UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO.: 98-673-CIV-MARTINEZ/BANDSTRA

SHELYNDRA BROWN, by her mother and next friend, JESSE O'NEIL, et al.,
Plaintiffs,

vs.

JEB BUSH, in his official capacity as Governor of the State of Florida, et al.,
Defendants.

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ORDER APPROVING SETTLEMENT AGREEMENT

THIS CAUSE came before the Court upon the Parties' Joint Motion to Approve the Amended Settlement Agreement ("Agreement"). (D.E. No. 298). On December 10, 2004, the Court held a fairness hearing pursuant to Federal Rule of Civil Procedure 23(e) to determine whether the Court should approve the Agreement. At the fairness hearing, this Court heard testimony from Kerry Schoolfield, a bureau chief within the Agency for Persons with Disabilities who has administrative responsibility for all components of the developmental disabilities services delivery system which are implicated by the Agreement executed in this case, and two expert witnesses, Clarence Sundram and Rick Campbell. The Court also heard testimony of two objectors, Donald R. Stover and Viola Foster. Attorneys representing both the proposed *amici* Voice of the Retarded and Florida's Voice on Mental Retardation (VOR/FVMR) and a group of objectors calling themselves the "Stover

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objectors" also appeared and addressed the Court.[1] In determining whether to approve the Agreement, the Court has considered the record of the case, memoranda and submissions of the parties in support of the motion for approval of the Agreement, the testimony of the witnesses at the fairness hearing, the documents entered into the record of the hearing by the parties, the letters from objectors and supporters of the Agreement, the statements of the Stover objectors made through their counsel, and the memorandum of the *amici* VOR/FVMR. For the foregoing reasons, the Agreement is approved.

I. Relevant Factual and Procedural Background

This action was filed on March 24, 1998 by six individuals, each of whom was then confined to one of Florida's four Developmental State Institutions for persons with developmental disabilities ("DSIs"),[2] on behalf of themselves and all others who were then or in the future would be confined to a DSI. Plaintiffs sought community-based placements.[3] (D.E. No. 1 at 2). The Plaintiffs' factual allegations are set forth in detail in their original Complaint, (D.E. No. 1), and their proposed Amended Complaint. (D.E. No. 253). The Plaintiffs' claims were brought pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

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[1]Although time was available for additional objectors to testify, after the parties presented their evidence in support of the Agreement, no objectors were present to testify. (Tr. 19-21, 173).

[2]The four DSIs operated by the State of Florida are the Community of Landmark ("Landmark") in Opa Locka, Gulf Coast Center ("Gulf Coast") in Fort Myers, Sunland Marianna in Marianna, and Tacachale Center in Gainesville. (Trs. 53, 56-60).

[3]Community-based services are "a range of services and settings." (Tr. 54) These setting could range from someone living at home with a family member, to someone living independently, to someone living in a supported independent living arrangement where the State provides "some assistance for someone to live alone or with a roommate." *Id.* It could also mean living in "a small foster care facility, which is three people or less" or living in a group home with four to fifteen people. *Id.* The four DSIs are large institutions which are considered intermediate care facilities for the developmentally disabled ("ICF/DD"). (Tr. 57). An ICF/DD "could range in size from a six-person ICF/DD, which is the more common size up to large facilities" such as the DSIs. *Id.*

("ADA"), and the regulations promulgated pursuant to the ADA, the Rehabilitation Act of 1973, 42 U.S.C. § 1983, 29 U.S.C. § 794, the Social Security Act, 42 U.S.C. § 1396 et seq., and the regulations promulgated pursuant to the Social Security Act, and the Due Process and Equal Protection Clauses of the United States Constitution. (D.E. No. 1).

On March 10, 1999, the Court entered an order certifying a class. (D.E. No. 123). Defendants, who are the Governor and various state officials, appealed this Order (D.E. Nos. 1, 140, 253). On February 3, 2000, the Eleventh Circuit Court of Appeals issued an opinion reversing and vacating the class certification order and remanding the matter back to the Court for further action with instructions to certify the class as follows:

> all individuals with developmental disabilities who were residing in a Florida DSI as of March 25, 1998, and/or are currently residing in a Florida DSI who are Medicaid eligible and presently receiving Medicaid benefits, who have properly and formally requested a community-based placement, and who have been recommended by a State-qualified treatment professional or habilitation team for a less restrictive placement that would be medically and otherwise appropriate, given each individual's particular needs and circumstances.

Brown v. Bush, No. 99-11544, slip op. at 5 (11th Cir. Feb. 3, 2000).[4] In its opinion, the Court of Appeals also identified the "core claims" of the named, individual plaintiffs to be "that they are institutionalized in DSIs, they qualify to be transferred from DSIs to less restrictive, community placements, and they want to be transferred, but there is a lack of appropriate, available, community placements." *Id.* at 6. On February 11, 2000, the Court issued a Revised Order Certifying Class. (D.E. No. 161). The Court set the case for trial for a two-week trial period beginning on February 23, 2004. (D.E. No. 233). On October 17, 2003, Plaintiffs filed a Motion Seeking Leave to Amend Their Complaint, to add new plaintiffs and further refine their claims.

[4]This opinion is also located in the record at D.E. No. 158.

(D.E. No. 253). In November and December 2003, the parties participated in three days of mediation with the assistance of an independent mediator. *See* (D.E. No. 284). As the mediation seemed likely to result in a settlement of the case, on December 29, 2003, the parties filed a Joint Motion to Stay the Case, including all pending motions. (D.E. No. 284). That motion was granted and was subsequently renewed at the request of the parties. (D.E. Nos. 285, 290, 291).

After further, lengthy mediation and negotiations, the parties executed a Settlement Agreement on May 11, 2004, which was filed with the court on May 21, 2004. (D.E. Nos. 292-293). The parties agreed to amend the Settlement Agreement to permit Defendants to utilize both the Supported Living Home and Community-Based Services Waiver ("Supported Living Waiver")[5] and the Developmental Disabilities Home and Community-Based Services Waiver ("DD Services Waiver") to serve clients residing in the DSIs. (D.E. Nos. 295 and 296). On June 16, 2004, the parties submitted and executed the amended Agreement. (D.E. No. 296). It is this Agreement that is before the Court for approval.

II. Legal Standard

Federal Rule of Civil Procedure 23(e) provides that settlement of a class action requires approval by the court. "[I]n class action suits, there is an overriding public interest in favor of settlement" and the approval of a class action settlement is committed to the sound discretion of the Court. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).[6] In order to approve a settlement, a Court must find that a settlement meets a two-part test. *Warren v. City of Tampa*,

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[5]The Supported Living Waiver is now known as the Family and Supported Living Waiver. (Tr. 55).

[6]In *Bonner v. Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

693 F. Supp. 1051, 1055 (M.D. Fla. 1988). First, the Court must determine that "there is no fraud or collusion [between the parties] in reaching the settlement." *Id.*; *see also Bennett v. Behring*, 737 F.2d 982, 986 (11th Cir. 1984). Second, the Court must determine that "'the settlement is fair, adequate, and reasonable.'" *Bennett*, 737 F.2d at 986 (quoting *Cotton*, 559 F.2d at 1330). The Court considers the following factors in assessing whether a settlement is fair, adequate, and reasonable:

1) The likelihood of success at trial and potential recovery;
2) The complexity, expense, and duration of litigation;
3) The terms of the settlement;
4) The procedures afforded to notify the class members of the proposed settlement, and to allow them to present their views;
5) The judgment of experienced counsel for the Plaintiff class;
6) The substance and the amount of opposition to the settlement;
7) The stage of proceedings at which the settlement was achieved.

Warren, 693 F. Supp. at 1055; *see also Bennett*, 737 F.2d at 986.

III. Analysis

The Court has examined all of these factors and will discuss them in turn.

A. Collusion

First, in regard to collusion there is no evidence in the record which indicates there was any collusion between the parties in arriving at the settlement. Significant discovery has taken place in this case. *See, e.g.,* (D.E. Nos. 97-108, 196, 229, 230, 232, 234, 235, 242, 245, 259, 260, 262 and 264). The parties settled this case with the assistance of a mediator after nearly six months of bargaining and six years of litigation. *See* (D.E. Nos. 274, 283, 285, 289, 291 and 293). Therefore, as there is no evidence of collusion, this factor weighs in favor of approval of the Agreement.

B. Fairness, Adequacy, and Reasonableness

The Court also finds the agreement is fair, adequate and reasonable under the seven factors outlined in *Warren* for the reasons discussed herein.

1. Likelihood of Success at Trial and Range of Potential Recovery

First, "[t]he Court is required to independently analyze the facts and the law to evaluate the Plaintiffs' likelihood of success at trial and range of potential recover." *Warren*, 693 F. Supp. at 1055. As the Eleventh Circuit Court of Appeals stated, the Plaintiffs' core claims are "that they are institutionalized in DSIs, they qualify to be transferred from DSIs to less restrictive, community placements, and they want to be transferred, but there is a lack of appropriate, available community placements." *Brown v. Bush*, No. 99-11544, slip op. at 6 (11th Cir. Feb. 3, 2000). The core claim in this case is governed by the Americans with Disabilities Act of 1990 ("ADA"), the federal regulations setting forth an "integration mandate," and the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which was issued more than a year after this case was filed. In *Olmstead*, the Supreme Court for the first time addressed the question of whether the ADA's bar on discrimination "may require placement of persons with mental disabilities in community settings rather than in institutions," and answered with "a qualified yes," explaining that

> [s]uch action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Olmstead, 527 U.S. at 587.

There is no dispute that the State's treatment professionals have determined that community placement is appropriate for class members and that the class members do not oppose the transfer to a less restrictive setting. The heart of the legal dispute in this case is the question of whether placement of class members can be "reasonably accommodated." 28 C.F.R. § 35.130(b)(7) states:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

The *Olmstead* Court stated "[i]f, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met." 527 U.S. at 605-606. The parties state they have exchanged expert reports and their experts disagree as to whether Defendants have an effective working plan. *See* (D.E. No. 298 at 12). Defendants also argue that the existence of a plan is only one of the factors the Court may consider in determining whether the placement of class members is feasible. (D.E. No. 298 at 12).

In addition to fact-based defenses, the Defendants have raised numerous other constitutional and other legal issues that would need to be litigated, at least on appeal, in the event that this case proceeded to trial. For example, Defendants have argued that the Integration Mandate in title 42 C.F.R. § 35.130(d) and the Social Security Act do not create private rights of action. *See* (D.E. No. 139 at 18 and 20). Plaintiffs disagree citing *Wilder v. Virginia Hosp.*

Association, 496 U.S. 498 (1990) which found the Medicaid "Act creates a right enforceable by health care providers under § 1983." *Id.* at 509-10; (D.E. No. 298 at 13). There is some uncertainty about which interpretation of the case law would ultimately prevail on these complex legal issues.

Furthermore, the Agreement allows for the placement of members of the class more quickly. Under the Agreement, most, if not all, class members will be placed within the next three years, all Landmark residents will have the opportunity for community placement by June 30, 2005, all Gulf Coast residents will have the opportunity for community placement by June 30, 2010, and all DSI residents will receive the benefits of improved support planning and education for treatment staff and families and guardians. *See* (D.E. No. 296 at 3-5). Due to the uncertainty of the outcome in this case and the fact that the Agreement will more promptly address a number of Plaintiff's concerns, this factor weighs in favor of approval.

2. Complexity, Expense, and Duration of Litigation

Next, the Court considers the complexity, expense and duration of the litigation. As the testimony at the fairness hearing and the previous submission of the parties indicate, this case is complex, both factually and legally. Trial, appeals and hearings in this Court after remand might take years. In the absence of this settlement, class members might have to wait for years for a resolution of the case. The expense of further litigation, including testimony and travel by nationally known experts, also would be substantial. Likewise, judicial resources are conserved by settlement. *See Cotton*, 559 F.2d at 1331 ("[S]ettlements contribute greatly to the efficient utilization of our scarce judicial resources."). Therefore, these factors also weigh in favor of a decision approving the Agreement.

3. Terms of Settlement

The Court must also consider the terms of the Settlement Agreement when deciding whether or not to approve the Agreement. The Court has examined the terms of the Agreement in detail. While the Plaintiff has not received every form of relief requested in its original Complaint, there does appear to be "a genuine *quid pro quo.*" *Warren,* 693 F. Supp. at 1059. As the Court stated in *Warren*, it appears "[e]ach side is giving, and each side is receiving, something of value." *Id.* Plaintiffs have agreed to a dismissal of this case with prejudice on June 30, 2007,[7] "except as to the claims for prospective declaratory and injunctive relief of class members who have not been discharged from the DSIs."[8] (D.E. No. 296 at 8). In exchange, Defendants have agreed to make a number of changes in the way DSIs are operated and in the number of DSIs operated by the State.

First, Defendants have agreed to determine what services are most appropriate for individuals living in the DSIs. By its terms, the Agreement provides for changes to the individual support planning process. "The support planning process for all individuals residing in the DSIs will first determine the supports and services that the individual needs to live in the community." (D.E. No. 296 at 3). The support planning process "will be based upon a positive view of the individual's abilities and skills." *Id.* "Based on the determination of the supports and services that the individual needs to live in the community, the treatment team will then make a

[7]The Court is to retain jurisdictions of this case until June 30, 2007. (D.E. No. 296 at 8).

[8]The parties have inserted an exception to this dismissal where there is a pending motion asserting a material breach. (D.E. No. 296 at 8).

recommendation, based on professional judgment, about whether the individual is appropriate for community placement." *Id.*

Defendants have also agreed to provide for more education on community living. The Agreement provides for educational and training programs for the staff regarding the services and supports available in the community, professional standards for determining how persons with developmental disabilities can best be served in the community, and the benefits of community living. *See* (D.E. No. 296 at 3-4). To enable residents and their family members, guardian, or guardian advocate to provide informed and meaningful input, the Agreement also provides for an education program that will include a description of the supports and services available in the community, the experiences of people with developmental disabilities who live in the community, and the professional judgment concerning the benefits for persons with developmental disabilities of living in the community. *See* (D.E. No. 296 at 4-5). The Agreement also states "Defendants retain the flexibility to modify both programs based on best practices and experience." (D.E. No. 296 at 4).

Furthermore, the Defendants have also agreed to comply with Policy Number 02-01, which provides for due process for "individuals residing at the DSIs who seek enrollment on the . . . [Florida Developmental Disabilities Home and Community Based Services] Waiver [("DD Waiver")] or the Supported Living [Home and Community Based Services] Waiver [("Supported Living Waiver")], including adverse determinations made on requests for particular waiver services. (D.E. No. 296 at 3- 4). These are waivers of certain requirements of 42 U.S.C. § 1396a which provides for state plans for medical assistance allowing the implementation of more

specialized medical plans. *See* 42 U.S.C. § 1396n. *See also* (Tr. 56); (D.E. No. 295). These waivers are a source of funding for the community-based services. (Tr. 56); (D.E. No. 295).

Defendants will also close or work toward the closure of two DSIs, Landmark and Gulf Coast.[9] The Agreement provides that "[b]y June 30, 2007, the Department will reduce the combined census of all of the DSIs by at least 180 individuals, at a rate of sixty persons per year." (D.E. No. 296 at 5). The Agreement does not require that these 180 individuals come from any particular facility. The Agreement also states "[a]t least eighty-five percent of the 180 persons moving from the DSIs over the life of the Agreement will be enrolled on the DD Waiver or the Family and Supported Living Waiver."[10] *Id.*

Defendants also acknowledge that additional funding is necessary to accomplish these goals. (D.E. No. 296 at 6). Therefore, Defendant Department of Children and Families ("Department") has agreed, for fiscal years 2005-2006 and 2006-2007, to submit "Legislative Budget Requests seeking the 'start up' funding necessary to accomplish the census reduction activities described above in each of these respective fiscal years." (D.E. No. 296 at 7). Defendant Department will also "seek the amount of funding necessary to provide services to individuals transitioned from the DSIs in their first year" on a waiver program. *Id.* The

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[9]The Agreement provides that the Defendants will close Landmark "no later than June 30, 2005." (D.E. No. 296 at 5). The Agreement provides that by June 30, 2005 the Department will develop a plan to close Gulf Coast Center. *Id.* Gulf Coast Center will be gradually phased down, in a similar manner to what has occurred at Landmark, and will close by July 1, 2010, after the termination of the Agreement. *Id.*

[10]The Court also notes that introducing more community-based services is consistent with the stated preferences of the Florida Legislature. *See, e.g.*, Fla. Stat. § 393.062 (2005). Furthermore, it is also consistent with the current demand for community-based services. While there is a large waiting list for community-based services, there are a dramatically smaller number of referrals for institutional services annually. (Tr. 63-64).

Agreement also provides that, if "the Legislature fails to adequately fund the Department's budget in a manner that prevents the Department from implementing the census reduction . . ., then the failure to comply" with the census reduction provisions will not be deemed to be a material breach of the Agreement. *Id.*

If Plaintiffs believe a material breach of this Agreement has occurred, Plaintiffs must give Defendants notice in writing. (D.E. No. 296 at 9). Defendants may then respond and Plaintiffs are required to advise Defendants of their acceptance or rejection of the Defendants' response. *Id.* If the parties cannot resolve an alleged breach, Plaintiffs may seek a resumption of the litigation. *Id.* Based on the examination of the terms of the Agreement which exemplify the "give and take"[11] between the parties, the Court finds the terms of the Agreement adequately protect the interests of each party and therefore, this factor also weighs in favor of approval.

4. Procedures Afforded to Notify the Class Members of the Proposed Settlement and to Allow Them to Present Their Views

Next, the Court considers the procedures afforded to notify the class members of the proposed settlement and to allow them to present their views. "To assess the adequacy of the notice, the Court must consider both the notice's mode of dissemination and its content." *In re Prudential Ins. Co. of Am. Sales Practices Litigation*, 177 F.R.D. 216, 231 (D. N.J. 1997). The Court's Order of September 2, 2004 established the manner and content of the notification to the class of the proposed settlement. (D.E. No. 301). In accordance with the parties' suggestion,

[11]For example, in Plaintiff's original complaint Plaintiff asked that Defendants "make available a friend-advocate to each plaintiff and member of the plaintiff class to assist each in securing" different forms of relief regarding community placement Plaintiff's asked for in the Complaint. This was not guaranteed by Defendants in the Agreement. (D.E. No. 1 at 42-43). Plaintiff also asked that Defendants "establish a system to prevent abuse and neglect of people with developmental disabilites" at the DSIs. *Id.* at 42. This system is not mentioned in the Agreement.

the Court ordered that notice be served on all residents of the state's four DSIs and their guardians or next of kin. (D.E. Nos. 301 and 297). As the parties noted in their motion, "this procedure for providing notice is likely to reach more than just those individuals who have been identified as class members." *See* (D.E. No. 297). Copies of the approved Notice of Proposed Class Settlement were mailed by Defendants' agent, The Copy Shop, to the individuals who resided at DSIs, and to their families and guardians. (Fairness Hrg., Exh. 1). The notice was mailed to approximately 3,189 persons. *Id.* Additionally, copies of the approved Notice of Proposed Class Settlement were prominently posted, for a period of at least thirty (30) days, in each home where individuals with developmental disabilities reside at each of the DSIs. (Fairness Hrg. Exhs 2-5).

In this case, where notice was both mailed to class members and their guardians and their next of kin or guardian and where notice was posted prominently in each home where individuals with developmental disabilities resided at each DSI, this Court finds "the procedure used to notify the class members was reasonably calculated to notify interested parties, and adequately provided the opportunity to be heard to any interested parties." *Warren*, 693 F. Supp. at 1060. The Court also notes the adequacy of the measures utilized to provide notice is evidenced by the volume of objections received. The Court received a substantial volume of correspondence relating to the Agreement in this case. (D.E. Nos. 299, 303-313, 315, 318). As the Court finds that the manner in which notice was provided in this case was reasonable and adequate to ensure that both class members and affected individuals received actual notice of the existence of the Agreement, this factor also supports approval of the Agreement.

5. The Judgment of Counsel for the Parties

In determining whether to approve the Agreement, the Court also considers the Judgment of Counsel of the parties. The views of experienced counsel favoring a settlement are entitled to significant weight. *See Warren*, 693 F. Supp. at 1060 (stating "[t]he Court is affording great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation."). Experienced attorneys from the Advocacy Center and outside counsel represent the Plaintiffs. The Advocacy Center's General Counsel, Hubert Grissom, has worked on this matter since 2001, and is experienced in class action litigation. Attorney Ellen Saideman, who has more than sixteen years of experience in the field of class action litigation involving individuals with disabilities, has remained active in the case as outside counsel since relocating from Florida to Rhode Island in 2000. Class counsel Robert D. Fleischner and Steven J. Schwartz of the Center for Public Representation in Massachusetts, each have more than thirty years experience in this type of litigation, and the negotiation, and implementation of structural reforms on behalf of individuals with mental and developmental disabilities confined to institutions. *See* (D.E. No. 220 and 221). In light of the experience of Plaintiffs' counsel, this Court gives great weight to their views, and their support of the Agreement weighs in favor of approval.

6. Substance and Amount of Opposition

The Court also considers the substance and amount of opposition in determining whether to approve the Agreement. The opposition to the Agreement is almost entirely by non-class members who oppose community services. Many correspondents wrote several letters, and in several instances several relatives, neighbors or friends of family members, wrote on behalf of

the same individual. Some letters failed to identify an individual, class member or otherwise, on whose behalf the letter was purportedly submitted, and some letters indicated that the writer had no connection to any DSI resident or, in one case, even with Florida. Numerous letters were not in the proper format nor served on the parties as required by the Notice issued pursuant to the Court's Order. (D.E. Nos. 297 and 301).

The largest group of objectors calls itself the "Stover objectors" and is a group of eighty individuals who are the parents or guardians of residents of Gulf Coast, Sunland, or Tacachale. The Stover objectors concede in their written submissions that residents who have not properly and formally requested community placement are not class members, so that any resident or legal guardian who has not sought community placement is a non-party objector. Non-party objectors may not veto a settlement agreement under Federal Rule of Civil Procedure 23(e). *See Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) ("We hold, therefore, that non-class members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement."); *Assoc. For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 473 (S.D. Fla. 2002) ("Under Fed. R. Civ. P. 23(e), non-class members are not permitted to assert objections to a class action settlement."). Furthermore, the objectors do not have a legally enforceable right, which is impaired by this Agreement, to the continued operation of a particular DSI. As the one court has noted, "[t]he State has always possessed the power - and frequently exercises the power - to relocate its residents for its own administrative needs. If it so desired, the State could unilaterally close any of the State [institutions] for economic reasons or otherwise." *Lelsz v. Kavanagh*, 783 F. Supp. 286, 298 (N.D. Tex. 1991).

The Court notes that at the fairness hearing, the Stover objectors made an oral motion to intervene. (Tr. 19). The Court denied this motion as untimely. (Tr. 19). It is unclear whether the objectors were arguing that they should have been allowed to intervene under Federal Rule of Civil Procedure 24(a) which relates to intervention as of right, or Rule 24(b) which relates to permissive intervention. However, it is clear that both 24(a) and 24(b) state that a party is permitted to intervene "upon *timely* application." Fed. R. Civ. P. 24(a)&(b) (emphasis added). In considering whether a motion to intervene was timely filed, this Court considers:

> (1) the length of time during which the proposed intervenor knew or reasonably should have known of the interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the proposed intervenor's failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if the motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that their motion was untimely.

Georgia v. United States Army Corps of Eng'rs, 302 F.3d 1242, 1259 (11th Cir. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989)).

First, in considering the length of time during which the proposed intervenors have know of their interest, the Court finds the Stover objectors knew of their interest long before the oral motion was made in the middle of the fairness hearing on December 10, 2005. Although the collective Objection to Class Settlement was filed by the Stover Objectors on November 23, 2004, a number of the Stover objectors were among the first to send this Court letters regarding the proposed settlement agreement. Viola Foster, who is listed as one of the Stover objectors, sent an objection to this Court on July 28, 2004 stating that she learned about the possible closure of Gulf Coast Center and this case in an article printed in the News-Press of Fort Meyers on July 12, 2004. (D.E. No. 304). Donald Stover, another Stover objector, presumably for which the

objectors are named, sent a letter to this Court on August 2, 2004. *Id.* Kay Duncan, a Stover Objector, sent a letter to this Court on August 5, 2004 voicing her concerns about the proposed settlement agreement. *Id.* In a letter postmarked August 10, 2004, Jean Eisenberg, another Stover objector, expressed her concern about the closure of Gulf Coast. *Id.* On August 18, 2004, Sarah Jones, another Stover objector, wrote the Court to express her concerns about the possible closing of Gulf Coast. *Id.* Constance Davis, yet another Stover objector sent the Court a letter on August 22, 2004. *Id.* Another Stover objector, Norman Stowers, sent the Court a letter on August 23, 2004. *Id.* The Court also notes that evidence was presented at the fairness hearing that notification was sent to all current residents of the DSIs and all legal guardians or next of kin of these current residents by October 18, 2004. (Defense Exh. 1, fairness hrg). *See also* (D.E. No. 297). The Stover objectors have not offered any explanation for why they had to wait until the middle of the fairness hearing to move to intervene in this case.

The Court also finds the parties would have been prejudiced if the Stover objectors had been allowed to intervene at the fairness hearing. The hearing was in progress at the time the Stover objectors made their oral motion to intervene. There is no indication that the parties were aware or had prepared a response to the Stover objectors' impromptu motion to intervene. The granting of the Stover objectors' oral motion to intervene in the midst of the fairness hearing would most likely have caused the hearing to have been adjourned at that time, and the intervention of the Stover objectors into the case would have interjected other legal issues[12]

[12]The Court notes the Stover objectors also made a last-minute oral motion to decertify the class in the middle of the fairness hearing arguing that a number of the original class members claims had become moot with the closure of Landmark. (Tr. 16-19). The Court finds it unnecessary to reach this argument in light of its findings that the Stover Objectors did not have standing and that their motion to intervene was untimely. However, the Court notes that where original class members' claims are found to be moot, this does not require a decertification of the class. *See East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 406 n.12 (1977) (stating that where a

which would have impeded the resolution of this case, which is already seven years old. Furthermore, it would have required the re-notification of the class for another fairness hearing. *See* (Fairness Hrg., Exh. 1) (stating notices were sent to 3,189 people). The Court also finds the extent of the prejudice to the Stover objectors in denying their motion to intervene is not great. The Stover objectors were still permitted to address the Court at the hearing and present a post-hearing memorandum. The Court also notes for the reasons more fully discussed below that the Court has also examined the Stover objectors concerns and finds these concerns have been sufficiently addressed. Other than the factors already discussed, there have not been any unusual circumstances which militate for or against allowing the Stover Objectors to intervene.[13]

The Court also notes that under Federal Rule of Civil Procedure 24(c) "a person desiring to intervene shall serve a motion to intervene upon the parties." Rule 24(c) also requires the motion to "state the grounds therefor and . . . [to] be accompanied by a pleading setting forth the claim or defense for which intervention is sought." In this case, no motion has ever been served. The Stover objectors simply made a last minute oral motion in the middle of the fairness hearing to intervene in this case. Therefore, the Court finds the intervention of the Stover objectors in this matter is untimely and improper.

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class had already been certified "the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims."). *See also Scott v. City of Anniston, Ala.*, 682 F.2d 1353, 1356-57 (11th Cir. 1982) (finding "[i]t was improper for the District Court to decertify the class on the grounds that the named plaintiffs, who lost because non-common individual claims were resolved against them, were inadequate representatives after the class has prevailed on the issue of liability."). The Court notes that in arguing that the class should be decertified, the Stover Objectors did not advance an argument that the original certification of the class was improper. Therefore, even if this Court were to consider the merits of this motion it would deny it.

[13]At the hearing, the Stover Objectors stated that they were requesting to be allowed to intervene "in fairness and in due process." This vague statement does not represent an unusual circumstance. In fact, it is most likely an argument that could be made in support of any motion to intervene.

Furthermore, even if these objectors had standing or were permitted to intervene, the Court would find their objections unfounded. The Court has examined all of the objections in this case. Many of the objectors are elderly parents of disabled adult children who have been in these institutions for many years. The parents write that they are unable to take care of their disabled adult child in their home at this point in their lives and that they worry about what will happen to their loved one if the institutions are closed. Other objectors write to relate bad experiences their loved one has had in a community home to support their contention that institution-based care is better than community-based care. Still others write to praise the institutions and the medical care their friend or loved one receives in the institutions.[14] The Court recognizes and understands the concerns the objectors are expressing but finds these concerns have been adequately addressed.

First, the objectors' concern that they will be forced to take their disabled relative into their home to care for him or her if an institution closes is unfounded. Residents at the institutions that are closing are not going to be forced out on the streets or into the homes of their elderly parents. Even with the closure of both Gulf Coast and Landmark, there will still be two public DSIs, Tacachale and Sunland Marianna, and approximately ninety private intermediate care facilities for developmentally disabled ("ICF/DDs") available to provide community-based care. (Tr. 73, 89, 94). Furthermore, the Court notes that there is also a misconception that all the institutions in Florida will be closing and there will be no place for the residents of these institutions to go except to community-based care.

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[14]The Court also notes that there are also letters from particular interest groups, some of which support the settlement agreement and some of which do not.

The Court notes that nothing in the Agreement abrogates the provisions of Title 42 U.S.C. §1396n(c), which governs choice of the individual. 42 U.S.C. §1396n(c)(2)(C) provides:

> A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that--
> (C) such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded *are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded;*

(emphasis added). This provision is often referred to as the "freedom of choice" provision. *See Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1351 (S.D. Fla. 1999) (referring to this provision as the freedom of choice provision). Nothing in the Agreement obligates an individual or guardian or other legally authorized representative to choose a home and community-based waiver placement if the individual in fact wants an institutional placement. However, the Agreement does not guarantee an individual a specific institutional placement if he or she chooses institutional placement. (D.E. No. 296 at 5). The plain language of 42 U.S.C. §1396n(c)(2)(C) also does not indicate any entitlement to a specific institutional placement. *See* (Tr. 145). *See also Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003) (the Medicaid statute does not create a right to have an institution or facility nearby the recipients home).

Furthermore, if an adverse decision is made regarding a request for a Medicaid placement, affected individuals retain the right to challenge those decisions through the fair hearing process required by federal law. *See* 42 C.F.R. § 431.230. Additionally, state law also affords protections to the extent that a state decision affects the substantial interests of an individual. *See* Fla. Stat. §§ 120.569, 120.57. Additionally, if an adverse decision is made at a

fair hearing or in the administrative process, state law affords a right to appeal to the state District Court of Appeal. *See* Fla. Stat. §120.68.

The Court also finds a number of safeguards have been put in place to ensure that an informed decision is made as to whether a person is placed in a community-based placement and that adults that choose to move to a community-based placement have a smooth transition. The Agreement provides for an educational program for "consumers, families, guardians, and guardian advocates" that includes information about the supports and services available in the community, and the experience of individuals actually living in the community. (D.E. No. 296 at 4-5). Kerry Schoolfied, the bureau chief for the Agency for Person with Disabilities, testified that for those individuals who have already indicated they want to leave a DSI, they have begun bringing providers to the families, for them to meet and discuss concerns. (Tr. 52, 72). Families will also visit homes in the community. (Tr. 72-73). Also, in the actual transition plan, efforts will be made to ensure that everyone has the information needed to make good decisions about the best way to care for that individual's needs. (Tr. 73). Furthermore, the Agency's area offices conduct monthly monitoring of licensed residential facilities. (Tr. 82). This monitoring determines whether the people are safe, the environment is safe, there are appropriate medication administration records, and it determines whether there are any potential licensure deficiencies in advance of annual licensure inspections. (Tr. 82). Additionally, the Waiver Support Coordinator provides case management services and also has regular contacts with the individual, and is able to monitor the safety of the individual and the services provided. (Tr. 107-108). The Waiver Support Coordinator also acts as an advocate for the individual. (Tr. 107).

Therefore, the Court finds the majority of the objectors did not have standing to object, the Stover Objectors could not properly intervene, and many of the concerns of the objectors are addressed by the Agreement or existing law. Furthermore, the Court notes that it may approve a settlement agreement despite opposition of class members, and even of named plaintiffs where the Court finds the agreement is not a product of collusion and is fair, adequate and reasonable. *Ayers v. Thompson*, 358 F.3d 356, 373 (5th Cir. 2004) ("a settlement can be approved despite opposition from class members, including named plaintiffs"). Therefore, this factor also weighs in favor of approving the Agreement.

7. Stage of Proceedings at which Settlement was Achieved

This Court also considers the stage of proceedings at which settlement was achieved in determining whether to approve the settlement. "The Court must consider whether sufficient discovery has been conducted by the parties to allow them to reach an informed evaluation of the relative merits on the case." *Warren*, 693 F. Supp. at 1060. "The law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations." *Ressler v. Jacobson*, 822 F. Supp. 1551, 1555 (M.D. Fla. 1992). However, in this case the agreement was entered into after substantial discovery and investigation.

In this case, the Agreement was executed after the case was pending for six years, after extensive discovery had been conducted, and just before the commencement of the trial period. *See* (D.E. Nos. 233, 274, 283, 285, 291 and 293). The parties have deposed numerous witnesses. *See* (D.E. Nos. 97-108, 229, 230, 232, 234, 235, 245, 259, 260, 262, and 264). Various motions to compel were also filed in the matter. *See* (D.E. Nos. 196 and 242). The parties have informed

the Court that they have exchanged expert reports, and the Defendants have deposed the Plaintiffs' experts. (D.E. No. 298 at 11); *see also* (D.E. No. 273 and 280). The parties have also informed the Court that "Plaintiffs and their experts have reviewed thousands of pages of relevant documents produced by the Defendants." (D.E. No. 298 at 11). As in *Ressler*, discovery has reached an advanced stage where the parties "'certainly have a clear view of the strengths and weaknesses of their cases.'" *Ressler*, 822 F. Supp. at 1555 (quoting *In re Warner Communications Securities Litigation*, 618 F. Supp. 735, 745 (S.D.N.Y.1985)). Therefore, it is clear that Plaintiffs did have access to sufficient information to evaluate the case. Thus, this Court finds this factor also mitigates in favor of approval of the Agreement.

As there is no evidence of collusion, and an examination of all seven factors support the approval of the agreement as fair, adequate, and reasonable, it is hereby:

ORDERED and ADJUDGED

1. The proposed Amended Settlement Agreement (D.E. No. 296) is **APPROVED**. This case is **ADMINISTRATIVELY CLOSED** and all pending motions are denied as **MOOT**. On June 30, 2007, if appropriate, the parties may make an appropriate motion for dismissal of this case with prejudice except as to the claims for prospective declaratory and injunctive relief of class members who have not been discharged from the DSIs as provided for in the Amended Settlement Agreement. *See* (D.E. No. 296 at 8).
2. The Stover Objectors' oral motion to intervene is **DENIED** for the reasons stated on the record at the hearing on December, 10 2005 and for the reasons stated herein.

3. The Stover Objectors' oral motion to decertify the class is **DENIED** for the reasons stated on the record at the hearing on December 10, 2004 and for the reasons stated herein.

DONE AND ORDERED in Chambers at Miami, Florida, this 11 day of August, 2005.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies Provided to:
Magistrate Judge Bandstra
All Counsel of Record