No. 03-35605

In the United States Court of Appeals
for the Ninth Circuit

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

Plaintiffs-Appellants,

vs.

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

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

Opening Brief of Plaintiffs-Appellants

LAW OFFICES OF LARRY A. JONES
Larry A. Jones
Christine Thompson Ibrahim
2118 8th Avenue
Seattle WA 98121
(206) 405-3240

PRESTON GATES & ELLIS LLP
Susan Delanty Jones
Todd L. Nunn
925 Fourth Avenue, Suite 2900
Seattle WA 98104
(206) 623-7580

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1(a) and (b), the Arc of Washington State, Incorporated, files this statement. The Arc is a Washington nonprofit corporation, with no parent corporation and no stockholders.

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I. STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1343(a)(4). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. On June 18, 2003, the district court entered a final judgment dismissing this case. ER 366, 367. Plaintiffs filed a timely notice of appeal on July 16, 2003, pursuant to Fed. R. App. P. 4(a) and 28 U.S.C. § 2107(a). ER 370.

II. STATEMENT OF ISSUES

1. Did the district court err when it dismissed this case?

2. Did the district court err when it decertified the plaintiff class?

3. Did the district court err when it denied the plaintiffs' summary judgment motions?

4. Did the district court err when it denied the plaintiffs' Americans with Disabilities Act claim?

III. STATEMENT OF THE CASE

The state of Washington injured the plaintiffs by illegally failing to provide two kinds of services with reasonable promptness to thousands of persons with mental retardation and other developmental disabilities, in violation of the

Medicaid Act, 42 U.S.C. § 1396a(a)(8). These services are (1) Intermediate Care Facilities for the Mentally Retarded (ICF/MR) and (2) Home and Community Based Services (HCBS), the latter allowed under a waiver authorized by 42 U.S.C. § 1396n(c).

On November 9, 1999, three developmentally disabled individuals and the Arc of Washington State, Inc., an advocacy organization ("the Arc"), filed a class action complaint seeking declaratory and injunctive relief for the state's violations of the Medicaid Act, 42 U.S.C. § 1396a(a)(8), the Rehabilitation Act, 29 U.S.C. § 794, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and the equal protection and due process clauses of the United States Constitution. ER 1.

On October 5, 2000, the district court certified the plaintiff class. Both parties moved for partial summary judgment. The class sought a ruling that the state was violating the Medicaid Act by failing to provide class members with all the services that they needed with reasonable promptness. ER 33 at 1-2; ER 34 at 1-24. The state sought a ruling that it did not violate the Medicaid Act by failing to provide HCBS waiver services. ER 79 at 1-16. The court denied the plaintiffs' motion and granted defendants' motion in part. ER 119. The court subsequently granted the state's motion to dismiss plaintiffs' ADA claims, but denied defendants' motion to dismiss the Arc as an organizational plaintiff. ER 132.

Following a pre-trial hearing on December 22, 2000, the court set forth the

claims that remained for trial. ER 134 at 1-3. The court ruled that the class had a claim under the Medicaid Act to hearings when applications for placement on the HCBS waiver are denied, as well as a claim to placement on the HCBS waiver under the equal protection clause. The court ruled that the Arc could pursue the following claims: that persons already on the HCBS waiver are not receiving all the services to which they were entitled; that persons eligible for ICF/MR services are not receiving them with reasonable promptness; and that persons eligible for placements in ICF/MRs are entitled to their choice of type of ICF/MR, which the state must then provide with reasonable promptness.

On October 26, 2001, the court denied preliminary approval to a proposed settlement between the parties. ER 191 at 1-9. At the court's suggestion, plaintiffs then separated the class into two subclasses, those persons on the HCBS waiver and those not on the waiver, and recruited independent counsel to represent each subclass. *See Id.* at 9. The parties renegotiated and arrived at a second proposed settlement. ER 233 at 1-6.

In the second proposed settlement, the state agreed to pay $14 million for new services for clients of the Division of Developmental Disabilities (DDD) to be expended within the fiscal year beginning July 1, 2002. The parties estimated that the state would be obligated to spend $24.9 million to maintain those services in each subsequent year. For fiscal year 2004, the defendants agreed to provide an

additional $21.3 million in new services, with an estimated carry-forward amount of $40.9 million per year. For fiscal year 2005, the defendants agreed to provide an additional $22.4 million in new services, with an estimated carry-forward of $41.3 million per year. Under the terms of the settlement, the total amount of new funding provided by the DDD to its clients for fiscal years 2003-2007 would have been $362 million. ER 233 at 6-9; ER 296 at 9-30.

On December 2, 2002, the court denied preliminary approval of the Second Amended Settlement Agreement. ER 323 at 11-13.[1] In June 2003 the court denied plaintiffs' motion for partial summary judgment and dismissed the remaining plaintiffs. ER 366.

IV. STATEMENT OF FACTS

Medicaid is a federal-state partnership that is a key component of funding for developmental disabilities services. State participation in the Medicaid program is optional, but if a state chooses to participate, the state's program must comply with the requirements set forth in the Medicaid Act and in federal implementing regulations. *Alexander v. Choate*, 469 U.S. 287, 289 n. 1, 105 S.Ct. 712 (1985). Two Medicaid programs are at issue in this case.

[1] The court's actions were apparently due to objections by two agencies that opposed the settlement terms and sought to intervene. ER 323 at 1-10. The court denied intervention, but disapproved the proposed settlement. ER 323 at 11-13.

A. Two Medicaid Programs.

The first Medicaid program offers care in an intermediate care facility for the mentally retarded ("ICF/MR"). ICF/MR programs provide residential services to people with developmental disabilities who require "active treatment," defined as having deficits and training needs in eight specified areas of daily living: toileting, personal hygiene, dental care, self-feeding, bathing, dressing, grooming, and communication of basic needs. ER 35 at 3. Most recipients of ICF/MR services in Washington live in five large state institutions, also referred to as residential habilitation centers or RHCs. ER 36 at 3. The state also funds some privately-operated, small community-based ICF/MRs, currently serving between 6 and 40 people each. ER 35 at 2.

The second Medicaid program is the Home and Community Based Services ("HCBS" or "the waiver") program, which allows states to waive certain requirements of the Medicaid Act that otherwise mandate that services for ICF/MR-eligible people must be provided in ICF/MR settings. *See* 42 U.S.C. § 1396n(c)(1).[2] The waiver permits states to offer services in community settings so that people with disabilities can avoid institutionalization. 42 C.F.R. §441.300. Washington's HCBS waiver program for persons with developmental disabilities is called the Community Alternatives Program (CAP) waiver. There were 10,000

[2]All cited statutes and regulations are appended.

persons on the waiver in September 2000. ER 93 at 2. Services available under the waiver include residential services (Group Homes, Intensive Tenant Support (ITS), and Alternative Living), daytime services, nursing, attendant care, physical and occupational therapy, behavior therapy, respite care and other medical services. ER 35 at 12-13. In 1999, DDD itself estimated that 4,505 Washingtonians with developmental disabilities needed residential services. ER 35 at 1. The state admits that people often wait "many, many years" for services. ER 93 at 1.

B. The Plaintiffs.

Plaintiff Arc of Washington State is this nation's oldest membership organization for people with developmental disabilities and their advocates and has a membership of approximately 3,000. ER 36 at 2. Many Arc members have been denied Medicaid services with reasonable promptness, often for years, and the lack of reasonably prompt services has caused severe injuries to individuals with developmental disabilities and their families. ER 36 at 3.

Plaintiff Olivia L. Murguia is 26 years old and has mental illness and an IQ of 42. ER 35 at 5-8. She lives with her mother, who has cancer. ER 35 at 13. Olivia has challenging behaviors and requires 24-hour care. ER 35 at 13, 22. In 1997, DDD found that Olivia had an unmet need for the Medicaid HCBS program called Intensive Tenant Support, and the need still existed on June 23, 2000. ER

35 at 12. DDD briefly placed her in a non-HCBS Adult Family Home from November 1996 to April 1997, but that facility could not provide the intensive services that Olivia needed, and she was forced to return to her mother's home. ER 35 at 13.

Plaintiff Guadalupe ("Lupita") Cano is 35 years old and has Down syndrome, moderate mental retardation, and depression. ER 35 at 4. Lupita lives with her 74-year-old mother Delia Cano who has provided her full care since Lupita's father's death in 1995. Beginning at that time, Delia Cano sought out-of-home residential services from the state. ER 35 at 20. Since November 1993, DDD has agreed that Lupita had an unmet need for Intensive Tenant Support. ER 35 at 22.

Plaintiff Lorianne V. Ludwigson is 25 years old and has moderate to severe mental retardation and bipolar disorder with psychotic features. ER 35 at 14. Lorianne is aggressive and manic, sometimes not sleeping for several days. ER 37. Lorianne's parents and guardians asked for an out-of-home placement in 1996. ER 35 at 15, 23. In June 1999, DDD finally recognized her need for Intensive Tenant Support services. ER 35 at 16. In 1998, 1999, and 2000, Lorianne received an annual two-week temporary respite placement at Fircrest, a large state-operated ICF/MR, proving that she was eligible for such services. ER 35 at 17. Lorianne lived with her parents until June 2000, when she had a short placement in an Adult

Family Home,. but that provider also could not provide the intensive supports that Lorianne needed. DDD again sent her back to her parents. ER 37.

V. STANDARDS OF REVIEW

The standard of review for standing issues is *de novo*. *Fair Housing of Marin v. Combs*, 285 F.3d 899, 902 (9th Cir. 2002). The decision on whether the three factors for *Burford* abstention have been met is reviewed *de novo*; if they are met, the court's action is reviewed for abuse of discretion. *City of Tucson v. U.S. West Communications*, 284 F.3d 1128, 1132 (9th Cir. 2002). This Court reviews *de novo* a district court's order granting a motion to dismiss for failure to exhaust administrative remedies. *Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298, 1302-03 (9th Cir. 1992). The district court's decertification of a certified class is reviewed for abuse of discretion. *Paton v. New Mexico Highlands* University, 275 F.3d 1274, 1278 (10th Cir. 2002). On appeal, the reviewing court engages in the same process in evaluating a motion for summary judgment as did the district court. *Poole v. VanRheen*, 297 F.3d 899 (9th Cir. 2002).

VI. SUMMARY OF ARGUMENT

The district court erred when it dismissed all claims. The Arc has standing to bring the lawsuit both as the representative of its members and in its own right. The Arc does not have a conflict of interest among its members over declaratory and injunctive relief, and, even if it did, it would still have standing as an organizational plaintiff. Contrary to the district court's ruling, plaintiffs' claims about the HCBS waiver are ripe and have not become moot. Plaintiffs' claims about the ICF/MR program are also ripe, although the court apparently overlooked that entire claim in its ruling. Plaintiffs were not required to exhaust administrative remedies before bringing this litigation under 42 U.S.C. § 1983 and, even if exhaustion were required, the Arc's claims should go forward, because at least one of its members did pursue an administrative remedy. Furthermore, the court should not have applied the *Burford* abstention doctrine, because none of the extraordinary elements required for abstention were present.

The district court originally and correctly found that the class met the requirements for certification, including numerosity, commonality, typicality, and adequacy of representation. The court erred when it summarily decertified the class without any change of circumstance and without any discussion of which requirement was no longer met.

The district court erred in denying plaintiffs' motions for summary

declaratory and injunctive relief to the class, the Arc, and the individual plaintiffs on the issue of reasonably prompt delivery of Medicaid services. The law is clear and plaintiffs showed by unrebutted evidence that they (1) are eligible for both HCBS waiver and ICF/MR services, (2) need them, and (3) have not received them promptly.

Finally, the court erred when it granted defendants' motion for partial summary judgment on the ADA claim. Plaintiffs sought a relocation of services consistent with the "integration mandate" of the ADA. This Court's recent on-point decision in *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003), requires reversal and a remand for trial.

VII. ARGUMENT

Defendants cannot reasonably dispute the central factual contention that lies behind this litigation (and much of the developmental disabilities "waiting list" litigation filed in numerous other states subsequent to the decision in *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998), *see* ER 34 at 2): that Washington state limits the reasonably prompt access of eligible persons with developmental disabilities to Medicaid ICF/MR and HCBS waiver services. In its order of December 19, 2000 the district court agreed that "[t]he Medicaid Act, and in particular 42 U.S.C. § 1396a(a)(8), clearly obligates states opting into Medicaid to provide medical

assistance with reasonable promptness to all eligible individuals." ER 132 at 6.

A. The District Court Erred When It Dismissed the Case.

1. The Arc Has Standing As An Organization.

a. The Arc has standing on behalf of its members. A membership organization may sue in its representative capacity 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 individual members in the lawsuit. *Presidio Golf Club. v. National Park Service*, 155 F.3d 1153, 1159 (9th Cir. 1998); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977).[3] Defendants contested only the third factor. ER 363 at 1-3; ER 132 at 4.

"[I]ndividualized proof from members is not needed where, as here, declaratory and injunctive relief is sought rather than damages." *Associated Gen. Contr. v. Metro. Water District*, 159 F.3d 1178, 1181 (9th Cir. 1998). The district court originally agreed:

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[3]In December 2000, the district court specifically ruled that the Arc had standing, ER 132 at 4-5, but reversed itself on this issue in its final order of dismissal in June 2003. ER 366 at 2-3. The conclusion that the Arc lacked standing was error.

> . . . the central issues are legal ones concerning Defendants' obligations under the Medicaid Act to provide particular services to persons eligible for broad programs. The participation of individual Arc members is not necessary to resolve these legal issues.

ER 132 at 4-5. That conclusion was correct, because plaintiffs merely ask that the needed services (whatever they are) be delivered promptly. ER 1 at 15-16. The court continued:

> Participation of individual Arc members is also unnecessary to shape proper relief on either of the claims at issue here . . . If Plaintiffs prevail, the Court need not determine the particular medical requirements of any disabled individual. Rather, it need only shape a general order clarifying Defendants' legal obligations to provide necessary services – whatever Defendants have determined them to be – with reasonable promptness.

ER 132 at 4-5. *Accord, Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998); *Boulet v. Cellucci*, 107 F. Supp. 2d 61 (D.Mass. 2000).

In later dismissing the Arc for lack of standing (ER 366), the district court cited *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr.*, 19 F.3d 241, 244 (5th Cir. 1994), but that case is inapplicable. Appellant there, Advocacy, Inc., was denied standing because it was a nonmembership organization. By contrast, the Arc is a membership organization.[4]

[4]Furthermore, in *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003), this Court held that a nonmembership organization can have standing.

b. The Arc has standing in its own right. An organization has standing in its own right, if defendants' illegal actions cause both "a diversion of its resources" and a "frustration of its mission." *Fair Housing of Marin v. Combs*, 285 F.3d at 905. Here, the Arc plainly has *per se* standing to sue. The Arc has regularly diverted its limited resources to providing information, education, and advocacy to members about how to combat defendants' wrongful denial of reasonably prompt Medicaid services. ER 339 at 2-5. The state's illegal practices frustrate the Arc's mission to "promote the welfare of every Washington resident with mental retardation and other developmental disabilities." ER 339 at 2-5. These facts are unrebutted.

There is another reason why, even if the Arc's representative capacity for its members were in doubt, it has standing in its own right. The Arc's mission is not limited to helping its members; it regularly advocates for nonmembers with developmental disabilities who request assistance when the state illegally denies prompt Medicaid services. ER 339 at 5. The Arc serves these Washingtonians whether they or their families have ever paid membership dues.

c. There is no conflict of interest among Arc members. The district court erroneously dismissed the Arc because of a "conflict of interest"

between those Arc members on the HCBS waiver and those eligible only for ICF/MR services. ER 366 at 3. There is no legal authority for that ruling.[5]

Because the Arc seeks only injunctive and declaratory relief, there can be no conflict of interest among its members. No member will be harmed by a declaration of the rights of another member. The Arc members on the HCBS waiver seek a declaration of their right to receive with reasonable promptness all services for which they have been found eligible. ER 1 at 12-13. Those Arc members not on the HCBS waiver, but eligible for the ICF/MR program, seek a declaration of their right to receive those services with reasonable promptness. There is no conflict between these goals.

In any event, the Arc, like every Washington corporation, acts through its board of directors. Wash. Rev. Code § 24.03.095. The board provides the single voice of the Arc in pursuing this litigation. Even if there were discord, unanimity is not required for associational standing. As this Court has explained:

> Unanimous opinions within an organization's membership will be few and far between with respect to most issues controversial enough to engender litigation. To insist that there be neither conflict nor potential for conflict on any issue litigated would, in effect, lead to the eradication of associational standing in most suits. Such a rule

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[5]The court cited Washington Rule of Professional Conduct 1.7, as support for its conflict of interest analysis. But there is nothing whatever in RPC 1.7 that suggests an organization cannot bring a case without unanimity among its members. The RPC addresses a lawyer's responsibility to clients, not a litigant's right to sue.

would disserve the public interest, which frequently would not be represented but for these suits.

Associated Gen. Contractors of Cal. v. Coalition, 950 F.2d 1401, 1409 (9th Cir. 1991).

2. The Plaintiffs' Claims Are Ripe. The district court erroneously held that plaintiffs' claim to reasonably prompt HCBS waiver services was not yet ripe because the defendants are allegedly seeking to amend the current HCBS CAP waiver. ER 366 at 4. Whether an issue is ripe for determination is based on whether it is "fit for judicial decision" and "whether the parties will suffer hardship if [the court] decline[s] to consider the issues." *Knight v. Kenai Penin. Borough Sch. Dist.,* 131 F.3d 807, 814 (9th Cir. 1997), quoting *San Diego County Gun Rights v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996). Here the HCBS waiver claims meet both criteria, and, in addition, the ICF/MR claims are ripe.

a. The issues are fit for decision. "[P]ure legal questions that require little factual development are more likely to be ripe." *Knight*, 131 F.3d at 814. Here, plaintiffs are not challenging the state's eligibility or service determinations; rather, they seek prompt provision of Medicaid services that defendants have found that plaintiffs need. ER 1. This is a purely legal question.

Defendants are seeking to amend the HCBS waiver. ER 343 at 7. However, the current HCBS waiver has been extended to remain in effect more than a year after its expiration date. ER 289 at 1, ER 362 at 1. Thus the issues under the

waiver are ripe for the thousands of persons currently on the waiver. Without the agreement of the federal government, the current HCBS waiver will not be changed and the state's current contract remains in effect. There is no evidence as to when, or if, the federal government and the state may agree on an amended waiver. "[W]e reject any claim that the issues presented here are not ripe for review because the case involves uncertain future events. The ordinance is currently in effect. . ." *Associated Gen. Contractors of Cal.*, 950 F.2d at 1407 n.5. Likewise, in this case, the HCBS waiver is currently in effect, *any change is an uncertain future event*, and these issues are ripe for review.

Moreover, plaintiffs' claims are not limited to the current CAP waiver, but apply to any amended HCBS waiver, as the district court initially recognized: "[T]he Arc seeks declaratory and injunctive relief mandating that Defendants adhere to alleged strictures of the Medicaid Act concerning provision of ICF/MR *and HCB services*." ER 132 at 5 (emphasis added). Merely because the state hopes to amend its current HCBS waiver program does not deprive this Court of the power to declare that any and all Medicaid HCBS waiver services must be provided with reasonable promptness.[6]

[6] In a leading waiting list case, the court retained jurisdiction even after the state's Medicaid waiver program was amended. *Boulet v. Cellucci*, 107 F.Supp.2d at 68 n.6.

b. Plaintiffs will suffer hardship if this Court declines to consider the issues. If this Court were to find the waiver issues unripe, defendants could continue to engage in illegal practices, causing harm to the plaintiffs. The state's motive in denying services is not malice but rather is based on tight fiscal constraints. Because those constraints remain, the state will likely re-offend, barring an injunction. The state long ago entered into a contract with the federal government to provide Medicaid services with reasonable promptness to poor disabled persons. It should not be given free rein to illegally ration Medicaid services when the budget is tight. "Inadequate appropriations do not excuse non-compliance" with the requirements of the Medicaid Act. *Doe v. Chiles*, 136 F.3d at 722.

"[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine legality of practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070 (1981). If the case were moot based on mere voluntary cessation of allegedly illegal conduct, "the courts would be compelled to leave 'the defendant...free to return to his old ways.'" *Id.* at 289 n.10, quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894 (1953).

In this case, despite assurances that defendants will not repeat the violations under a proposed amended HCBS waiver, there can be no proof that they will not

continue to minimize state expenditures by withholding or unreasonably delaying waiver services. Many plaintiffs have already waited unreasonably long and the issue is ripe for determination.

c. ICF/MR claims are ripe. In any event, plaintiffs should be allowed to proceed with their claim that ICF/MR services are due with reasonable promptness. The state makes no claim that the ICF/MR program is being amended. Although plaintiffs asked the court to allow their claims to prompt ICF/MR services to go forward, ER 361 at 1-5, the ripeness of the ICF/MR claim was simply ignored by the district court in its dismissal order. ER 366 at 3-4 (addressing only the HCBS waiver). The ICF/MR claims are neither moot nor unripe and should have been permitted to go forward.

3. Plaintiffs Are Not Required to Exhaust Administrative Remedies.

Exhaustion of state remedies is not a prerequisite for plaintiffs to bring this action under 42 U.S.C. § 1983. *Patsy v. Board of Regents of the State of Florida,* 457 U.S. 496, 516, 102 S.Ct. 2557 (1982). This principle applies to the Medicaid Act. *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 523, 110 S.Ct. 2510 (1990). Furthermore,

> In almost any case brought under Section 1983 there will be some sort of administrative or judicial avenue of relief at state law - whether compelled by federal statute or simply available under general state court jurisdiction. Thus the mere fact that Congress created parallel and perhaps duplicative avenues for review does not, standing alone, demonstrate an implicit purpose to impose an exhaustion requirement.

Alacare, Inc.-North v. Baggiano, 785 F.2d 963, 967-68 (11th Cir. 1986). Thus, a court must consider whether there is congressional intent to require exhaustion of state remedies. *Id.*, 785 F.2d at 967. In the case of the Medicaid Act, this requisite intent is lacking. *Wilder*, 496 U.S. at 523; *accord*, *Alacare,* 785 F.2d at 967-69. The district court's order neither addressed these authorities, nor referenced the §1983 claim in its order of dismissal, and its failure to do so was error. *See* ER 366 at 4-5.

Under Washington law, an administrative law judge is not authorized to order the declaratory and injunctive relief sought by the plaintiffs. Wash. Rev. Code § 71A.10.050. This is not surprising, because "administrative remedies are generally inadequate where structural, systemic reforms are sought." *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1309 (9th Cir. 1992) (enforcing exhaustion requirement because only one component of a local program, not structural or systemic reforms to a statewide program, was at issue). Here, by contrast, plaintiffs' constitutional due process claims ". . .are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109, 99 S.Ct. 980 (1977). The district court erred in ignoring the clear authority of *Patsy* and *Wilder* and requiring exhaustion in this §1983 case.

Even if *Patsy* and *Wilder* did not apply, resort to state administrative

remedies would be futile. Exhaustion is not required when it would be futile because plaintiffs' claims would likely be denied in whole or in part. *Tallahassee Memorial Regional Medical Center v. Cook,* 109 F.3d 693 (11th Cir. 1997); *accord Doe v. Arizona Dept. of Education,* 111 F.3d 678 (9th Cir. 1997). At least one of the Arc's members did pursue an administrative appeal that was unsuccessful, because the state illegally denied services based on lack of funding by the legislature. ER 335 at 1-3. At the hearing, the state's witness testified that the out-of-home residential services requested by the Arc family were "contingent upon funding availability." ER 348 at 2-3. Since the state has taken the position that inadequate state funding excuses its failure to comply with Medicaid's reasonable promptness requirement (contrary to *Doe v. Chiles*, 136 F.3d at 722), further resort to state administrative remedies would be futile. Exhaustion is therefore not required.

4. The *Burford* Abstention Doctrine Does Not Apply.

Abstention is a comity doctrine that balances the strong federal interest in having federal rights adjudicated in federal courts against a state's interest in uniformity when a matter of "local concern" is at issue. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098 (1943). Abstention is an "extraordinary and narrow exception to the duty of the district court to adjudicate a controversy properly before it." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728, 116 S.Ct. 1712

(1996). "'Abstention from the exercise of federal jurisdiction is the exception, not the rule.'" *City of Tucson v. U.S. West Communications,* 284 F.3d 1128, 1132 (9th Cir. 2002), quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236 (1976).

a. Three factors must exist for *Burford* abstention. This Court has recently thrice reaffirmed that before a district court may apply *Burford* it must find that *all* of the following factors are met: (i) the state has concentrated suits involving the applicable agency in a particular court; (ii) the federal issues are not easily separable from complicated state law issues in which state courts may have special competence; and (iii) federal review might disrupt state efforts to establish a coherent policy. *Southern California Edison Company v. Lynch*, 307 F.3d 794, 806 (9th Cir. 2002); *City of Tucson*, 284 F.3d at 1132-34; *United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001). None of these three factors is met in this case.

i. The state has not chosen to concentrate this type of challenge in a particular state court. In *Burford,* 319 U.S. at 317, the Texas legislature had granted the Texas Railroad Commission exclusive authority to regulate the oil industry. Texas also granted authority to review the Commission's orders to a single set of state courts in a single county. *Id.* at 325. Washington, by contrast, has not attempted to concentrate suits against the state under the federal Medicaid Act in a state court, yet alone in a particular state court. *Cf. City of*

Tucson, 284 F.2d at 1133-34; ER 366 at 7; ER 343 at 9-10; Wash. Rev. Code § 71A.10.050(1); Wash. Admin. Code § 388-825-120.

ii. Washington law governing administrative and judicial remedies is easily separable from the federal issue at stake here. Plaintiffs seek no relief under any state law -- complex or otherwise. ER 1. The district court acknowledged this in December 2000: the "central issues are legal ones concerning Defendants' obligations under the Medicaid Act to provide particular services to persons eligible for broad programs." ER 132 at 4-5. Mandatory adherence by states to the Medicaid Act implicates substantial federal concern for the enforcement of the federal law. *See* 42 U.S.C. § 1396n(c)(1) and 42 U.S.C. § 1396n(c)(2) (waiver of Medicaid program permitted only if Secretary of U.S. Department of Health and Human Services approves). The district court erred legally and logically in concluding that, because "states have [difficulties] in managing large, federal entitlement programs" (citing *Olmstead v. L.C.*, 527 U.S. 581, 119 S.Ct. 2176 (1999)), a federal court cannot separate the administration of such programs from the critical federal issues at stake in this case. *See* ER 366, at 6-7.

iii. Federal court review will establish, not disrupt, coherent policy. Plaintiffs seek declaratory and injunctive relief directing the state to adhere to the Medicaid Act requirements for ICF/MR and HCBS services. ER 1. Such

relief would clarify the state's obligations in developing its policies for services under the Medicaid Act. Indeed, the Washington statutes and regulations that the state claims shield it from federal judicial scrutiny are required by and must comply with the federal Medicaid laws that plaintiffs seek to enforce. *See* 42 U.S.C. § 1396a(a); 42 U.S.C. § 1396n(c); 42 C.F.R. §§ 441.300-.302; *see also Chiropractic America v. LaVecchia,* 180 F.3d 99, 107 (3d Cir. 1999) (*Burford* abstention does not apply to "cases where the state regulations under constitutional review were enacted to comply with a federal mandate in the particular regulatory field"). The district court erred by failing even to mention this factor in its order of abstention under *Burford.*

b. The State has waived any right to assert the *Burford* abstention doctrine. A state may voluntarily submit to federal jurisdiction even though it "might have had a tenable claim for abstention." *Southern California Edison*, 307 F.3d at 806, quoting *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626, 106 S.Ct. 2718 (1986). "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Southern California Edison*, 307 F.3d at 806, quoting *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480, 97.S.Ct. 1898 (1977).

Plaintiffs filed their complaint on November 9, 1999. ER 1. In December

1999, the state moved to dismiss, but did not seek abstention. ER 12. In its Answer and Affirmative Defenses filed in February 2000, the state raised twelve affirmative defenses, but not abstention. ER 21 at 9-10. In April 2000, the district court set the trial date for January 2001 (ER 23) and the state actively prepared for that trial. ER Docket at 9-17; ER 131. The state then agreed to a continuance of trial, ER 148, reached proposed settlements with the plaintiffs, and jointly and voluntarily submitted the proposed settlements to the district court for approval. ER 150. By consenting to the proposed settlements, the state expressly waived any abstention defense. *Southern California Edison*, 307 F.3d at 806.

Only after the district court disapproved the Second Amended Settlement Agreement (ER 323) did the state move -- on April 28, 2003, three and one-half years after the complaint was filed and after innumerable rulings by the district court -- to dismiss the case based on the *Burford* abstention doctrine. ER 343. Thus, even if this Court finds on *de novo* review that the three factors exist that are required for *Burford* abstention, the district court abused its discretion in applying *Burford* here.

B. The District Court Abused Its Discretion When It Decertified Plaintiffs' Litigation Class.

On December 2, 2002 the district court not only denied approval of the parties' Second Amended Settlement Agreement ("SASA"), but also decertified the existing litigation class. ER 323 at 13. This Court should reverse the district

court's decertification and reinstate the litigation class because the court abused its discretion.

In reviewing a district court's class certification order, this Court must determine whether the district court exercised its discretion "within the framework of Rule 23." *Zinser v. Accufix Rsrch. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (*amended and superceded on other grounds*, 273 F.3d 1266 (9th Cir. 2001)). The Rule 23 framework requires the court to apply permissible "legal criteria or standards." *Yamamoto v. Omiya*, 564 F.2d 1319, 1326 (9th Cir. 1977). Additionally, the district court must "adequately consider" the various relevant factors. *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234 (9th Cir. 1996). While a court may "modify [a certification order] in the light of subsequent developments in the litigation," *Gen. Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982), a court may not logically decertify a litigation class when "none of the facts upon which the earlier order was based ha[ve] changed." *Paton v. New Mexico Highlands University*, 275 F.3d 1274, 1280 (10th Cir. 2002).

In order for its order to withstand review, a district court must set forth and explain the criteria it applied and its analysis of the relevant factors. "[B]rief and conclusory" orders that "merely reiterate" the requirements of Rule 23 without stating a valid reason for the court's conclusion constitute an abuse of discretion. *Valentino*, 97 F.3d at 1234. That standard reasonably requires the district court to

provide enough explanation of its decision to allow this Court to evaluate whether the district court gave adequate weight to the relevant factors and applied the appropriate legal standards. Were the district court not required to provide such an explanation, the language of *Valentino*, and indeed substantive review of a district court's discretionary orders, would become meaningless.

1. The District Court Properly Certified The Litigation Class.

On October 5, 2000, the district court properly certified this suit as a class action, defining the class as "all developmentally disabled persons in the State of Washington who i) meet the medical and financial requirements for eligibility for ICF/MR services; ii) have applied for HCB waiver services; and iii) have not received HCB waiver services, or not received them with reasonable promptness, and individuals who will be similarly situated in the future." ER 87. In order for a class to be certified, plaintiffs must demonstrate that they satisfy the following requirements:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements are commonly referred to respectively as numerosity, commonality, typicality, and adequacy of representation. *See Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). In addition, the class

must meet one of the three requirements of Fed. R. Civ. P. 23(b). In this case, plaintiffs sought certification pursuant to Rule 23(b)(2), which requires plaintiffs to demonstrate that defendants have "acted or refused to act on grounds generally applicable to the class[.]" In its 2000 order (ER 87), the court discussed each of the relevant factors and properly concluded that plaintiffs had satisfied all of the requirements.

With regard to **numerosity**, the court found, and defendants "implicitly acknowledge[d,] the existence of an indeterminate population of adults" in the class. *Id.* at 4-5. While the court was unable to "determine with precision" the number of people in the class "at any one time," such precision is not required to satisfy numerosity. *See Robidoux v. Celani,* 987 F.2d 931, 935 (2d Cir. 1993). It is not seriously disputed that the class as defined by the court is sufficiently numerous that joinder of all class members would be impracticable.

With regard to **commonality**, the court identified two specific questions common to all members of the litigation class:

> 1) Does the State violate federal law when it fails to provide HCB waiver services to persons who have applied for them and are eligible for ICF-MR services, or when it fails to provide them with reasonable promptness? 2) Does the State violate federal law when it fails to provide class members a fair hearing upon denying them HCB waiver services?

ER 87 at 5. The court also concluded that the defendants had refused to provide the services to class members on substantially the same grounds: that the waiver

program was full and that mere eligibility for ICF/MR services did not entitle class members to HCB waiver services. *Id.* at 6.

Typicality is a permissive standard, under which "representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The district court was concerned that plaintiffs' proposed class definition was too broad to satisfy this requirement because the proposed class potentially included members who desired certain services that other members had rejected. ER 87 at 2-3. The court discussed its concern at length and amended the class definition to exclude claims for services the class representatives had declined. ER 87 at 3-4. By defining the class more precisely, the court addressed and resolved any issues related to typicality.

Representativeness is a two-part inquiry. Both the putative class representatives and class counsel must adequately represent unnamed class members to fulfill this requirement. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). In this case, the district court concluded that there were no conflicts between the named plaintiffs and absent class members, primarily because the class as defined by the court comprised individuals all seeking to expand the pool of HCB waiver resources to be large enough to accommodate "all who desire them." ER 87 at 5. The court properly concluded

that, because the class sought simply to assert, rather than relinquish, their collective claim that HCB waiver resources should be expanded sufficiently to provide services to everyone in the class, the first representativeness requirement was satisfied. *See Lerwill*, 582 F.2d at 512. Similarly with regard to plaintiffs' counsel, the court found that, based on the record, counsel had "conducted themselves energetically and with a sufficient degree of competence." ER 87 at 5.

2. The District Court's Summary Decertification Was Not Based On Any New Development Or Change In The Validity Of The Litigation Class

Between October 2000 and December 2, 2002, the certified litigation class was rarely discussed. During that time, the parties proposed and the court considered four additional, broader, class definitions in motions and proposed settlements.[7] While the applicants for intervention at one point raised some questions about the certified litigation class, the court properly rejected those as untimely and "not sufficiently weighty" to justify consideration. ER 191 at 10. The record reflects that nothing changed with regard to the Rule 23 requirements in

[7] *See* Plaintiffs' Motion to Modify Class Definition (ER 95); Stipulated Motion for Preliminary Approval of Class Settlement (ER 149); Joint Motion for Preliminary Approval of Amended Settlement Agreement (ER 233); Joint Memorandum Re Order to Show Cause (ER 296).

the time between the two orders, and the court's analysis in its October 2000 order remains valid to this day.

The December 2002 order (ER 323) dealt with the Second Amended Settlement Agreement ("SASA," ER 296 at 9-30), which the parties had negotiated in response to the court's suggestions in its May 17, 2002 Order To Show Cause. *See* ER 323, ER 282. The latter order expressed no concern about the validity of the litigation class, even though it clearly contemplated that the parties might not develop an acceptable settlement agreement. ER 282. While the court commented that it would "consider lifting the stay in this action. . ." (*id.* at 10), it did not even mention that the validity of the litigation class might be in jeopardy. Nor did it identify any developments in the suit that might affect the litigation class.

Similarly, nothing in the December 2002 order itself addressed the validity of the litigation class. ER 323. The entire order was devoted to discussing and analyzing the arguments for and against the SASA, which proposed a settlement class significantly broader than the litigation class. *See* ER 134. The court did not even allude to the litigation class until the final sentence of the final paragraph of its discussion, stating cryptically: "This case is not the classic type of case that is

amenable to treatment as a class action; Plaintiffs [*sic*] have failed to demonstrate that the requirements of Fed. R. Civ. P. 23 have been met."[8] ER 323 at 12.

The district court's decertification of the litigation class with no discussion of the Rule 23 requirements, the reason for its decision, or what facts changed between its October 2002 order and December 2, 2002 order to justify decertification, constitutes clear abuse of discretion. In *Valentino*, 97 F.3d at 1234, this Court considered a certification order that "merely reiterate[d] Rule 23(b)(3)'s predominance requirement and [was] otherwise silent as to any reason why common issues predominate[d] over individual issues certified under Rule 23(c)(4)(A)." This Court held that the "district court abused its discretion by not adequately considering the predominance requirement before certifying the class." *Id.* This case is even more extreme than *Valentino*. Here, the district court glossed

[8] The preceding sentence in the Order notes that, because the SASA "states what the named plaintiffs will receive if the [SASA] were approved, but [says] nothing . . . about the other class members," it found a "problem with the class representatives adequately representing the putative class/subclasses." ER 323 at 12. Because the court's concern was exclusive to the "putative class/subclasses" in the SASA, that concern cannot justify decertifying the litigation class. Even assuming the court meant to apply its concern about representativeness to the litigation class, the terms of the SASA reveal no conflict between the representatives and other class members. Even if the terms of the SASA allowed for a potential future conflict, this would not justify decertification because "this circuit does not favor denial of class certification on the basis of speculative conflicts." *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003).

over every Rule 23 factor, failing even to identify which factor or factors plaintiffs had suddenly failed to meet. ER 323. As such, it is impossible to determine whether the court "adequately considered" the relevant factors, or even whether the court's decision was grounded "within the framework of Rule 23." *Valentino*, 97 F.3d at 1234; *Zinser,* 253 F.3d at 1186. Were the district court's unreasoned order (ER 323) permitted to stand, it would eviscerate substantive review of certification orders and render meaningless this Court's language in *Valentino*.

Because the district court abused its discretion in decertifying the litigation class without analysis, this Court should vacate the court's December 2, 2002 order (ER 323) to the extent it decertified the litigation class. Nothing in the record suggests that any "subsequent developments" occurred between the certification and decertification that bear in any way on plaintiffs' compliance with the Rule 23 requirements. *Gen. Telephone*, 457 U.S. at 160. As such, this Court should order the litigation class reinstated.

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

The Medicaid Act requires that states provide Medicaid services with reasonable promptness. 42 U.S.C. § 1396a(a)(8). Courts have held that the implementing regulations "define the contours of the statutory right to reasonably prompt provision of assistance," requiring provision of services within 90 days.

Doe v. Chiles, 136 F.3d at 712, 717, 722 (ICF/MR services); *accord*, *Lewis v. New Mexico Department of Health*, 94 F. Supp. 2d 1217, 1234 (D. N.M. 2000) (HCBS services) and *Boulet v. Cellucci,* 107 F. Supp. 2d 61, 72-73 (D.Mass. 2000) (HCBS services). *See also Blanco v. Anderson*, 39 F.3d 969, 972 (9th Cir. 1994) (treating 45-day limit for nondisabled persons established by 42 C.F.R. § 435.911(a)(2) as controlling definition of "reasonable promptness" for Medicaid services); *Sobky v. Smoley*, 855 F. Supp. 1123, 1147 (E.D. Cal. 1994) (42 C.F.R. § 435.911 "establish[es] definite standards for measuring acceptable delay in providing services"). "It is axiomatic that delays of 'several years' . . . are far outside the realm of reasonableness." *Doe v. Chiles*, 136 F.3d at 717; see also *Lewis*, 94 F. Supp. 2d at 1235 ("service delays of two or more years 'are egregious enough that the reasonableness requirement does not strain judicial competence'"). Indeed the district court found that "the reasonably prompt delivery of Medicaid medical assistance is an individual federal statutory right. . . ." ER 119 at 4.

First motion. Plaintiffs brought their first motion for partial summary judgment in August 2000. ER 33. Plaintiffs offered the unrebutted testimony of the Arc executive director that many Arc members have disabled family members who are on the HCBS waiver and who have failed to receive with reasonable promptness those waiver services that they need and are eligible for. ER 36 at 4. The district court noted that defendants did not rebut the Arc's claim, ER 119 at

10, but wrongly declined to grant partial summary judgment, remarking without explanation, "[n]or is the court convinced that the Arc would be entitled to judgment as a matter of law if certain of its members on the waiver in fact did not receive all the waiver services they desire." *Id.* But plaintiffs did not demand all the waiver services they *desire*, but those for which they are eligible. ER 34 at 2. They offered the requisite proof. ER 34-37. This Court should reverse and grant summary judgment that plaintiffs are due with reasonable promptness all the HCBS services for which they are eligible.

Second motion. By the time of plaintiffs' second motion for partial summary judgment in April 2003 the district court had decertified the class. ER 332, 333; ER 323. Nonetheless, denial of timely Medicaid services has been "one of the regular recurring problems for Arc members in recent years." ER 339 at 2. Therefore, on its own behalf, the Arc asked for declaratory and injunctive relief that its eligible members on the HCBS waiver were due needed waiver services promptly and that those not on the waiver were due ICF/MR services promptly. ER 332. On June 17, 2003, the district court, having decided that two other pending motions were moot, declared without explanation that it "denied" plaintiffs' summary judgment motion. ER 366 at 8. This was error.

1. Eligible Plaintiffs Are Entitled to HCBS Waiver Services. Arc members on the HCBS waiver are not receiving all the services that they need

and are eligible for with reasonable promptness. ER 333-337. In fact, in reply to an audit of the HCBS waiver by the Center for Medicare and Medicaid Services (CMS), the federal agency responsible for Medicaid, the state has admitted that defendant DDD had refused prompt Medicaid services. ER 339 at 9. Consequently in late 2002, in an attempt to convince CMS that the state had changed its ways, Linda Rolfe, director of the defendant DDD, issued a memorandum to her case managers across the state describing "Changes to Waiver Procedures." ER 339 at 6-8. That DDD memorandum stated in part that:

> **We will not use lack of funding as a defense when a fair hearing concerning access to services is held for a CAP Waiver client.**

ER 339 at 8 (bold in original). By titling the memorandum a "change," DDD has admitted that it indeed had had a policy and practice of wrongfully using a lack of funding as a reason to deny and delay services.

Notwithstanding these admissions, Arc members and others continue to wait for services for which they have been found eligible, perhaps because the directive applies only *at a fair hearing* and does not instruct DDD case managers to cease misleading their clients as to the proper legal standard in the ordinary course of business. *See* ER 339 at 6-8. DDD has informed Arc members of their fair hearing appeal rights, but then discouraged them from filing for a fair hearing, by saying that it will do "no good" because there are no funds available. ER 339 at 3. DDD itself has been largely responsible for misleading families into not making

requests for the services that are needed and into not appealing, because they illegally say that there are no funds available. *Id.* The practice continues.

Defendants failed to raise a material issue of fact about two illustrative cases of Arc members who were denied prompt HCBS services. One Arc member, the Waugh family, waited several years for a needed residential placement for their daughter. ER 336 at 1-2. Defendants admit (1) that the daughter with developmental disabilities is on the HCBS waiver, (2) that DDD placed her on the out-of-home residential placement list in July 2001, and (3) that as of April 2003 she had still not been given such a placement. ER 347 at 5. No more facts are required to justify summary judgment for the Arc declaring that HCBS waiver services are due with reasonable promptness.

In July 2002 Arc members, the Gries family, requested an out-of-home placement for their son who is on the HCBS waiver and were told, not that he was ineligible or did not need the service, but that there was no money for HCBS residential services.[9] ER 337 at 1-3; 347 at 3-5. He was still being denied the service in April 2003. ER 347 at 5. These and other Arc members have waited unreasonably long periods of time for HCBS services, and the Arc should be granted summary judgment.

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[9] Inadequate state funding does not excuse a state's failure to comply with Medicaid's reasonable promptness requirement. *Doe v. Chiles*, 136 F.3d at 722.

2. Eligible Plaintiffs Are Entitled to ICF/MR Services. Eligible Arc members were being denied access to ICF/MR services when plaintiffs filed this litigation in 1999 and such access continues to be blocked today. ER 339 at 5. In the Arc's motion for partial summary judgment, it noted that CMS, the federal monitoring agency, made a specific finding that the state was illegally blocking access to ICF/MR services and commented: "No information was provided [by the state] contesting the accuracy of the information presented in our finding on ICF/MR services or indicating the State disagreed with the conclusions reached by the CMS reviewers." ER 333 at 13. Defendants did not dispute that in their response to plaintiffs' motion. *See* ER 340.

Significant unrebutted evidence by Arc members was detailed below, including the Wilkins family's five-year struggle to find an institutional ICF/MR placement for their son with autism. ER 334 at 2-3. Defendants did not deny that the Wilkins' son was eligible for the ICF/MR services, but said that the state was "not accepting applications:" ER 334 at 2-3. The state concedes that, beginning in 1998, it did not provide the service because of his age. ER 342 at 1. But no statute or regulation allows the state to deny ICF/MR services to persons based on age. Furthermore, to the extent that a state's statutes or regulations conflict with the Medicaid statute and regulations, the former must yield to the latter. *Rinefierd v. Blum*, 412 N.Y.S.2d 526, 528, 66 A.D.2d 351, 353 (1979). Because the state

cannot dispute that services were delayed for years, the Arc should be granted a partial summary judgment for reasonably prompt ICF/MR services.

In addition, the State admits that Arc members, the Holladays, requested an out-of-home placement in 1999. ER 335 at 2, ER 342 at 5. Pamela Holladay requested ICF-MR services at least as early as 2000. ER 348 at 1. Defendants did not dispute that the Holladays' daughter was eligible for the services. ER 342 at 5. Defendants attempted to refute the Holladays' claim by saying that the Holladays were only willing to accept ICF/MR services in their particular area of the state. ER 342 at 5. The transcript of the Holladays' administrative appeal hearing, however, demonstrates otherwise. ER 348 at 3-4. The Holladay family's request for either an ICF/MR institutional or appropriate community placement was wrongfully denied in 2000, on the basis of inadequate state appropriations. ER 335 at 3. Therefore, there is no disputed issue over the Holladays' claim that they were denied reasonably prompt ICF/MR services. Other Arc members will need these services in the future. ER 339 at 3. Thus, the need for prompt access to ICF/MR services is a live dispute for Arc members, who need summary declaratory and injunctive relief from this Court.

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

Both the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794, prohibit public entities and recipients of

federal funds from discriminating against any individual by reason of disability. The implementing regulations for those statutes require that public and federally-funded entities provide programs and activities "in the most integrated setting appropriate to the needs of the qualified" individual with a disability. 28 C.F.R. § 35.130(d); 28 C.F.R. § 41.51(d). This so-called "integration mandate" was upheld by the United States Supreme Court in *Olmstead v. L.C.*, 517 U.S. 581, 587, 119 S.Ct. 2176 (1999), where the Court ruled that unnecessary segregation of persons with developmental disabilities is a violation of the ADA.

The district court dismissed this claim on summary judgment. ER 132 at 2-3. But the ADA claim is inherently factual and must be reserved for trial. *Crowder v. Kitagawa*, 81 F.3d 1480, 1485-86 (9th Cir. 1996). After the district court entered its order, the Ninth Circuit confirmed the plaintiffs' position in a case involving a directly analogous Washington state HCBS waiver. *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003); *accord Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003). Based on *Townsend,* this Court should reverse the decision of the district court, ER 132, and remand for trial the factual question whether plaintiffs' demands, if granted, would constitute a "fundamental alteration" of the state's programs, a defense under the ADA.

In its motion to dismiss the ADA claim, the state wrongly characterized plaintiffs' claim as one for new services, citing *Rodriguez v. City of New York*, 197

F.3d 611 (2nd Cir. 1999), *cert. denied*, 531 U.S. 864, 121 S.Ct.156 (2000). ER 101 at 1-4. Even though plaintiffs pointed out that they were not asking for new services, but for services to be provided in integrated settings, ER 112 at 1-2, the district court agreed with defendants. ER 132 at 3.

The same issue faced this Court in *Townsend*. There, this Court addressed another Washington HCBS waiver called COPES, which is primarily for senior citizens, allowing in-home services as an alternative to the placement of poor disabled seniors in nursing homes. *Townsend*, 328 F.3d at 514. Washington restricted access to the COPES waiver by adopting more stringent income thresholds for users of the HCBS waiver than for persons who were willing to choose institutional care in a nursing home. Plaintiff challenged that practice as a violation of *Olmstead*'s integration mandate: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d); *and see, Olmstead* 527 U.S. at 592. In rejecting the district court's ruling against the plaintiff, this Court explained that "where the issue is the *location* of services, not *whether* the services will be provided, *Olmstead* controls." *Townsend,* 328 F.3d at 517.

Here, as in *Townsend*, no new services are being demanded; instead, plaintiffs merely seek to have the *same* services delivered in settings that comply

with the integration mandate. At trial plaintiffs will offer proof of the settings in which the integration mandate can be met. As contrasted with the large state-operated institutions (*see* ER 36 at 3), there are two less institutional settings in which plaintiffs have requested services. Each provides the same services, but in a more integrated setting, like the community-based services in *Townsend*.

The first type includes the small ICF/MR group homes that may be as small as four persons.[10] Because as ICF/MRs, these group homes must meet all the statutory provisions of the federal Medicaid ICF/MR program, the only difference is whether *they are offered in* the large state institutions or the obviously more integrated setting of a group home with a minimum of four persons.

The second setting is that offered under the HCBS waiver program. Just as in *Townsend*, 328 F.3d at 517, plaintiffs here request no new services, merely a relocation of the services to more integrated settings. ER 112 at 1-2. Current ICF/MR services include toilet training, personal hygiene, dental hygiene, self-feeding, bathing, dressing, grooming, and communication. Wash. Admin. Code § 388-825-020. On remand, the issue will be whether providing those services in a more integrated setting in the community would constitute a

[10] The federal ICF/MR webpage notes that these homes are only technically "institutions" by placing that term in quotation marks. www.cms.hhs.gov/medicaid/icfmr.

"fundamental alteration," whether that placement be in a small ICF/MR group home or in an HCBS waiver program.

Fisher v. Oklahoma Health Care Authority, 335 F.3d 1175, 1183 (10th Cir. 2003), another case involving a Medicaid HCBS waiver, cited *Townsend* with approval and took it a step further. The court noted that, in enacting the ADA, Congress recognized that "while the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole. H. R. Rep. No. 101-485, pt. 3, at 50, *reprinted in* 1990 U.S.C.C.A.N. 445, 473. " *Id.*, 335 F.3d at 1183. "If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed." *Id.*

Plaintiffs look forward to proving that providing in alternative community settings the same services available in large state-operated ICF/MRs would not constitute a fundamental alteration. They request a remand to the district court with an instruction that short-term increased fiscal impact, by itself, is insufficient to prove a fundamental alteration.

CONCLUSION

The state's failure to provide necessary Medicaid services with reasonable promptness to poor persons with developmental disabilities, as required under 42

U.S.C. § 1396a(a)(8), will continue for the foreseeable future absent injunctive relief from this Court. This Court should reverse the district court's decision to dismiss the Arc and the individual plaintiffs. It should vacate the order decertifying the litigation class and reinstate the class as certified. It should reverse the lower court's denial of summary judgment to plaintiffs, and grant declaratory and injunctive relief to plaintiffs, declaring that the Arc and the class have a right to HCBS and ICF/MR services with reasonable promptness, not to exceed 90 days. It should reverse the district court's judgment against plaintiffs on the issue of their right under the ADA to receive services like those delivered in large institutions in more integrated settings in the community. Finally, it should remand the issue for trial on the question whether the state can prove that such a change would constitute a fundamental alteration in the Medicaid program.

Respectfully submitted this 24th day of November 2003.

LAW OFFICES OF LARRY A. JONES

Larry A. Jones, WSBA 18984
Christine Thompson Ibrahim, WSBA 28607

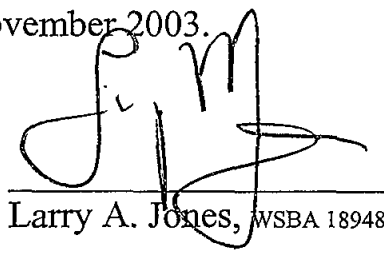
PRESTON GATES & ELLIS, LLP

Susan Delanty Jones, WSBA 9529
Todd L. Nunn, WSBA 23267
Attorneys for Plaintiffs-Appellants

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

Pursuant to FED. R. APP. 32(a)(7)(C) and CIRCUIT RULE 32-1, the foregoing opening brief is proportionally spaced, has a 14-point typeface, and contains 10,500 or fewer countable words.

Dated this 24th day of November 2003.



Larry A. Jones, WSBA 18948

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

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

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE ARC OF WASHINGTON STATE, INC., et al.,	)	
Plaintiffs/Appellants	)	No. 03-35605
vs.	)	CERTIFICATE OF SERVICE
LYLE QUASIM, in his official capacity as the Secretary of the Washington Department of Social and Health Services, et al.	)	
Defendants/Appellees	)	

SUSAN DELANTY JONES declares as follows:

I certify that on November 24, 2003, I caused to be served two copies of the Opening Brief of Plaintiffs/Appellants, and one copy of Plaintiff/Appellants' Excerpts of Record, by messenger to: Attorneys for Defendants, Lucy Isaki, Attorney General's Office, 900 4th Avenue, Suite 2000, Seattle, Washington 98164-1012.

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

Dated this 24 day of November 2003 at Seattle, Washington.

Susan Delanty Jones, WSBA 09529

28 USC 1291

Section 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 USC 1331

Section 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC 1343 (a)(3) and (a)(4)

Section 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section -

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 USC 2107(a)

Section 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

[CITE 29 U.S.C. Sec. 794]

Section 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined For the purposes of this section, the term "program or activity" means all of the operations of -

(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)

(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(3)

(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship -

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education,

health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

42 USC 12132

Section 12132. Discrimination

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

[CITE: 42USC1396a]

TITLE 42--THE PUBLIC HEALTH AND WELFARE CHAPTER 7--SOCIAL SECURITY

SUBCHAPTER XIX--GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

Sec. **1396a**. State plans for medical assistance
(**a**) Contents
A State plan for medical assistance must--

(8) 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;

United States Code
TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 - SOCIAL SECURITY
SUBCHAPTER XIX - GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

U.S. Code as of: 01/02/01
Section 1396n. Compliance with State plan and payment provisions

(c) Waiver respecting medical assistance requirement in State plan; scope, etc.; "habilitation services" defined; imposition of certain regulatory limits prohibited; computation of expenditures for certain disabled patients; coordinated services; substitution of participants

(1) The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan. For purposes of this subsection, the term "room and board" shall not include an amount established under a method determined by the State to reflect the portion of costs of rent and food attributable to an unrelated personal caregiver who is residing in the same household with an individual who, but for the assistance of such caregiver, would require admission to a hospital, nursing facility, or intermediate care facility for the mentally retarded.

(2) A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that -

(A) necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services under the waiver and to assure financial accountability for funds expended with respect to such services;

(B) the State will provide, with respect to individuals who -

(i) are entitled to medical assistance for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded under the State plan,

(ii) may require such services, and

(iii) may be eligible for such home or community-based care under such waiver,

for an evaluation of the need for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded;

(C) such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded;

(D) under such waiver the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals does not exceed 100 percent of the average per capita expenditure that the State reasonably estimates would have been made in that fiscal year for expenditures under the State plan for such individuals if the waiver had not been granted; and

(E) the State will provide to the Secretary annually, consistent with a data collection plan designed by the Secretary, information on the impact of the waiver granted under this subsection on the type and amount of medical assistance provided under the State plan and on the health and welfare of recipients.

42 USC 1983

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[**CITE: 28CFR35.130**]

TITLE 28--JUDICIAL ADMINISTRATION CHAPTER I--DEPARTMENT OF JUSTICE

PART 35--NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES--Table of Contents

Subpart B--General Requirements

Sec. 35.**130** General prohibitions against discrimination.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

[CITE: 28CFR41.51]

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER I--DEPARTMENT OF JUSTICE

PART 41--IMPLEMENTATION OF EXECUTIVE ORDER 12250, NONDISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS--Table of Contents

Subpart C--Guidelines for Determining Discriminatory Practices

Sec. 41.51

General prohibitions against discrimination.

General

(d) Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

[CITE 42 CFR 435.911]

TITLE 42--PUBLIC HEALTH

CHAPTER IV--CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES--(Continued)

PART 435--ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA--Table of Contents

Subpart J--Eligibility in the States and District of Columbia

Sec. 435.**911** Timely determination of eligibility.

(a) The agency must establish time standards for determining eligibility and inform the applicant of what they are. These standards may not exceed--

(1) Ninety days for applicants who apply for Medicaid on the basis of disability; and

(2) Forty-five days for all other applicants.

(b) The time standards must cover the period from the date of application to the date the agency mails notice of its decision to the applicant.

(c) The agency must determine eligibility within the standards except in unusual circumstances, for example--

(1) When the agency cannot reach a decision because the applicant or an examining physician delays or fails to take a required action, or

(2) When there is an administrative or other emergency beyond the agency's control.

(d) The agency must document the reasons for delay in the applicant's case record.

(e) The agency must not use the time standards--

(1) As a waiting period before determining eligibility; or

(2) As a reason for denying eligibility (because it has not determined eligibility within the time standards).

[44 FR 17937, Mar. 23, 1979, as amended at 45 FR 24887, Apr. 11, 1980; 54 FR 50762, Dec. 11, 1989]

[CITE: 42CFR441.300]

TITLE 42--PUBLIC HEALTH

CHAPTER IV--CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES--(Continued)

PART 441--SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES--Table of Contents

Subpart G--Home and Community-Based Services: Waiver Requirements

Sec. 441.**300** Basis and purpose.

Source: 46 FR 48541, Oct. 1, 1981, unless otherwise noted.

Section 1915(c) of the Act permits States to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization. Those services are defined in Sec. 440.180 of this subchapter. This subpart describes what the Medicaid agency must do to obtain a waiver.

Federal Rules of Civil Procedure (2003)

Rule 23. Class Actions

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Washington Rules of Professional Conduct

RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) For purposes of this rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) Otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or

(2) The broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.

[Effective September 1, 1985; amended effective September 1, 1995.]

RCW 24.03.095
Board of directors.

The affairs of a corporation shall be managed by a board of directors. Directors need not be residents of this state or members of the corporation unless the articles of incorporation or the bylaws so require. The articles of incorporation or the bylaws may prescribe other qualifications for directors.

RCW 71A.10.050

Appeal of department actions -- Right to.

(1) An applicant or recipient or former recipient of a developmental disabilities service under this title from the department of social and health services has the right to appeal the following department actions:

(a) A denial of an application for eligibility under RCW 71A.16.040;

(b) An unreasonable delay in acting on an application for eligibility, for a service, or for an alternative service under RCW 71A.18.040;

(c) A denial, reduction, or termination of a service;

(d) A claim that the person owes a debt to the state for an overpayment;

(e) A disagreement with an action of the secretary under RCW 71A.10.060 or 71A.10.070;

(f) A decision to return a resident of an [a] habilitation center to the community; and

(g) A decision to change a person's placement from one category of residential services to a different category of residential services.

The adjudicative proceeding is governed by the Administrative Procedure Act, chapter 34.05 RCW.

(2) This subsection applies only to an adjudicative proceeding in which the department action appealed is a decision to return a resident of a habilitation center to the community. The resident or his or her representative may appeal on the basis of whether the specific placement decision is in the best interests of the resident. When the resident or his or her representative files an application for an adjudicative proceeding under this section the department has the burden of proving that the specific placement decision is in the best interests of the resident.

(3) When the department takes any action described in subsection (1) of this section it shall give notice as provided by RCW 71A.10.060. The notice must include a statement advising the recipient of the right to an adjudicative proceeding and the time limits for filing an application for an adjudicative proceeding. Notice of a decision to return a resident of a habilitation center to the community under RCW 71A.20.080 must also include a statement advising the recipient of the right to file a petition for judicial review of an adverse adjudicative order as provided in chapter 34.05 RCW.

[1989 c 175 ? 138; 1988 c 176 ? 105.]

NOTES:

Effective date -- 1989 c 175: See note following RCW 34.05.010.

WAC 388-825-020 Definitions. "Abandonment" means action or inaction by a person or entity with a duty to care for a vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care.

"Adolescent" means a DDD eligible child age thirteen through seventeen years.

"Attendant care" means provision of physical and/or behavioral support to protect the safety and well being of a client.

"Best interest" includes, but is not limited to, client-centered benefits to:

(1) Prevent regression or loss of skills already acquired;

(2) Achieve or maintain economic self-support;

(3) Achieve or maintain self-sufficiency;

(4) Prevent or remedy neglect, abuse, or exploitation of individuals unable to protect their own interest;

(5) Preserve or reunite families; and

(6) Provide the least-restrictive setting that will meet the person's medical and personal needs.

"Client or person" means a person the division determines under RCW 71A.16.040 and WAC 388-825-030 eligible for division-funded services.

"Community support services" means one or more of the services listed in RCW 71A.12.040 including, but not limited to the following services: Architectural, case management, early childhood intervention, employment, counseling, family support, respite care, information and referral, health services and equipment, therapy services, and residential support.

"Department" means the department of social and health services of the state of Washington.

"Director" means the director of the division of developmental disabilities.

"Division or DDD" means the division of developmental disabilities of the department of social and health services.

"Emergency" means a sudden, unexpected occurrence demanding immediate action.

"Exemption" means the department's approval of a written request for an exception to a rule in this chapter.

"Family" means individuals, of any age, living together in the same household and related by blood, marriage, adoption or as a result of sharing legal custody of a minor child.

"Family resources coordinator" means the person who is:

(1) Recognized by the IDEA Part C lead agency; and

(2) Responsible for:

(a) Providing family resources coordination;

(b) Coordinating services across agencies; and

(c) Serving as a single contact to help families receiving assistance and services for their eligible children who are under three years of age.

"ICF/MR" means a facility certified as an intermediate care facility for the mentally retarded by Title XIX to provide services to the mentally retarded or persons with related conditions.

"ICF/MR Eligible" for admission to an ICF/MR means a person is determined by DDD as needing active treatment as defined in CFR 483.440. Active treatment requires:

(1) Twenty-four hour supervision; and

(2) Continuous training and physical assistance in order to function on a daily basis due to

deficits in the following areas: Toilet training, personal hygiene, dental hygiene, self-feeding, bathing, dressing, grooming, and communication.

"Individual" means a person applying for services from the division.

"Individual alternative living" means provision of community-based individualized client training, assistance and/or ongoing support to enable a client to live as independently as possible with minimal services.

"Individual supportive living service" (also known as companion home) means provision of twenty-four hour residential support in a nonlicensed home for one adult person with developmental disabilities.

"Intelligence quotient score" means a full scale score on the Wechsler, or the intelligence quotient score on the Stanford-Binet or the Leiter International Performance Scale.

"Medicaid personal care" is the provision of medically necessary personal care tasks as defined in chapter 388-15 WAC.

"Nonresidential programs" means programs including, but not limited to, county-funded habilitation services.

"Nursing facility eligible" means a person is assessed by DDD as meeting the requirements for admission to a licensed nursing home as defined in WAC 388-71-0700 (3) through (5). The person must require twenty-four hour care provided by or under the supervision of a licensed nurse.

"Other resources" means resources that may be available to the client, including but not limited to:

(1) Private insurance;

(2) Medicaid;

(3) Indian health care;

(4) Public school services through the office of the superintendent of public instruction; and

(5) Services through the department of health.

"Part C" means early intervention for children from birth through thirty-five months of age as defined in the Individuals with Disabilities Education Act (IDEA), Part C and 34 CFR, Part 303 and Washington's federally approved grant.

"Residential habilitation center" or **"RHC"** means a state-operated facility certified to provide ICF/MR and/or nursing facility level of care for persons with developmental disabilities.

"RHC capacity" means the maximum number of eligible persons that can reside in a residential habilitation center without exceeding its 1997 legislated budgeted capacity.

"Residential programs" means provision of support for persons in community living situations. Residential programs include DDD certified community residential services and support, both facility-based such as, licensed group homes, and non-facility based, i.e., supportive living, intensive tenant support, and state-operated living alternatives (SOLA). Other residential programs include individual alternative living, intensive individual supportive living services, adult family homes, adult residential care services, nursing homes, and children's foster homes.

"Respite care" means temporary residential services provided to a person and/or the person's family on an emergency or planned basis.

"Secretary" means the secretary of the department of social and health services or the secretary's designee.

"Vacancy" means an opening at a RHC, which when filled, would not require the RHC to exceed its 1997 biannually budgeted capacity, minus:

(1) Twenty-six beds designated for respite care use; and

(2) Any downsizing related to negotiations with the Department of Justice regarding community placements.

"Vulnerable adult" means a person who has a developmental disability as defined under RCW 71A.10.020.

WAC 388-825-120 Adjudicative proceeding. (1) A client, former client, or applicant acting on the applicant's own behalf or through an authorized representative has the right to an adjudicative proceeding to contest the following department actions:

(a) Denial or termination of eligibility set forth in WAC 388-825-100;

(b) Development or modification of the individual service plan set forth in WAC 388-825-050;

(c) Authorization, denial, reduction, or termination of services set forth in WAC 388-825-100;

(d) Admission or readmission to, or discharge from, a residential habilitation center;

(e) A claim the client, former client, or applicant owes an overpayment debt;

(f) A decision of the secretary under RCW 71A.10.060 or 71A.10.070;

(g) A decision to change a client's placement from one category of residential services to a different category of residential services.

(2) Adjudicative proceedings are governed by the Administrative Procedure Act (chapter 34.05 RCW), RCW 71A.10.050, the rules in this chapter, and by chapter 388-02 WAC. If any provision in this chapter conflicts with chapter 388-02 WAC, the provision in this chapter shall govern.

(3) The applicant's application for an adjudicative proceeding shall be in writing and filed with the DSHS office of appeals within twenty-eight days of receipt of the decision the appellant wishes to contest.

(4) The department shall not implement the following actions while an adjudicative proceeding is pending:

(a) Termination of eligibility;

(b) Reduction or termination of service, except when the action to reduce or terminate the service is based on the availability of funding and/or service; or

(c) Removal or transfer of a client from a service, except when a condition in subsection (5)(f) of this section is present.

(5) The department shall implement the following actions while an adjudicative proceeding is pending:

(a) Denial of eligibility;

(b) Development or modification of an individual service plan;

(c) Denial of service;

(d) Reduction or termination of service when the action to reduce or terminate the service is based on the availability of funding or service;

(e) After notification of an administrative law judge's (or review judge) ruling that the appellant has caused an unreasonable delay in the proceedings; or

(f) Removal or transfer of a client from a service when:

(i) An immediate threat to the client's life or health is present;

(ii) The client's service provider is no longer able to provide services due to:

(A) Termination of the provider's contract;

(B) Decertification of the provider;

(C) Nonrenewal of provider's contract;

(D) Revocation of provider's license; or

(E) Emergency license suspension.

(iii) The client, the parent when the client is a minor, or the guardian when the client is an adult, approves the decision.

(6) When the appellant files an application to contest a decision to return a resident of a state residential school to the community, the procedures specified in RCW 71A.10.050(2) shall govern the proceeding. These procedures include:

(a) A placement decision shall not be implemented during any period during which an appeal can be taken or while an appeal is pending and undecided unless the:

(i) Client's or the client's representative gives written consent; or

(ii) Administrative law judge (or review judge) after notice to the parties rules the appellant has caused an unreasonable delay in the proceedings.

(b) The burden of proof is on the department; and

(c) The burden of proof is whether the specific placement proposed by the department is in the best interests of the resident.

(7) The initial order shall be made within sixty days of the department's receipt of the application for an adjudicative proceeding. When a party files a petition for administrative review, the review order shall be made within sixty days of the department's receipt of the petition. The decision-rendering time is extended by as many days as the proceeding is continued on motion by, or with the assent of, the appellant.