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 FOR SUMMARY JUDGMENT ON ADA CLAIMS, AND DENYING MOTIONS TO DISMISS PLAINTIFF ARC, TO MODIFY CLASS DEFINITION, AND TO AMEND JUDGMENT

Plaintiffs in this matter are three developmentally disabled individuals and an advocacy organization, The Arc of Washington State. Plaintiffs allege that the State of Washington structures and administers its Medicaid programs for the developmentally disabled in ways which 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. In a prior order, this Court resolved one particular facet of this complex case by determining that eligibility for Medicaid services provided in institutions known as Intermediate Care Facilities for the Mentally Retarded (ICF-MRs) does not suffice under the Medicaid Act to establish entitlement



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to placement on the Medicaid-funded, non-institutional Home and Community Based Services (HCBS) waiver. Order Denying Plaintiffs' Motion for Partial Summary Judgment, p. 11 (dkt. # 119).

The matter is now before the Court for resolution of four motions: 1) Defendants' Motion for Summary Judgment on Plaintiffs' ADA Claims; 2) Defendants' Motion to Dismiss Plaintiff Arc; 3) Plaintiffs' Motion to Modify the Class Definition; and 4) Plaintiffs' Motion to Amend Judgment. For the reasons discussed in detail below, Defendants' Motion for Summary Judgment on Plaintiffs' ADA Claims is GRANTED, and the remaining three motions are DENIED.

**I. Defendants' Motion for Summary Judgment on Plaintiffs' ADA Claim.**

Read charitably, Plaintiffs' Complaint raises the claim that under the ADA, if the State offers HCBS waiver placements to *some* developmentally disabled persons who meet the medical and personal asset eligibility requirements, then it must do so for *all* similarly situated persons. See Complaint at ¶¶ 11, 52 (asserting the State is in violation of the ADA and that the ADA requires provision of services "in the most integrated setting appropriate to the needs of . . . qualified" individuals). In asking the Court to dismiss Plaintiffs' ADA claims, it is this claim to which Defendants refer. In their Memorandum in Opposition to Defendants' motion, Plaintiffs clarify that they do in fact claim, under the ADA, that "all eligible persons should have access to the benefits that the State of Washington already provides to many other eligible persons with developmental disabilities." Plaintiffs' Memorandum in Opposition to Motion to Dismiss ADA Claims, p. 4 (dkt. # 112).

The precise language of the ADA prohibits, within limits, discrimination against the disabled on account of any disability:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such an entity.

42 U.S.C. § 12132. In Olmstead v. L.C., 527 U.S. 581, 600, 119 S.Ct. 2176 (1999), the Supreme Court held that "unjustified segregation of persons with disabilities is a form of discrimination" prohibited by the ADA. The question for this Court is thus whether the exclusion of the Plaintiff class from the HCBS waiver amounts to "unjustified segregation."

The Court concludes that it does not. As the Supreme Court noted, "once [ a State] provides community-based treatment to qualified persons with disabilities, [its responsibility] is not boundless." Id. at 603. In particular, the ADA does not require a State either "to provide a certain level of benefits to individuals with disabilities" or to make "fundamental alterations" in existing programs. Id. It is well established that changing an essential eligibility requirement for participation in a program counts as a "fundamental alteration." See, e.g., Pottgen v. Missouri State High School Activities Association, 40 F.3d 926 (8th Cir. 1994); and Aughe v. Shalala, 885 F.Supp. 1428 (W.D. Wash. 1995) . The Court has previously ruled that the availability of space under the numerical cap imposed on HCBS waiver is a requirement for eligibility for waiver placement. To strike this requirement would amount, both as a matter of common sense and as a matter of law, to a fundamental alteration in the HCBS waiver program.[1]

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.

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[1]In Olmstead, the Supreme Court did not need to reach the issue of whether removing a numerical limit on HCBS enrollments would count as a "fundamental alteration" of the waiver program, because the Georgia waiver program at issue was not full. Olmstead, 527 U.S. at 601 (noting that "HHS approved up to 2109 waiver slots for Georgia, but Georgia used only 700"). As discussed in this Court's Order Denying Plaintiffs' Motion for Partial Summary Judgment, it is not obvious that the Washington CAP waiver is completely full, but it is clear there are not sufficient openings for the entire Plaintiff class.

**II. Defendants' Motion to Dismiss the Arc of Washington State.**

Defendants move to dismiss The Arc of Washington State for lack of standing. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), sets forth three criteria that must be met for an organization to have standing to sue on behalf of its members:

> (a) its members would otherwise have standing to sue in their own right;
> (b) the interests it seeks to protect are germane to the organization's purpose; and
> (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343. Whether the Arc meets these criteria depends in large part on the claims it asserts and the relief it requests.

Plaintiffs' submissions suggest that in the wake of this Court's previous rulings the Arc will attempt to pursue two Medicaid Act claims on behalf of its members. The first is that certain Arc members (or persons whose guardians are members) enrolled on the HCBS waiver have not received all of the HCB services to which they are entitled, or not received them with reasonable promptness. The second is that certain Arc members are eligible for, and desirous of, ICF-MR community residential placements, but have not received them with reasonable promptness. On both claims, the Arc seeks declaratory and injunctive relief.

Defendants concede that the Arc satisfies the first two Hunt criteria for these claims, but argue that it fails to satisfy the third, on the grounds that individualized proof is essential to establish the precise services which Arc members may need. However, the Arc is not disputing the accuracy of the State's determinations of the medical needs of its members. Instead, the Arc alleges that Defendants have illegally failed to provide services (either ICF-MR or HCB services) that Defendants themselves have determined to be necessary. Although the Arc cannot prevail on either of these claims without first showing that some of its members are not getting services that the State has determined they should, proof or disproof on this point can presumably come from the State's own records. For each claim, the central issues are legal ones concerning Defendants' obligations

under the Medicaid Act to provide particular services to persons eligible for broad programs. The participation of individual Arc members is not necessary to resolve these legal issues.

Participation of individual Arc members is also unnecessary to shape proper relief on either of the claims at issue here. The Arc seeks declaratory and injunctive relief mandating that Defendants adhere to alleged strictures of the Medicaid Act concerning provision of ICF-MR and HCB services. If Plaintiffs prevail, the Court need not determine the particular medical requirements of any disabled individual. Rather, it need only shape a general order clarifying Defendants' legal obligations to provide necessary services--whatever Defendants have determined them to be-- with reasonable promptness.

Accordingly, in so far as the Arc presses the two claims described here, it satisfies the third prong of the Hunt test, and Defendants' objection to the Arc's standing are unfounded.

**III. Plaintiffs' Motion to Modify the Class Definition.**

Named individual plaintiffs in this action currently represent 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). Plaintiffs have moved the Court to modify the class definition to encompass 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 or services in an ICF-MR community residential facility; and iii) have not received HCB waiver services or services in an ICF-MR community residential facility, or have not received them with reasonable promptness, and individuals who will be similarly situated in the future.

Memorandum in Support of Plaintiffs' Motion to Modify Class Definition, p. 7 (dkt. # 96). Such a modification would allow the class to pursue a claim to placements in ICF-MR community

residential facilities.

Whether it is proper to modify the class definition is potentially a complex issue. The threshold inquiry, however, must be whether the individual plaintiffs and the new class satisfy all the requirements set forth in Fed. R. Civ. P. 23(a) and 23b(2). Here, there is a genuine issue of material fact concerning the named individual plaintiffs' desire for ICF-MR services. See Declaration of Lucy Isaki, Exhibits A, B, and C (dkt. # 76). The existence of this issue suffices to call the "typicality" (Fed. R. Civ. P. 23(a)(3)) and "representativeness" (Fed. R. Civ. P. 23(a)(4)) of the named individual plaintiffs into doubt. Apart from denying that there is in fact a genuine issue concerning the named Plaintiffs' desire for ICF-MR services, Plaintiffs have not met their burden of showing Fed. R. Civ. P. 23(a) is satisfied for their proposed class. Accordingly, Plaintiffs' request to modify the class definition is denied.

**IV. Plaintiffs' Motion to Amend Judgment.**

Pursuant to Fed. R. Civ. P. 59(e), Plaintiffs move the Court to amend its prior Order Denying Plaintiffs' Motion for Partial Summary Judgment (dkt. # 119). Specifically, Plaintiffs request that the Court add to its conclusions the following order:

> 4) Defendants shall provide Medicaid medical assistance, including ICF-MR services, with reasonable promptness to individuals determined to be eligible for and in need of such services.

Plaintiffs justify their request by noting that the Court has already found that "the reasonably prompt delivery of Medicaid medical assistance is an individual statutory right." Order Denying Plaintiffs' Motion, p. 4 (dkt. # 119).

The Medicaid Act, and in particular 42 U.S.C. § 1396a(a)(8), clearly obligates states opting into Medicaid to provide medical assistance with reasonable promptness to all eligible individuals. However, the Court can not order the State of Washington to comply with this law without having first established by the proper evidentiary standard that the State has violated it. Otherwise, the Court would fall afoul of Article III of the Constitution, which gives the federal courts jurisdiction

only over "cases" and "controversies," and as a corollary requires plaintiffs to be "injured in fact" before granting them standing to press a claim. This Court simply does not have the power to order anyone to obey the law merely because the law is clear.

In the context of a summary judgment motion, Fed. R. Civ. P. 56 assigns to Plaintiffs as the moving party the burden of showing there are no genuine issues of fact concerning whether the State has violated 42 U.S.C. § 1396a(a)(8). Plaintiffs have failed to meet their burden. As previously noted, there is a genuine issue of fact concerning whether the named individual plaintiffs even desire ICF-MR services. That Plaintiffs' interpretation of the disputed evidence may well be the more credible does not suffice to make summary judgment appropriate. As far as the Arc's claims on behalf of its members are concerned, there is insufficient evidence in the record currently before the Court to convince it that the State has failed to provide ICF-MR services with reasonable promptness to Arc members who are eligible for, and desirous of, such services. More generally, although DSHS publications such as Strategies for the Future provide compelling evidence of waiting lists and "unmet needs" for services provided by the Division of Developmental Disabilities, it is not yet sufficiently clear that 1) the waiting lists are for Medicaid ICF-MR services the State is required to provide, and 2) the persons on the lists are Medicaid eligible. Summary judgment for Plaintiffs is inappropriate, and Plaintiffs' motion to amend will be denied.

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**V. Conclusion.**

ACCORDINGLY, the Court hereby FINDS and ORDERS that:

1) Defendants' Motion for Partial Summary Judgment on ADA Claims (dkt. # 101) is GRANTED;

2) Defendants' Motion to Dismiss The Arc of Washington State (dkt. # 103) is DENIED;

3) Plaintiffs' Motion to Modify Class Definition (dkt. # 95) is DENIED; and

4) Plaintiffs' Motion to Amend Judgment (dkt. # 120) is DENIED.

DATED this 19 day of December, 2000.

Franklin D. Burgess
United States District Judge

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United States District Court
for the
Western District of Washington
December 19, 2000

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:99-cv-05577

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

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Judge Burgess