

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

SALLY HART AZ Bar. No. 13453  
STEPHEN PALEVITZ AZ Bar No. 013356  
ARIZONA CENTER FOR DISABILITY LAW  
3131 N. Country Club, Suite. 100  
Tucson, AZ 85716  
(520) 327-9547

ANNE RONAN AZ Bar No. 006041  
TAMI JOHNSON AZ Bar No. 017296  
ARIZONA CENTER FOR DISABILITY LAW  
3839 N. Third St., Ste. 209  
Phoenix, AZ 85012  
(602) 274-6287

THERESE YANAN  
DNA PEOPLES LEGAL SERVICES  
NATIVE AMERICAN PROTECTION & ADVOCACY PROJECT  
P.O. Box 3539  
Tuba City, AZ 86045  
(520) 283-3208

BRUCE B. VIGNERY  
SARAH LENZ LOCK  
AARP LITIGATION  
601 E. Street, NW  
Washington, DC 20049

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

PEG BALL, CREE JAMES, a minor person by )  
and through her grandfather and guardian BENNIE )  
JAMES, and JEANNE SPINKA, as individuals )  
and as representatives of a class of persons )  
similarly situated, )  
Plaintiffs, )  
v. )  
PHYLLIS BIEDESS, Director of the Arizona Health )  
Care Cost Containment System, THE ARIZONA )  
HEALTH CARE COST CONTAINMENT )  
SYSTEM ADMINISTRATION, and the STATE )  
OF ARIZONA, )  
Defendants. )

No. CIV 00 - 67 TUC ACM  
MEMORANDUM IN SUPPORT  
OF MOTION TO CERTIFY  
A CLASS ACTION

INTRODUCTION

The subject of this lawsuit is AHCCCS program policies and practices in administering its Home

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

and Community Based Services [HCBS] benefit. The plaintiffs are disabled individuals who are harmed by a serious deficiency in defendants= administration of the HCBS benefit -- the widespread lack of home care services prescribed for them to remain living in the community. Named plaintiffs seek to compel defendants to reform this deficiency on behalf of themselves and a statewide class of HCBS beneficiaries.

The AHCCCS HCBS benefit is a joint program of the federal and state governments. In choosing to participate in the federal Medicaid program, AHCCCS has agreed to comply with standards established in the Medicaid statute and regulations. Plaintiffs believe that a number of these standards are violated by the inadequacy of HCBS attendant care services. Plaintiffs also believe that defendants= failure to provide attendant care services violates Arizona=s AHCCCS statute and its Medicaid State Plan. Finally, defendants= policy of giving no denial notices with appeal rights when it fails to provide home care services violates constitutional and statutory protections.

Three original named plaintiffs file this motion for class certification. Seven more HCBS eligible individuals seek to join them and have concurrently filed a motion to intervene as additional named plaintiffs. Their cases are similar to those of the original named plaintiffs in that they have not received home care services to which they are entitled which puts them at risk of institutionalization. Their cases provide additional facts about the grievous hardships caused by defendants= failure to provide promised services to those struggling to remain in their homes.

ARGUMENT

- 1. PLAINTIFFS SEEK CHANGES IN DEFENDANTS=HCBS POLICIES AND PRACTICES TO ASSURE THAT HOME CARE SERVICES WILL BE PROVIDED
  - A. HCBS Recipients Go Without Prescribed Attendant Care Services And Have No Remedy Under the Defendants= Administration of the Home Health Benefit.

Named plaintiffs in this case, Peg Ball, Cree James, and Jeanne Spinka, are disabled individuals who have been determined eligible for HCBS services that include home care under plans developed for them by their AHCCCS contracting providers. However, each of the named plaintiffs has gone without her needed home care services for substantial periods of time. When AHCCCS failed to send the promised

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

home care workers, it gave plaintiffs no written notices that would advise them of the availability of appeals or other remedies.

Peg Ball, who has quadriplegia and sleep apnea, has an HCBS care plan that calls for her to receive 50 hours of attendant care per week, but has actually received much less, with constant changes and resignations of staff. She has managed to survive through the unpaid services of her companion, but had to go into a nursing home in 1997 when her companion could not care for her.

Plaintiff Cree James is an 8 year old with periventricular leukomalacia, mental retardation and developmental delay, whose care plan calls for 60 hours of home care monthly as well as respite care. Her grandparents have been forced to care for her without assistance for long periods of time due to the failure of HCBS to fill and maintain her care plan. Jeanne Spinka has quadriplegia with limited use of her hands as a result of Infantile Progressive Spinal Muscular Dystrophy and needs total care. Her HCBS plan prescribes 40 hours of attendant care per week, but because she is actually receiving only 25 hours her 82 year old mother attempts to help, at risk to her own frail health. Plaintiffs have been told by resigning home care workers that their salaries and working conditions under the HCBS program are so poor that they cannot continue to work for the program.

The named plaintiffs have no remedies for the failure of AHCCCS to provide them with the attendant care services to which they are entitled. AHCCCS gives no notice of adverse action when it fails to fill a care plan because it does not consider this to be a denial of services. HCBS recipients report that if they complain about the lack of services they are told by their case managers that they can get always get services in a nursing home. Beneficiaries who report thefts or unreliability of their workers are labeled Adifficult@ by their case managers and receive fewer worker assignments. Some HCBS recipients have managed to file grievances with their health plans and find that more services are provided for a short period of time, but the problem always reoccurs.

In addition to the original three named plaintiffs, seven more HCBS recipients have filed a motion to intervene as named plaintiffs. Their fact situations are similar to those of the original named plaintiffs in that they desperately need home care services in order to remain living in the community, but have actually

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

received far less services from the defendants than the amounts prescribed for them.

B. The Law Requires Defendants To Provide Adequate Home Care Services To HCBS Recipients

The defendants' failure to provide home care services to individuals entitled to HCBS services in Arizona violates a number of provisions of federal and state law.

The federal Medicaid statute and regulations contain specific requirements for state programs like AHCCCS that are violated by the defendants' current policies and practices, including: the requirement of 42 U.S.C. ' 1396a(a)(8) that Medicaid assistance be furnished with reasonable promptness to eligible individuals; the requirement of 42 C.F.R. ' 435.930(b) that once an individual has been found eligible for Medicaid services, the state agency must continue to provide such services until the recipient is found ineligible; the provision in 42 U.S.C. ' 1396a(a)(10)(A)(ii)(VI) that HCBS services be made available to persons who would otherwise be eligible for institutional care; the requirement under U.S.C. ' 1396a(a)(30)A that state payment rates for Medicaid services be sufficient to make providers available to Medicaid beneficiaries to the same extent that they are available to the general population; and the requirement in 42 U.S.C. ' 1396n(c)(2)(C) and (d)(2)(C) that an HCBS eligible beneficiary be able to freely choose to receive medical assistance at home as an alternative to receiving institutional care.

The failure of defendant AHCCCS to provide plaintiffs with the home care services prescribed in their HCBS care plans also violates provisions of Arizona state law, including the following: the requirement of A.R.S. ' 36-2931 et seq. that long term care services at home be made available to persons at risk of institutionalization who choose them as an alternative to nursing facility services; and the defendant's agreement in their Arizona State Plan that HCBS services would be provided to eligible persons.

The failure of defendants to provide plaintiffs with the home care services prescribed in their HCBS care plans also violates the provision of the Americans with Disabilities Act [ADA] at 42 U.S.C. ' ' 12131-12134 and its implementing regulations which require AHCCCS services to be made available in the community rather than in institutions where to do so will meet the needs of qualified individuals with

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

disabilities. It also violates Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. ' 794, and its implementing regulations. The regulations violated include, but are not limited to, 28 C.F.R. ' 41.52(d) and 45 C.F.R. ' 84.4(b)(a)(iii) and (b)(2). The deficiencies in HCBS attendant care services also violate 42 U.S.C. ' 1983 [known as the Federal Civil Rights Act]

Finally, the failure of defendant AHCCCS to give denial notices with information about appeal procedures to HCBS beneficiaries whose home care plans are not being met violates the notice and hearing requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; the federal Medicaid statute at 42 U.S.C. ' 1396a(a)(3), and the federal Medicaid regulations at 42 C.F.R. ' 431.200 et seq.; and ' 1983 of the Federal Civil Rights Act. It further violates the notice, grievance and hearing requirements of the state AHCCCS statute at A..R.S. ' 36-2903.01, and the state AHCCCS regulations at A.A.C. R9-22-316.

C. Named Plaintiffs Seek Relief On Behalf Of Themselves And A Class Of Persons Entitled To HCBS Services Who Are Not Receiving Prescribed Attendant Care Services

Plaintiffs ask the Court to issue a declaratory judgment holding defendant-s policies and practices with respect to attendant care services under the HCBS program violate the Medicaid statute and regulations; the AHCCCS statute and the Arizona State Plan; the ADA and Section 504 of the Rehabilitation Act together with their regulations; the Federal Civil Rights Act (42 U.S.C. ' 1983); and notice and hearing requirements of the Due Process Clause, the Medicaid statute and regulations, the Federal Civil Rights Act, and the AHCCCS statute and regulations. They further ask the Court to issue injunctive relief prohibiting defendants from failing to provide HCBS beneficiaries with sufficient home care services, and notice and appeal rights when services are not provided. Finally, they ask the Court to require the defendants to devise an administrative plan for assuring that plaintiffs receive their prescribed home care services.

Certification of a statewide class of HCBS recipients is an appropriate way to expeditiously resolve the issues raised in this litigation. The Ninth Circuit has observed that ~~A~~the central purpose of Rule 23 . . .

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[is] to have litigation in which common interests or common questions of law or fact prevail, disposed of, where feasible, in a single lawsuit.@ Domingo v. New England Fish Co., 727 F.2d 1429, 1444, modified on other grounds, 742 F.2d 520 (9<sup>th</sup> Cir. 1984). The purpose of Rule 23 would be carried out by certification of a class in this case because the putative class members are all subject to the challenged AHCCCS policies and procedures at issue here.

II. ALL OF THE REQUIREMENTS OF RULE 23 ARE SATISFIED

For certification of a class action under F.R.Civ.P. 23, the class must satisfy the four requirements of the following subsection (a) and at least one of the requirements of subsection (b). Blake v. Arnett, 663 F.2d 906, 912 (9<sup>th</sup> Cir. 1981); Wehner v. Syntex Corp., 117 F.R.D.641, 643 (N.D.Cal. 1987). These requirements are fully met in this case.

A. The Size Of The Class Along With Other Factors Makes Joinder Of All Class Members Impracticable

Although commonly referred to as the numerosity requirement, Rule 23(a)(1) encompasses consideration of several factors, only one of which is class size. National Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595, 599 (N.D.Cal. 1986); Thonen v. McNeil-Akron, Inc., 661 F.Supp. 1271, 1273 (N.D.Ohio 1986) (*citing Newberg on Class Actions*, ' 3.03 (1985).

To satisfy this factor, a class plaintiff must show that the difficulty or inconvenience of joinder makes class litigation desirable. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-914 (9<sup>th</sup> Cir. 1965); International Molders and Allied Workers Local Union No. 164 v. Nelson, 102 F.R.D. 457, 461 (N.D.Cal. 1983). Often this showing can be accomplished through sheer numbers, but in some instances other indicia of impracticability should be considered. Jordan v. County of Los Angeles, 669 F.2d 1311, 1319 (9<sup>th</sup> Cir.), vacated on other grounds, 459 U.S. 810 (1982). In this case the class is sufficiently large that its size alone satisfies the requirement of impracticability, but in the interest of caution, the other relevant considerations will also be discussed.

Statistics published by defendant AHCCCS show that in 1998 12,131 persons received ALTCS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

community based services. AHCCCS, Community Based Report (1998). The AHCCCS report also stated that the various home and community based services are expected to grow annually at between 4 percent and 15 percent. Projected units of home care services needed by eligible persons in 1999-2000 were: attendant care hours, 2,970,743; homemaker hours, 389,064; personal care hours, 985,844; respite/in-home hours, 61,601. Id., Attachment 6.

Clearly, this class is sufficiently large to satisfy the impracticability requirement based on size alone. However, even if the class were smaller, Aother indicia of impracticability@ would satisfy the first element. There is geographic diversity of the class, as its members are scattered across the state of Arizona. They are also, by definition, elderly and disabled people with limited income and resources who would find it difficult or impossible to finance separate, individual lawsuits. Further, they seek declaratory and injunctive relief, another factor that demonstrates impracticability of joinder. Jordan, 669 F.2d at 1319; National Ass=n of Radiation Survivors, 111 F.R.D. at 600. Finally, the class consists of Aunnamed and unknowable future members . . . [whose] joinder at this time is impracticable,@ another relevant consideration. Cruz v. Bowen, 672 F.Supp. 1300, 1304 (N.C.Cal. 1987).

This case presents a classic instance of impracticability of joinder. Thousands of elderly and disabled people who are spread across the state need injunctive relief to protect them from the defendants= inadequate policies. Rule 23(a)(1) is clearly satisfied.

B. There Are Common Questions Of Fact Or Law

Rule 23(a)(2) requires that Aplaintiffs must establish that there are questions of law or fact common to the class as a whole.@ National Ass=n of Radiation Survivors, 111 F.R.D. at 600 (emphasis in original). The rule Adoes not require that every question of law and fact be common to every member of the class.@ Jordan, 669 F.2d at 1320 (citations omitted). Because of the Apermissive application@ which is generally given to it, Athe commonality requirement is usually found to be satisfied.@ Ibid.

Here plaintiffs raise a number of legal issues that are common to the class members. The common questions of law challenge AHCCCS administrative policies and practices that fail to assure adequate amounts of home care services to HCBS recipients. Both named plaintiffs and class members contend that

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

these policies and practices violate requirements of the Medicaid statute and regulations, the AHCCCS statute and State Plan, the ADA and Rehabilitation Act statutes and regulations, and the Federal Civil Rights Act. Named plaintiffs as well as class members also contend that AHCCCS= policy and practice of refusing to give notice of appeal rights when prescribed attendant care services are not provided violates procedural requirements of the Due Process Clause of the Constitution, the Medicaid statute and regulations, ' 1983 of the Federal Civil Rights Act, and the Arizona AHCCCS statute and regulations.

¶The commonality requirement is satisfied where the question of law linking the class members is substantially related to the resolution of the litigation even through the individuals are not identically situated. @ Jordan, 669 F.2d 1320 (citation omitted). Here, the questions of law are not merely substantially related to the resolution of the litigation, but are the subject of the litigation. The commonality requirement is easily satisfied.

C. The Named Plaintiffs= Claims Are Typical Of The Claims Of The Class Members

Rule 23(a)(3) requires that the claims of the representative parties must be typical of the claims of the class members. This requirement has been explained by the 9<sup>th</sup> Circuit as follows:  
The typicality requirement is designed to assure that the named representative=s interests are aligned with those of the class. Where there is such an alignment of interests, a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class. In this respect, the typicality requirement is closely related to both the 23(a)(2) requirement that there be common questions of law or fact and the 23(a)(4) requirement that the named plaintiff adequately protect the interests of the class.

Jordan, 669 F.2d at 1321. *See also, e.g., General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982); LaDuke v. Nelson, 762 F.2d 1318, 1332 (1985), *modified on other grounds*, 796 F.2d 309 (9<sup>th</sup> Cir. 1985); Cruz v. Bowen, *supra*, 672 F.Supp. at 1305.

Here, the named plaintiffs= claims are typical of those of the class members for essentially the same reason that commonality is satisfied. See Wehner v. Syntex Corp., 117 F.R.D. at 644. Their claims arise from defendants= uniform statewide policies and practices with respect to administration of the HCBS program that violate recipients= rights under the several federal and state laws cited above. All of the class members are affected by these policies and practices in similar manner to the named

1  
2 plaintiffs because, by definition, they are persons who have not received the full amount of attendant  
3 care services prescribed in their HCBS care plans. Thus, the class members will be benefitted by the  
4 relief requested by the named plaintiffs.

5  
6 D. The Class Representatives Will Fairly And Adequately Protect The Interests Of The  
7 Class Members

8 The final requirement of Rule 23(a) is that the representative parties be able to fairly and  
9 adequately protect the interests of the class. F.R.Civ.P. 23(a)(4). The Ninth Circuit has explained this  
10 requirement as follows: A[a]dequacy of representation depends on the qualifications of counsel for the  
11 representatives, an absence of antagonism, a sharing of interests between the representatives and the  
12 absentees, and the unlikelihood that the suit is collusive.@ In re Northern District of California, Dalkon  
13 Shield IUD Products Liability Litigation v.A.H. Robbins Co., 693 F.2d 847, 855 (9<sup>th</sup> Cir. 1982)  
14 (citations omitted), *cert. denied*, 459 U.S. 1171 (1983).

15 The named plaintiffs' interests are obviously not antagonistic to the interests of the class.  
16 Named plaintiffs and class members seek the same results in compelling defendants to make changes in  
17 their HCBS policies and procedures necessary to ensure that beneficiaries are actually provided with  
18 the attendant care services to which they are entitled under the law. The named plaintiffs' vigorous  
19 pursuit of these goals will necessarily benefit the class members. There exists no conflict of interests.

20 AThe adequacy [of representation] heading also factors in competency and conflicts of class  
21 counsel.@ Amchem Products, Inc. v. Windsor, \_ U.S. \_, 117 S.Ct. 2231, 2251 n.20 (1997). Plaintiffs'  
22 attorneys are experienced in litigation involving the procedural and substantive rights of Medicaid and  
23 Medicare beneficiaries. They have represented plaintiffs in numerous class actions in federal courts. A  
24 representative sample of cases in which plaintiffs' counsel have acted as lead counsel include: Grijalva v.  
25 Shalala, 946 F.Supp. 747 (D.Ariz. 1996, *aff'd*, 152 F.3d 1115 (9<sup>th</sup> Cir. 1998), *vacated and*  
26 *remanded*, 119 S.Ct. 1573 (U.S. May 3, 1999), *vacated and remanded*, 185 F.3d 1075 (9<sup>th</sup> Cir.  
27 1999); Perry v. Chen, 985 F.Supp. 1197 (D.Ariz. 1996); Linoz v. Heckler, 800 F.2d 870 (9<sup>th</sup> Cir.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1986); Vorster v. Sullivan, 709 F.Supp. 934 (C.D.Cal. 1989); J.K. v. Schamadan, CIV 91-261-TUC-JMR; (D.Ariz. 1991); Heisler v. Chen, CV 95-1615 PHX-PGR (D.Ariz. 1995); Latimore v. Chen, CV 9501450 PHX EHC (D.Ariz. 1995); and Arnold v. ADHS, 160 Ariz. 593, 775 P.2d 521 (Ariz. 1989).

III. DEFENDANTS HAVE ACTED ON GROUNDS GENERALLY APPLICABLE TO THE CLASS OF HCBS RECIPIENTS

In addition to the four requirements of Rule 23(a), plaintiffs must also satisfy one subdivision of Rule 23(b). This case meets the requirement of Rule 23(b) that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole . . . @ F.R.Civ.P. 23(b)(2).

As discussed above, defendants= HCBS policies and practices apply to all HCBS recipients statewide. These include: the process by which the defendants contract with local providers of HCBS services; the defendants= practices with respect to monitoring and supervision of providers= delivery of services; and the defendants= policies concerning notice and remedies for HCBS beneficiaries who have not received promised services. Plaintiffs seek declaratory and injunctive relief to prohibit the defendants from continuing their general policies and practices that deprive beneficiaries of home care services and violate the applicable laws.

This is precisely the kind of lawsuit in which certification of a class under Rule 23(b)(2) is appropriate. See Elliott v. Weinberger, 564 F.2d 1219, 1229 (9<sup>th</sup> Cir. 1977), *aff=d in part and rev=d in part on other grounds sub nom.* Califano v. Yamasaki, 442 U.S.682 (1979).

CONCLUSION

The four factors of Rule 23(a) and one subdivision of Rule 23 (b) are present in this case, and plaintiffs accordingly ask that a class be certified.

DATED: \_\_\_\_\_, 2000.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Respectfully submitted,  
ARIZONA CENTER FOR DISABILITY LAW  
DNA PEOPLES LEGAL SERVICES  
AARP LITIGATION

by Sally Hart  
Attorneys for Plaintiffs