IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

GERALD NELSON, by his legal guardian and next friend, JANE PRENTICE; JOAN BZDAWKA, by her legal guardian and next friend, RICHARD MILLER; SANDRA EHRLICHMAN, by her legal guardian and next friend, NANCY STEEVES; MARILYN BERDIKOFF, by her legal guardian and next friend, LOIS DEGNER; LENORE CZARNECKI, by her agent and next friend, CAROLYN CETNAROWSKI; and JOHN GORTON, by his agent and next friend, DEBORAK BRUNK, each on their own behalf and on behalf of a class of persons similarly situated,

Plaintiffs,

v. Case No. 04-C-0193

MILWAUKEE COUNTY; WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES; and HELENE NELSON, in her official capacity as Secretary of DHFS,

Defendants.

STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR CERTIFICATION OF INTERLOCUTORY ORDER PURSUANT TO 28 U.S.C. § 1292(B)

Defendants Wisconsin Department of Health and Family Services and Helene Nelson (collectively "the State defendants"), by their attorneys Maureen McGlynn Flanagan and Mary E. Burke, Assistant Attorneys General, and Peggy A. Lautenschlager, Attorney General, submit this brief in support of their motion for certification of the Court's interlocutory Order filed February 7, 2006, for appeal pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF THE CASE

Plaintiffs are all aged sixty or over and are either developmentally-disabled or suffer from the disabilities of aging. In their Fourth Amended Complaint, they allege nine separate claims on behalf of themselves and a putative class based on the Americans with Disabilites Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, the Rehabilitation Act, 29 U.S.C. § 701 *et seq*., and on 42 U.S.C. § 1396a(a)(30)(A), the "equal access" provision of the Medical Assistance ("Medicaid") Act, Title XIX of the Social Security Act. They allege that the defendants, including the Wisconsin Department of Health and Family Services ("DHFS"), DHFS Secretary Helene Nelson and Milwaukee County, are discriminating against themselves on the basis of their disabilities and violating § 1396a(a)(30)(A) of the Medicaid Act by refusing to increase the rates paid to their providers of residential, community-based services.

After answering the Fourth Amended Complaint, both the State and the County defendants moved to dismiss, challenging the plaintiffs' standing to attack the capitated rates paid by DHFS to Milwaukee County and the rates the County pays their providers, as well as the sufficiency of all nine claims of the latest amended complaint. On February 7, 2006, the Court issued an interlocutory Decision and Order partially granting some of defendants' motions, agreeing that plaintiffs have alleged no past injuries to themselves and, therefore, lack standing to pursue retroactive monetary and declaratory relief. The Court also limited plaintiffs' discrimination claims to forms of discrimination based on the ADA or Rehabilitation Act, eliminating allegations of age discrimination or discrimination based on county of residency.

In all other respects, however, the Court denied the motions to dismiss, concluding that plaintiffs have standing to seek prospective relief based on the alleged inadequacy of the capitated rates paid by DHFS to Milwaukee County and, in turn, the rates Milwaukee County is

willing to pay plaintiffs' providers. In addition, the Court concluded that all nine claims survive, either entirely or in part, the defendants' motions for judgment on the pleadings, F.R.C.P. 12(b)(6) and 12(c). In particular, the Court concluded that § 1396a(a)(30)(A) of the Medicaid Act creates a private right of action enforceable under the Civil Rights Act, 42 U.S.C. § 1983 (*see* Order at 18-21).

The State defendants now move the Court to amend the February 7 Order to include a statement certifying the interlocutory order for appeal pursuant to 28 U.S.C. § 1292(b). As further argued below, the Order presents two controlling questions of law—plaintiffs' standing to seek prospective relief and whether § 1396a(a)(30)(A) creates a private right of action for Medicaid recipients—as to which there are substantial grounds for difference of opinion. Moreover, an immediate appeal from the Order is likely to advance materially the ultimate termination of this litigation.

ARGUMENT

CERTIFICATION IS APPROPRIATE BECAUSE THE FEBRUARY 7, 2006, ORDER FULFILLS THE CRITERIA FOR AN IMMEDIATE APPEAL REQUIRED BY 28 U.S.C. § 1292(B).

The State defendants request the certification from this Court necessary to seek immediate review by the court of appeals of the interlocutory Order of February 7, 2006. Pursuant to 28 U.S.C. § 1292(b),

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in

> the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

In order for the State defendants to petition for permission to appeal, this Court must certify that: (1) the order presents a controlling question of law, (2) there is a substantial ground for a difference of opinion on the question, and (3) an immediate appeal and resolution of the question promises to materially speed up the litigation. *See Ahrenholz v. Board of Trustees of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). All criteria must be satisfied before a district court may certify its order. *See id.* at 676.

"A controlling question of law must encompass at the very least every Order which, if erroneous, would be reversible error on final appeal." *Katz v. Carte Blanche Corporation*, 496 F.2d 747, 755 (3rd Cir. 1974). The term is clearly not so limited, however, and has long been construed to mean that the question must be "serious to the conduct of the litigation, either practically or legally." *Id.*, quoted in *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991). "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enterp. v. Tushie-Montgomery Assoc.*, 86 F.3d 656, 659 (7th Cir. 1996) (citation omitted).

The State defendants respectfully submit that the February 7 Order plainly presents two controlling questions of law: first, whether plaintiffs' claims of future injury based on the claimed inadequacy of the rates paid their long-term residential care providers are sufficiently ripe to confer standing; and secondly, whether plaintiffs have a private right of action to challenge the adequacy of the rates being paid to their providers based on 42 U.S.C. §§ 1983 and 1396a(a)(30)(A). By even the strictest standard, these two questions are "controlling" because,

if this Court has decided them wrongly, the decision on either one would constitute reversible error. *Katz*, 496 F.2d at 755. Clearly, whether the plaintiffs have standing to pursue their prospective claims and have a private right of action to attack the rates paid their providers under the Medicaid Act are critical, both legally and practically, to the conduct of this litigation. *Cf. Sokaogon Gaming Enterprise Corp.*, 86 F.3d at 659.

Secondly, there is substantial ground for difference of opinion on both the question of plaintiffs' standing and on whether they have a private right of action based on § 1396a(a)(30)(A). On the issue of standing, this Court concluded that the prospect that plaintiffs might have to move from one community-based residential setting to another, combined with the possibility that, at some future time, they might suffer "trauma and deterioration" constitute "a threat of injury that is real and immediate" (Order at 8). Neither the plaintiffs nor the Court has cited any case with similar facts that supports the Court's conclusion. The State defendants respectfully suggest that there is "substantial ground" for a difference of opinion on this point, given the requirements of settled precedent for establishing standing and ripeness. *Cf. Tobin for Governor v. Illinois State Bd. of Elect.*, 268 F.3d 517, 527-28 (7th Cir. 2001) (the "injury in fact" requirement requires plaintiffs to establish he or she is "immediately in danger of sustaining some direct injury"; speculation is insufficient).

That there is substantial ground for difference of opinion on the question whether Medicaid recipients have a private right of action based on the § 1396a(a)(30)(A) is beyond debate. Although this Court relied primarily on the unreported decision of the Northern District of Illinois in *Memisovski ex rel. Memisovski v. Maram*, 2004 WL 1878332 (N.D. Ill. 2004), the Seventh Circuit has never directly ruled on this point. *See Methodist Hospitals, Inc. v Sullivan*, 91 F.3d 1026, 1029 (7th Cir. 1996) (holding that *providers* of medical care have a private right of

action based on § 1396a(a)(30)(A)). *Methodist Hospitals* is overdue for re-examination in light of *Gonzaga University v. Doe*, 536 U.S. 273, 279-86 (2002), however, and a growing number of cases decided since *Gonzaga* have now specifically held that § (a)(30)(A) does not confer a private right of action on either recipients or providers or both. *See Westside Mothers v. Olszewski.*, 368 F. Supp. 2d 740, 774 (E.D. Mich. 2005) (re-examining prior decisions recognizing private right in light of *Gonzaga*; finding no right of action for recipients); *Oklahoma Chap. of Amer. Aca., Pediat. v. Fogarty.*, 366 F. Supp. 2d 1050, 1102-04 (N.D. Okla. 2005) (analyzing cases; holding that recipients but not providers have right of action under (a)(30)(A)); *In re. NYAHSA Litigation*, 318 F. Supp. 2d 30, 39-40 (N.D.N.Y. 2004) (recipients are intended beneficiaries; no private right of action for providers); *Bio-Medical Applications of NC, Inc. v Electronic Data Systems Corp.*, __ F. Supp. 2d __, 2006 WL 270139 (E.D.N.C. 2006) (providers have no private right of action under (a)(30)(A)); *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 56-59 (1st Cir. 2004) (re-examines prior precedent; held: providers do not have private right of action, but rationale may affect recipients as well); *Sanchez v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005) (holding that neither recipients nor providers have private right of action under (a)(30)(A)).

Finally, an immediate appeal on the questions of standing and whether plaintiffs' have a private right of action under § 1396a(a)(30)(A) promises materially to speed up the ultimate termination of this litigation. Reversal of the Court's determination on the standing question would conclude the case entirely, while resolution of whether plaintiffs have a private right of action under § 1396a(a)(30)(A) could substantially limit the scope of discovery, dispositive motions and trial of the case. Because the primary purpose of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is that of materially advancing the ultimate termination of the litigation, *see*

Fisons Limited v. United States, 458 F.2d 1241, 1245 (7th Cir. 1972), the certification sought by the State defendants motion is particularly appropriate in this case.

CONCLUSION

For the reasons discussed above, the State defendants respectfully request certification from this Court pursuant to 28 U.S.C. § 1292(b) to seek review by the court of appeals of the interlocutory Order of February 7, 2006.

Dated this 23rd day of February, 2006.

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