

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

JAN 7 2002

JUDGE JOHN E. GRADY
UNITED STATES DISTRICT COURT

No. 00 C 5392

JUDGE GRADY

MAGISTRATE DENLOW

DOCKETED

JAN 15 2002

EDWARD BOUDREAU, by and through his
parents, Edwin and Ann Boudreau, et. al.,

Plaintiffs,

vs.

GEORGE H. RYAN, in his official capacity as
Governor of the State of Illinois, et al.,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW
IN RESPONSE TO THIS COURT'S ORDER OF JANUARY 11, 2001

Now comes the Plaintiffs, by and through their attorney, Robert H. Farley, Jr., Ltd., and Thomas G. Morrissey, Ltd., and submits this Memorandum of Law in response to this Court's Order of January 11, 2001, and states as follows:

I. All The Merits Issues Are Before This Court.

The Plaintiffs are entitled to a reasonable prompt placement in a residential medicaid setting after being found eligible by the Pre-Admission Screening (PAS) Agency. Under the Medicaid Act, the Plaintiffs are entitled to receive care and services "in the best interests of the recipients." 42 U.S.C. Sec. 1396a(a)(19).¹ The Medicaid Act requires that medical assistance be available in all political subdivisions of the State *id.* at (1). The Act also mandates that

¹ Experts, State Officials, QMRP and Service Providers are in agreement that it is in the best interests of the recipients that residential medicaid services be made available for persons to maintain their involvement with their family / community. Also, family participation is part of the active treatment program.

medical assistance be furnished with reasonable promptness to all eligible individuals, *id.* at (8), and be available to eligible recipients from qualified providers of their choice, *id.* at (23).

Moreover, the Act requires that medical assistance be furnished in the same amount, duration, and scope to all individuals in the group, *id.* at (10). Under the Rehabilitation Act, individuals with disabilities are to be placed in the least restrictive setting available. 29 U.S.C. Sec. 794(a); 28 C.F.R. Sec. 41.51(d).

II. The Four Proposed Class Representatives, Individually, Are Entitled To Relief And Have Standing To Act As Class Representatives

The Plaintiffs have brought this lawsuit, individually and on behalf of a class. One of the proposed class representatives, Douglas Wilsman was found on November 20, 2000 to be Medicaid eligible by the Pre-Admission Screening Agency, Options & Advocacy for McHenry County, Inc., for an intermediate care facility for the developmentally disabled (ICF/DD) and eligible for a community integrated living arrangement (CILA).

Options & Advocacy for McHenry County is a Pre-Admission Screening Agency and is an **agent** of the **State of Illinois**.² (emphasis added) Janice Prunier-King, the PAS Agent for

² 59 Ill. Adm. Code Section 120.10 defines Pre-Admission Screening (PAS) agents as follows:

Community agencies . . . selected by the Department to act as agents of the Department in carrying out certain federal and State requirements related to the assessment, determination or eligibility, and arrangements for Medicaid-funded services and supports for individuals with a developmental disability. (See Exhibit "A")

The Procedures Manual for Developmental Disabilities Pre-Admission Screening Agencies issued by the Illinois Department of Human Services, states as follows:

The role of the DD PAS agency is to ensure compliance with applicable Federal and State laws, arrange for and conduct assessments, make necessary determinations regarding eligibility for services,

Options & Advocacy testified that she has been unable to locate an appropriate ICF/DD which has a vacancy or opening for Douglas Wilsman.³ Neither has Douglas Wilsman turned down an ICF/DD placement. Additionally, both Melissa Wright and Edward McManus of DHS-ODD refused to approve CILA residential funding for Douglas Wilsman.

Similarly, the other three proposed class representatives, Christine Auer, Leah Jones, and Susan Lowrey have been found eligible for Medicaid services and have been unable to obtain a Medicaid residential placement, be it an ICF/DD or a CILA. No PAS agency has been able to locate an ICF/DD provider which has offered to provide Christine Auer, Leah Jones, or Susan Lowrey residential Medicaid services.⁴

All the class representatives have suffered an injury by not receiving a prompt medicaid residential placement, be it an ICF/DD or CILA. The Defendants are required to comply with

educate individuals and families, and make referrals and provide linkage to appropriate and needed services. (See Exhibit "B")

³ Sheltered Village, an ICF/DD provider refused to serve Douglas.

⁴ The claim by the Defendants lawyer, Michael Leech, that the proposed class representatives have been presented ICF/DDs which are available to them is not supported by the record. No PAS Agent has located an ICF/DD provider that has offered to serve any of the class representatives.

MR. LEECH:

What we find is with the four people who have been added, who we learned about approximately three weeks ago were going to be plaintiffs in this case, of those four people they have - - the best way I can put it is, **the issue is not availability. The issue appears to be preference.** And that's the difference between whether there is any kind of arguable case or not.

THE COURT: What do you mean by the issue being preference rather than availability?

MR. LEECH: . . . But they are not willing to take other options that are made available to them. (See Exhibit "C" - Transcript of October 17, 2001)

the provisions of the Medicaid Act. See *Wilder v. Virginia Hosp. Assn*, 496 U.S. 498, 502 (1990); *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985). One of those statutory provisions is section 1396a(a)(8), which provides in its entirety:

A State plan for medical assistance must -

- (8) provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.
42 U.S.C. Sec. 1396a(a)(8).

The implementing regulations promulgated by the federal Department of HHS pursuant to the Medicaid Act elaborate upon the state's obligation to act upon Medicaid applications with reasonable promptness.⁵ The regulations make clear that no undue delay may occur in the application for services.

The right created by section 1396a(a)(8) to receive "medical assistance" with "reasonable promptness" applies to all the Medicaid services for which the Plaintiffs in this case are eligible. The reasonable promptness provision extends beyond the application process itself to the provision of services as well. *Doe v. Chiles*, 136 F.3d 709, 721 (11th Cir. 1997).

⁵ A corresponding regulation provides that the responsible state agency "must," among other things, "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." 42 C.F.R. Sec. 435.930(a)-(b) (1996). Another regulation states that "[t]he agency must establish time standard for determining eligibility and inform the applicant of what they are." 42 C.F.R. Sec. 435.911(a) (1996). These period are **not to exceed "[n]inety days for applicants who apply for Medicaid on the basis of disability"** or "[f]orty-five days for all other applicants." 42 C.F.R. Sec. 435.911(a)(1)-(2) (1996). (emphasis added) Moreover, the agency "must not use the time standards" as "a waiting period." 42 C.F.R. Sec. 435.911(e)(1) 1996.

II. Class Certification Is Appropriate In This Case

A. Numerosity

Plaintiffs satisfy the numerosity requirement. The evidence is hundreds and hundreds of persons are waiting for residential Medicaid services. Association for Individual Development, Garden Center for the Handicapped, Clearbrook and Misericordia have persons waiting for ICF/DD services. Geri Pinzine, of Options & Advocacy, testified that there are persons who have been found eligible for Medicaid services by her agency and who have been unable to obtain ICF/DD services. Moreover, the Defendants acknowledge that numerosity can be satisfied if only 30 or 40 persons are seeking services.⁶

Common sense assumptions may be used to support a finding of numerosity. *Scholes v. Stone, E McGuire & Benjamin*, 143 F.R.D. 181, 184 (N.D. Ill. 1992) citing *Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 784 (N.D. Ill. 1984)

In *Boulet*, 107 F.Supp.2d at 80, where the Court certified a class action on behalf of the developmentally disabled, the Court stated that “individual joinder would be impractical, especially in light of the particular circumstances of plaintiffs’ medical and financial circumstances.” In the instant case, the Plaintiffs satisfy the numerosity required.

B. Commonality and Typicality

In *Boulet*, 107 F.Supp.2d at 81, the Court stated “[w]hile the plaintiffs have unique

⁶ MR. LEECH: . . . In that regard, I would see you [JUDGE GRADY] looking at two issues. One would be the issue that classically arises in the setting of a class action, which is numerosity. If there were only three persons, that isn’t enough. If you get 30 or 40, why, you are in class action territory. (See Exhibit “D” - Transcript of December 6, 2001 at p. 835-836)

medical and support requirements, this does not change the fact that this class action raises the same basic claim stemming from deficiencies in the operation of the Commonwealth's Plan." In *Benjamin H. v. Ohl*, 1999 U.S. Dist. LEXIS 22454 at *9, the Court stated:

The defendant maintains that there is no common question of law or fact because some members of the class need a different type or a different amount of care; some members of the class are currently receiving care while on the wait list, while others are not; and some are on the waiting list in the planning stage and will not need treatment until the future. The Court is of the opinion that these subtle differences noted by the defendant are insufficient to find that the class members share no common issues of law or fact. The Rule does not require that each and every class member have identical factual and legal situations.

Where a question of law refers to standardized conduct by the defendants toward member of the proposed class the commonality requirement is usually met. *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988) citing *Franklin v. City of Chicago*, 102 F.R.D. 944, 949 (N.D. Ill. 1984).

Plaintiffs satisfy the commonality and typicality requirement.

C. Adequacy of Representation

The agents of the State of Illinois, the Pre-Admission Screening Agency admit that the four proposed class representatives have all done what was asked of them in seeking ICF/DD services. No Plaintiff has turned down an offer of ICF/DD placement. These four Plaintiffs have standing to adequately represent the interests of the class. There is no conflict of interest between the claims of these Plaintiffs and the class as the Defendants are required to provide a prompt ICF/DD placement or satisfy this entitlement with a prompt CILA placement.

The Defendants do not contest that counsel for the Plaintiffs are seasoned attorneys in complex litigation, including Section 1983 claims, civil rights, rights of the disabled and class

litigation.

Plaintiffs satisfy the adequacy of representation requirement.

D. F.R.C.P. 23(b)(2)

The Defendants have acted on grounds generally applicable to the Class, by not providing the full range of residential Medicaid services in either an appropriate ICF/DD or CILA. In *Boulet*, 107 F.Supp.2d at 81, the Court stated that 23(b)(2) certification was appropriate because “defendants are acting or refusing to act in a manner that is ‘generally applicable’ to the entire class.” Likewise, in *Benjamin H. v. Ohl*, 1999 U.S. Dist. LEXIS 22454 at *12, the Court stated:

This case fits squarely into the requirements of Rule 23(b)(2). The defendant, in her official capacity, has acted and may act in the future in a manner that affects the entire class’ ability to receive needed benefits in a timely manner. The effects on the class members are uniform, and the plaintiffs are seeking declaratory and injunction relief that will benefit the class as a whole.

The Plaintiffs have satisfied Rule 23(b)(2).

III. The Availability Of ICF/DD Beds

The issue of the availability or lack of availability of ICF/DD beds and where they are located address is being addressed upon the Defendants insistence that this Court conduct a *Szabo* hearing to prove their claim that there are appropriate ICF/DD beds available for the four class representatives. Plaintiffs have put on evidence before this Court to refute Defendant’s claim.

The issue of whether there are available ICF/DD beds and where they are located addresses both the merits of the case and the issue of class certification. The merits issues relate to “best interests of the recipients;” “freedom of choice;” “statewideness;” and “comparability

and uniformity of services.” For purposes of class certification, if there were available an appropriate ICF/DD bed for the four proposed class representatives and the putative class, then there would be no class and no injury.

In order to prevail on the motion for class certification, the Plaintiffs do not have to prove that there are in fact fewer vacancies in the relevant geographical area than are necessary to service the number of eligible applicants.⁷ However, in this case the Plaintiffs have litigated the issue and proved that there are fewer vacancies that are necessary to service the number of eligible applicants. The Defendant, Melissa Wright, is “certain there are eligible people on various lists throughout the Chicago metro and the rest of the state.” In response to the Court’s question, “Is that a problem,?” Ms. Wright replied, “It’s a problem in terms of people with disabilities who want services who can’t necessarily get them where they want them. Yes. That is a problem.” (Tr. 1506-1507) In 1999, Connie Simms of DHS-ODD contacted Gary Smith of the National Association of State Developmental Directors (NASDDS) and he estimated that there were between 4,000 - 6,000 persons in the State of Illinois seeking residential services. (Tr.

⁷ See *Newberg on Class Actions* (3rd Edition) Sec. 7.20 Prima Facie Showing of Class Entitlement. “It is generally accepted that Rule 23 should be liberally construed. Furthermore, Rule 23 contemplates a prompt class ruling by the court, often at the pleading stage. Given these factors, allegations of class facts, viewed in the light of attending facts and circumstances, are usually sufficient for a prima facie showing of entitlement to maintain a class action.”

Newberg, Sec. 7.26 states: “No matter how the initial class determination is raised, burden or proof concepts, if applicable at all concerning class facts, are governed by familiar principles and are not affected by the identity of the moving party. This rule is in contrast to the general rule that the moving party has the burden of proving facts in support of its motion. (fn) Class action determinations, by contrast, relate to whether a procedural device which has been invoked may be maintained under Rule 23 criteria. The accident of how this determination is precipitated is not of significance for burden of proof concepts, (fn) because the class proponent, usually the plaintiff, has the initial burden of demonstrating satisfaction of the Rule 23 requirements.”

1508-1510) Jeri Johnson of DHS-ODD testified that Lynn Handy of DHS-ODD and herself have heard from service providers that there are hundreds; thousands of developmentally disabled persons seeking residential services. (Tr. 752)

The unrebutted evidence at the hearing has clearly demonstrated that there are not enough ICF/DD openings or vacancies to provide services to the hundreds and hundreds of person who are seeking residential (ICF/DDs) services. Ms. Wright testified that there were only 18 ICF/DD vacancies in the Chicago metropolitan area in December, 2000 and only 18 in December, 2001. (Tr. 1517) The ICF/DDs in the Chicago metropolitan area are in excess of 99% occupied. (Tr. 1517-1518) In December, 2001, the DHS-ODD Statewide vacancies for ICF/DDs was approximately 167. (249 less the 87 shown for Pediatric Rehabilitation Institute which is not an acceptable provider per Ms. Wright)⁸ The ICF/DDs in the State of Illinois are approximately 97.5% occupied (6600 Statewide private ICF/DDs)

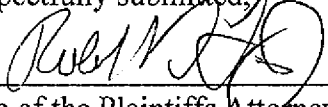
The purpose of evidence being offered by the Plaintiffs during this hearing concerning the issue of the availability of ICF/DD beds is in response to Defendants claim that the class representatives have no standing because there are available ICF/DD beds for them and they have suffered no injury. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Court stated:

That a suit may be a class action, however, adds nothing to the question of standing for even named plaintiffs who represent a class "must allege and show that they personally have been injured, not that the injury has been suffered by other unidentifiable members of the class to which they belong and which they purport to represent. 426 U.S. at 40 n 20 (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975))

⁸ See Exhibit "NN" - Volume V - Plaintiffs Exhibit Books.

In the instant case, the Plaintiffs have shown that they have personally been injured by the denial of medicaid residential (ICF/DD) services.

Respectfully submitted,



One of the Plaintiffs Attorney

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Illinois Administrative Code

☐ Illinois Administrative Code
☐ TITLE 59: MENTAL HEALTH
☐ CHAPTER I: DEPARTMENT OF HUMAN SERVICES
☐ PART 120 MEDICAID HOME AND COMMUNITY-BASED SERVICES WAIVER
PROGRAM FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES
☐ SUBPART A: GENERAL PROVISIONS

[Previous Document in Book]

[Next Document in Book]

59 Ill. Adm. Code 120.10 Definitions

For the purposes of this Part, the following terms are defined:

"Code." The Mental Health and Development Disabilities Code 405 ILCS 5.

"Community integrated living arrangement (CILA)." A living arrangement provided by a licensed community developmental disabilities services agency where eight or fewer individuals with a developmental disability reside under the supervision of the agency. Individuals receive a customized array of flexible habilitation or personal care supports and services in the home, in day programs and in other community locations under the supervision of a community support team within the local agency. 210 ILCS 135/3(d)

"Community living facility (CLF)." A facility geared to assist the individual in preparing for independent living. Emphasis is placed on teaching the individual adequate social and daily living skills. Individuals are involved in practical experiences in community living and are guided in planning for and using leisure time and developing the ability to function independently in the community. Community living facilities are limited to no more than 20 individuals, age 18 or older (Community Living Facilities Licensing Act 210 ILCS 35).

"Community residential alternatives (CRA)." A group home, as defined in the Community Residential Alternatives Licensing Act 210 ILCS 140, for eight or fewer adults with developmental disabilities who are unable to live independently but are capable of community living if provided with an appropriate level of supervision, assistance and support services. A community residential alternative may provide training and guidance to individuals in the skills of daily living and shall provide opportunities for participation in community activities. A community residential alternative shall not be a medical or nursing facility. 210 ILCS 140/3(4)

"Confidentiality Act." The Mental Health and Developmental Disabilities Confidentiality Act 740 ILCS 110.

"Days." Unless otherwise indicated, means calendar days.

"Department." The Department of Mental Health and Developmental Disabilities.

"Developmental training." A day program that focuses on the development and enhancement of daily living skills such as motor development, dressing, grooming, toileting, eating, language, reading and writing, quantitative skills, capacity for independent living, economic self-sufficiency and reduction of maladaptive behaviors.

"Director." The Director of the Department of Mental Health and

Exh. b. 2 A

Developmental Disabilities.

"Grant agreement." When fully executed the obligating instrument providing the basis for Departmental financial participation in grant-in-aid programs and which formalizes the contractual relationship between the Department and the provider indicating the amount of Department funds which will be paid to the provider for the provision of services as described in the grant agreement and the agency plan. Requirements for grant-in-aid funded providers are contained in the Department's rules at 59 Ill. Adm. Code 103.

"Guardian." A person appointed by the court as the plenary or limited guardian or conservator of the individual for an individual over age 18 so long as the limited guardian's duties encompass concerns related to service requirements or the natural or adoptive parent of a minor or a person acting as a parent of a minor.

"Habilitation." An effort directed toward the alleviation of a developmental disability or toward increasing the level of physical, mental, social or economic functioning of an individual with a developmental disability. Habilitation may include, but is not limited to diagnosis, evaluation, medical services, residential care, day care, special living arrangements, training, education, sheltered employment, supported employment, protective services, counseling and other services provided to individuals with developmental disabilities by developmental disabilities facilities. (Section 1-111 of the Code)

"Home individual program (HIP)." A program which provides support and training to one or two individuals with developmental disabilities in a home environment.

"Individual." A person with developmental disabilities who is requesting, is receiving or has received services under this Part.

"Individual service/support plan." A written plan of care, consistent with the individual's diagnosis and needs, which describes the habilitation goals and a projected timetable for their attainment and the services/support to be provided as defined in Section 4-309 of the Code.

"Intermediate care facility for the mentally retarded (ICF/MR)." Medicaid-certified long-term care facility as defined by 42 CFR 440.150 (1994) serving individuals with developmental disabilities. ICF/MR includes community facilities licensed by the Department of Public Health for skilled/pediatric nursing (77 Ill. Adm. Code 390) (if certified as ICF/MR), intermediate care for the developmentally disabled (77 Ill. Adm. Code 350), intermediate care for the developmentally disabled with 16 beds and under (77 Ill. Adm. Code 350) and State-operated developmental centers.

"Mental retardation." Significantly subaverage general intellectual functioning which exists concurrently with impairment in adaptive behavior and which originates before the age of 18 years. (Section 1-116 of the Code)

"Nursing facility." A Medicaid-certified long-term care facility. Nursing facilities include facilities licensed by the Department of Public Health for skilled/pediatric nursing (77 Ill. Adm. Code 390) (unless certified as ICF/MR), intermediate care and skilled nursing (77 Ill. Adm. Code 300).

(X) "Pre-admission screening and resident review (PASARR) agents." Community agencies or units of local government selected by the Department to act as agents of the Department in carrying out certain federal and State requirements related to the assessment,

A

**PROCEDURES MANUAL
FOR
DEVELOPMENTAL DISABILITIES
PRE-ADMISSION SCREENING AGENCIES**

July, 2000

Office of Developmental Disabilities
Illinois Department of Human Services

Exhibit B

MDrh 000100

INTRODUCTION

010.00 AUTHORITY AND RESPONSIBILITY

This manual provides the policies and procedures to be followed by Developmental Disabilities Pre-Admission Screening (DD PAS) agencies as set forth in the following documents:

- (1) the Omnibus Reconciliation Act of 1987;
- (2) the Illinois Nursing Home Care Act (210 ILCS 45/2-201.5);
- (3) Illinois Department of Public Aid Rule 89, Illinois Administrative Code 140.642 (Screening Assessment for Nursing Facility and Alternative Residential Settings and Services);
- (4) the State of Illinois Department of Human Services Community Service Agreement; and
- (5) 89 Illinois Administrative Code, Part 144 (Intermediate Care Facility/Mental Retardation).

020.00 ROLE OF PAS AGENCIES

The role of the DD PAS agency is to ensure compliance with applicable Federal and State laws, arrange for and conduct assessments, make necessary determinations regarding eligibility for services, educate individuals and families, and make referrals and provide linkage to appropriate and needed services. The PAS process will prevent inappropriate admissions to long term care facilities (nursing facilities and Intermediate Care Facilities serving persons with Developmental Disabilities [ICFDDs]) and inappropriate enrollments in waiver programs.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD BOUDREAU, by and through)	Docket No. 00 C 5392
his parents nfr Edwin Boudreau)	
nfr Ann Boudreau, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Chicago, Illinois
)	October 17, 2001
GEORGE H. RYAN, in his official)	9:30 o'clock a.m.
capacity as Governor of the)	
State of Illinois, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS - MOTIONS
BEFORE THE HONORABLE JOHN F. GRADY

APPEARANCES:

For the Plaintiffs:	ROBERT H. FARLEY, JR., LTD., by MR. ROBERT HUGH FARLEY, JR. 1155 South Washington Naperville, Illinois 60540
	MR. THOMAS G. MORRISSEY 10249 South Western Avenue Chicago, Illinois 60643
For the Defendants:	HINSHAW & CULBERTSON, by MR. MICHAEL JOHN LEECH 222 North LaSalle Street Suite 300 Chicago, Illinois 60601
	HINSHAW & CULBERTSON, by MS. RENDI L. MANN-STADT 400 South Ninth Street Suite 200 Springfield, Illinois 62701

ALEXANDRA ROTH, CSR, RPR
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Exhibit C

1 proceed as a class action, your Honor should make what factual
2 inquiries are necessary. We think that would help, put the
3 parents, the guardians of the disabled on the stand that they
4 can adequately represent the class.

5 THE COURT: Mr. Leech?

6 MR. LEECH: Your Honor, this motion is one that
7 essentially is trying to cut us off from being able to do
8 discovery in order to address that very issue of class
9 certification. As your Honor will remember, you had suggested
10 that it makes sense to start with the strong ones. If you find
11 you are satisfied you have good class representatives there,
12 you can go forward.

13 What we find is with the four people who have been
14 added, who we learned about approximately three weeks ago were
15 going to be plaintiffs in this case, of those four people they
16 have -- the best way I can put it is, the issue is not
17 availability. The issue appears to be preference. And that's
18 the difference between whether there is any kind of arguable
19 case or not.

20 Now, having taken the depositions of the plaintiffs
21 and having documents from the PAS agents is a start to
22 resolving that issue. But the people in the PAS agency --

23 THE COURT: What do you mean by the issue being
24 preference rather than availability?

25 MR. LEECH: I'm sorry. Let me explain that.

"C"

1 What we are finding is that people who don't -- among
2 the plaintiffs being tendered to us who don't have ICF/DD
3 placements, don't have ICF/DD placements because they place
4 limitations on where they are prepared to go. They'll be happy
5 to go and accept an ICF/DD placement at Misericordia or at
6 Lamb's Farm, places that are extremely sought after by people
7 in the community. But they are not willing to take other
8 options that are made available to them.

9 THE COURT: Let me interrupt a minute.

10 Mr. Farley, what do you say about that?

11 MR. FARLEY: Judge, we -- to address that, we filed
12 additional factual submissions in support of class
13 certification. We dealt with the issue that ICF/DDs are not
14 readily available. We attached deposition transcript from the
15 state's only people that say there are not plenty of ICF/DD
16 beds in the Chicago metropolitan area. And for one of the
17 plaintiffs who is mildly retarded the state admitted that there
18 are very few beds that would be available. Most ICF/DDs
19 wouldn't take him.

20 So it's not a question of preference, we don't want
21 anything. They sought placement at multiple locations and they
22 can't get in.

23 THE COURT: Let's assume that they can't get in but
24 they are only interested in one place.

25 MR. FARLEY: No, Judge. The facts are that they have

"C"

1 was a transitional plan in terms of how to address this.

2 THE COURT: All right. Mr. Leech, let me hear from
3 you.

4 MR. LEECH: Your Honor, I have -- going to ask for
5 your indulgence because I have a whole series of points. Our
6 introspection really consisted of going through the recitation
7 of how you described the issue. You said, if I've got the
8 issue wrong, why, now is the time to tell me, and encouraged us
9 to discuss it with you.

10 I don't quite want to put it that way, but there
11 are -- I think just to read what your Honor said. "The
12 question is, are there persons who reside in the nine-county
13 area who are eligible for residential services who because of
14 the shortage of appropriate placements, wherever those
15 appropriate placements might be found, are unable to be placed?
16 And if the answer is yes, then do these four plaintiffs more or
17 less adequately represent the class of such persons?"

18 Now, I realize you are doing that off the cuff. But
19 it seemed to us that there were a number of issues that were
20 lurking within that statement. And I want to start at the
21 first part about are there persons. In that regard, I would
22 see you looking at two issues. One would be the issue that
23 classically arises in the setting of a class action, which is
24 numerosity. If there were only three persons, that isn't
25 enough. If you get 30 or 40, why, you are in class action

Exhibit "D"

1 territory.

2 But there is a second important issue that has to do
3 with the way the plaintiffs are putting on the case. You'll
4 recall in ruling on the motion to dismiss, you had cited the
5 Mallett case and pointed out that an individual denying of
6 services for a failure to follow the state plan, that's not
7 actionable. The Seventh Circuit says so.

8 It's the failure of the plan -- and we have a kind of
9 conceptional problem here. It isn't as if the plaintiffs have
10 pulled out and handed to you the Illinois Medicaid Plan and
11 said, here is where it's missing something. They've gone far
12 outside that. And I understand why. The priority placement
13 guidelines, for instance, are central to the operation of the
14 waiver part of the plan. And so it's appropriate to go there.


15 But it's a slippery slope down to a series of isolated
16 alleged failures to follow the plan being made out to say,
17 well, here is what the plan shows. So that it seems to me is
18 an issue, do we have something that's a systemic, if you will,
19 kind of problem?

20 How you measure that I think is a difficult thing for
21 you to struggle with for a couple of reasons. And the law has
22 ways of addressing these things. In the context of employment
23 discrimination, you have a sort of standard operating procedure
24 standard. In the municipal liability cases the question is,
25 well, what's the policy of the municipality?

"D"

CERTIFICATE OF SERVICE

I, Robert H. Farley, Jr., Attorney for the Plaintiffs, deposes and states that he served a copy of the foregoing Plaintiffs Memorandum of Law by hand delivering a copy to Hinshaw & Culbertson (Attn. Steven M. Puiszis / Michael Leech) 222 N. LaSalle Street, Suite 300, Chicago, IL on January 14, 2002.



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