NO. 03-35605

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
No. C99-5577-FDB
The Honorable Franklin D. Burgess

RESPONSE BRIEF OF DEFENDANTS-APPELLEES

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The court has jurisdiction under 28 U.S.C. § 1331 or under 28 U.S.C. § 1343(a)(3) and § 1343(a)(4).

II. STATEMENT OF ISSUES

1. Did the District Court properly dismiss the case due to lack of ripeness?

2. Did the District Court correctly decertify Plaintiffs' class based on lack of representativeness?

3. Did the District Court properly find that the Plaintiff ARC of Washington lacked standing to sue?

4. Did the District Court properly deny Plaintiffs' motion for summary judgment?

5. Did the District Court properly find the Plaintiffs were required to exhaust their administrative remedies?

6. Did the District Court properly apply the Burford abstention doctrine in deciding to abstain from exercising its jurisdiction and dismissing the action?

7. Did the District Court properly dismiss Plaintiffs' ADA claim based on the fundamental alteration doctrine?

III. STATEMENT OF THE CASE

This case involves an attempt by the named individual Plaintiffs, a Plaintiff class, and The Arc of Washington, an advocacy group for the developmentally disabled, to judicially remake the State of Washington's statutory and regulatory scheme for the care and treatment of its residents with developmental disabilities. In essence, the Plaintiffs have requested that the District Court order the state to fundamentally alter its Home and Community Based Services program by admitting to that program any person who would otherwise qualify for treatment in an Intermediate Care Facility for the Mentally Retarded. This fundamental alteration would result in admission to the program of thousands of individuals over and above the numerical limit agreed to, and approved by, the Centers for Medicare and Medicaid Services (CMS) of the federal government. Plaintiffs would also have the District Court order the state to change its Medicaid program to establish privately owned and run Intermediate Care Facilities for the Mentally Retarded in order to allow individuals who qualify, to choose between state owned and run facilities and those privately run facilities.

This lawsuit was initiated in November 1999 by three developmentally disabled adults who were receiving services through a program funded jointly by the state and federal governments and operated by the state Department of Social and Health Services (hereinafter referred to as DSHS or Department). The

corporate Plaintiff, The Arc of Washington, allegedly sued on its own behalf and ostensibly on behalf of its members. The complaint contained class allegations.

Plaintiffs alleged that the Department[1] denied them needed medical services under the Medicaid Act 42 U.S.C. § 1396a by "failing to provide those services with reasonable promptness", by "failing to provide a fair hearing for any individual whose claim for Medicaid services is not acted upon with reasonable promptness", and that Plaintiffs "have suffered and continue to suffer physical, mental and emotional deprivation" due to acts and omissions of the Department. ER 1 at 15, 16. Plaintiffs also alleged that the Department had violated their rights to Due Process and Equal Protection under the Fifth and Fourteenth Amendments of the Constitution and 42 U.S.C. § 1983. ER 1 at 16, 17.

Plaintiffs requested both injunctive and declaratory relief mandating the Department to provide placements in Intermediate Care Facilities for the Mentally Retarded (ICF-MR) facilities, or services under the state's Home and Community Based Services (HCBS) waiver program, commonly referred to as the Community Alternatives Program or CAP waiver pursuant to 42 U.S.C. § 1396n(c), to Plaintiffs and all class members, at their option, with reasonable promptness. Plaintiffs further requested that fair hearings be provided when services were not made available within 90 days or some other reasonably prompt period. Plaintiffs

[1] For purposes of consistency, Defendants will be referred to as "Department" unless the reference is to a specific Defendant and not others.

also demanded that services be rendered to them in the "most integrated setting appropriate to their individual needs", thus making a claim under 42 U.S.C. § 12132 (American with Disabilities Act) and 29 U.S.C. § 794 (Rehabilitation Act).

For a period of more than nine months after the filing of their complaint, Plaintiffs failed to move for certification of their class. The matter of class certification only came before the District Court when the Department filed its motion to strike the class allegation on August 2000. SER 44. The Court subsequently certified a more precisely defined Plaintiff class of those who meet the medical and financial requirements of ICF-MR services, have applied for those services, and have not received the services applied for or have not received them in a reasonably prompt manner (and those similarly situated in the future).

Thereafter, both parties moved for partial summary judgment. The Plaintiffs' motion sought a ruling that the Department violated the Medicaid Act by failing to provide all needed services to all class members and that the services were not provided in a reasonably prompt manner. ER 33. The Department moved for partial summary judgment on the grounds that a numerical cap on the number of participants in the HCBS/CAP waiver program serves as an additional eligibility requirement for that program, and thus the Department was not required to admit applicants whose admission would cause the state to exceed that

numerical limit. The court denied Plaintiffs' motion and by the same order granted the Department's motion. ER 119.

The Department subsequently moved for partial summary judgment on Plaintiffs' ADA claim on the grounds that Plaintiffs' demanded relief would cause a fundamental alteration of its developmental disabilities program, and, in a separate motion, moved to dismiss the corporate Plaintiff, The Arc of Washington, for lack of standing under the test enunciated in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). SER 101 & SER 103. The court granted the Department's motion for partial summary judgment on the ADA claim and denied its initial motion to dismiss the corporate Plaintiff. ER 132.

After the court further defined the issues left for resolution at trial, the parties engaged in extensive settlement negotiations. Those negotiations resulted in the presentation to the court on August 16, 2001 of a proposed settlement agreement resolving all issues then pending. ER 149 & 150. There followed motions by several developmentally disabled individuals and by advocacy organizations for the developmentally disabled in general opposition to the proposed settlement, seeking to intervene and to decertify the class. Intervenors alleged that the settlement was unfair and inadequate and that the class Plaintiffs were inadequate representatives for the class. The court denied the third party

motions and also denied the parties' proposed settlement agreement on October 26, 2001. ER 191.

The denial by the court of the proposed settlement agreement subsequently led to the filing of motions seeking the approval of an amended settlement agreement on April 4, 2002, ER 233, and of a second amended settlement agreement on June 14, 2002, ER 296. Again, there followed motions by third parties to intervene, decertify the class and in opposition to the settlements. The grounds for these motions were in large part the same as in the oppositions to the first proposed settlement; claims of unfairness, inadequate settlement terms and that the class Plaintiffs did not adequately represent the entire class. The court denied approval of the second amended settlement agreement and by the same order decertified the Plaintiff class for the reason that the named Plaintiffs were inadequate class representatives. ER 323.

In April 2003 the Department filed a supplemental motion to dismiss and re-noted for consideration its earlier filed motion to dismiss. ER 343 & SER 346. Plaintiffs also filed for partial summary judgment. ER 332. The court granted the Department's motion to dismiss all remaining claims and Plaintiffs. ER 366.

This appeal followed.

IV. STATEMENT OF FACTS

This case challenges the way the state administers two of its programs for people with developmental disabilities. Those programs are known respectively as, intermediate care facilities for the mentally retarded (ICF-MR) and the Home and Community Based Services (HCBS or waiver) program. They receive federal matching funds pursuant to the Medicaid Act

ICF-MR services are optional services that states may provide as part of state plans under the Medicaid Act, 42 U.S.C. § 1396a. ICF-MR services are residential services provided in institutional settings to qualified individuals with developmental disabilities. In Washington most ICF-MR services are provided in one of five large state run institutions known collectively as residential habilitation centers (RHC). To be "qualified" for the purposes of receiving care in a residential habilitation center an individual must have deficits in eight specified activities of daily life and require "active treatment" as defined in federal regulations. The state also provides limited ICF-MR services in small privately run intermediate care facilities.

The state's Home and Community-Based Services (HCBS) waiver program, also known as the Community Alternatives Program (CAP) waiver, was administered by DSHS pursuant to federal Medicaid law. The CAP waiver was essentially a written agreement between DSHS and the federal Centers for

Medicare and Medicaid Services (CMS) through which the state and federal governments funded home and community-based services to qualifying individuals with developmental disabilities. Federal funding was provided through the Medicaid program, whose requirements must be met in DSHS's administration of the CAP waiver. Once the agreement between the state and CMS receives federal approval, its terms become fixed and cannot be changed without the consent of CMS.

The purpose of the CAP waiver was to provide services that enabled clients with developmental disabilities to reside successfully in the community who otherwise would have been at risk of institutionalization. Waiver programs are optional, are administered and approved outside state Medicaid Plans, and can be limited to a subset of the eligible individuals. 42 U.S.C. § 1396n(c)(10). At the time of the filing of the lawsuit which is the subject of this appeal there were 9,977 spaces available under the CAP waiver program in Washington, all of which were essentially filled for the purposes of the litigation.

On January 1, 2004 CMS approved substantial changes in the states HCBS plan from a single CAP waiver program to a new program consisting of a number of smaller waivers offering limited services serving discrete populations of individuals with developmental disabilities. Although the exact effect of the change in the state HCBS waiver program(s) on the Plaintiffs, or any class of

Plaintiffs, is unknown at this time, there will be significant differences in the nature and scope of services available to individuals on the new waivers. ER 366 at 4.

V. STANDARDS OF REVIEW

The Department agrees with the standards of review as stated by Plaintiffs with the exception that where, as here, controlling statutes do not provide for exhaustion of administrative remedies, the trial court may require exhaustion in its exercise of discretion, and its decision is reviewed under the abuse of discretion standard. *Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298, 1302 (9th Cir. 1992).

VI. SUMMARY OF ARGUMENT

The District Court correctly found that the case was not ripe for adjudication due the fact that the Defendant was in the process of terminating its HCBS/CAP waiver program and replacing it with a significantly different program offering a discrete set of services to those individuals who qualify for one of several waivers. The court found that the effect of this change in the waiver program made the factual issues concerning services and eligibility uncertain and incapable of adjudication.

The District Court properly decertified the Plaintiff class after reviewing, and denying, two attempted settlement agreements. Due to the attempted intervention by advocacy organizations on behalf of individuals with

developmental disabilities who objected to the fairness of the proposed settlements and moved the decertify the Plaintiff class, it became clear to the court that it had improvidently certified the Plaintiff class in October of 2000 and that the named Plaintiffs and class counsel were unable to adequately represent the class. The intervening parties had objected to the proposed class settlements on the grounds that they were unfair in their terms and that class Plaintiffs were unable to adequately represent the putative class(es).

Specifically, intervenors objected on the grounds that the settlement was inadequate, that the class as previously certified did not represent the interests of the absent class members and that representation of the class by Plaintiffs' counsel was inadequate. Based on the intervenors' motions to decertify the class and its independent review of the settlement agreements and the prior pleadings in the case, the court properly found that the settlement classes were inadequate representatives of the absent class members, and that it had improvidently certified the class. The court therefore properly decertified the class.

The District Court properly dismissed the The Arc of Washington for lack of standing, finding that participation of the organization's members was needed in order to both prove the violations alleged and to fashion a particularized remedy flowing to individual claimants. The court further found that The Arc has no standing in its own right as it could not show that it had suffered any injury in fact.

Plaintiffs' first motions for summary judgment were properly denied because they were unable to demonstrate there were no factual issues in dispute and that they were entitled to judgment as matter of law. Plaintiffs presented no new evidence to the District Court sufficient to support their motions. Instead they merely restated, in affidavits from counsel, from individual parents or guardians, and from the executive director of the corporate Plaintiff The Arc, allegations previously made in their complaint. Plaintiff The Arc of Washington's second motion for summary judgment was ruled moot due to the dismissal of Arc for lack of standing.

The District Court ruled correctly that the Plaintiffs did not exhaust their administrative remedies. In its finding it held that Plaintiffs' failure to exhaust their remedies deprived the Department of the opportunity to address the issues which occur in the program it administers.

The District Court properly found that the three prongs of the *Burford* abstention doctrine were met in this case. It found that the state had concentrated litigation challenging the agency action in one forum; that the federal issues cannot be easily separated from complex issues under state law; and, that federal intervention might disrupt state efforts to establish a coherent policy. The court correctly declined to exercise federal jurisdiction, ruling that all of the issues raised

by Plaintiffs can be adequately addressed through the administrative and judicial remedies provided under state law.

Finally, in dismissing the Plaintiffs' ADA and Rehabilitation Act claims the District Court properly found that the relief requested by Plaintiffs would require the state to fundamentally alter its program for the care and treatment of individuals with developmental disabilities. The court correctly found that the demand of Plaintiffs that all persons eligible for treatment in an ICF-MR be admitted to the state's HCBS/CAP waiver would constitute a change in an essential eligibility requirement and therefore, as a matter of law, would fundamentally alter the Department's program.

VII. ARGUMENT

A. The Court Properly Dismissed the Plaintiffs' Claim for Lack of Ripeness

The District Court dismissed Plaintiffs' claims and, in finding that those claims were not ripe, stated:

> [T]he waiver program at issue is in the process of changing into a program constituted of several waivers, therefore, whether Plaintiffs herein will have any complaints that require redress is unknown, and it is a waste of judicial resources to address the original waiver under these circumstances.

ER 366 at 7.

The new program referred to by the court is a program comprised of several waivers offering a discrete set of services to those individuals who meet the

eligibility requirements for that particular waiver. ER 323 at 2. It is unknown what waiver any individual Plaintiff will qualify for or what services that individual would have access to under the new waivers.

In ruling on issues of ripeness courts have found that ripeness must exist throughout the life of the lawsuit.

> The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury-in-fact prong. Sorting out where standing ends and ripeness begins is not an easy task. Indeed, because the focus of the ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline. The overlap between these concepts has led some legal commentators to suggest that the doctrines are often indistinguishable. In 'measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing.'

Westlands Water District Distribution District v. Natural Resources Defense Council, 276 F. Supp. 2d 1046, n.4 (E.D. Cal. 2003) internal citations omitted. Emphasis in original. Here the issue of ripeness does merge with the issues of standing and injury in fact.

1. The Issues Are Not Fit For Decision Since Factual Issues Remain Uncertain

"[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 (9th Cir. 1996). The issues before this court regarding eligibility for services, and what constitutes reasonable promptness, are complex factual and legal issues which would need to

be resolved before the District Court could rule on the merits of the case. The court could not simply rule in a vacuum that the Department would need to provide services in a "reasonably prompt manner", since, as the District Court pointed out in ruling on another issue, "The Court simply does not have the power to order anyone to obey the law merely because the law is clear." ER 132 at 7. Simply put, Plaintiffs do not know if they have been injured in fact since the waiver is in the process of changing into a different program with the attendant issue of need and eligibility for services left unresolved at this time. Plaintiffs may find that they are ineligible for waiver services, or they may be placed on a waiver where all services are totally satisfactory to them. The program as complained of by Plaintiffs does not exist at this time as CMS approved of the new waiver program effective January 1, 2004.

> [A] federal court normally ought not resolve issues 'involving contingent future events that may not occur as anticipated, or indeed may not occur at all.'

Clinton v. Acequia, Inc., 94 F.3d 568, 572 (9th Cir. 1996).

Plaintiffs' reliance on *Associate Gen. Contractor of Cal. v. Coalition*, 950 F.2d 1401 (9th Cir. 1991), for the proposition that future uncertain events are unripe for review, is readily distinguished. The issue before the *Associate Gen. Contractor* court was the chilling effect of a minority-owned business enterprise bidding ordinance on Plaintiffs. There the ordinance was in effect with no

indication it was about to be repealed or amended. In this case, the waiver program has ended and has been replaced by a new program consisting of several waivers with significant differences from the one currently in place. Any effect of the new waiver program on the Plaintiffs is uncertain at this time. ER 323 at 2. There is no factual record on the new waiver program, but there will be new and different factual issues which arise under the new program. The issue is not fit for decision and is therefore not ripe.

2. Plaintiffs Make No Showing Of Hardship

The District Court correctly dismissed the case on ripeness grounds since the Plaintiffs (and the Department) do not know which waiver, if any, Plaintiffs may be eligible for, and which services, if any, they may need. Other than assertions that the Department will "likely" re-offend and "could" continue illegal practices, none of which is supported in the record, Plaintiffs have not shown any hardship from the District Court's ruling on the issue of ripeness. Plaintiffs do not, and cannot, show what effects the new waivers will have on them. Until such time as the effect of the impact of the new waivers is seen the issues herein are unripe.

B. The Court Properly Decertified Plaintiffs' Class

The District Court certified the Plaintiff class in October of 2000 and this case proceeded as a class action for next two years. During those two years the parties, on three occasions, attempted to settle all issues in the lawsuit. It was

largely through challenges to the proposed settlement agreements by developmentally disabled intervenors represented by two separate advocacy organizations, and through the court's own observation of the efforts of Plaintiffs, that the District Court became convinced that the Plaintiff class should be decertified and that the case should proceed as a non-class action.

1. Procedural History of Attempted Class Settlements and Ultimate Decertification

The Plaintiffs' complaint alleged that the structure and administration of the Department's Medicaid program violates the Medicaid Act, the ADA and the Rehabilitation Act, and the equal protection and due process clauses of the Fifth and Fourteenth Amendments. Plaintiffs sought to certify a class, under Fed. R. Civ. P. 23(b)(2), defined as "all individuals with developmental disabilities in the state of Washington who have applied for, and who qualify for, but are not receiving or have not received with reasonable promptness, Medicaid services for which they are eligible". ER 1 at 11.

Western District of Washington's Local Rule 23(f)(3) in place in 2000 provided that:

> **(3)** Within ninety days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23 Fed. R. Civ. P. as to whether the case is to be maintained as a class action.

Plaintiffs failed to move for class certification during the ninety days required by the local rule, and in fact did not do so for nine months following the filing of their complaint. In August 2000 the Department moved to strike the class allegations alleging that Plaintiffs were inadequate class representatives due to their failure to proceed in a timely manner with the class certification. *East Texas Motor Freight System v. Rodriquez,* 431 U.S. 395, 404-405, 97 S. Ct. 1891 (1977). The District Court denied the motion to strike the class allegations but, pursuant to Fed. R. Civ. P. 23(b)(2), eventually certified a "more precisely defined class" than that proposed by Plaintiffs. ER 87 at 2. The court commented that it was "not pleased" that the issue of class certification was brought before it by way of the Department's motion to strike class allegations. ER 87 at 5.

After the court disposed of a number of Plaintiffs' claims and the state's defenses, the parties engaged in extensive settlement negotiations which resulted in the submission to the court in August 2001 of a stipulated Motion For Preliminary Approval of Class Settlement. ER 149. There followed several motions filed by Washington Protection and Advocacy System (WPAS) and Columbia Legal Services (CLS) on behalf of developmentally disabled individuals who would be class members, seeking to intervene, to decertify or modify the previously certified class, and to object to the proposed class settlement. SER 152; 158; 163; 165; and 167. The gravamen of these motions by intervenors was that the settlement

was inadequate, that the class as previously certified did not represent the interests of the absent class members, and that representation of the class by Plaintiffs' counsel was inadequate. SER 159 at 7-11 & SER 166 at 8-16.

Subsequent to the motions to intervene and to decertify or amend the class, the court denied the Motion for Preliminary Approval of Class Settlement and in doing so denied as moot the motions to intervene and to decertify the class. The District Court, in its order, refused to approve the settlement because of the problems it perceived with the settlement class. ER 191 at 7-8. Specifically, the court found that the class, as defined in the settlement agreement, failed for two reasons. First, the commonality requirement was not met because the parties had expanded the settlement class to encompass three distinct subgroups and had not provided the court with any proof of the existence of common issues of law and fact applicable to the class and to the subgroups consisting of those on the waiver and those not on the waiver. Second, the Court found representation of absent class members by class Plaintiffs to be inadequate due to conflicting interests between the various subgroups within the class as to the allocation of the settlement resources. In addition subgroups within the class appeared to have claims of different strengths.

After the court denied the settlement, the parties engaged in further negotiations. These negotiations resulted in the filing of a Joint Motion for

Preliminary Approval of Amended Settlement Agreement (ASA). ER 233. The ASA provided for the certification of a second class and the creation of two subclasses within each class, together with the appointment of counsel for the additional class and subclasses. ER 233 at 6-7. The same parties who objected to the previous attempt at settlement again filed their motions to intervene and objected to the proposed amended settlement. SER 241, & 242. Prior to any ruling on the ASA, the court entered an Order to Show Cause to allow the settling parties an opportunity to show why the settlement class certification should not be denied. ER 282. In a Joint Memorandum re Order to Show Cause, the parties withdrew the ASA and submitted a Second Amended Settlement Agreement (SASA) which they believed addressed the concerns the court expressed in its previous order. ER 296. The SASA changed the ASA by deleting the 23(b)(3) subclasses, narrowed the definition of the covered claims, excluded from coverage members of a class of Plaintiffs covered by a settlement in another lawsuit, and changed language in the Notice to Class Members. Once again, as allowed by the court's Order to Show Cause, motions with supporting memoranda of law and declarations objecting to the settlement were filed by WPAS and CLS. ER 282 at 10.

2. Summary of Objections to Second Amended Settlement Agreement

WPAS and CLS, separately representing absent class members with developmental disabilities, objected to the SASA on essentially identical grounds. The list of CLS's stated objections, while not exhaustive, involved the adequacy of representation by the class/subclasses and class counsel. CLS asserted that conflicts between subclasses were inherent in the SASA due to the waiver of legal claims required of class members, and that there was no definition of legal rights of the class members, no mechanism for allocation of settlement resources, and no assurance that the funds available would meet the unmet Medicaid needs of the proposed class(es). They asserted that the subclass was therefore required to forego entitlement to Medicaid services for only a chance at those same services under the settlement. In addition, CLS argued there was inadequate legal representation of the classes by counsel since subclass counsel "rubber stamped" the proposed settlement in which one subclass gave up entitlement to Medicaid in exchange for inadequate funding for services for both subclasses. CLS also raised objections to the adequacy of notice, including failure to demonstrate adequacy of representation, as well as requirements in the SASA that individuals must pursue damage claims in order to preserve their rights under the Medicaid Act. CLS further objected to the SASA on the grounds that it impaired the rights of

individuals to seek administrative and subsequent judicial review of agency actions and that the covered claims improperly exceeded the requested relief. SER 304.

The independent grounds for objection listed by WPAS were that the CAP waiver program under which the case was filed would expire less than four months from the time the SASA would be entered and would "thus undermine the certification of the class and subclasses", that the parties mischaracterized the adequacy of benefits provided under the SASA, that Plaintiffs failed to conduct adequate discovery prior to settlement, and that representation by class counsel was inadequate. SER 242.

3. The Legal Basis For Decertification

The District Court issued its order certifying Plaintiffs' class on October 5, 2000. ER 87. As was later recognized in its order of December 2, 2002, the District Court ultimately concluded its original certification of the class was improvidently granted. ER 323 at 11. The Department had originally moved to strike the class allegations due to the delay on the part of Plaintiffs' to move for class certification. SER 44. The delay on Plaintiffs' part in seeking the class certification was in excess of nine months and was in violation of the Western District of Washington's Local Rule 23(f)(3). A delay of that magnitude also calls into question the ability of the Plaintiffs to adequately represent the proposed class.

East Texas Motor Freight System v. Rodriquez, 431 U.S. 395, 404-405, 97 S. Ct. 1891 (1977).

A court may, under Federal Rules of Civil Procedure 23(c)(1), "modify the class, establish subclasses, or decertify as appropriate in response to factual developments. The question whether a class should be decertified may be raised by the court acting sua sponte." *In re Prudential Securities Incorporated Limited Partnerships Litigation*, 158 F.R.D. 301, 304 (S.D.N.Y. 1994) (internal citations omitted). "Under Fed.R.Civ.P. 23(c)(1), a class certification order is 'conditional, and may be altered or amended before the decisions on the merits.' Consequently, courts are required to reassess their class rulings as the case develops. "The court may reconsider [its decision to certify a class], by decertifying, modifying the definition of the class, or creating subclasses in the light of future developments in the case." *Doe v. Karadzic*, 192 F.R.D. 133, 136 (S.D.N.Y. 2000). Finally, even an appellate court may *sua sponte* consider the propriety of class certification and decertify the class on its own motion. *Rector v. City and County of Denver*, 348 F.3d 935, 949 (10th Cir. 2003).

Plaintiffs complain that the District Court abused its discretion when it decertified the class and that it did not sufficiently explain the reasoning behind its decertification ruling of December 2, 2002. However, a full reading of the District Court's order reveals the factual and legal basis behind its decision. The order sets

forth in some detail the issues and objections to the SASA raised by CLS and WPAS on behalf of the intervenor absent class members. These objections, raised by the intervenors, and which were discussed by the court, have to do with the inadequacy of the class representatives, ER 323 at 3 & 4, inadequacy of representation by class counsel Fed. R. Civ. P. 23(a)(4), ER 323 at 4 & 5, inadequacy of the settlement under *Anchem Prod., Inc. v. Windsor,* 521 U.S. 591, 619 (1997); class conflicts preventing adequate representation by class Plaintiffs, ER 323 at 5; inadequacy of subclass representation, and, deficits in commonality and typicality, ER 323 at 6. For the reasons brought forward by intervenors, the court recognized that the class previously certified did not meet the standard of adequacy of representation necessary to maintain class action status. Fed. R. Civ. P. 23(a). The District Court, after noting the untimely nature of Plaintiffs' motion for class certification and the court's improvidential granting of class status, cited the history of Plaintiffs' legal efforts which it said it had "indulged overly long". ER 323 at 11.

The District Court found that the representative Plaintiffs inadequately represented the claims of the absent class members. ER 323 at 12. In order for Plaintiffs to serve as adequate class representatives their interest must coincide with that of the unnamed class members. *Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 157-58, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). Here Plaintiffs

negotiated a class settlement which specified what each of the named Plaintiffs would receive but was silent about what benefits absent class members would receive, or how they would receive them. When class representatives seek relief which favors some members over others, or where their claims are antagonistic to other class members, they are inadequate class representatives. *Payne v Tavenol Laboratories Inc.* 673 F.2d 798, 810-11 (5th Cir. 1982).

Plaintiffs' class purported to represent both those person already on the waiver and seeking access to services to which they are entitled, and those who are not on the waiver but who are seeking access to waiver services. The District Court determined that these two groups had competing claims to a limited pool of funding and services. 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 certified at its inception. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

The District Court concluded that the covered claims provision of the SASA set up a class conflict by requiring all class and subclass members to give up their right to any claim of injunctive or equitable relief in exchange for only the possibility of access to Medicaid Services. The Court determined that all members were required to give up their rights, but only some class members were given anything in exchange. Further, the named Plaintiffs were assured of their rights to

services but unnamed class members were left with only a chance to receive those very same services. The Court observed that class representatives cannot have interests antagonistic to unnamed class members. Because of the antagonistic and unfair nature of the settlement, the class representatives were determined not qualified to represent the unnamed class members. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

One of the requirements for continued certification of the class is that the Plaintiffs' counsel be capable of continued zealous representation of the class. Here the intervenors argued and the District Court agreed that representation of Plaintiffs had been inadequate. From the initial failure to seek class certification, as raised by the Department, *East Texas Motor Freight System v. Rodriquez*, 431 U.S. 395, 404-405, 97 S. Ct. 1891 (1977), to counsel's negotiating its attorney fees in the settlement, as raised by the intervenors, *Munoz v. Arizona State University*, 80 F.R.D. 670, 671 (D. Ariz. 1978), the Court concluded that class counsel had demonstrated an inability to adequately represent the class.

From the record before this court it is clear that the District Court was correct in decertifying the Plaintiff class because the named Plaintiffs did not fulfill the requirements of Fed. R. Civ. P. 23(b)(2) to adequately represent the absent class members. This court should find that the District Court did not err in its order decertifying the class.

C. The District Court Correctly Dismissed The Arc for Lack of Standing

Having dismissed Plaintiffs' ADA and Rehabilitation Act claims and having decertified the Plaintiff class, the District Court was now left with the individual Plaintiffs and the The Arc of Washington asserting claims for HCBS and ICF-MR services under the Medicaid Act. The District Court considered the issue of The Arc's standing in the Department's motion to dismiss filed in April 2003.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) the Supreme Court promulgated a three prong test against which to measure standing. To establish standing, a Plaintiff must have (1) suffered an injury in fact, (2) that is causally connected to the conduct complained of, and (3) is likely to be redressed by a favorable decision. *See id.* at 560-61. "[W]hen the appellant is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ***substantially more difficult*** to establish." *Id.* at 562 (citation and internal quotation omitted) (emphasis added).

1. The Arc Has No Standing On Behalf Of Its Members

The Arc of Washington State, Inc. is a loosely organized voluntary association engaged in advocacy and education for individuals with developmental disabilities. The Arc's membership includes, but is not limited to, disabled persons and their families. Plaintiff The Arc sought injunctive and declaratory relief in the

District Court on behalf of its members but did not seek such relief on its own behalf. SER 104-3 & 6-11.

In *Hunt v. Washington State Apple Advertising Comm'n.* 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) the Supreme Court held that a membership organization such as The Arc has standing to bring suit on behalf of its members only when, "(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 the individual members in the lawsuit."

The Arc fails the third prong of the *Hunt* test. The present case involves the alleged violation of federal law, but the success or failure of each member's claims will depend on case-by-case determinations of individual needs and whether adequate services were offered to address those needs to the extent required by law. In order to prevail on the claims made, and be awarded the relief sought, individual members of The Arc must come forward to show what specific waiver services they are eligible for, what waiver services they are being denied, and what would constitute a reasonable time in which the Department must provide those services. The District Court found that the participation of individual members of the organization would be required in order to both prove the violations and to fashion a particularized remedy which would then flow to the individual claimants.

ER 366 at 2. Without this individualized inquiry, plaintiffs are merely asking the court to state what the law is in this area.

In *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980), a religious organization challenged a federal regulation under the Free Exercise Clause of the First Amendment. However, to establish a Free Exercise violation, the organization had to prove that the regulation had a coercive effect on its individual members. Because participation of the organization's individual members was needed to show the regulation's coercive effect, the Supreme Court held that the organization lacked standing in the lawsuit. *See Harris*, 448 U.S. at 321.

Here Plaintiffs allege they "have suffered and continue to suffer physical, mental and emotional deprivation, including but not limited to the loss of skills, the loss of opportunities to develop to their fullest potential, and the aggravation of existing physical, mental and emotional conditions." ER 1 at 16. Plaintiffs' claims raise several questions: What physical, mental, and emotional deprivations have Plaintiffs suffered? What skills and opportunities have Plaintiffs lost? What existing conditions have been aggravated? What services have been offered? Each of these questions requires individualized proof. The Arc lacks standing to bring these claims because "the need for 'individualized proof' so pervades the claims asserted that the furtherance of the members' interests requires individual

participation." *Terre du Lac Ass'n, Inc. v. Terre du Lac, Inc.*, 772 F.2d 467, 471 (8th Cir. 1985) (quoting *Hunt*, 432 U.S. at 344).

In *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), a housing rights association challenged a city zoning ordinance on the ground that it excluded low and moderate income persons from living in the city. However, the excluded persons would have to prove the fact and extent of their injuries in order to obtain relief. The Supreme Court held that because participation of the association's individual members was needed to obtain this relief, the association lacked standing to sue on their behalf. *See Warth*, 422 U.S. at 511.

Similarly, The Arc asked the Court to "[i]ssue preliminary and permanent injunctive relief requiring the defendants . . . to offer all plaintiffs who are eligible for waiver services the choice of receiving ICF-MR or home and community-based services that are suitable for their needs within 90 days or some other specifically-defined period." ER 1 at 18. Again, participation of the individual disabled persons is necessary to determine what services are "suitable for their needs." Plaintiffs allege that "[t]he plaintiffs waiting for DDD assistance require a range of treatment and services," "many adult plaintiffs need community care placements" while "other individuals need nonresidential services," and "[t]he plaintiffs presently need state-funded services for a variety of reasons." ER 1 at 14. Furthermore, the Executive Director of The Arc has specifically stated that the

services to be delivered to each person depend on the needs of the person and require an individualized determination. SER 104-3 & 6-10.

Plaintiff relies on *Associated Gen. Contr. v. Metro. Water District,* 159 F.3d 1178 (9th Cir. 1998) for the proposition that where injunctive and declaratory relief are requested, the participation of the individual members is not required. The Arc seeks no relief for itself. Any relief which would accrue to the individual Plaintiffs would only be in the form of particularized services provided to them by the state after individualized assessments. Therefore, the members must participate in the lawsuit in order to prove their entitlement to the services. SER 104-3 & 6-10. *Assoc Gen Contr.* is distinguishable. There the relief sought was prohibitory, requiring that the Defendant refrain from doing some act. Here the requested relief, while injunctive, is more akin to an action for damages since it will cause the Department to affirmatively change its position *vis a vis* Plaintiffs. It will cause benefits created by the Department to accrue to Plaintiff's individual members in different forms and in different ways based on the individual needs of each member, which must be individually determined.

Finally, the Supreme Court has also refused to find other membership advocacy organizations such as Plaintiff have standing to bring actions on behalf of their members. *See, e.g., Lujan,* 504 U.S. at 562-67 (organization has no standing based on its members' special interest in wildlife protection); *Simon v.*

Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39-40, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (organization has no standing based on its concern with obtaining medical services for the poor); *Sierra Club v. Morton*, 405 U.S. 727, 736, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) (organization has no standing based on its expertise in environmental conservation issues).

2. The Arc Has No Standing In Its Own Right

The District Court properly dismissed the organization for lack of standing. The Arc failed to demonstrate that it met the first requirement for standing enunciated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), that of injury in fact. In *Association for Retarded Citizens v. Dallas County*, 19 F.3d 241, 244 (5th Cir. 1994) the Court stated "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *See also, Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d. 298, 305 (5th Cir. 2000). This redirection of organizational resources to support litigation is not the "injury in fact" contemplated by *Lujan*.

The Arc admits that it does not keep any records to support its contention that it has diverted resources from other activities in order to "combat defendants' wrongful denial". ER 339 at 2. The Arc "does not keep a systematic tally of the advocacy efforts on behalf of non members". ER 339 at 5. Instead, the record

below, developed by The Arc itself, supports the proposition that The Arc has not suffered from the alleged actions or inactions of the Department. The Arc advocates for the disabled. The Arc has advocated for the disabled for the 65 years prior to the instant litigation, doing then exactly what it does today. ER 339 at 2-5. There is nothing in the record which supports the contention that The Arc has suffered any articulable harm at the hands of the Department.

Plaintiff The Arc argues that it has standing because it serves the interests of those who are **not** members of the organization. This position of course flies in the face of the holdings in *Hunt, Lujan, Louisiana ACORN,* and *Association for Retarded Citizens of Dallas,* all of which stand for the premise that organizational standing rests on the three prongs of the *Hunt* test, the first of which states that **members** must have standing to sue on their own behalf before the organization has standing. *Association for Retarded Citizens v. Dallas County,* 19 F.3d 241, 244 (5th Cir. 1994).

3. The Issue Of The Arc's Conflict Of Interest With Its Members Was Held To Be Moot

The District Court in its Order Granting Defendants' Motion to Dismiss and Denying Plaintiffs' Motion for Partial Summary Judgment, ER 366 stated that any issue raised by the Department in its Supplemental Motion to Dismiss regarding The Arc's conflict of interest with its members was mooted by its order dismissing

The Arc for lack of standing. ER 366 at 3. The issue of conflict of interest therefore does not need to be considered or decided by this court.

However, if this court does choose to consider the issue of the conflict of interest between The Arc of Washington and its members, it should consider the basis and reasoning of the District Court in its finding of conflict of interest by initial class counsel. ER 191 at 7. The District Court found potential disagreements over the allocation of funds between those on the waiver as opposed to those off the waiver, and regarding differences in strength of claims between class members/subgroups. Since The Arc asserts its claims on behalf of all of its members, the same members who would make up the Plaintiff class, these same conflicts exist between The Arc and its members. Which claim takes priority? Which group gets the allocated settlement proceeds? When those on the waiver want more services from a limited pot of funds what happens to the claims of those not on the waiver? All of these problems lead inexorably to the conclusion that The Arc cannot effectively represent its members' interests in this case.

The Seventh Circuit considered the issue of organizational standing when a conflict of interest may be present. In the case of *Retired Chicago Police Assoc. v City of Chicago,* 76 F.3d 856, 864 (7th Cir. 1996) the court said:

> [A] profound conflict arises where the association's suit, if successful, would cause a direct detriment to the interests of some of its members and the litigation was not properly authorized.

and,

> In *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374 (7th Cir.1987), we held that an association fails to meet the second prong [*of the Hunt test*] where there is a serious conflict of interest between the organization and its members. We found that "[b]ecause the interests which SSBR seeks to protect by maintaining this action do not reflect and are actually at odds with the interests of some of its members, they certainly cannot be said to be 'germane' to SSBR's overriding purposes, and SSBR cannot invoke representational standing as a basis for suing the defendants." *Id.* at 1381. *See Retired Police Assoc.* at 863.

Plaintiff The Arc has an inherent conflict with some of its members. If some members are on the waiver and some are not, then some members will be harmed by The Arc's participation in this case. The District Court was correct in finding The Arc has a conflict of interest.

D. The Court Did Not Err When It Denied Plaintiffs' Motions For Summary Judgment

The District Court having dismissed Plaintiffs' ADA claims, the individual Plaintiffs, the class, and The Arc sought to establish, in their first motion for summary judgment, that as a matter of law all persons otherwise eligible for ICF-MR services were also automatically eligible for admission to the Washington HCBS/CAP waiver program.

An appellate court will apply the same standard of review used by the District Court under Federal Rules of Civil Procedure 56(c). When reviewing the decision by a District Court the appellate court must view the evidence in the light

most favorable to the nonmoving party, the court must determine whether there are any genuine issues of material fact and whether the District Court correctly applied the relevant substantive law. *Delta Savings Bank v. United States,* 265 F.3d 1017, 1021 (9th Cir. 2001), *cert. denied,* 534 U.S. 1082, 122 S. Ct. 816, 151 L. Ed. 2d 700 (2002).

1. The Washington State Medicaid Plan and Waiver Program

Washington State participates in the Medicaid program which has been approved by the Secretary of Health and Human Services pursuant to 42 U.S.C. § 1396c. The State Plan, through the Medicaid Act and its regulations, defines this state's obligations and binds the state as a matter of federal law. Washington's State Plan includes ICF-MR services. Each of the named Plaintiffs' guardians testified that they did not seek ICF-MR placements in such institutions. SER 76, Exs. A - C.

Washington also participates in the waiver program approved by CMS. The waiver program covers several services for developmentally disabled persons that are not enumerated in the Medicaid Act. *See* 42 U.S.C. § 1396n(c). The waiver services are generally non-institutional. They assist patients while they live at home or in community-based residential settings. SER 72 at 6.

Washington's waiver program in 1999 was limited to 9,977 persons, up from 7,597 in 1997 and 1,227 in 1983. SER 72 at 7; SER 73 at 5. The waiver program

was essentially full at the time of Plaintiffs' motion in 2000. SER 72 at 7, SER 73 at 5-6. DSHS accepts new participants into the waiver program as slots become available, based on need. *See* 42 U.S.C. § 1396n(c)(9). None of the three named Plaintiffs in this lawsuit were on the waiver program at the time the motion was filed. SER 72 at 9, SER 73 at 4-6.

2. The Court Correctly Denied Plaintiffs' Motions for Summary Judgment

a. Plaintiffs' First Motion for Partial Summary Judgment

In Plaintiffs' first motion for summary judgment they sought to establish as a matter of law that developmentally disabled people in the state of Washington who were eligible for care in an ICF-MR were also automatically entitled to optional residential and community based services provided under the HCBS waiver program, even thought that program had reached its maximum numerical capacity of 9,977 as approved by the federal CMS. As the District Court noted, The Arc's only support for its claim that some of its members were on the HCBS waiver and not receiving services in a reasonable prompt manner, was a mere repetition of the statements of the allegations made in its complaint. ER 119 at 10. The Department countered by submitting declarations of the Director of DDD, Linda Rolfe, Assistant Secretary of DSHS, Timothy Brown and DDD employee, Sue Poltl, putting all factual issues raised by Plaintiffs in dispute and the District Court correctly denied the motion on this basis.

In their first motion Plaintiffs argued that they are entitled to residential and community-based services not required by the Medicaid Act, but offered exclusively through Washington's waiver program, a program into which they had not been accepted, and which had reached its maximum capacity as approved by the federal government. As such, Plaintiffs sought to erase the fundamental distinction Congress drew between the enumerated required services offered through the State Plan under the Medicaid Act, 42 U.S.C. § 1396d(a), and additional optional services offered through the waiver program, 42 U.S.C. § 1396n.

This is not the law. Plaintiffs' argument misperceives the nature of assistance that Congress provided under the Medicaid statutory scheme. As the Supreme Court has explained:

> Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, ***the benefit provided through Medicaid is a particular package of health care services***, such as 14 days of inpatient coverage."

Alexander v. Choate, 469 U.S. 287, 303, 105 S. Ct. 712, 721, 83 L. Ed. 2d 661 (1985) (emphasis added). *See also Beckwith v. Kizer*, 912 F.2d 1139, 1144 (9th Cir. 1990) ("[t]he Medicaid statute is intended to alleviate the problem of unnecessary institutionalization, but does not purport to solve it altogether").

Thus, in order to prevail on their motion, Plaintiffs were required to show that the residential and community-based services they sought were part of the package of health care services to which they were entitled under the Washington State Medicaid Plan or under the HCBS waiver program. This they could not do. As discussed, the Washington State Plan provides ***only*** for institutional-type ICF-MRs that each Plaintiff has rejected. SER 76 at Exs. A-C, SER 72 at 9 and SER 73 at 4. Because the states are free to establish the maximum number of participants in waiver programs, once they reach that "cap," no new applicants are "eligible" as a matter of law:

> [a]s a practical matter, the statute can best be read to mandate that, once a state chooses to implement a waiver program and chooses the eligibility requirements, ***a cap is simply another eligibility requirement for that program***. The cap for all intents and purposes operates like those further eligibility requirements approved in *Skandalis* and *Beckwith*. ***Individuals who apply after the cap has been reached are not eligible***, or alternatively, the waiver services are not "feasible" for them until the cap has risen to include them.

Boulet v. Cellucci, 107 F. Supp.2d 61 (D. Mass. 2000).[2]

Because it was uncontroverted that Washington's waiver program was full, Plaintiffs could not establish that they were entitled to the waiver services they seek. Plaintiffs' reliance on 42 U.S.C. § 1396a(a)(8) providing that "[a] State plan

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[2] In *Boulet,* the court found that Plaintiffs were entitled to waiver services because – unlike the Plaintiffs here - they had applied *before* the Massachusetts waiver program had reached its maximum capacity. *See Boulet,* 107 F. Supp.2d 61, (D. Mass. 2000).

for medical assistance must . . . provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals" is misplaced. Plaintiffs read the key term -- ***"eligible"*** – entirely out of the statute. *See United States v. Trident Seafoods Corp.*, 92 F.3d 855 (9th Cir. 1996) ("[t]he Court must construe . . . the statute in a manner that gives meaning to every word . . . "). As explained in *Boulet*, once the cap on the waiver program is reached, no new applicants are "eligible" for waiver services as a matter of law.

Boulet is consistent with several prior decisions that addressed related issues. In *Beckwith et al. v. Kizer*, 912 F.2d 1139, 1141 (9th Cir. 1990), this Court addressed the California waiver program that allowed the state to provide benefits to physically disabled individuals who required at least 90 days of acute-level hospital care, and who would receive such benefits immediately after being discharged from a hospital. The waiver program was challenged by a class action on behalf of those who required intensive in-home medical services but who were not hospitalized, and were thus excluded from the waiver. *Id.* at 1141. This Court affirmed the dismissal of Plaintiffs' claim for injunctive relief. It reasoned that under Medicaid law California was free to include in its waiver group only those who entered the program from the hospital:

> In this situation, the State of California did not choose to limit the target group to those suffering from any particular disease or disability. It chose to define its target class in terms of the need for long-term acute hospital-level care and to look to hospitalization as a criterion.

Id. at 1143 (citations omitted).

As to the motion on behalf of The Arc, the District Court recognized the applicable law, but in this instance found the supporting declarations of Plaintiff's Executive Director wanting, stating that they "merely restate plaintiff's claim", and *sub silentio* finding that the declaration failed as a matter of law to put forth evidence entitling Plaintiff to judgment. The court specifically refers to its examination of a recent report by CMS concerning the CAP waiver that was attached to a declaration of Plaintiff's executive director. In referring to the report, the court states that while it raises issues about problems in the provision of services to persons on the waiver, it does not "establish a lack of genuine issues of material fact concerning the adequacy of services provided to Arc members . . . ". ER 119 at 10. The court stated it could not generalize from an observation by CMS that services to some of the 10,000 persons on the waiver raised concerns, sufficient to conclude that Arc members themselves are not receiving services. The motion now contested before this Court was brought specifically on behalf of The Arc and its members, not the class, not individual Plaintiffs, and not some unspecified group who is not before the court.

With regard to the claims by The Arc that certain of its members were on the HCBS waiver but were not receiving services in a reasonably prompt manner, the court ruled that the Plaintiffs had not presented sufficient evidence to establish the lack of genuine issues of material fact. ER 119 at 10. That the court was unconvinced of the evidentiary merits of Plaintiff's claim is abundantly clear when this order is read in conjunction with the 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. In that order the court specifically found as to the Motion to Amend Judgment that the "Plaintiffs have failed to meet their burden". The Court stated that "[a]s 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." ER 132 at 7. SER 342.

The Supreme Court has approved of lower courts denying summary judgment when, as here, the trial court has determined that the case would best proceed to trial:

> Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that a court may deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

b. Plaintiffs' Second Motion for Partial Summary Judgment

(1) Plaintiff Lacked Standing

Plaintiffs state in their brief that the District Court erred when it "declared without explanation that it 'denied' plaintiffs' summary judgment motion". From the foregoing, it is clear that Plaintiffs fail to understand the import of the Order Granting Defendants' Motion to Dismiss and Denying Plaintiffs' Motion for Partial Summary Judgment. ER 366.

Plaintiffs' second motion was denied because the court ruled, as to The Arc, that it did not have standing to bring the claims on behalf of its members, as it failed the third prong of the *Hunt v. Washington State Apple Advertising Comm'n.* test. Standing is a necessary fact which must be proven to show entitlement to judgment.

> The question of standing is an aspect of justiciability as that term relates to the 'case or controversy' requirement of Article III, Section 2 of the United States Constitution. The Plaintiff's ability to demonstrate his or her standing in a particular case is a threshold requirement which empowers a federal court to adjudicate the dispute.

City and County of Denver v. Matsch, 635 F.2d 804, 808 (10th Cir. 1980), and:

> The '[p]laintiff's ability to demonstrate his or her standing in a particular case is a threshold requirement which empowers a federal court to adjudicate the dispute.'

Hinkson v. Pfleiderer, 729 F.2d 697, 700 (10th Cir. 1984).

Because Plaintiff lacked standing to pursue its claims for summary judgment, there was simply nothing left for the court to adjudicate. Having dismissed all Plaintiffs and all claims, the court did not and could not consider the factual averments of the summary judgment claim as there was nothing left on which the court could enter summary judgment.

E. The District Court Correctly Found That Exhaustion of Administrative Remedies Was Required

"Exhaustion is the rule, waiver the exception." *Abbey v. Sullivan*, 978 F.2d 37 (2nd Cir. 1992). "When a statute does not provide for the exhaustion of administrative remedies, a trial court may require exhaustion in the exercise of its discretion" *Hoeft v. Tucson Unified Sch Dist.*, 967 F.2d 1298 (9th Cir. 1992).

The implementing regulations of the Medicaid Act require that DSHS provide an opportunity for a fair hearing as follows:

> a) The State agency must grant an opportunity for a hearing to the following:
>
> (1) Any applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness.
>
> (2) Any recipient who requests it because he or she believes the agency has taken an action erroneously.

42 C.F.R. § 431.220.

Pursuant to the requirements of the Medicaid Act, 42 U.S.C. § 1396a(a)(3), Washington provides for comprehensive administrative appeal rights to all individuals who are denied developmental disability services provided by DSHS, including those services provided through the CAP waiver. *See* Wash. Rev. Code § 71A.10.050(1) (granting administrative appeal rights for "a denial, reduction, or termination of a service" or "an unreasonable delay in acting on an application . . . for a service"); and Wash. Admin. Code § 388-825-120. The Washington APA requires exhaustion of administrative remedies. Wash. Rev. Code § 34.05.534. It provides that a person whose rights are violated by an agency's failure to perform a duty required by law may file a petition for judicial review in state superior court, with opportunity for appellate review. Wash. Rev. Code § 34.05.514.

The Department moved the District Court to dismiss the instant case based on lack of subject matter jurisdiction over Plaintiffs' claims, premised on the fact that Plaintiffs failed to utilize, much less exhaust, the administrative remedies available to them under the Medicaid Act and state law. The court agreed that Plaintiffs failed to exhaust their administrative remedies, finding that the state's administrative hearing system was able to resolve complaints about the services for which Plaintiffs are eligible. SER 344 at 1-7, ER 366 at 5.

Plaintiffs below, and in this appeal, contend that resort to the state's administrative process would have been futile. The District Court found that "far from being futile, the administrative remedies provided allow a program participant to settle a problem more efficiently, and among those with expertise, than proceeding to a different forum entirely, and the State is provided the first opportunity to address the issues that occur in the program that it is charged with administering." ER 366 at 5. The District Court's finding which held that the exhaustion doctrine's principal purpose is "preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors...." is supported by, *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

Plaintiffs further contend that exhaustion of administrative remedies would be futile since the Department has based denial of services on the impermissible ground of inadequate state funding. The District Court, in its order dismissing the case, referred to, and appeared to give great weight to, written assurances the Department gave to CMS regarding this issue. The court stated that Plaintiffs' had presented no evidence to show the state had used lack of funding as a defense since June of 2002. ER 366 at 5.

By not availing themselves of and exhausting their administrative remedies Plaintiffs have not given the agency an opportunity to resolve their complaints.

"Because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review application of those regulations to a particular factual context." *Abbey v. Sullivan* at 44. The District Court was correct in holding that the Department must be given an opportunity to address and resolve Plaintiffs' concerns prior to resorting to this litigation.

F. The District Court Properly Abstained From Exercising Jurisdiction Under the *Burford* Doctrine

The District Court, having dismissed The Arc for lack of standing was now left with the individual plaintiffs asserting their own claims to HCBS and ICF-MR services.

Federal courts should abstain from exercising jurisdiction when the exercise of jurisdiction would conflict with a state's regulatory scheme. This is especially true when issues of substantial local importance that would transcend the federal issues are in dispute. *Burford v. Sun Oil Co.*, 319 U.S. 315, 318-319, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). The *Burford* abstention doctrine requires that three factors must be satisfied. A federal court should abstain when: (1) the state concentrates litigation challenging the actions of the agency in a particular court; (2) the federal issues cannot be easily separated from complex issues of state law where state courts might have special competence; and (3) federal intervention might disrupt state efforts to establish a coherent policy. *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128, 1133 (9th Cir. 2002).

In *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 805 (9th Cir. 2002), this court articulated when the *Burford* abstention is appropriate. A federal court sitting in equity may decline to interfere with proceedings or orders of state administrative agencies when: (1) there are difficult questions of state law bearing on substantial issues of public policy whose importance transcends the result in the case at bar; or (2) the exercise of federal jurisdiction would be disruptive of state efforts to establish coherent policies regarding matters of substantial public concern. *Southern Cal. Edison Co.* at 806.

In this case, the trial court correctly declined to exercise jurisdiction after concluding that Plaintiffs' allegations concerning Department violations of CAP waiver requirements can all be adequately addressed through administrative and judicial remedies under state law. ER 366 at 7. The District Court further found that the CAP waiver program is a matter of local importance warranting deferral to the state for administration of the remedial procedures in place. *Id.* The *Burford* factors have been met here and jurisdiction was properly declined.

1. Washington's Statutory And Regulatory Scheme Meets The Requirements Of The *Burford* Test

Under Wash. Rev. Code Title 71A, an applicant or recipient of developmental disabilities services has the right to appeal the Department's actions regarding both eligibility for services and decisions affecting those services under

the Washington Administrative Procedure Act (APA), Wash. Rev. Code § 34.05.[3] *See* Wash. Rev. Code § 71A.10.050; Wash. Admin. Code § 388-825-120. The Washington APA requires exhaustion of administrative remedies. Wash. Rev. Code § 34.05.534. Parties may seek the review of adverse administrative decisions through the filing of a petition for judicial review in state superior court, and with later opportunity for review in the state's appellate courts. Wash. Rev. Code § 34.05.514, Wash. Rev. Code § 34.05.526.

Washington provides comprehensive state administrative and judicial remedies for suits challenging developmental disability decisions of the Department under Washington's APA. Cases are directed first to the state Office of Administrative Hearings for trial before an administrative law judge who specializes in developmental disability cases. Wash. Rev. Code § 34.05.419(1)(b); Wash. Rev. Code § 34.05.425(1). This judge's decision can be appealed by either party to a review judge in the Department's Board of Appeals who has extensive knowledge of the subject matter. Wash. Rev. Code § 34.05.464. Finally, judicial review is available in superior court for applicants/recipients only. Wash. Rev. Code § 34.05.542. Both parties can then appeal adverse superior court decisions to state appellate courts. Further, Washington law concentrates review of validity of

[3] The Washington APA also provides a forum for challenges to the validity of administrative rules issued by the Department. Wash. Rev. Code § 34.05.570(2)(b).

agency rules in a particular superior court, Thurston County. Wash. Rev. Code § 34.05.570(2)(b).

Plaintiffs argue that the state has not chosen to concentrate cases in a particular court. While the petition for review can be brought in the Superior Court of the county of the Plaintiff's residence or in the Superior Court of Thurston County, at Plaintiff's choice, the initial challenge to the agency's actions is brought before the state Office of Administrative Hearings. These administrative law judges have particular expertise in cases involving Medicaid and disability law issues and these judge's resolve a vast majority of cases at the administrative hearing level.

This case involves difficult questions of state law in the area of developmental disabilities services, bearing on policy issues of substantial public import. Given the current fiscal climate facing the state, issues dealing with how to properly allocate limited funds; how to define developmental disability and set forth qualifications for services (Wash. Rev. Code § 71A.10.020(1)); the nature and extent of services within the Department's legal authority (Wash. Rev. Code § 71A.12.140); the continuum of services to be authorized (Wash. Rev. Code § 71A.12.040); licensing, certification, and standards of care and procedures for payment of costs of care (Wash. Rev. Code § 71A.12.080); assessment of needs and determination of necessary services (Wash. Rev. Code § 71A.18.020); and

many other major policy issues of public importance found in Wash. Rev. Code Title 71A are included within the issues presented by this case. The necessary synthesis of these issues requires the state be given flexibility in administration of its program for the care and treatment of those with developmental disabilities.

The Supreme Court has implicitly acknowledged the difficulties faced by states in managing large, federal entitlement programs. *Olmstead v. L.C. ex rel Zimring,* 527 U.S. 581, 600, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999), addressed the issue of whether the ADA required placement of persons with mental disabilities in community settings rather than institutions. The Court recognized that "[t]o maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow", *Id.* at 605, and held that courts must take into account the resources available to the state and the needs of others with mental disabilities.

The Department asks this Court to find, "that the state system, coupled with 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, support application of the *Burford* abstention doctrine to this case." ER 366-7.

2. Washington Has A Comprehensive System For The Treatment And Care Of The Developmentally Disabled Which Would Be Disrupted By The Exercise Of Federal Jurisdiction In This Case

The Washington Legislature has identified broad policies to guide state services for individuals with developmental disabilities.

> It is declared to be the policy of the state to authorize the secretary [of DSHS] to develop and coordinate state services for persons with developmental disabilities ...[and] encourage the establishment and development of services to persons with developmental disabilities through locally administered and locally controlled programs.
>
> The complexities of developmental disabilities require the services of many state departments as well as those of the community. Services should be planned and provided as a part of a continuum. A pattern of facilities and services should be established, within appropriations designated for this purpose, which is sufficiently complete to meet the needs of each person with a developmental disability regardless of age or degree of handicap, and at each stage of the person's development.

Wash. Rev. Code § 71A.12.010.

Washington, through its laws and regulations on developmental disability services, has established a coherent policy with respect to a matter of substantial public concern, the administration of the state's CAP waiver program addressing the needs of over 11,000 individuals with developmental disabilities. Concepts of comity and federalism argue strongly for deference to Washington's policy in the administration of this comprehensive state program.

The cases cited in support of Plaintiffs' argument that *Burford* should not be applied are distinguishable. Plaintiffs in *Quackenbush v. Allstate Ins. Co.*,

517 U.S. 706 (1996) were seeking damages rather than more intrusive injunctive relief; In *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 805-806 (9th Cir. 2002) a non-settling intervenor sought to have the court abstain from exercising jurisdiction after the main Plaintiff and Defendant settled their dispute; The court in *Chiropractic America v. Lavecchia*, 180 F.3d 99 (3rd Cir. 1999) held that abstention was proper in a case involving state automobile regulations where exercising jurisdiction would create a "parallel federal regulatory review institution".

Exercise of federal jurisdiction in this case would force the District Court to become inextricably intertwined in the operation of the state program for the treatment and care of the developmentally disabled in Washington State. As the court stated in the context of its denial of approval of the Second Amended Settlement Agreement, "Moveover, the Court is concerned that the SASA holds the potential to keep the Court embroiled in the program about which Plaintiffs complain for the foreseeable future and perhaps beyond. Finally, the SASA comes perilously close to manipulating a substitution of this court for the Legislature." ER 323 at 11.

3. The State Of Washington Did Not Wave Its Right To Assert The *Burford* Abstention Doctrine

Plaintiffs now contend that the Department waived any right to assert the *Burford* abstention doctrine when they attempted to settle the case with Plaintiffs.

Plaintiffs quote *Southern California Edison Co. v. Lynch*, 307 F.3d 794 (9th Cir. 2002) for the proposition that *settling* a case is consenting to the jurisdiction of the court. However, the case now before this court has *not been settled* and therefore *Southern California Edison* does not apply. Indeed, in *Southern California Edison* the party asserting the abstention doctrine was not a settling party but was in fact a non-settling intervenor, and the public entity involved had consented to the jurisdiction of the court by agreeing to a stipulated judgment.

Further, Plaintiffs' waiver argument is improper. Plaintiffs attempt to use the Department's good faith as a weapon against it. The use of the attempted settlement against the Department is akin to the use of settlement negotiations as evidence of liability at trial, something expressly disallowed by Fed. R. Evid. 408. The policy behind the exclusionary rule on settlements negotiations is to foster private resolution of disputes over litigation and bring about a more efficient, more cost effective, and considerably less burdened judicial system. *Goodyear Tire and Rubber Company v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003). This policy should be extended to the facts of this case. Use by of the attempted settlement in seeking an advantage on appeal should not be allowed.

Finally, the express terms of the proposed settlement agreement in paragraph 11.6 states:

> No Admission of Liability. This agreement and each of its provisions and the implementation of this agreement shall not be construed as an

> admission by the State of Washington or any of its Representatives of any fault, wrongdoing, negligence, willful conduct, or liability of any kind whatsoever, and this agreement is entered into solely as a compromise and to avoid further litigation, controversy, costs, and expenses.

ER 296-47. By expressly excluding any admission of liability the Department was not waiving any defense available to it under existing law. The Department did not waive the assertion of the *Burford* doctrine.

Plaintiffs' argument that the Department waived its abstention argument because they engaged in settlement negotiations is without merit.

G. The District Court Properly Dismissed The Plaintiffs' ADA Claim

Plaintiffs sought an order requiring the Department to provide HCBS services to all persons in Washington who are otherwise eligible for treatment in an ICF-MR. This request on the part of Plaintiffs would open the state waiver to thousands of individuals over and above the numerical limit approved by CMS. The District Court correctly found that the requested increase constituted a fundamental alteration of the state's program for the care and treatment of those with developmental disabilities.

Plaintiffs in their complaint requested that the District Court order the Department to provide a choice of full HCBS/ICF-MR benefits to the entire class of Plaintiffs. ER 1 at 5, 6, 12, 13. Plaintiffs reiterated this position in their Memorandum in Opposition to Motion to Dismiss ADA Claims stating, "that *all*

eligible persons should have access to the benefits the State of Washington already provides to many other persons with developmental disabilities". ER 112-2 (emphasis added). The District Court correctly noted in its order dismissing the ADA claims that "it is clear there are not sufficient openings (in the CAP program) for the entire Plaintiff class". ER 132 at 3.[4] In the case now before the court, Washington had a limit of 9,977 spaces available under its CAP waiver program when this lawsuit was filed. It is not disputed that waiver slots were essentially full during that year. ER 119 at 3. Plaintiffs allege that the size of the class eligible for waiver services, but not receiving those services, exceeds 2,000 individuals. ER 1 at 10.

The District Court dismissed Plaintiffs' ADA claim based on its analysis of Title II of the ADA and the above facts. Citing to *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 600, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999) the court pointed out that "once (a State) provides community based treatment to qualified persons with disabilities, (its responsibility) is not boundless". *Id.* at 603. In its order the court

[4] Here, it is important to distinguish between the concepts of eligibility for and availability of HCBS/CAP waiver services. Definitionally for the purposes of this case, eligibility for HCBS CAP waiver services consists of a determination that an individual has a developmental disability as defined by applicable state law, that the person would require the level of care provided in an ICF-MR, hospital or nursing facility and that the applicant meets certain asset and income restrictions. 42 C.F.R. § 435.217; 42 C.F.R. § 435.236. Availability of HCBS CAP waiver services comes about when unfilled slots are available under the numerical limits

further found that the numerical cap imposed in the HCBS CAP waiver itself was an essential eligibility requirement of that program. ER 132 at 3. The court held that making a change to the numerical limits imposed under the CAP waiver constitutes as a fundamental alteration of the program.

In the case of *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017 (D. Hawaii 1999) the court interpreted the Medicaid act and related federal regulations as they apply to numerical limits on HCBS waivers. After analyzing the provisions of 42 U.S.C. § 1396n(c)(2)(C), (c)(9) and (c)(10) and 42 C.F.R. § 441.303(6) the court found that:

> Thus, it is clear that the Medicaid statute and its regulations require the State to provide a number to the Secretary that will act as the limit on the State's HCBS-MR program every year. As a result, when the slots are filled by eligible individuals, the HCBS-MR program is no longer a 'feasible alternative' available under the waiver. Stated differently, the HCBS-MR program is not an entitlement. *Id.* at 1028.

Stated differently again, the numerical limitation is an essential eligibility requirement and was so found by the District Court. ER 132 at 3.

In *Pottgen v. Missouri State High School Activities Association*, 40 F.3d 926 (8th Cir. 1994), the court engaged in an analysis of the role played by an age limitation, if it constituted an essential eligibility requirement and if waiver of the

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of the waiver approved by the federal Centers for Medicare & Medicaid Services (CMS). 42 U.S.C. § 1396n(c)(2)(C), (c)(9) & (c)(10); 42 C.F.R. § 441.303(6).

limitation was a reasonable accommodation which could be made to the program. The court held:

> Reasonable accommodations do not require an institution 'to lower or to effect substantial modifications of standards to accommodate a handicapped person.' **Waiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program.** Other than waiving the age limit, no manner, method, or means is available which would permit Pottgen to satisfy the age limit. Consequently, no reasonable accommodations exist. *Id.* at 930. [emphasis added]

Another court has reached the same conclusion in dealing with eligibility for AFDC. *Accord Aughe v. Shalala*, 885 F. Supp. 1428 (W.D. Wash. 1995), finding the waiver of an age limitation was not a reasonable accommodation.

Seeking to fit the facts of this case to this Court's holding in *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003), 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. Plaintiffs now state that the District Court chose to characterize their demand as one for new services when in fact they merely seek the same services in a more integrated setting. Plaintiffs are bound by the record below. Plaintiffs have always demanded "full medical assistance benefits due to persons whom the Department has found eligible for ICF-MR benefits" and "that all eligible persons should have access to the benefits that the State of Washington already provides to many eligible persons with developmental disabilities". ER 112 at 2 & 4. The services provided under the

CAP waiver and its successor are different from and additional to those available under the Medicaid State Plan or as state funded services.

Plaintiffs contend that the determination of whether an alteration to a program is fundamental in nature always requires a factual determination is incorrect. The lesson to be learned from the cases cited by Plaintiffs in support of this position is not that a factual determination of reasonableness is always required, for obviously it is not. If one reads *Makin, Pottgen* and *Shalala* as correctly stating the proposition that alterations of essential eligibility requirements are fundamental alterations as a matter of law, it is only when determinations of reasonableness turn on issues which are factual in nature that the record must be sufficiently developed to support that determination. *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003).

Here the record is clear. Plaintiffs request access to the CAP waiver program for "thousands" of additional individuals, individuals who are not now receiving waiver services, thus changing the fundamental nature of the waiver program previously negotiated with, and approved by, CMS under the provisions of 42 U.S.C. § 1396. The District Court correctly dismissed the ADA claim, and properly held this proposed addition of thousands of new waiver recipients as being exactly the type of fundamental programmatic alterations disapproved of by the courts in *Makin, Pottgen* and *Shalala*, and warned of by the Supreme Court in

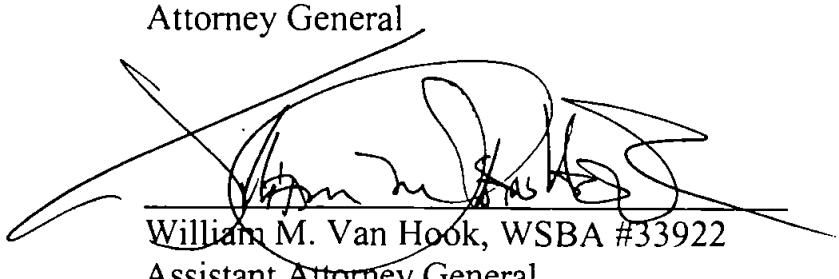
Olmstead v. L.C. ex rel Zimring, 527 U.S. 581, 600, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999).

VIII. CONCLUSION

Based on the foregoing, the Department respectfully requests the Court of Appeals to affirm the decisions of the District Court and dismiss this case.

RESPECTFULLY SUBMITTED this 23rd day of January, 2004.

CHRISTINE O. GREGOIRE
Attorney General



William M. Van Hook, WSBA #33922
Assistant Attorney General
Office of the Attorney General
Attorneys for Defendants-Appellees

Edward J. Dee, WSBA No. 15964
Assistant Attorney General
Office of the Attorney General
Attorneys for Defendants-Appellees

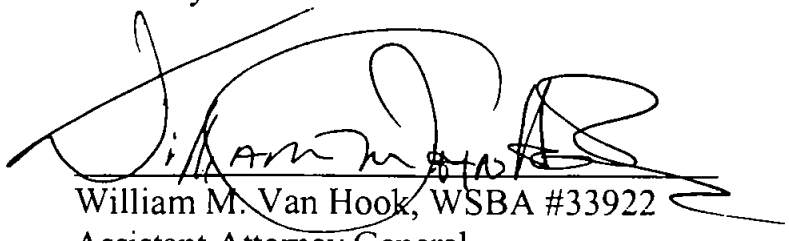
CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 03-35605

I certify that the Response Brief of Defendants-Appellees is proportionately spaced, has a Times New Roman typeface of 14 points, and contains 13,693 words.

Dated this 23rd day of January, 2004.

CHRISTINE O. GREGOIRE
Attorney General



William M. Van Hook, WSBA #33922
Assistant Attorney General
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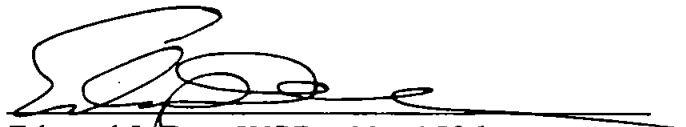
Attorneys for Defendants-Appellees



Edward J. Dee, WSBA No. 15964
Assistant Attorney General
Office of the Attorney General
Attorneys for Defendants-Appellees

STATEMENT OF RELATED CASES AS REQUIRED BY NINTH CIRCUIT RULE 28-2.6

The case of Boyle v. Braddock, U.S. District Court (W.D. Wash.) No. C01-5687FDB, is currently pending before this Court on appeal from the District Court's order of dismissal. The Boyle case raises issues regarding the Medicaid program that are closely related to those in Plaintiffs'-Appellees' appeal.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE ARC OF WASHINGTON STATE INC, a Washington corporation on behalf of its members; et al., Plaintiffs-Appellants, v. LYLE QUASIM, in his official capacity as the Secretary of the Washington Department of Social and Health Services; et al., Defendants-Appellees.	NO. 03-35605 CERTIFICATE OF SERVICE

JEFFREY S. NELSON declares as follows:

I certify that on January 23, 2004, in accordance with Fed. R. App. P. 25, I served two copies of the Response Brief of Defendants-Appellees, and one copy of Defendants-Appellees' Supplemental Excerpts of Record, and this Certificate of Service, by giving them to Assistant Attorney General Edward J. Dee, for delivery to each of the parties to this action at their mailing address as listed below:

Larry A. Jones
Christine Thompson Ibrahim
Law Office of Larry A. Jones
2118 Eighth Avenue
Seattle, WA 98121-2608

Susan Delanty Jones
Preston Gates & Ellis LLP
Suite 2900
925 Fourth Avenue
Seattle, WA 98104-1158

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

Executed at Olympia, Washington this 23rd day of January, 2004.

JEFFREY S. NELSON
Legal Assistant I
Washington State Attorney General's Office

ADDENDUM TO BRIEF – TABLE OF CONTENTS

NO. 03-35605

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ARC OF WASHINGTON STATE INC, a Washington corporation on behalf of its members; et al.,

Plaintiffs-Appellants,

v.

LYLE QUASIM, in his official capacity as the Secretary of the Washington Department of Social and Health Services; et al.,

Defendants-Appellees.

DEFENDANTS-APPELLEES' MOTION FOR AN EXTENSION OF TIME TO FILE BRIEF

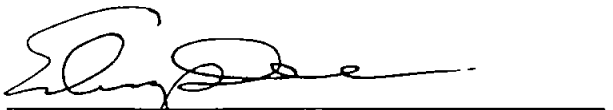
Pursuant to Circuit Rule 31-2.2(b), Defendants-Appellees request an extension of time to submit their answering brief, which is currently due on December 24, 2003. Defendants-Appellees seek an extension until January 23, 2004. This request is based on the attached declaration of Edward J. Dee, Assistant Attorney General, attorney for Defendants-Appellees. The declaration demonstrates diligence by Defendants-Appellees and substantial need for the extension, establishes that notice of the intended application for extension of time

ADDENDUM 1

was provided to Larry Jones, attorney for Plaintiffs-Appellants, and further establishes that Plaintiffs-Appellants have no objection to the requested extension.

Respectfully submitted this 4th day of December, 2003.

CHRISTINE O. GREGOIRE
Attorney General



Edward J. Dee, WSBA No. 15964
Assistant Attorney General
Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Defendants-Appellees' Motion for an Extension of Time to File Brief and Declaration of Edward J. Dee in Support of Defendants-Appellees' Motion for an Extension of Time to File Brief to be served via first class mail, postage prepaid, as set forth below:

Larry A. Jones
Christine Thompson Ibrahim
Law Office of Larry A. Jones
2118 Eighth Avenue
Seattle, WA 98121-2608

Susan Delanty Jones
Preston Gates & Ellis LLP
Suite 2900
925 Fourth Avenue
Seattle, WA 98104-1158

DATED this 5th day of December, 2003, at Olympia, Washington.

JEFFREY S. NELSON
Legal Assistant I
Washington State Attorney General's Office

NO. 03-35605

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ARC OF WASHINGTON STATE INC, a Washington corporation on behalf of its members; et al., Plaintiffs-Appellants, v. LYLE QUASIM, in his official capacity as the Secretary of the Washington Department of Social and Health Services; et al., Defendants-Appellees.	DECLARATION OF EDWARD J. DEE IN SUPPORT OF DEFENDANTS-APPELLEES' MOTION FOR AN EXTENSION OF TIME TO FILE BRIEF

I, *Edward J. Dee*, state and declare as follows:

1. I am an attorney admitted to practice before this Court. I am an Assistant Attorney General representing the State of Washington, Department of Social and Health Services and am co-counsel in the above-captioned matter with William M. Van Hook, Assistant Attorney General.

2. Defendants-Appellees' answering brief is due on December 24, 2003. This was the initial due date for the answering brief after an extension was granted to Plaintiffs-Appellants to file their opening brief.

ADDENDUM 2

3. The length of the requested extension of time for filing said answering brief is 30 days from the present due date, which will be January 23, 2004.

4. The requested extension is necessary due to the complexity of the case and the intervening holiday period. Defendants-Appellees' filed a 43 page brief with 48 attached documents, arguing complex issues of standing, ripeness, exhaustion of administrative remedies, and the *Burford* abstention doctrine. In addition, they seek reversal of the trial court's decertification of the litigation class, its denial of two summary judgment motions submitted by Plaintiffs-Appellants, and its denial of their ADA claim.

One of the assistant attorneys general assigned to this case transferred to a different division of the Attorney General's Office in October. Her replacement, William Van Hook, joined our office in mid-October and is new to the field of disability law. He is working long hours to familiarize himself with the case. Due to my other assignments and responsibilities, Mr. Van Hook has primary responsibility for developing Defendants-Appellees' answering brief. The extension to January 23, 2004 is necessary due to long-scheduled vacation plans for Mr. Van Hook and me between December 26, 2003 and January 9, 2004, regarding which notices of unavailability of counsel were previously submitted.

5. Defendants-Appellees have exercised diligence in developing their answering brief, given the number and complexity of the issues in this appeal. The brief will be filed within the time period requested.

6. Today I received a telephone call from Larry Jones, attorney for Plaintiffs-Appellants. Mr. Jones stated that Plaintiffs-Appellants have no objection to the requested extension to January 23, 2004.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 4th day of December, 2003.

Edward J. Dee, WSBA No. 15964
Assistant Attorney General

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE ARC OF WASHINGTON STATE INC, a Washington corporation on behalf of its members; et al.,

Plaintiffs - Appellants,

v.

LYLE QUASIM, in his official capacity as the Secretary of the Washington Department of Social and Health Services; et al.,

Defendants - Appellees.

No. 03-35605

D.C. No. CV-99-05577-FDB
Western District of Washington, Tacoma

ORDER

Appellees' motion for an extension of time in which to file the answering brief is granted. The answering brief is due January 23, 2004. The optional reply brief is due 14 days after service of the answering brief.

Court records do not currently reflect that the district court has issued the certificate of record. Appellants shall monitor the issuance of the certificate.

For the Court:
CATHY A. CATTERSON
Clerk of the Court:

Cathie A. Gottlieb
Deputy Clerk
Ninth Cir. R. 27-7/Appendix A,
General Orders for the
United States Court of Appeals

pro 12.8

ADDENDUM 3