

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JAMES STALEY, by and through his mother and next)
friend KAREN STALEY; HELEN HEALY, by and)
through her mother and next friend SUSAN)
SCHREPPING, TARA PETERS, by and through her)
mother and next friend CHRIS KANNIER; JOHN)
DUFFIELD, by and through his mother and guardian)
LAURIE DUFFIELD; MOLLY DRUMMOND, by)
and through her mother and next friend DIANN)
DRUMMOND, and THE ARC OF OREGON,)
individually and on behalf of all others similarly)
situated,)

Plaintiffs,)

v.)

JOHN KITZHABER, Governor of the State of)
Oregon, individually and in his official capacity; GARY)
WEEKS, Director of the Oregon Department of)
Human Services, individually and in his official)
capacity, and OREGON DEPARTMENT OF)
HUMAN SERVICES,)

Defendants.)

STEWART, Magistrate Judge:

CV-00-0078-ST

OPINION AND ORDER

INTRODUCTION

Plaintiffs, who are five adults with developmental disabilities, filed this action in January 2000 against defendants John Kitzhaber, Governor of the State of Oregon, Gary Weeks, Director of the Oregon Department of Human Services, and the Oregon Department of Human Services (plaintiff the Arc of Oregon was subsequently added) seeking Medicaid services in the most integrated setting appropriate to their needs. The individual plaintiffs allege that they remained for years on waiting lists for necessary residential or in-home services and other support services, in violation of the Medicaid Act (Title XIX of the Social Security Act) and Title II of the Americans with Disabilities Act.

The parties entered into a settlement agreement on September 11, 2000. This six-year agreement provides relief to plaintiffs, as well as all others similarly situated. Because the settlement affects all individuals in the State of Oregon with developmental disabilities who are or may be eligible to receive services under the federal Medicaid program, the parties stipulated that the action be amended to add class action allegations and to another plaintiff, The Arc of Oregon, a state-wide non-profit membership organization comprised of persons with mental retardation, their parents and friends, and mental retardation professionals. Accordingly, plaintiffs filed a Third Amended Complaint on September 20, 2000 and now move this court for an order certifying a class action for settlement purposes only and granting preliminary approval of the settlement reached between plaintiffs and defendants. This court has federal question jurisdiction under 28 USC § 1331 and all parties have consented to allow a Magistrate Judge to enter final orders and judgment in this case in accordance with FRCP 73 and 28 USC § 636(c).

For the reasons set forth below, plaintiffs' Motion for an Order Certifying a Settlement Class and For Preliminary Approval of Class Action Settlement (docket #26) is GRANTED.

STANDARDS

Pursuant to Federal Rule of Civil Procedure ("FRCP") 23, plaintiffs seeking class certification must satisfy each of the four conditions required by FRCP 23(a) and at least one of the conditions of FRCP 23(b). *Eisen v. Carlisle & Jacquelin*, 417 US 156, 163 (1974).

The Supreme Court has recognized that FRCP 23 expresses a policy in favor of litigation in which common interests, or common questions of law or fact, are disposed of (where feasible) in a single lawsuit. *Gulf Oil Co. v. Bernard*, 452 US 89, 99 n11 (1981). Thus, FRCP 23 warrants an expansive construction and courts should err on the side of permitting the matter to proceed as a class action. *Eisenberg v. Gagnon*, 766 F2d 770, 785 (3d Cir 1985), *cert denied sub nom. Wassertrom v. Eisenberg*, 474 US 946 (1985). In addition, in ruling on such a motion, the allegations of the complaint are taken as true and the court may not consider the merits of the case. *Guenther v. Pacific Telecom, Inc.*, 123 FRD 333, 335 (D Or 1988).

DISCUSSION

The parties jointly move this court for: (1) certification of the class; and (2) preliminary approval of the class settlement agreement.

I. Certification of the Class

A. FRCP 23(a)

FRCP 23(a) requires that in order to obtain certification, plaintiffs must demonstrate that (1) the class is so numerous as to render joinder of all members impractical; (2) common questions of law or

fact exist; (3) the claims of the named plaintiffs are typical of the claims of the class; and (4) the class representatives will fairly and adequately protect the interests of the class. *General Telephone Co. v. Equal Opportunity Comm'n*, 446 US 318, 321, n3 (1980).

1. Numerosity

The numerosity requirement of Rule 23(a) relates to the impracticability of joining all potential members of the proposed class. FRCP 23(a), however, does not obligate plaintiffs to demonstrate that the joinder of all members of the proposed class is impossible; rather plaintiffs need only show that joinder would be difficult or inconvenient. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F2d 909 (9th Cir 1964). In this district, approximately forty members are sufficient to satisfy the numerosity requirement. *Wilcox Development Co. v. First Interstate Bank*, 97 FRD 440, 443 (D Or 1983).

In the instant case, there are over 4,000 people throughout the State of Oregon with developmental disabilities who are on the waiting list to receive Medicaid services, and there may be thousands more who are not on the list but who qualify for Medicaid services. Thus, the joinder of all such parties is impracticable and plaintiff satisfy the requirement of “numerosity.”

2. Commonality

FRCP 23(a)(2) requires that questions of law or fact be common to the class. There need not be a finding that every question of law or fact is common to every class member, however. *Beebe v. Pacific Realty Trust*, 99 FRD 60, 64 (D Or 1983). Rather, plaintiffs must show at least one issue, either factual or legal, whose resolution will affect all or a significant number of the putative class members. *Id.* There is commonality where the question of law linking the class members is

substantially related to the resolution of the litigation. *Jordan v. County of Los Angeles*, 669 F2d 1311, 1320 (9th Cir 1982).

This complaint sets forth a pattern and practice on the part of defendants that allegedly violates rights secured by Title XIX of the Social Security Act (Medicaid), Title II of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs have alleged systematic failure on the part of defendants to provide needed Medicaid services to which plaintiffs are entitled, to provide services in the most integrated setting, and to furnish such services with reasonable promptness.

All of plaintiffs' claims involve common factual questions concerning the manner in which defendants have exercised their legal responsibilities to persons with developmental disabilities. Each of the plaintiffs is or may be eligible to receive services under the federal Medicaid program. Defendants' inaction in the face of those claims for services is a key fact which all plaintiffs have in common and is the basis of their claim for relief. Common issues of fact clearly predominate over individual ones in this case, rendering class certification appropriate. *Basic, Inc. v. Levinson*, 485 US 224, 228-29 & 250 (1988).

Plaintiffs' legal claims similarly reflect a core of commonality. As set forth above, plaintiffs contend that defendants' failure to provide timely, needed services for people with developmental disabilities who are eligible under the federal Medicaid program contravenes federal law. This is the common legal grievance of all class members.

In assessing commonality, it is essential to note that factual variations among the claims of individual members of the proposed class do not bar class certification under FRCP 23(a)(2). *Hanlon*

v. Chrysler Corp., 150 F3d 1011, 1019 (9th Cir 1998); *Beebe*, 99 FRD at 64. While the factual circumstances of individual class members, such as time on the waiting list and the specific services needed, may vary to some extent, such differences are not controlling since all members of the proposed class rely on common legal theories. *Califano v. Yamasaki*, 442 US 682, 701 (1979) (issue of whether a hearing was required before defendant could recoup Social Security overpayments turned on questions of law applicable in the same manner to each member of the class). Moreover, it is the defendants' conduct that is the subject of the present litigation, and that conduct reflects a common issue for all members of the proposed class. *Hanlon*, at 1019-20.

A fair review of plaintiffs' claims yields the conclusion that questions of law and of fact are common to all members of the class. Accordingly, plaintiffs meet the commonality requirements of FRCP 23(a)(2).

3. Typicality

FRCP 23(a)(3) requires that the claims or defenses of the representative parties be typical of those of the class. This criterion is said to limit the class claims to those fairly encompassed by the named plaintiffs' claims. *General Telephone Co.*, 446 US at 330. Where there is such an alignment of interests, the named plaintiffs who vigorously pursue their own interests will necessarily advance the interests of the class.

The Rule does not, however, mandate that the claims of individual class members be identical. *Hanlon*, 150 F3d at 1020. According to the Ninth Circuit, a central issue for consideration is the systemic practices of defendants. When the alleged conduct affects both the named representatives

and the class sought to be represented, the typicality requirement is met regardless of factual differences between individual claims. *Jordan*, 669 F2d at 1321.

In the present action, plaintiffs easily meet this standard with respect to the proposed class. They have alleged systemic violations of Title XIX of the Social Security Act, Title II of the ADA, Section 504 of the Rehabilitation Act, and the Due Process Clause of the United States Constitution. The named plaintiffs have been adversely affected in the same way as the other class members: they have been denied needed services. They are fully qualified to serve as class representatives.

In addition, plaintiffs are not subject to any disqualifying conditions which would bar their representation of the class. Plaintiffs are not vulnerable to any unique defenses that are inapplicable to other members of the prospective class. *See Guenther v. Pacific Telecom, Inc.*, 123 FRD 333, 338 (D Or 1988). Nor does any adverse interest exist between these named plaintiffs and other members of the proposed class as they all seek services to which they allege they are entitled.

4. Adequacy of Representation

The final requirement of FRCP 23(a) is that plaintiffs must show that they would adequately represent the interests of the class. This ensures that the interests of absent class members are adequately protected. *Hansberry v. Lee*, 311 US 32, 42 (1940). Whether the class representatives satisfy this test depends upon “the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between the representatives, and the unlikelihood that the suit is collusive.” *Walters v. Reno*, 145 F3d 1032, 1046 (9th Cir 1998).

In this case, the interests of the plaintiffs and other members of the class are the same, as they all seek Medicaid services to which they allege they are entitled. Further, this court is unaware of any

antagonism between any of the named plaintiffs and any member of the putative class with respect to the subject matter, and hence nothing that would impair any plaintiff's ability to be an adequate class representative. The large scope and universal character of the state's obligations in the settlement agreement strongly indicate lack of collusion.

Significantly, the presence of the Arc of Oregon as a named representative, standing in the shoes of all its members with mental retardation, provides a guarantee that a broad range of interests is represented and that no antagonistic interests exist between the named class representatives and the class members themselves.

With respect to the adequacy of counsel, plaintiffs' attorneys from the Oregon Advocacy Center ("OAC"), James Wrigley and Kathleen Wilde, each have more than 20 years experience in federal and state court litigation. Ms. Wilde has previously served as lead counsel in federal class actions. OAC is a public interest law firm which is specifically funded by the federal government to represent people with developmental disabilities, such as plaintiffs. OAC's attorneys have access to a nationwide network of other similarly funded law offices, which have handled similar cases. Robert C. Weaver of Garvey, Schubert & Barer participated in the drafting of the complaint and crucial early negotiations. He has over 20 years of litigation experience, first as an assistant U.S. attorney, and then as a partner at Garvey, Schubert & Barer with a substantial civil and criminal litigation practice. Mary Tarbox, since graduating from law school and going to work at Garvey, Schubert & Barer in 1999, has been involved in both civil and criminal litigation in state and federal court. Clearly, plaintiffs are more than adequately represented by counsel in this case.

B. FRCP 23(b)(2)

In addition to meeting all four conditions set out in FRCP 23(a), a proposed class action must also satisfy one of the three subsections of FRCP 23(b). Here, plaintiffs seek certification under FRCP 23(b)(2), which compels the party petitioning for class certification to demonstrate that the opposing party “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.” Plaintiffs seek certification under this subsection because they seek declaratory and injunctive relief against defendants’ systemic nonconformity with the requirements of federal law. FRCP 23(b)(2) reflects a principal intent to make class actions freely available in civil rights matters. It is especially appropriate to those actions involving government regulation, welfare administration, and other areas of group remedies against government officials. *Macera v. Chinlund*, 595 F2d 1231, 1240 (2nd Cir 1979), *vacated and remanded on other grounds sub nom. Lombard v. Macera*, 442 US 915 (1979)

When defendants are alleged to have acted on grounds applicable to all class members, the first portion of FRCP 23(b)(2) is satisfied. *Sorenson v. Concannon*, 893 F Supp 1469, 1479 (D Or 1994). In the present action, plaintiffs contend that defendants’ failure to provide needed Medicaid services in a timely manner in the least restrictive environment affects the class as a whole. The systemic nature of the defendants’ inactions is readily evident, even though not every class member has yet sought Medicaid benefits, or experienced the same degree of harm. The practices at issue affect the class as a whole, making certification under Rule 23(b)(2) appropriate.

The second prong of FRCP 23(b)(2) turns on the nature of the relief sought. In the present case, plaintiffs seek declaratory and injunctive relief, declaring that defendants’ actions and inactions

violate Title XIX of the Social Security Act, Title II of the ADA, Section 504 of the Rehabilitation Act, and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and enjoining defendants from continuing such practices. Such requested relief is consistent with and fulfills the requirements of FRCP 23(b)(2). The Ninth Circuit has frequently certified class actions when plaintiffs have sought declaratory and injunctive relief in response to allegedly unlawful governmental policies and practices. *Walters v. Reno*, 145 F3d at 1047 (9th Cir 1998); *Gete v. I.N.S.*, 121 F3d 1285, 1300 (9th Cir 1997).

For the above reasons, plaintiffs have satisfied all requirements for issuance of an order certifying the class for settlement purposes.

II. Preliminary Approval of the Class Action Settlement

FRCP 23(e) provides that the dismissal or compromise of a class action must be approved by the court and that the notice of the proposed settlement must be given to members of the class in such a manner as the court directs. The purpose of the preliminary evaluation of class action settlements by the court is to determine whether the proposed settlement is within the range of possible approval, and whether notice to the class of the terms and conditions of the settlement and the scheduling of a fairness hearing is worthwhile. Whether a settlement is within the range of approval involves an initial examination by the court of the terms of the agreement to determine whether the proposed settlement was the product of good faith, arms length negotiations. If the court finds this to be true, the settlement is presumptively valid. *U.S. v. State of Oregon*, 913 F2d 576, 581 (9th Cir 1990).

The proposed settlement in this litigation satisfies the requirements for preliminary approval. The settlement is the result of prolonged, far-ranging negotiations between the parties. From the outset,

the parties saw this action as a challenge to the state's system of administering its Medicaid program, rather than merely a case involving a few individuals. While defendants acknowledged the strength of plaintiffs' case, reasonable compromises were made by both parties on issues requiring the expenditure of substantial state resources. The negotiations included not only counsel, but also representatives of two major advocacy organizations (one of which, The Arc of Oregon, subsequently became a plaintiff) and the Mental Health and Developmental Disabilities Services Division administrator directly responsible for state-wide developmental disability services. The sweeping relief achieved as a result of the negotiations creates a system of entitlements that benefits the entire class.

ORDER

For the reasons set forth above, plaintiffs' Motion for an Order Certifying a Settlement Class and For Preliminary Approval of Class Action Settlement (docket #26) is GRANTED.

DATED this 27th day of October, 2000.

Janice M. Stewart
United States Magistrate Judge