No. 03-35605

In the United States Court of Appeals
for the Ninth Circuit

The Arc of Washington State, Inc., a Washington corporation on behalf of its members, and Guadalupe Cano, by and through her guardian, Delia C. Cano, and Olivia L. Murguia, by and through her guardian, Teri L. Hewett, and Lorianne V. Ludwigson, by and through her guardians, Donald and Sheryl Ludwigson,

Plaintiffs-Appellants,

vs.

Lyle Quasim, in his official capacity as the Secretary of the Washington Department of Social and Health Services, et al.
Defendants-Appellees.

Appeal from the United States District Court
Western District of Washington at Tacoma
Case No. 99-5577FDB
The Honorable Franklin D. Burgess

Reply Brief of Plaintiffs-Appellants

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

ARGUMENT

I. The Arc Has Standing.[1]

A. The Arc Has Standing to Sue on Behalf of its Members.

The State cites no authority in its brief that overrides this Court's holding that "[i]ndividualized proof from members is not needed where, as here, declaratory and injunctive relief is sought rather than damages." *Associated Gen. Contr. v. Metro. Water District*, 159 F.3d 1178, 1181 (9th Cir. 1998). Defendants also did not, and cannot, refute the district court's statements that:

> . . .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.*

ER 132 at 4-5 (emphasis added). Further,

> *Participation of individual Arc members is also unnecessary to shape proper relief on either of the claims at issue here.* . . 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.

ER 132 at 4-5 (emphasis added). This case is not about individual service needs; it is about having services for which *the State* has found a person eligible delivered

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[1]The district court dismissed only the Arc based on lack of standing. It dismissed the individual plaintiffs for failure to exhaust administrative remedies. ER 366 at 2-3.

promptly. The State does not distinguish those cases where similarly-situated plaintiffs were allowed to proceed as class actions. *E.g., Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998); *Boulet v. Cellucci*, 107 F. Supp. 2d 61 (D.Mass. 2000); *Makin ex rel. Russell v. Hawaii,* 114 F. Supp. 2d 1017 (D. Hawaii 1999).

In the district court, the State did not challenge the first prong of the test set forth in *Hunt v. Washington State Apple Advertising Com'n,* 432 U.S. 333, 97 S.Ct. 2434 (1977), thereby conceding plaintiffs' injury in fact.[2] *See* ER 363 at 1-3; ER 132 at 4. The district court did not find that the Arc failed the injury in fact prong, ER 366 at 2-3, and neither should this Court. In fact, people with disabilities, many of whom are Arc members, have been harmed by the State's conduct at issue here. In 1998, the State published a self-damning document, *Strategies for the Future,* acknowledging that 4,500 persons with developmental disabilities were waiting for residential services outside their parental homes and that 3,000 more were waiting for in-home services. ER 35 at 1-2. It admitted that the "community service system in Washington for persons with developmental disabilities...is *eroding,*" ER 34 at 5, and that "[h]istorically, Washington has not devoted the fiscal effort to DDD [Division of Developmental Disabilities] as have most other

[2] The first prong of the *Hunt* test includes the "injury in fact" requirement of *Lujan v. Defenders of Wildlife*, 504 US 555, 560-61 (1992).

states." ER 34 at 6. Plaintiffs have shown that the State's violations cause harm, thereby demonstrating injury-in-fact. *Id.*; *cf.* ER 1 at 3.

B. The Arc Has Standing on its Own as an Association.

Defendants ignore *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002), which held that an organization has standing in its own right, if defendants' illegal actions cause both "a diversion of its resources" and a "frustration of its mission." Reaffirming that decision, this Court has again found associational standing where a fair housing organization had to "divert its scarce resources from [its] other efforts to promote awareness of – and compliance with – federal and state accessibility laws and to benefit the disabled community in other ways." *Smith v. Pacific Properties*, ___ F.3d ___ (9th Cir. 2004), 2004 WL 112633, *7. In addition to the diversion of financial resources, the illegal actions of the State have required the Arc to divert resources from other activities, including "its basic parent-to-parent support function" and "providing more education and training on best practices in the field of developmental disabilities." ER 339 at 5. Instead, the Arc has been forced to counsel its members on how to obtain residential placements for which they are eligible, ER 339 at 2; correct misstatements by DDD case managers that a funding limit exists for a person on the HCBS waiver, ER 339 at 3; assist its local chapters in securing ICF/MR services for members wrongfully denied by the State, *id.*; call CMS, the federal

agency with power to sanction the State over its illegal operation of Medicaid, and ask it to take action, *id.*; and use paid staff time to counsel non-members and members about these wrongful actions. ER 339 at 4-5.

Standing exists where a housing "organization had 'stopped everything else' and devoted all attention to the litigation in question and diverted resources to counter the defendant's conduct." *Alexander v. Riga*, 208 F.3d 419 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001), quoted in *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000). Here, the Arc executive director and another staff member devoted an enormous amount of effort to fighting against the State's illegal denial of services with reasonable promptness. FER 115 at 1-2.

C. There is no Conflict of Interest nor is Unanimity Required.

The State claims that "conflicts exist between The Arc and its members." State's Br. at 32-33. But the district court's concerns were about conflicts within a proposed *settlement* class. ER 366 at 3. In any event, unanimity of member interests is not required for standing. *Associated Gen. Contractors of Cal. v. Coalition,* 950 F.2d 1401, 1409 (9th Cir. 1991).

This case seeks declaratory and injunctive relief for persons with developmental disabilities whom defendants have found eligible for ICF/MR or HCBS services. ER 1. No one's interest is harmed by such a declaration. By contrast, the State's cited cases involved an association's suit against some of its

own members for damages, *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n,* 830 F.2d 1374, 1377 (7th Cir. 1987), and a lawsuit claiming reduced health premiums for some members by increased premiums for others, *Retired Chicago Police Ass'n v. City of Chicago,* 76 F.3d 856 (7th Cir. 1996). Those cases are inapplicable, even if this Court did require unanimity -- which it does not.

II. The Plaintiffs' Claims Are Ripe.

After four years of litigation, defendants attempt to evade review by amending the HCBS waiver and then asserting plaintiffs' claims are unripe. The Court should disallow this conduct.

A. The Issues are Fit for Decision.

The first element of ripeness is whether the case is fit for decision. *Knight v. Kenai Penin. Borough Sch. Dist.,* 131 F.3d 807, 814 (9th Cir. 1997). The State admits that "[p]ure legal issues which require little factual development are more likely to be ripe," *San Diego County Gun Rights v. Reno,* 98 F.3d 1121, 1132 (9th Cir. 1996). State's Br. at 13. Defendants claim that "[t]he issues before this court regarding eligibility for services, and what constitutes reasonable promptness, are complex factual and legal issues" rendering the matter unripe. *Id.*. However, this case is about legal questions. There are no factual disputes about eligibility, because plaintiffs merely seek prompt services for which *defendants* have found

them eligible. This simply is not a "sketchy record" with "many unknown facts." *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1992).

What constitutes reasonable promptness is also a legal issue. Numerous cases have found that the Medicaid statute and regulations provide the meaning of "reasonable promptness." Open. Br. at 33.

Defendants assert that a recent amendment to the HCBS waiver renders this lawsuit unripe.[3] State's Br. at 12-13. The waiver is routinely amended every few years, 42 U.S.C. 1396n(h). If mere amendments rendered a case unripe, judicial review would be impossible, because a state is permitted to submit a proposed amendment at any time. 42 U.S.C. § 1396n(f). In *Boulet*, 107 F.Supp.2d at 68 n.6, the court retained jurisdiction even though the state had amended the waiver. In *Risinger v. Concannon*, 117 F.Supp.2d 61, 65-66 (D.Me. 2000), disabled plaintiffs sued for prompt delivery of Medicaid services, and the court found the dispute ripe even though the state had changed the program. Here, the Arc proved that some of its eligible members, including the Waughs and the Gries, have been denied services for years. Open. Br. at 36; ER 337 at 2; ER 338 at 1-2. The legal

[3]If the amendments were significant, one would have expected the State to describe the differences below, but there is no such record.

issues presented are forged in real conflict between people with developmental disabilities and a state agency.

Details of waivers may change, but the basic purpose remains the same -- to provide therapeutic and supportive home and community-based services as an alternative to the institutional care for which persons are otherwise eligible. 42 U.S.C. § 1396n(c). Likewise, appellants' claims -- that many people found eligible are not served with reasonable promptness -- remain the same.

1. The HCBS CAP waiver is still in effect. Amendments to the waiver were approved effective January 1, 2004.[4] State's Br. at 8. Although CMS approved the amendments, it also granted an extension of the existing CAP waiver. The CAP waiver is therefore still in effect and defendants mislead the court by saying that it no longer exists. State's Br. at 14. The State has sought and received multiple extensions from CMS. It provides no proof that it will not seek others.

2. The plaintiffs' claims concern any waiver. The district court initially recognized that plaintiffs' claims relate to any waiver: "[T]he 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*." ER 132 at 5 (emphasis added), Open. Br. at 16. This remains true.

[4]The State here introduces evidence from documents not in the record below. The same documents State that the CAP waiver is still in effect.

B. Plaintiffs Will Suffer Hardship if Ripeness is Not Found.

The second element of ripeness is "whether the parties will suffer hardship if [the court] decline[s] to consider the issues." *Knight,* 131 F.3d at 814. Waiver services are provided to "meet [the] health and welfare needs" of the persons on the waiver. ER 339 at 8. A delay in meeting those medical needs is necessarily a considerable hardship. *See* FER 39 at 1-5 (deprivation of services for which persons are eligible leaves parents who are senior citizens struggling to cope; sometimes they die, leaving disabled son or daughter stranded). The Arc has demonstrated that its eligible members are being denied services, some for many years. ER 336 at 1-2; ER 337 at 1-3; ER 347 at 3-5. Denials persisted even when a person was so disabled as to be in diapers at age 22, ER 337 at 2, or so assaultive that he choked his mother. ER 338 at 1-2. Defendants denied ICF/MR services to a plaintiff by illegally denying permanent placement at the ICF/MR, although plaintiff wanders away, requires 24-hour supervision, is assaultive, and is not developing life skills. ER 37 at 1-4. Cases like these and other needy families deprived of services were before the court below at the time of its decision on ripeness. FER 333 at 1-10. These persons are being greatly harmed by the ruling that their matter was unripe.

In addition, plaintiffs will suffer the hardship of four years of diverted resources should the Court find the matter unripe now. The Arc is being harmed

by the diversion of large blocks of the time of its executive director to combating the State's illegal actions. ER 115 at 1-2.

C. Defendants Will Re-Offend.

It is the duty of courts to be aware of attempts to defeat injunctive relief by protestations of repentance and reform. *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 745 (9th Cir. 1996), citing *United States v. Oregon Medical Society*, 343 U.S. 326, 333 (1952). The heavy burden of persuading a court of the mootness of a case lies with the moving party, *Adarand Constructors, Inc. v. Slater*, 528 U.S. 222, 224, 120 S.Ct. 722 (2000), and the same burden should be applied to assertions of unripeness. Voluntary cessation of challenged conduct moots a case only if it is "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.*, quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361 (1968). Here, the wrongful behavior will recur, because the motive for financial savings by delaying prompt services remains.[5] In *Honig v. Doe*, 484 U.S. 305, 318, 108 S. Ct. 592 (1988) (student's right to special education was not moot, even though he no longer faced expulsion and had relocated to different school district, because of "reasonable likelihood

[5] Defendants have forecast such continued behavior in this Court. "Given the current *fiscal climate* facing the State . . .," State's Br. at 49; " '. . . Washington's public policy interests and concerns in and for the even-handed administration of its *limited resources* to a population with great and diverse needs . . . .' " State's Br. at 50 (emphases added).

that [he] will again suffer the deprivation of EHA-mandated rights that gave rise to this suit").[6] Likewise, where a state withdrew planned Medicaid cuts before trial, the case was not moot. *Arkansas Medical Society, Inc. v. Reynolds*, 819 F.Supp. 816, 820 (E.D. Ark. 1993), *aff'd*, 6 F.3d 519 (8th Cir. 1993).

The State has offered no proof whatever that it will not continue to economize by illegally delaying the provision of needed services to persons with developmental disabilities. (*See* note 5 above). Defendants may not evade review by changing the waiver after four years of litigation, and by making a blanket, unsupported assertion that the amended waiver -- which is outside the record -- is significantly different. There is a live controversy that meets both constitutional and prudential criteria for adjudication.

D. The ICF/MR Claims Are Ripe.

The ICF/MR claims remain ripe and central to this litigation. Defendants do not deny that plaintiffs' ICF/MR claims are ripe, and, indeed, do not address them at all on appeal. The district court's failure to rule on this issue was error.

III. Plaintiffs Are Not Required to Exhaust Administrative Remedies.

Defendants cite just two cases -- both plainly distinguishable -- in support of their argument that the district court correctly dismissed plaintiffs' claims for

[6]A reasonable likelihood need not rise to the level of being more probable than not. *Id.* at n.6.

failure to exhaust administrative remedies. *Weinberger v. Salfi*, 422 U.S. 749, 764-66, 95 S.Ct. 2457 (1975), required exhaustion under the Social Security Act in 1975, not the Medicaid Act today. *Abbey v. Sullivan*, 978 F.2d 37 (2d Cir. 1992), actually helps plaintiffs. The Court held that exhaustion should apply in a case where the plaintiff challenged the application of "concededly valid regulations." *Id.* at 45. Where, however, a plaintiff claims that an agency has adopted policies that violate the Medicaid Act and that the agency has no "inclination" to correct, exhaustion should not apply. *Id.* Here, defendants have adopted policies that create waiting lists and fail to promptly deliver required services. ER 1 at 1-19. Under *Abbey,* the Court cannot require exhaustion in this case.

Nor do "state administrative procedures" foreclose resort to 42 U.S.C. § 1983. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 523, 110 S.Ct. 2510 (1990)Here, defendants recite a list of state administrative procedures (States' Br. at 43-44), but -- like the district court, ER 366 at 5 -- do not attempt to show Congressional intent to require exhaustion. *See Alacare, Inc. North v. Baggiano*, 785 F.2d 963, 967-68 (11th Cir. 1986) (no Congressional preference for exhaustion in Medicaid cases); *accord Wilder*, 496 U.S. at 520, 523 (no Congressional intent to foreclose § 1983 claim in Medicaid case, even where state had tiered administrative scheme).

Defendants behave as though the §1983 claim does not exist in this litigation. But it does -- see ER 1 at 15-17 -- and defendants have failed to distinguish *Wilder* and *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 500-01, 102 S.Ct. 2557 (1982) (". . . this Court has stated categorically that exhaustion is not a prerequisite to an action under 42 U.S.C. § 1983, and we have not deviated from that position in the 19 years since *McNeese v. [Board of Education*, 373 U.S. 668, 83 S.Ct. 1433 (1963)]").

As to futility, defendants ignore the fact that one of the Arc's members did pursue an administrative appeal that was denied on the illegal ground of insufficient funding. ER 335 at 1-3; 348 at 2-3.[7]

IV. ***Burford* Abstention Does Not Apply.**

Defendants concede this Court's three-part test for abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098 (1943). *See Southern California Edison Company v. Lynch*, 307 F.3d 794, 806 (9th Cir. 2002); *City of Tucson v. U.S. West Communications*, 284 F.3d 1128, 1132-34 (9th Cir. 2002). Thus, the dispute concerns its application.

[7] The illegal "lack of funding" excuse did not cease in June 2002. *See* ER 366 at 5. In April 2003 the Arc was still receiving complaints from members that eligible families were being denied services. ER 339 at 4-5.

A. The State Has Not Concentrated this Type of Challenge in a Particular Court.

Defendants describe the State's procedural scheme at length. State's Br. at 47-52. The bottom line -- not disputed by plaintiffs -- of defendants' recitation is that claimants have a right to certain administrative hearings and to judicial review in state courts. *Id.* at 48. These rights are insufficient to meet the *Burford* prong requiring concentration of DDD suits in a particular state court. *See City of Tucson*, 284 F.3d at 1133-34 (specialized administrative system of review not the designation of "any particular state court," thus first prong under *Burford* not met); *Burford*, 319 U.S. at 325 (all review of administrative decisions involving Texas Railroad Commission concentrated in the Travis County district court). Resort to "superior court" and "state appellate courts," as provided in Washington, State's Br. at 48, is insufficient to satisfy the first prong. Nor are the administrative law judges employed by the State's Office of Administrative Hearings members of a "court." *See* Wash. Admin. Code, § 10-04-020; § 10-08-001.

B. Washington Law is Easily Separable from the Federal Claims.

Plaintiffs' claims are not "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *New Orleans Publ. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (citation omitted). Plaintiffs do not plead state claims, and this case presents no questions of state law. The federal claims have been stated repeatedly and were long acknowledged by the

district court. ER 132 at 4-5. Defendants fail to rebut this simple argument, preferring instead a long irrelevant recitation of the statutory and regulatory provisions that govern Washington disability programs. State's Br. at 47-50.

C. Federal Court Review will not Disrupt Allegedly Coherent State Policy.

Like the district court, defendants ignore the sensible conclusion reached by the Third Circuit: *Burford* abstention does not apply to "cases where the state regulations under constitutional review were enacted to comply with a federal mandate in the particular regulatory field." *Chiropractic America v. LaVecchia*, 180 F.3d 99, 107 (3d Cir. 1999). Here, federal statutes require the very "comprehensive system" that the State contends shields it from review by federal courts. *See, e.g.*, 42 U.S.C. § 1396a(a); 42 U.S.C. § 1396n(c); 43 C.F. R. §§ 441.300-.302. Because none of the three *Burford* prongs are met, the district court abused its discretion in applying *Burford* abstention.

D. The State Waived Reliance on *Burford*.

Even if defendants are correct that submitting to federal court jurisdiction in a proposed settlement is not admissible under the Federal Rules of Evidence, defendants must concede that a state may voluntarily submit to federal jurisdiction. *Southern California Edison*, 307 F.3d at 806. Defendants completely ignore plaintiff's chronology showing that from November 1999 until at least late January 2001 (*See* ER Docket at 1-17), the state had many opportunities to assert

abstention, but failed to do so. Open. Br. at 23-24. Failure to raise abstention until after the court's disapproval of the Second Amended Settlement Agreement, three and one-half years after commencement of the lawsuit (ER 343), is submission to federal jurisdiction. *Southern California Edison*, 307 F.3d at 806.

V. The District Court Abused Its Discretion By Decertifying Plaintiffs' Litigation Class.

A court abuses its discretion if it does not show that it "adequately consider[ed]" Rule 23 factors. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). *Doe v. Karadzic*, 192 F.R.D. 133 (S.D.N.Y. 2000), State's Br. at 22, emphasized that when a court revisits certification, including decertification, it "must again engage in a rigorous analysis of whether the conditions for maintaining a class action have been satisfied." *Id.* at 136 (citation and quotations omitted).

A. The Order Denying Approval of the Second Amended Settlement Agreement ("December 2 Order") did not Support Decertification of the Litigation Class.

1. Defendants Misconstrue the Scope of the Litigation Class. The litigation class the district court decertified was comprised of "*only* disabled individuals who are *waiting for placement* on the HCBS waiver." *See* ER 87 at 4; ER 191 at 5 (emphasis in original). Defendants mistakenly argue that the litigation

class includes people *both* on the waiver *and* not on the waiver.[8] However, only the *proposed settlement classes* included both.

2. The Objections affect only the proposed settlement class, not the litigation class. Defendants direct this Court to intervenors' Objections to the Second Amended Settlement Agreement ("SASA") as the basis for decertification. State's Br. at 20-25. They provide no analysis as to why these Objections are relevant to the litigation class. Intervenors' objection to the proposed settlements, and specifically the SASA, was that alleged conflicts existed between the subclass of individuals who were on the waiver and the subclass who were not. The intervenors did not allege problems with the class of plaintiffs who were not on the waiver.[9] As such, the Objections could not justify decertification.

The objection defendants characterize as having "to do with the inadequacy of the class representatives," State's Br. at 23, related to the "inherent conflicts

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[8] *See* State's Brief at 24 ("When the original class was certified the named Plaintiffs were not on the waiver and thus could not represent those absent persons already on the waiver. Thus the class was improvidently granted at its inception.")

[9] The intervenors made brief, early objections to the litigation class, but the district court properly denied those objections as untimely and "not sufficiently weighty" to justify consideration. ER 191 at 10; Open. Br. at 29. Although defendants cursorily cite those objections (State's Br. at 18), they do not argue that the court was wrong to deny them, nor do they advance the objections at all. "Simply recast[ing] the arguments [a party] originally made against class certification" is insufficient to justify decertification. *Wilder v. Bernstein*, 645 F.Supp. 1292, 1312 (S.D.N.Y. 1986) (quoted in *Doe v. Karadzic*, 192 F.R.D. 133, 137 (S.D.N.Y. 2000).

between the subgroups within the [settlement] class." ER 323-3. The objection that "class conflicts prevent[] adequate representation by class Plaintiffs," State's Br. at 23, referred to objections by the intervenors on behalf of "persons who are participating in the State's" waiver. ER 323-5. The subclass representatives to whom intervenors objected were settlement representatives, not the litigation class representatives. ER 323 at 6. The "deficits in commonality and typicality," State's Br. at 23, also appear to be objections to the "proposed subclass representatives." ER 323 at 6. Defendants' remaining objections ("inadequacy of the settlement," State's Br. at 23, and "inadequacy of subclass representation," *id.*) by definition apply only to the settlement class, not the litigation class. Finally, defendants' assertion that the district court "found that the representative Plaintiffs inadequately represented the claims of the absent class members," State's Br. at 23, referred to a criticism the court specifically applied only to the SASA's "putative class/subclasses." ER 323-12; Open. Br. at 31, n.8. In each case, the difference between the defendants' characterization and the actual objection highlights defendants' failure to understand the distinction between the certified litigation class and the proposed settlement class.

B. Counsel Adequately Represent the Interests of the Litigation Class.

1. Plaintiffs' brief delay in seeking class certification does not render counsel's representation inadequate. Defendants repeatedly refer to plaintiffs' counsel's delay in moving for certification as evidence of inadequacy of representation.[10] State's Br. at 17, 21, 25. Although the court made a cursory reference to the delay before cryptically declaring that it had "indulged [plaintiffs' efforts] overly long," ER 323 at 11, nothing in the December 2 Order satisfies *Valentino*.

Moreover, neither the cited law nor the facts support defendants. A brief delay does not indicate inadequate representation, especially when plaintiffs' counsel continues to prosecute the litigation vigorously. The plaintiffs in *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460 (N.D. Cal. 1978), waited thirty-two months before moving for class certification. The court did not find counsel inadequate because plaintiffs continued discovery during the interim, and because "all parties

[10] Defendants also make a cursory reference to plaintiffs' counsel negotiating its attorneys' fees in the first proposed settlement agreement, relying on *Munoz v. Ariz. St. Univ.*, 80 F.R.D. 670 (D. Ariz. 1978). *Munoz* involved counsel whose history and handling of the litigation strongly suggested abusive "assembly line" litigation. *Id.* at 672. Nothing even remotely similar occurred here. Further, this Court rejects a "general proscription" on negotiating attorneys' fees as part of a settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 971 (9th Cir. 2003). Nevertheless, insofar as this Court finds it inappropriate to negotiate for fees as part of a settlement, plaintiffs corrected their error and did not negotiate fees in the ASA or the SASA.

have always recognized that the suit was brought on a class basis." *Id.* at 486-87. That is the situation here. Plaintiffs pursued discovery and motion practice during this litigation, and made it clear from the beginning that they intended this suit as a class action. ER 1; ER Docket.

By contrast, plaintiffs in *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 399-400 (1977), proceeded to trial without moving for certification, offered no evidence in support, and a class was first certified on appeal. Similarly, the plaintiffs in *Munoz v. Ariz. St. Univ.*, 80 F.R.D. 670 (D. Ariz. 1978), delayed over three years in moving for certification and still had not done so when the court ruled on a motion to strike. Further, defendants have never shown that they were prejudiced by the delay. FER 64 at 2. Thus, plaintiffs' brief delay in moving for certification does not constitute inadequacy of representation.

2. Plaintiffs' efforts to negotiate a settlement protected the interests of the litigation class. In their settlement negotiations, the parties sought to reach a settlement that would benefit both the litigation class and some individuals already on the waiver. In pursuing such an agreement, plaintiffs' counsel had to make certain concessions, because "the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (quotation and citation omitted). The parties answered all of the intervenors'

objections regarding these concessions. The district court did not analyze the objections or answers, but merely summarized the arguments before declaring that certification had been "improvident." ER 323 at 11. The objections did not justify decertification, and the court's cursory treatment is insufficient under *Valentino*.

Decertification was particularly inappropriate given the court's support of the parties' efforts to reach a settlement that extended beyond the litigation class.[11] The court never mentioned that the parties' continuing efforts to reach a settlement might threaten the litigation class. Open. Br. at 30. It was unreasonable for the court to rule that plaintiffs' counsel's diligent efforts to achieve a result the court appeared to encourage would also render them inadequate representatives.

For these reasons, the district court abused its discretion when it decertified the litigation class.

VI. The Court Erred When It Denied the Plaintiffs' Two Summary Judgment Motions.

In addressing plaintiffs' summary judgment claims, the State undertakes a curiously general discussion of Medicaid, much of which is irrelevant, and distorts the ICF/MR and waiver programs. For example, it states that the waiver program covers services not enumerated in "the Medicaid Act." State's Br. at 35. It remarks

[11] *See* ER 191-8, 9 (encouraging parties to divide settlement class into subgroups to resolve conflicts); ER 282-10 (noting complexity of settlement and granting "an additional opportunity" to "address and resolve the Court's concerns" with the settlement class).

that "waiver services are generally non-institutional." *Id.* (emphasis added). plaintiffs have asked for services "not required by the Medicaid Act, but offered exclusively through *Washington's* waiver program . . ." *Id.* at 37 (emphasis added). But the waiver program *is* part of the Medicaid Act, specifically 42 U.S.C. § 1396n, and is by definition non-institutional, requiring states that wish to receive funding for waivers to prove that the waiver services are cheaper than institutional alternatives. 42 U.S.C § 1396n(c)(2)(D). Also, the waiver program is not solely "Washington's," but a federal-state partnership, as is all of Medicaid.

A. Plaintiffs' First Motion for Summary Judgment.

Plaintiffs offered on appeal the unrebutted testimony of the Arc executive director that many Arc members have disabled family members who are on the waiver and who have failed to receive with reasonable promptness those services for which the State has found them eligible. Plaintiffs noted that the district court agreed that this claim was unrebutted below, Open. Br. at 33-34, although the district court denied the motion anyway. The State now speculates that the district court *sub silentio* found the testimony of the executive director "wanting." State's Br. at 40.

Whatever the district court thought is not in the record, but it did declare, without explanation, that it was unconvinced that summary judgment should be

granted even if certain Arc members on the waiver did not receive all the waiver services they "desire." ER 119 at10; *cf.* Open. Br. at 33-34.

The unrebutted declarations offered by Plaintiffs clearly established a lack of genuine issues of material fact. The State *does not dispute* the executive director's testimony that Arc members who were on the waiver were not receiving those Medicaid services for which they are eligible with reasonable promptness:

> The Arc's statewide membership of approximately 3,000 includes many families with members with developmental disabilities who have been denied Medicaid services with reasonable promptness. Many have waited for out of home residential services for years. The Arc's members tend to include families who have sons and daughters with more severe disabilities. Many children of Arc members who are waiting for out of home residential placements are already on the HCBS (CAP) waiver.

ER 36 at 4.

Although the district court made no such finding, the State claims that the Arc witness's testimony was rebutted by the declarations of Rolfe, Brown and Poltl. State's Br. at 36. Significantly, the State offers *no evidence at all* to assist this Court, but merely speculates the district court found a material issue of fact in ruling against the plaintiffs. Since this Court reviews a motion for summary judgment *de novo*, *Poole v. VanRheen*, 297 F.3d 899, 905 (9th Cir. 2002), defendants' failure to offer any evidence rebutting the plaintiffs' proof should cause this court to grant summary judgment on plaintiffs' claim that those on the

HCBS waiver are due all needed services for which they are eligible with reasonable promptness. Open. Br. at 32-34.

B. Plaintiffs' Second Motion for Summary Judgment.

In 2003, after the district court decertified the class , plaintiff Arc filed a second summary judgment motion, asking that ICF/MR and HCBS services be delivered to the Arc's eligible members with reasonable promptness. FER 333 at 1-10. The State does not defend the motion on its merits, arguing only that plaintiffs lack standing. State's Br. at 42-43. Thus, all of the facts undisputed below, *see* ER 347 at 2-8, remain undisputed. If this Court finds, as it should, that plaintiffs have standing, it should grant summary judgment to plaintiff Arc. *See* Open. Br. at 34-38.

VII. The District Court Erred When It Denied Plaintiffs' ADA Claim.

The State raises three objections to plaintiffs' Americans with Disabilities Act ("ADA") claim. First, the State's obligations are not "boundless." Second, the limit on the number of persons to be served is an "essential" eligibility requirement, and making a change would be a fundamental alteration in the State's program. Third, the plaintiffs' "location of services" argument is raised for the first time on appeal. None of the objections has merit. This Court should accept plaintiffs' ADA argument and remand for trial.

The ADA implementing regulations, 28 C.F.R. § 41.51(d), require a program to be provided in the most integrated setting appropriate to the needs of a disabled person. Indeed, defendants do not challenge plaintiffs' contention, Open. Br. at 41, that small community ICF/MRs and the HCBS program, in contrast to the large state institutions, are more integrated residential alternatives that comply with the integration mandate.

However, defendants make the polemical argument that a state's obligation in providing community services is not "boundless." State's Br. at 55, citing *Olmstead L.C. ex rel. Zimring*, 517 U.S. 581, 600, 119 S.Ct. 2176 (1999). Plaintiffs have never asserted such a claim. Rather, they argue, consistent with the ruling in *Makin ex rel. Russell v. Hawaii*, 114 F.Supp.2d 1017, 1035 (D. Hawaii 1999), cited by defendants, that while *Olmstead* may not require a state to instantly serve all disabled people, it *does* require a state to "responsibly develop the program in such a way that will allow the [HCBS] wait list to move at a reasonable pace."

Defendants' second argument regarding fundamental alterations has also been rejected. The implementing regulations to the ADA require a state to reasonably modify its programs to avoid discrimination, unless it can actually demonstrate that modifications would result in a fundamental alteration. 28 C.F.R. § 35.130(b)(7).

Defendants inform this Court that the *Medicaid Act* does not require lifting the waiver lid, citing *Makin*. State's Br. at 56, 58. They fail to disclose, however, that the *Makin* court explicitly considers the ADA and explains:

> . . . the ADA requires the state to administer its waiver program in the "most integrated setting appropriate to the needs of qualified individuals."

Makin, 114 F. Supp 2d 1017, 1035 (citation omitted) (also explaining that whether modifications should be made and, if so, whether they would "fundamentally alter" a program are material questions of fact).[12]

Fundamental alteration is a defense under the ADA, and the onus is on defendants to prove that a requested modification would result in a fundamental alteration. Defendants have not offered any proof that adding people to the waiver would fundamentally alter the program. They have only stated that adding people

[12]Defendants claim that *Makin, Pottgen v. Missouri State High School Activities Assn*, 40 F.3d 926 (8th Cir. 1994), *Aughe v. Shalala*, 885 F.Supp. 1428 (W.D.Wash. 1995), and *Boulet* hold that the waiver lid is an essential eligibility requirement not subject to the ADA's reasonable modification doctrine. State's Br. at 57. *Boulet*, 107 F.Supp.2d 61, has only the Medicaid Act before it, and says nothing about the ADA. *Makin* finds a lid under the Medicaid Act, but explicitly finds that lid expandable under the ADA. 114 F. Supp. at 1034-35. *Pottgen* and *Aughe* were both decided before the *Olmstead* case on which *Makin* relies. Furthermore, both are factually distinct, deciding age requirements rather than the size of a Medicaid program, which is the issue here and in *Makin*.

would cause them to exceed the cap on the number of people, an argument the court rejected in *Makin*:

> In this case, Defendants argue that any modification to the program would require them to ignore state funding limits, and, therefore, fundamentally alter the HCBS-MR program to an unlimited state funded program. Further, it claims that requiring the state to ignore the population limits is a fundamental alteration. Also, the State argues that providing more individuals with services would force it to exceed its federal funding limits, making it take on 100% of the costs of these additional individuals' care. *These arguments fail to show how the modification would fundamentally alter the program*, since it merely argues that the state would potentially have a problem funding it. Also, the court would not expect the state to provide 100% of the funds, but would analyze whether the state could amend the "population limits" approved by the HCFA to provide for more individuals. It would not be an unlimited program as Defendants claim.

Makin, 114 F.Supp.2d 1017, 1034 (emphasis added). Similarly, in *Fisher v. Oklahoma Health Care Authority,* 335 F.3d 1175, 1183 (10th Cir. 2003), which defendants ignore, observed: "[i]f every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed."

Third, this case has never been about creating new types of services, but about prompt delivery of services to eligible people in community settings. ER 1. Defendants' plaintive protest that "plaintiffs for the first time contend that the issue before the court is one of the 'location of services' rather than the provision of new or additional services to a new class of persons" (State's Br. at 57) shows only that

defendants continue to misunderstand plaintiffs' claims: namely, that those people whom defendants find eligible should receive services in the most integrated setting with reasonable promptness.

Plaintiffs do not seek new services, but services in integrated, home and community based settings.[13] ER 112 at 1-2. The district court repeatedly recognized this. ER 132 at 1-3; *cf.* ER 119 at 2-3 and ER 134 at 2-3. Plaintiffs were therefore on solid ground in making this argument on appeal (the "location of services" phraseology itself is indebted to *Townsend v. Quasim,* 328 F.3d 511, 517 (9th Cir. 2003)).

The district court's ADA ruling should be reversed and remanded with an instruction that short-term increased fiscal impact, by itself, is insufficient to prove a fundamental alteration.

CONCLUSION

Washington State fails to provide developmentally disabled persons reasonably prompt Medicaid services, even after it finds those persons eligible. Such failure causes harm to persons with disabilities, their families, their

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[13]Defendants allege incorrectly that "[t]he services provided under the CAP and its successor are different from and additional to those available under the Medicaid State Plan or as State-funded services." State's Br. at 57-58. This uncited "fact" is untrue. *See Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003) (same long term care services are available in institutional and community settings, the only difference being location).

caregivers, and The Arc as an organization. Declaratory and injunctive relief are necessary to redress this harm.

This Court should reverse the district court's decision to dismiss the Arc and the individual plaintiffs. It should vacate the order decertifying the litigation class and reinstate the class as certified. It should reverse the lower court's denial of summary judgment to plaintiffs and grant declaratory and injunctive relief to plaintiffs, declaring that the Arc and the class have a right to HCBS and ICF/MR services with reasonable promptness. It should uphold the ADA's integration mandate, reverse the district court's dismissal of plaintiffs' ADA claims, and remand for trial the issue of fundamental alteration.

DATED this 5th day of February, 2004.

Respectfully submitted,

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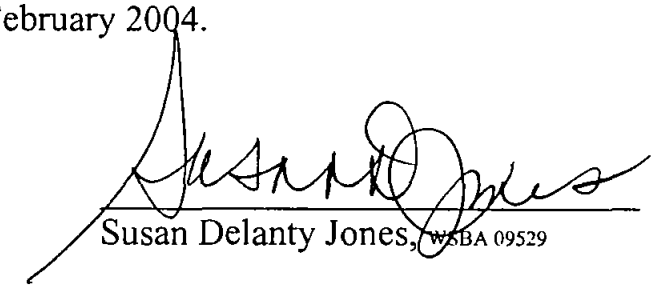
CERTIFICATION OF COMPLIANCE
WITH FED. R. APP. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 03-35605

Pursuant to FED. R. APP. 32(a)(7)(C) and CIRCUIT RULE 32-1, the foregoing reply brief is proportionally spaced, has a 14-point typeface, and contains 6609 countable words.

DATED this 5th day of February 2004.



Susan Delanty Jones, WSBA 09529

STATEMENT OF RELATED CASE
REQUIRED BY NINTH CIRCUIT RULE 28-2.6

There is a related case, namely, *Boyle et al. v. Braddock*, No. 03-35312, which raises the same or closely related issues or involves the same transaction or event.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The Arc of Washington State, Inc., et al., Plaintiffs/Appellants, vs. Lyle Quasim, in his official capacity as the Secretary of the Washington Department of Social and Health Services, et al., Defendants/Appellees	No. 03-35606 CERTIFICATE OF SERVICE

SUSAN DELANTY JONES declares as follows:

I certify that on February 5, 2004, I caused to be served two copies of the Reply Brief of Plaintiffs/Appellants, and one copy of Plaintiff/Appellants' Further Excerpts of Record, by messenger to: Attorneys for Defendants-Appellees, William M. Van Hook and Edward J. Dee, Attorney General's Office, 670 Woodland Square Loop SE, Olympia, Washington 98504-0124.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 5th day of February 2004 at Seattle, Washington.

Susan Delanty Jones, WSBA 09529

APPENDICES TO REPLY BRIEF OF PLAINTIFFS-APPELLANTS

A	42 U.S.C. § 1396n(f)
B	42 U.S.C. § 1396n(h)
C	28 C.F.R. § 35.130(b)(7)
D	TITLE 10 WAC, ADMINISTRATIVE HEARINGS, OFFICE OF

APPENDIX A

42 U.S.C. 1396n(f)

(f) Monitor of implementation of waivers; termination of waiver for noncompliance; time limitation for action on requests for plan approval, amendments, or waivers

(1) The Secretary shall monitor the implementation of waivers granted under this section to assure that the requirements for such waiver are being met and shall, after notice and opportunity for a hearing, terminate any such waiver where he finds noncompliance has occurred.

(2) A request to the Secretary from a State for approval of a proposed State plan or plan amendment or a waiver of a requirement of this subchapter submitted by the State pursuant to a provision of this subchapter shall be deemed granted unless the Secretary, within 90 days after the date of its submission to the Secretary, either denies such request in writing or informs the State agency in writing with respect to any additional information which is needed in order to make a final determination with respect to the request. After the date the Secretary receives such additional information, the request shall be deemed granted unless the Secretary, within 90 days of such date, denies such request.

APPENDIX B

42 U.S.C. 1396n(h)

(h) Period of waivers; continuations

No waiver under this section (other than a waiver under subsection (c), (d), or (e) of this section) may extend over a period of longer than two years unless the State requests continuation of such waiver, and such request shall be deemed granted unless the Secretary, within 90 days after the date of its submission to the Secretary, either denies such request in writing or informs the State agency in writing with respect to any additional information which is needed in order to make a final determination with respect to the request. After the date the Secretary receives such additional information, the request shall be deemed granted unless the Secretary, within 90 days of such date, denies such request.

APPENDIX C

28 C.F.R. § 35.130(b)(7)

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

APPENDIX D

Title 10 WAC
ADMINISTRATIVE HEARINGS, OFFICE OF

Chapters

Chapter 10-04 WAC
AGENCY ORGANIZATION—PUBLIC RECORDS

WAC

WAC 10-04-010 Purpose. The purpose of this chapter is to provide rules implementing RCW 42.17.250 et seq. for the office of administrative hearings.

[Statutory Authority: RCW 34.05.020, 34.12.030 and 42.17.250. 99-20-115, § 10-04-010, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 34.04.020 and 47.17.250 - 47.17.320 [42.17.250 - 42.17.320]. 82-22-052 (Order 3), § 10-04-010, filed 11/1/82.]

WAC 10-04-020 Function—Organization—Offices. The office of administrative hearings conducts impartial administrative hearings for state agencies and local governments pursuant to chapter 34.12 RCW. The office is under the direction of the chief administrative law judge.

Administrative law judges preside over hearings in adjudicative proceedings and issue initial or final orders, including findings of fact and conclusions of law.

The administrative office is located at 919 Lakeridge Way SW, 2nd Floor, P.O. Box 42488, Olympia, Washington, 98504-2488. The office hours are 8:00 a.m. to noon and 1:00 p.m. to 5:00 p.m., Monday through Friday except legal holidays. Administrative law judges are assigned to field offices located in Everett, Olympia, Seattle, Spokane, Vancouver, and Yakima. Each office is headed by a senior administrative law judge.

All written communications by parties pertaining to a particular case shall be filed with the field office, if any, assigned to the case, and otherwise with the chief administrative law judge or designee at the administrative office.

[Statutory Authority: RCW 34.05.020, 34.12.030 and 42.17.250. 99-20-115, § 10-04-020, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 42.17.250 [(1)](a). 93-10-098, § 10-04-020, filed 5/5/93, effective 6/5/93. Statutory Authority: RCW 42 17.250 and 34.05.220 (1)(b). 89-13-036 (Order 6), § 10-04-020, filed 6/15/89. Statutory Authority: RCW 42.17.250 and 34.04.020. 85-22-032 (Order 4), § 10-04-020, filed 10/31/85. Statutory Authority: RCW 34.04.020 and 47.17.250 - 47.17.320 [42.17.250 - 42.17.320]. 82-22-052 (Order 3), § 10-04-020, filed 11/1/82.]

WAC 10-04-030 Public records—Availability. Public records are available for public inspection and copying except as otherwise provided under chapter 42.17 RCW and these rules.

[Statutory Authority: RCW 34.05.020, 34.12.030 and 42.17.250. 99-20-115, § 10-04-030, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 34.04.020 and 47.17.250 - 47.17.320 [42.17.250 - 42.17.320]. 82-22-052 (Order 3), § 10-04-030, filed 11/1/82.]

WAC 10-04-040 Public records—Officer. The public records officer for the administrative office shall be the executive assistant. For those records maintained at field office locations, the public records officer shall be the senior administrative law judge.

[Statutory Authority: RCW 34.05.020, 34.12.030 and 42.17.250. 99-20-115, § 10-04-040, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 34.04.020 and 47.17.250 - 47.17.320 [42.17.250 - 42.17.320]. 82-22-052 (Order 3), § 10-04-040, filed 11/1/82.]

WAC 10-04-050 Requests for public records. (1) Members of the public may inspect or obtain copies of public records in accordance with chapter 42.17 RCW by submitting a written request to the public records officer (or designee) during office hours. The office shall provide a form for submitting a request for public records. The request shall include the following information:

(a) The name of the person requesting the record;

(b) The date on which the request was made;

(c) The nature of the request;

(d) An appropriate description of the record requested; and

(e) Where and how to deliver the record requested.

(2) The public records officer shall assist the member of the public in appropriately identifying the public record requested.

[Statutory Authority: RCW 34.05.020, 34.12.030 and 42.17.250. 99-20-115, § 10-04-050, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 34.04.020 and 47.17.250 - 47.17.320 [42.17.250 - 42.17.320]. 82-22-052 (Order 3), § 10-04-050, filed 11/1/82.]

WAC 10-04-060 Copying fees. No fee shall be charged for the inspection of public records. The office shall charge a fee of fifteen cents per page of copy for providing copies of public records and for the use of the office's copy equipment, including electronic telefacsimile transmission, plus the actual postage or delivery charge. Fees may be waived for minimal copies.

[Statutory Authority: RCW 34.05.020, 34.12.030 and 42.17.250. 99-20-115, § 10-04-060, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 42.17.250 and 34.05.220 (1)(b). 89-13-036 (Order 6), § 10-04-060, filed 6/15/89. Statutory Authority: RCW 34.04.020 and 47.17.250 - 47.17.320 [42.17.250 - 42.17.320]. 82-22-052 (Order 3), § 10-04-060, filed 11/1/82.]

WAC 10-08-001 Declaration of purpose. (1) Chapter 10-08 WAC contains the model rules of procedure which RCW 34.05.250 requires the chief administrative law judge to adopt for use by as many agencies as possible. The model rules deal with general functions and duties performed in common by the various agencies. The model rules supplement Administrative Procedure Act provisions which contain grants of rulemaking authority to agencies. It is not the purpose of the model rules to duplicate all procedural provisions of the Administrative Procedure Act. This chapter sets forth general rules applicable to proceedings before many state agencies. It should be read in conjunction with the provisions of the Administrative Procedure Act (chapter 34.05 RCW) and with any administrative rules governing adjudicative proceedings which have been adopted by the particular agency.

(2) Except to the extent an agency is excluded from chapter 34.05 RCW or parts of chapter 34.05 RCW, each agency must adopt as much of the model rules as is reasonable under its circumstances. Any agency adopting a rule of procedure that differs from these model rules must include in the order of adoption a finding stating the reasons for variance.

(3) Adoption of these 1999 amendments to the model rules does not invalidate any variances in rules adopted by agencies between the effective date of the 1988 amendments to the Administrative Procedure Act and the effective date of these 1999 amendments to the model rules.

(4) In the absence of other rules to the contrary, these model rules shall govern any adjudicative proceedings under the Administrative Procedure Act.

[Statutory Authority: RCW 34.05.020, 34.05.250, 34.12.030 and 34.12.080. 99-20-115, § 10-08-001, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 34.05.250. 89-13-036 (Order 6), § 10-08-001, filed 6/15/89.]

WAC 10-08-035 Adjudicative proceedings—Application. An application for an adjudicative proceeding may be on a form provided by the agency for that purpose or in other writing signed by the applicant or the applicant's representative. The application for an adjudicative proceeding should specify the issue to be decided in the proceeding.

[Statutory Authority: RCW 34.05.020, 34.05.250, 34.12.030 and 34.12.080. 99-20-115, § 10-08-035, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 34.05.250. 89-13-036 (Order 6), § 10-08-035, filed 6/15/89.]

WAC 10-08-040 Adjudicative proceedings—Notice of hearing. (1) In any adjudicative proceeding all parties shall be served with a notice of hearing within the time required by law governing the respective agency or proceeding. If there is no requirement under other law, all parties shall be served with a notice of hearing not less than seven days before the date set for the hearing. The notice shall include the information specified in RCW 34.05.434. If the hearing is to be conducted by teleconference call, the notice shall so state.

(2) The notice shall state that if a limited-English-speaking or hearing impaired party or witness needs an interpreter, a qualified interpreter will be appointed and there will be no cost to the party or witness. The notice shall include a form for a party to indicate whether the party needs an interpreter and to identify the primary language or hearing impaired status of the party.

(3) Defects in the notice may not be waived unless:

(a) The presiding officer determines that the waiver has been made knowingly, voluntarily and intelligently;

(b) The party's representative, if any, consents; and

(c) If a party is an impaired person, the waiver is requested through the use of a qualified interpreter.

[Statutory Authority: RCW 34.05.020, 34.05.250, 34.12.030 and 34.12.080. 99-20-115, § 10-08-040, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 34.05.250. 89-13-036 (Order 6), § 10-08-040, filed 6/15/89. Statutory Authority: RCW 34.04.022 and chapter 2.42 RCW. 85-22-032 (Order 4), § 10-08-040, filed 10/31/85. Statutory Authority: RCW 34.04.020 and 34.04.022. 82-22-052 (Order 3), § 10-08-040, filed 11/1/82.]

WAC 10-08-045 Adjudicative proceedings—Notice to limited-English-speaking parties. (1) When an agency is notified or otherwise made aware that a limited-English-speaking person is a party in an adjudicative proceeding, all notices concerning the hearing, including notices of hearing, continuance, and dismissal, either:

(a) Shall be written in the primary language of the party; or

(b) Shall include a notice in the primary language of the party which describes the significance of the notice and how the party may receive assistance in understanding and responding to the notice.

(2) For purposes of this chapter, the term "limited-English-speaking person" means any person involved in a legal proceeding who cannot readily speak or understand the English language. The term has the same meaning as "non-English-speaking person" as defined in RCW 2.43.020.

[Statutory Authority: RCW 34.05.020, 34.05.250, 34.12.030 and 34.12.080. 99-20-115, § 10-08-045, filed 10/6/99, effective 11/6/99. Statutory Authority: RCW 34.05.250. 89-13-036 (Order 6), § 10-08-045, filed 6/15/89.]

WAC 10-08-050 Adjudicative proceedings—Assignment of administrative law judge—Motion of prejudice. (1) Whenever a state agency as defined in RCW 34.12.020(4) conducts a hearing which is not presided over by officials of the agency who are to render the final decision, the agency shall use one of the following methods for requesting assignment of an administrative law judge:

(a) Not less than twenty days prior to the date of the hearing, notify the chief administrative law judge or his or her designee of the date, time, and place of the hearing and request assignment of an administrative law judge to preside over the hearing, or

(b) File with the office of administrative hearings a copy of the hearing file, which filing shall be deemed to be a request for assignment of an administrative law judge to issue the notice of hearing and preside over the hearing, or

(c) Schedule its hearings to be held at times and places reserved and provided to the agency for that purpose by the office of administrative hearings.

(2) Motions of prejudice with supporting affidavits under RCW 34.12.050 must be filed at least three days prior to the hearing or to any earlier stage of the adjudicative proceeding at which the administrative law judge may be required to issue a discretionary ruling. If the notice of hearing does not state the name of the presiding administrative