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1 G. Curtis Drake
2 P. Keith Keller
3 Keller, Reynolds, Drake,
4 Johnson & Gillespie, P.C.
5 38 South Last Chance Gulch
6 Helena, Montana 59601
7 406-442-0230
8 Attorneys for Defendants

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STATE OF MONTANA
COUNTY OF HELENA

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF MONTANA, HELENA DIVISION

11 * * * * *

12 SHIRLEY WALL, et. al.,) No. CV-96-49-E-CCL
13) Plaintiffs,)
14 v.) DEFENDANTS' PRELIMINARY
15) STATS OF MONTANA, et. al.,) PRETRIAL STATEMENT
16) Defendants.)

17 * * * * *

18 In accordance with this Court's order of November 7, 1996, and
19 Rule 235-1(c) of the Rules of this Court, the Defendants submit
20 this preliminary pretrial statement.

- 21 1. Issues Concerning Jurisdiction:
22 There is no issue concerning jurisdiction of this Court.
23 2. Issues of Fact and Law Genuinely in Dispute:
24 A. Legal Issues
25 1. Whether the ADA or the federal Constitution create a
26 right to community-based mental health care

1 2. Whether determinations of placement of patients at
2 Warm Springs by state courts are res judicata.

3 3. Whether the federal court should abstain from ruling
4 in view of *Ihler v. Chisholm*.

5 4. Whether this is an appropriate class action.

6 5. Whether the individually named Defendants may be
7 dismissed.

8 6. Whether there is any claim against Montana Mental
9 Health Nursing Care Center at Lewistown.

10 7. Whether several of the named Plaintiffs and putative
11 class members can be properly represented by the attorneys who have
12 filed this action, as they have legally appointed representatives,
13 such as guardians, who are not parties to this suit.

14 3. issues of Fact

15 1. Whether there is any need for a state hospital.

16 2. Whether the Plaintiffs, or any of them, are properly
17 placed as the state hospital.

18 3. Stipulations of Fact and Law

19 The Defendants are willing to stipulate to the following
20 matters.

21 The Defendants are willing to stipulate to the authenticity of
22 hospital charts, records, policies, procedures and plans.

23 4. Deadlines Relating to Joinder and Amendments to Pleadings

24 None are contemplated.

25 5. Pendency or Disposition of Related Litigation

1 In *Ihler v. Chisholm*, Lewis and Clark County Cause NO. ADV-88-
2 383, a case still pending before the Honorable Dorothy McCarter, a
3 class embracing the then patients at Warm Springs was certified.
4 The plaintiff class was represented by some of the same lawyers as
5 represent the Plaintiffs here. Mr. Smith, Mr. Burnim and
6 Ms. Gallagher were among the lawyers representing the plaintiffs in
7 that action. Mr. Drake, Mr. Keller, and Ms. Kradolfer represented
8 the defendants. In *Ihler*, the court considered and rejected
9 plaintiffs' claim that they were entitled to community-based care
10 under state and federal law in two orders, entered January 23,
11 1991, and March 6, 1991. *Ihler* also dealt with a variety of other
12 issues concerning conditions at the State Hospital not relevant to
13 this litigation.

14 0. Propriety of Special Procedures, Including Reference to a
15 Master or a Magistrate Judge

16 The Defendants will not stipulate to reference to a Magistrate
17 Judge.

18 7. Controlling Issues of Law

19 1. Class certification. The parties have already filed
20 briefs seeking and opposing class certification.

21 2. Res judicata. As grounds for their motions for
22 partial judgment on the pleadings and motion for an order denying
23 class certification. The Defendants have raised res judicata,
24 judicial estoppel issue. Patients at Warm Springs come in two
25 general classes: court ordered commitments or voluntary
26 commitments. Of a total of 194 patients on July 22, 1996, 27 were

3. DEFENDANTS' PRELIMINARY PRETRIAL STATEMENT

1 voluntary, 133 were involuntarily committed, 3 were committed by
2 the Indian Health Service, and the remainder were committed under
3 the criminal statutes. In the case of involuntary commitments
4 under Montana's scheme, the committing district court must
5 determine that the commitment to Warm Springs is the least
6 restrictive environment appropriate for the patient. Criminal
7 commitments- are similarly statutorily regulated. The issue is
8 whether this Court can reconsider those commitments or whether they
9 are res judicata.

10 3. Partial judgment on the Pleadings - The Defendants
11 have moved for a partial judgment on the pleadings based on res
12 judicata as described above, and because the allegations of the
13 complaint are necessarily speculative in claiming that some
14 patients may unnecessarily be placed in the hospital. This issue
15 has been briefed by the parties

16 4. Judicial Abstention based on the court's ruling in
17 the related *Ihler v. Chisholm Case*. This issue has been raised in
18 briefs already filed.

19 5. The status of guardianships of the six named
20 Plaintiffs have guardians who are not parties. Additionally, many
21 putative class members have appointed guardians when consent to
22 joinder is requisite to this action.

23 8. Anticipated Course of Discovery

24 The Defendants believe that most issues can be disposed of as
25 issues of law. To the extent that factual issues are involved,
26 they include the propriety of placement of the individual named

1 | Plaintiffs. Discovery would be limited to depositions of the
2 | principal members of the treatment team for each such Plaintiff,
3 | and the depositions of whatever experts the Plaintiffs call to
4 | rebut the treatment team's conclusions. Discovery might take two
5 | to three months.

6 | If the case is not certified, Defendants propose that expert
7 | reports be exchanged by January 15, 1997, and discovery close by
8 | February 28, 1997.

9 | If the case is certified as a class action, more time will be
10 | necessary because the Court will have to review the medical history
11 | of most class members. The Defendants would propose expert
12 | disclosures be exchanged by March 31, 1997, and that discovery
13 | close by May 31, 1997.

14 | 9. Propriety of Modifying Standard Pretrial Procedure
15 | Established by Rule 235

16 | This should be modified by matching an expedited trial setting
17 | if a trial setting is necessary.

18 | 10. Expedited Trial Setting

19 | If a trial is necessary, it should be placed on the expedited
20 | docket to avoid delay for the reasons stated in Defendants' motion
21 | for an expedited hearing.

22 | 11. Prospect for Compromise of Case

23 | The Defendants do not see any possibility of compromising the
24 | case.

