UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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GERALD NELSON[1], et al.,

Plaintiffs,

vs. Case No. 04-C-0193

MILWAUKEE COUNTY, et al.,

Defendants.

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**BRIEF IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION**

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## INTRODUCTION

Plaintiffs had previously filed a motion for class certification, however, the parties and the Court elected to hold it in abeyance pending the resolution of defense motions on the pleadings. On February 7, 2006, the Court issued a decision resolving the State's motion to dismiss and the County's motion for judgment on the pleadings. Most of the claims were allowed to proceed, but the Court did some pruning. Plaintiffs are now further simplifying the case by agreeing to dismiss the Medicaid claim. (A stipulation to that effect is being filed with the Court.) The legal issues have been clarified and it is time to address the question of class certification. Plaintiffs submit that there are substantial common questions of law and fact concerning funding for group home services in Milwaukee County and that this case meets all other criteria for certification under Rule 23, Federal Rules of Civil Procedure.

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[1] Gerald Nelson passed away on February 6, 2006 at St. Luke's Hospital. He was there for about a month and never recovered from gall bladder surgery. His status as a plaintiff is being addressed by a separate submission. The Court may decide to remove Mr. Nelson's name from the caption and "promote" Ms. Bzdawka. Or the Court can simply leave Mr. Nelson listed as the lead plaintiff. See *Henrietta D. v. Gulliani*, 1996 WL 633382 (E.D.N.Y. 1996) (lead plaintiff died but remained on the caption).

## STANDARD FOR GRANTING CLASS CERTIFICATION

"[O]f necessity" the class certification process is "not accompanied by the traditional rules and procedures applicable to civil trials." *Eisen v. Carlisle & Jacquelin*, 477 U.S. 156, 178 (1974). In general, courts do not have "any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 178. The criteria for class certification are as follows:

> 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.

Fed. R. Civ. P. 23(a). There is also an implied requirement that the class be identifiable. *Clarke v. Ford Motor Co.*, 220 F.R.D. 568, 576 (E.D. Wis. 2004). If all of these criteria are satisfied, the court must then determine whether the class fits into one of the categories in Rule 23(b). *Id.* at 579.

## ARGUMENT

### I. The proposed class is sufficiently definite and identifiable.

Plaintiffs seek certification of the following class:

> All Milwaukee County residents with disabilities who are now or will in the future be: (1) eligible for the Family Care program, and (2) appropriate, based on reasonable professional judgment, for residential services in adult family homes and community-based residential facilities.

"An identifiable class exists if its members can be ascertained by reference to objective criteria." *Gomez v. Illinois. State. Bd. of Educ.*, 117 F.R.D. 394, 397 (N.D. Ill. 1987); *Clarke*, 220 F.R.D. at 576. Plaintiff classes are often defined in reference to eligibility for specified government programs. *Collins v. Hamilton*, 349 F.3d 371, 372 n. 1 (7th Cir. 2003).

The eligibility element in the proposed definition here is objective and clearly meets the requirement that the class be identifiable. The other element in the definition is appropriateness for services provided in either AFHs or CBRFs based on reasonable professional judgment. The scope of these services is defined generally by State statutes. Wis. Stat. §50.01(1)(a)1 & (1)(b) (AFH); Wis. Stat. §50.01(1g) (CBRF). The State regulations contain more specific provisions regarding service provision in both types of residential facilities. Ch. HFS 82 and 88, Wis. Adm Code (AFH); Ch. HFS 83, Wis. Adm. Code (CBRF). The regulations thus provide a framework for determining the type of individuals who are appropriate to live there. That, in turn, defines the class.

The proposed definition ties class membership to evaluations and determinations that are already being made on an ongoing basis by Family Care staff. Basing class membership on these familiar criteria results in an objective, definite and identifiable class definition.

**II. The class is so numerous that joinder of all members is impractical.**

The numerosity requirement of Rule 23(a) is satisfied where joinder of the individual members will be difficult or impractical; it need not be impossible. *Clarke I*, 220 F.R.D. at 578, citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). A reasonable estimate of class size is sufficient. *Leist v. Shawano County*, 91 F.R.D. 64, 67 (E.D. Wis. 1981). A potential class size of forty or more is generally sufficient to support certification. *Clarke I,* supra.; *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Joinder may also be impractical for reasons other that sheer numbers. "Inclusion of future class members makes joinder impractical regardless of the number of persons already injured." *Elliott v. Chicago Housing Authority*, 2000 WL 263730, *7 ((N.D. Ill. 2000) (citations omitted). This is common in public benefit cases where "the membership of the class is regularly shifting

as new applicants are granted benefits . . . and ot hers leave the rolls." *Raymond v. Rowland*, 200 F.R.D. 173, 179 (D. Conn. 2004). Characteristics of the class m embers may also be relevant. Disability is a factor. *Mississippi Protection and Advocacy v. Cotten* , 929 F.2d 1054, 1057 (5th Cir. 1991) ("no patient of the Center is likely to be capable of re presenting himself in this or any other court."). Financial st atus is another factor. *M.A.C. v. Betit* , 284 F.Supp. 2d 1298, 1303 (D.Utah 2003) (Medicaid clients "by definition lack the financial resources [to file] on their own.").

The class consists of more than 1,000 individuals. It is undisputed that approxim ately 1,080 current class m embers reside in AFHs and CBRFs funded through the F amily Care program. [Factual stipulation in connection with plaintiffs' motion for class certification: ¶1 - 100 AFH clients and 980 CBRF clients].[2] Moreover, the entire Family Care program currently serves about 5,800 Milwaukee County residents. [Factual stipulation: ¶2]. Many of the approxim ately 4,700 Family Care members who are not currently in an AFH/CBRF are part of the class because they are now appropriate for AFH/CBRFs eve n though they are living so mewhere else. In addition, many will b e appropriate in the f uture. Some will no longer b e able to liv e independently as their needs increas e. Others are now receiving m ore intensive services such as in nursing homes, but they will be able to live in an AFH/CBRF in the future as their condition improves or as comm unity care providers adopt new care methods and technologies. This is an example of the shiftin g membership concept common i n public benefit cases. *Raymond v. Rowland*, 200 F.R.D. at 179.

Yet more class members will be both eligible and appropriate at some point in the future. The Milwaukee County Disability Services Division now has approximately 350 clients in AFHs and 400 in CBRFs. [Factual stipulation: ¶3]. They are under 60 and are funded through the

[2] Plaintiffs are using approximate totals. Obviously, these numbers can be computed exactly, but only some time after they have been re ported, inputted into a data base and t hen verified. Given the size of the numbers here, an approximation of current totals should be sufficient.

Medicaid waiver programs rather than Family Care. *Id.* They now live in AFH/CBRFs and it is reasonable to assume that most will be appropriate for this level of care when they reach age 60.

Finally, there are unknown future class members. Some are future residents of Milwaukee County. Some are living in the County but have not yet become disabled, while others have disabilities and live in the County, but have not yet become eligible for Family Care because they are over the financial asset limit. All of these are future members of the proposed class who cannot possibly be ascertained at this time.

The proposed class satisfies the first Rule 23(a) element based on sheer numbers. It also satisfies other indicia of impracticality because it contains future members and is composed of individuals who are unlikely to bring their own actions due to their disabilities and their financial situation. Joinder of all class members is clearly impractical.

**III. There are questions of law and fact common to the class.**

The second Rule 23(a) element is the existence of common questions of law and fact. The test is satisfied by the presence of a single common legal or factual issue. *Clarke I*, 220 F.R.D. at 578-9. Class actions may be based on a common legal issue affecting persons with disabilities even though the precise services delivered to each class member will vary based on individual needs. *M.A.C. v. Bettit,* 284 F.Supp.2d at 1303 (Medicaid-funded services); *Bradley v. Harrelson*, 151 F.R.D. 422, 426 (M.D. Ala. 1993) (prison mental health care); *Armstead v. Pingree*, 629 F.Supp. 273, 278 (MD. Fla. 1986) (treatment conditions in state psychiatric hospitals); *Association for Retarded Citizens of North Dakota v. Olson*, 561 F.Supp. 473, 475 (D.N.D. 1983) (lack of community treatment and conditions in state facilities); *Johnson v. Brelje*, 482 F.Supp. 121, 125 (N.D. Ill. 1979) (pass and release procedures at state facility). The next sections discuss the specific legal and factual issues that are suitable for class treatment.

**A. Plaintiffs' ADA and §504 claims raise common issues of law and fact.**

The Court has ruled that the plaintiffs have stated a claim of discrimination under the ADA and §504 in comparison to other Milwaukee County residents with lesser disabilities. *Nelson*, *5 & n. 12. The Court permitted the plaintiffs' claims to go forward under the effective program access and participation provisions in 28 C.F.R. §35.130. *Nelson*, *6, citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir. 2003), cert. denied, 541 U.S. 936 (2004). It also allowed the plaintiffs' claims under the integration regulations: 28 C.F.R. §35.130(d) and 28 C.F.R. §41.51(d). *Nelson*, *6, citing *Bruggeman v. Blagojevich*, 324 F.3d at 911; *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999); *Radaszewski v. Maram*, 383 F.3d 599, 608 (7th Cir. 2004). Finally, the Court held that plaintiffs stated a claim under the reasonable accommodation provisions. *Nelson*, *7 (citations omitted). These claims are clearly suitable for class treatment. As the District Court in *Henrietta D.* put it, "the unifying legal and factual question is whether defendants violated their legal obligation to provide plaintiffs with meaningful access, as required by the ADA and the Rehabilitation Act, to public assistance benefits and services." 1996 WL 633382, *13 (E.D.N.Y. 1996). Add in the other legal claims and that is our case.

The complaint alleges wide-spread financial problems going beyond the named plaintiffs. [4th Amd. Cmplt. ¶57 - 64]. For example:

> The failure to provide reasonable rates and cost of living rate increases has and will cause numerous operators of adult family homes, community-based residential facilities and day programs[3] for persons in AFHs and CBRFs to either cut the level of services they provide or refuse to serve Milwaukee County residents with disabilities with the result that they will be forced to move from

[3] A brief explanation of the role of day programs is in order. Day programming can be part of the "individual service plan" for specific clients. §HFS 83.32(2)(a) and §HFS 83.33(2)(c). These clients leave the AFH/CBRF on a regular schedule during the week in order to attend work or activity programs. Not all AFH/CBRF residents attend day programs. For those who do, it represents another potential loss: "Clients develop attachments to the other clients and to particular staff members in their CBRF and at their day program." [Burr I Aff. ¶12]. Clients will lose contact with their friends if a change in residence makes continued attendance at their day program impossible for geographic or other reasons. Plaintiffs believe there is also a problem with day program rates. [Burr II Aff. ¶15].

> their homes and to lose their day services. This will cause substantial numbers of these residents to be admitted to institutions such as nursing homes.

[4th Amd. Cmplt. ¶64]. Moreover:

> All members of the proposed class are similarly affected by the failure of DHFS and Secretary Nelson to provide an adequate capitated rate to Milwaukee County Family Care and the failure of Milwaukee County to provide adequate payments to AFHs, and CBRFs and day programs for persons in AFHs and CBRFs.

[Id. at ¶129].

The sufficiency of the Family Care rates and the effect of those rates on the members of the class are common issues of fact and they relate to the common issues of law that the Court has already identified. The proposed class satisfied Rule 23(a)(2).

**B. The defendants have asserted class-based defenses to the ADA and Rehabilitation Act claims.**

The defendants have asserted a fundamental alteration defense to plaintiffs' ADA and §504 claims. [Dkt. #50: Stipulation regarding issues in dispute: defenses G & H]. This defense must be resolved in the aggregate rather than on an individual basis. *Olmstead*, 527 U.S. at 603-4. In applying the fundamental alteration defense, "[a] court must therefore take care to consider the cost of a plaintiff's care not in isolation, but in the context of the care [the State] must provide to all individuals with disabilities comparable to those of the plaintiff." *Radszewski v. Maram*, 383 F.3d at 614. In other words, the needs of other individuals who require AFH/CBRF care must be part of the reasonable modification analysis. Since the comparable individuals are also members of the proposed class, this class-based defense presents additional common issues of law and fact that support the motion for certification.

**IV. The claims of the named plaintiffs are typical of the class.**

The third element is whether the claims of the proposed class representatives are typical of the claims of the class as a whole. Rule 23(a)(3). The requirements of commonality and

typicality in Rule 23 "tend to merge." *General Telephone Co. of Southwest v. Falcon* , 457 U.S. 147, 157 n. 13 (1982). It is not a demanding requirement because it looks at the essential characteristics of the claims rather than whether they are identical in all respects. *Clarke*, supra.

There are five pairs of named plaintiffs consisting of a Family Care member and their guardian or agent under a power of attorney. (The allegations regarding a sixth pair, Gerald Nelson and his guardian, Jane Prentice, are being dismissed from the case due to his death.) The complaint alleges that they are all facing exactly the same funding issues and threats of losing their current AFH/CBRFs as the rest of the class. The claims of the named plaintiffs are typical under Rule 23(a)(3).

**V. The representatives will fairly and adequately protect the interests of the class.**

The fourth element is whether the named plaintiffs will be able to adequately represent the class. Fed. R. Civ. P. 23(a)(4). The class representatives may not have interests that conflict with or are antagonistic to those of the class. *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977); *Clarke*, 220 F.R.D. at 579. However, it is not necessary that their interests be identical. *Id.* citing *Edmondson v. Simon*, 86 F.R.D. 375, 381 (N.D.Ill. 1980). This conflict analysis is conducted at the outset of the case when it is not known exactly which class members will receive a specific benefit or suffer a specific detriment. *Uhl v. Thoroughbred Technology and Telecommunications, Inc*, 309 F.3d 978, 986 (7th Cir. 2002).

The individual plaintiffs are in AFHs and CBRFs that are in financial difficulty because of the Family Care rate problems that are the heart of this case. They all feel strongly about getting to the bottom of the funding issue and remaining in their current homes rather than face the trauma of moving and probable deterioration. [4th Amd. Cmplt. ¶89-90, 99-100, 108-9, 118-119, 126-7]. Two of the guardians submitted affidavits that show how strongly they feel about

this. [Dkt. #12-Steeves Aff. ¶17- 19]; [Dkt. #10-Miller Aff. ¶17]. Th is is not an abstract dispute for the plaintiffs. They have every reason to litigate the case vigorously on behalf of the class.

**VI. Plaintiffs' counsel will fairly and adequately represent the interests of the class.**

The qualifications of class counsel had been treated as an element of the named plaintiffs' adequacy as class representatives. Fed. R. Civ. P. 23(a)(4); *Clarke*, supra. As amended in 2003, Rule 23(g) continues the historic al requirement that counsel "fairly and adequately represent the interests of the class." Rule 23(g)(1)(B). It also contains additional provisions:

> In appointing class counsel, the court
> (i) must consider
> •the work counsel has done in iden tifying or investig ating potential claims in the action,
> •counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
> •counsel's knowledge of the applicable law, and
> •the resources counsel will commit to representing the class;
> (ii) may consider any other m atter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
> (iii) may direct potential class co unsel to pro vide information on an y subject pertinent to the appointm ent and to propose term s for attorneys fees and nontaxable costs; and
> (iv) may make further orders in connection with the appointment.

Rule 23(g)(1)(C). The following sections will discuss the se factors separately in regard to Atty. Pledl and the National Health Law Program , Inc. All of the elements going to the adequacy of counsels' representation have been satisfied.

**A. Atty. Robert Theine Pledl**

Atty. Pledl has obtained and reviewed t housands of pages of docum ents, and has consulted with numerous clients, potential clients, potential witnesses and experts to identify and investigate potential claim s in the case. Consis tent with the trend to wards later certification motions, counsel's efforts have significantly st reamlined both the class motion and the ultim ate presentation of the m erits. See Rule 23, A dvisory Committee Notes to the 2003 Am endments.

("discovery in aid of the certification decision also includes information required to identify the nature of the issues that actually will be presented at trial.") Several experts have been evaluating documents and they have prepared reports and affidavits going to the merits of the case. Motions on the pleadings have been fully briefed and decided. The work already performed on this case demonstrates Atty. Pledl's commitment.

A *curriculum vitae* was attached to the Second Pledl Affidavit. [Dkt. 53]. He has previously served as plaintiffs' counsel in three certified class actions. Atty. Pledl also has an extensive background in other litigation involving disability and civil rights issues.

**B. National Health Law Program, Inc.**

Atty. Sarah Jane Somers and Atty. M. Jane Perkins of the National Health Law Program have filed a notice of appearance and will be serving as co-counsel for the plaintiffs and the putative class. They have both filed Declarations setting out their background and qualifications in support of the class certification motion. The National Health Law Program is a non-profit law firm specializing in health issues affecting low-income people and individuals with disabilities.

Atty. Somers is a staff attorney in the Program's Chapel Hill office. She has previously served as counsel in several class actions including *Dubois v. Medows*, No. 4:03-cv-00107-SPM (N.D. Fla.); *Ball v. Biedess*, No. 4:00-cv-00067-EHC (D.Ariz.) and *Dunajski v. Keegan*, No. 3:99-cv-00353 (D.Ariz.). She has also written a number of manuals and articles on Medicaid and various health law topics. She is admitted to practice in the First, Third, Sixth and Ninth Circuit Courts of Appeal and several district courts. She is in the process of applying for admission in the Eastern District.

Atty. Perkins is the Program's Legal Director and is also located in the Chapel Hill office. She has very extensive experience in class action litigation involving Medicaid, civil rights and

children's health. She has also written extensively on Medicaid and health care poverty law topics. She is admitted to practice before the United States Supreme Court, the Third, Fourth, Sixth, Eighth, Ninth, Tenth and District of Columbia Courts of Appeals and various district courts. She is in the process of applying for admission in the Eastern District.

**VII. The proposed class action is maintainable under RULE 23(b)(2).**

Once all of Rule 23(a) criteria have been met, the next step is to determine whether the class meets one of the subsections in Rule 23(b). *Clarke*, 220 F.R.D. at 579. Rule 23(b)(2) applies to situations where the defendants "acted or refused to act on grounds equally applicable to the class" and plaintiffs seeks declaratory and injunctive relief. Cases alleging systemic problems in government programs are generally appropriate for certification under Rule 23(b)(2). *Raymond v. Rowland*, 220 F.R.D. at 181. This is just such a case. Any declaratory or injunctive relief will benefit the class as whole. *Clarke*, supra. The putative class action is maintainable under Rule 23(b)(2).

## CONCLUSION

Plaintiffs have requested certification of a class based on the following definition:

> All Milwaukee County residents with disabilities who are now or will in the future be: (1) eligible for the Family Care program, and (2) appropriate, based on reasonable professional judgment, for residential services in adult family homes and community-based residential facilities.

The proposed class meets all of the requirements of Rule 23. A class action will be the most efficient means of resolving the issues in the case. The named plaintiffs are suitable representatives and the undersigned have the necessary experience to serve as class counsel. It is respectfully requested that the Court certify this class.

Date: March 1, 2006

Respectf ully submitted,

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