaintiffs to proceed with this claim as either an individual or class claim until it considers Plaintiffs' motion to modify the class

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asserting that Defendants could not contest a claim that Plaintiffs are on the waiver. Plaintiffs' assertion relies on Audit Report which suggests the State's determinations of who is on the waiver could be afflicted with a high rate of "false positives" (a high percentage of those thought by the State to be on the waiver might in fact not be). Even if this possibility were confirmed, it would not necessarily imply that there is a high rate of "false negatives" (a high rate of error in the State's determinations that persons are not on the waiver). Put in terms familiar to lawyers, a high probability of "convicting the innocent" (what statisticians refer to as "Type I error") can go hand in hand with a low rate of "acquitting the guilty" ("Type II error"): at the extreme, imagine a court in which everyone is convicted. Plaintiffs could not rely on any logical inference from a high rate of false positives to establish that they are actually on the waiver.

definition.[6]

III. Claims of The Arc of Washington State.

The Arc of Washington State, on behalf of its members who are developmentally disabled individuals or their guardians, asserts claims identical to those of the individual plaintiffs and the class. These claims are resolved in the same manner, and to the same extent, as discussed above. In addition, The Arc also asserts that some of its developmentally disabled members (or persons whose guardians are members) have actually been placed on the HCBS waiver by the State but not provided with all the waiver services to which they are entitled by law, or not provided them with reasonable promptness.

Plaintiffs support this last claim with various affidavits of Sue Elliott, currently executive director of The Arc. Beyond briefly referring to the Washington CAP Waiver Simulated Audit Report, these affidavits merely restate Plaintiffs claim. See, e.g., Fourth Declaration of Sue Elliott (dkt. # 92). Although the Audit Report suggests there may be serious problems with the provision of services to persons on the waiver, the Court does not believe it suffices to establish a lack of genuine issues of material fact concerning the adequacy of services provided to Arc members on the HCBS waiver. Nor is the Court convinced that the Arc would be entitled to judgment as a matter of law if certain of its members on the waiver in fact did not receive all the waiver services they desire. Although Defendants' submissions relevant to summary judgment are silent about this claim, the Court does not regard summary judgment for Plaintiffs as appropriate.[7]

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[6]Defendants have alerted the Court that they regard Plaintiffs' motion to modify as a motion for reconsideration. The Court believes Defendants have erred in so doing. Nonetheless, the Court will grant Defendants leave to respond to Plaintiffs motion by November 28, 2000. Plaintiffs may reply to the response by December 1, 2000.

[7]Defendants have filed a motion to dismiss The Arc for lack of standing. The Court will rule on this motion separately.

IV. Conclusion

Defendants have requested oral argument on their cross motion for partial summary judgment. The Court has thoroughly considered the arguments of each of the parties, and considers oral argument unnecessary.

For the reasons given in the body of this opinion, the Court hereby FINDS and ORDERS that:

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) 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.

Accordingly, Plaintiffs' Motion for Partial Summary Judgment (dkt. # 33) is DENIED, and Defendants' Motion for Partial Summary Judgment (dkt. # 79) is GRANTED in part and DENIED in part.

DATED this 17 day of November, 2000.

FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE