UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

WOLF PRADO-STEIMAN, et al.,

Plaintiffs,

vs. **Case No.: 98-6496-CIV-FERGUSON**

JEB BUSH, et al.,

Defendants.
_____/

JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

Plaintiffs, as representatives of the certified class,[1] and Defendants, all sued in their official capacities only, move this Honorable Court to approve the Settlement Agreement which was filed with this Court on June 30, 2000. As grounds therefor, the parties would state:

Preliminary Statement

Plaintiffs filed a civil rights class action lawsuit pursuant to Title 42 U.S.C. § 1983 in order to challenge the administration of the Florida Developmental Services Home and Community-Based Services Waiver (Waiver), a Medicaid program which provides funding for community-based services for individuals with developmental disabilities. Among other things, the Second Amended Complaint alleges that Defendants denied some individuals enrolled on

[1] / In this Court's Order dated March 29, 1999, the class was certified as "All persons with developmental disabilities who are presently receiving Home and Community-Based Waiver services or who are eligible to receive Home and Community-Based Waiver Services, or who would receive or be eligible for Home and Community-Based Waiver Services in the future."

the Waiver needed Waiver services, denied other individuals enrollment on the Waiver, and failed to provide these individuals with any notice of their due process rights.

On March 29, 2000, the Court certified a class in this case. The class definition has been described above in footnote 1. Defendants have appealed the Order Certifying Class. Although oral argument in the appeal was held in December 1999, no opinion has been issued to date.

A non-jury trial was scheduled to commence on July 10, 2000, on the Second Amended Complaint. Upon being apprised that the parties had executed a Settlement Agreement, the Court removed the case from the trial docket, pending a proceeding to consider whether the Settlement Agreement should be approved.

On June 30, 2000, the Court issued an Order dismissing this case without prejudice. The Order further provided that the Court would retain jurisdiction of the case for sixty (60) days to review and approve the Agreement.

In 1999 and again in 2000, the Florida Legislature appropriated additional funding for community-based services provided through the Waiver. As a result of the funding, Defendants have been able to enroll more than 6,000 persons on the Waiver, and have been able to provide additional Waiver services to more than 8,000 persons already enrolled on the Waiver.

The parties have now reached a settlement which is a fair resolution of this case. Further, the Settlement avoids unnecessary utilization of scarce judicial resources that would be required to resolve the many complicated questions regarding the adequacy of Florida's Waiver under both federal statutory mandates and the federal constitution.

I. SUMMARY OF SETTLEMENT

The terms of the Settlement Agreement are designed to guide an orderly and safe expansion of the Waiver, and to ensure the health and safety of those enrolled on the Waiver. Additionally, the Settlement Agreement assures that individuals seeking Waiver services will be provided notice of their due process rights if an adverse action is taken regarding a request for Waiver services.

The following describes the terms of the Settlement Agreement:

A. By August 31, 2000, the Department of Children and Family Services (Department) will complete an assessment of the need for additional Waiver providers by District. Upon completion of the assessment of need for providers, each District shall establish a plan for recruiting new providers and expanding existing providers, where indicated. The District plans must be completed by September 15, 2000. Those plans are subject to approval by the Department. Each district will be accountable for following their respective approved plan.

Also, the Department will create a statewide registry of Waiver providers by September 15, 2000.

B. Effective July 1, 2000, the Department shall certify all Waiver providers on a statewide basis, without the necessity of certification by district.

C. The Settlement Agreement provides for provider training. A workgroup will be established to make recommendations as to an appropriate curriculum for provider training. The parties anticipate that they will be able to utilize existing curriculum for training purposes.

Ultimately, the Settlement Agreement contemplates mandatory training. Short term, the training will be made available on a voluntary basis (effective July 1, 2001).

The workgroup will make recommendations for "phasing in" mandatory training. The Department and the Agency shall then consider the recommendations, and determine how best to structure a mandatory training program. By September 2, 2001, the Department will submit a request to the Florida Legislature to fund competency-based training of providers. In the event that funding is not appropriated for competency-based training, beginning fiscal year 2002-2003, the Department will make available $200,000 per year for use in developing curriculum and implementing a mandatory training program.

The Department and the Agency also agree to develop a protocol for medication administration and handling consistent with state law. This protocol will be available for implementation by October 1, 2000. Effective December 1, 2000, the Department will begin to modify provider assurances for appropriate direct care workers and the providers who employ them to require training on the protocol as a condition of enrollment as a Waiver provider or continued enrollment on the Waiver.

D. By March 1, 2001, the Department and the Agency will revise and strengthen training requirements for Waiver Support Coordinators, to ensure that they have appropriate training on a number of topics.

The Department will seek funding from the 2001 Legislature for funding for a competency-based training program for Waiver Support Coordinators.

By November 1, 2000, the Department and the Agency, with input from the Advocacy Center, will develop a proposal to eliminate unnecessary paper work by Waiver Support Coordinators.

By October 1, 2000, the Department will establish and implement a policy for handling complaints against Waiver Support Coordinators.

Also, the Department and the Agency will study the issue of caseloads for Waiver Support Coordinators, to determine what an appropriate caseload for Waiver Support Coordinators might be, and to determine an appropriate "mix of cases" for a Waiver Support Coordinator. The term "mix of cases" refers to the number of clients for which a Waiver Support Coordinator provides more intensive case management services, in comparison to the number of clients for which a Waiver Support Coordinator provides more routine case management services.

The Department and the Agency will also study support coordination rates, and determine whether an enhanced support coordination rate is appropriate where more intensive case management services are required. If feasible, in the sole discretion of the Defendants, the Department and the Agency will submit a request to the Governor and the Florida Legislature, by September 1, 2001, for funding to support the enhanced rate. Also, by September 1, 2001, the Department and the Agency will submit a recommendation to the Florida Legislature regarding an appropriate "mix of cases."

E. The Settlement Agreement requires the creation of a Quality Assurance System. The Legislature has directed the Agency for Health Care Administration to contract with an

outside entity to perform quality assurance monitoring of Waiver services. The Request For Proposal for the quality assurance will be issued by December 31, 2000.

In the absence of a bid protest or administrative challenge to the award of the contract, the Department and the Agency agree that they will begin implementation of the Quality Assurance system within sixty (60) days after execution of the contract.

By September 30, 2000, a contractor retained by the Department will conduct an evaluation to determine how the Department can best provide medical quality assurance services in all of the Districts. As a result of that evaluation, the Department will develop a uniform plan of medical case management. The Department will implement medical case management in the districts by December 31, 2000.

The parties also agree that citizen monitors will be used to assist in monitoring Waiver services.

F. By December 1, 2001, the Department will substantially complete choice counseling for all individuals who live and receive Waiver services at the residential habilitation centers (large group homes with more than 15 beds). The focus of the choice counseling will be alternative residential placement options. In order to ensure that individuals have a meaningful choice of residential placement options, the Department will work toward developing alternative residential placements.

If a vacancy occurs in the residential habilitation centers, the vacancy will not be filled with an individual enrolled on the Waiver. Two residential habilitation centers are exempted from this requirement, Carlton Palms and F.I.N.R.S. However, beginning six (6) months after the approval of the Settlement Agreement by the Court (and every six months thereafter), the

Department agrees to review each Waiver placement in Carlton Palms and F.I.N.R.S. to determine whether the placement continues to be medically necessary.

G. The Settlement Agreement establishes service delivery time lines. During the course of this fiscal year (2000-2001), the Department agrees that, subject to availability of a slot and funding for the slot, it will incrementally enroll 3,889 persons on the Waiver, consistent with the Spending Plan previously submitted to the Legislature.

Effective the date that this Settlement Agreement is approved by the Court and continuing until June 30, 2001, the Department will make reasonable efforts to provide those requested Waiver services for which a determination of medical necessity has been made within ninety (90) days of the date of the individual's enrollment on the Waiver, to the extent that sufficient provider capacity exists.

The Department is in the process of completing an applications policy for the Waiver. The expected date for completion of the policy is September 1, 2000.

Effective July 1, 2001, the Department will enroll eligible individuals on the Waiver with reasonable promptness, to the extent that a Waiver slot and funding for that slot exist. The Department will also provide medically necessary Waiver services to enrolled individuals with reasonable promptness.

The Settlement Agreement establishes time frames for processing an application for Waiver services, notifying the client of action on the application, requesting a Waiver Support Coordinator, completion of a support plan and cost plan, and initiation of services, with which the Department agrees to substantially comply. For individuals who are both Medicaid recipients and Developmental Services (DS) clients, medically necessary services should be

provided within ninety (90) days after receipt of the application for Waiver services - to the extent that the individual is eligible for the Waiver, and a slot and funding exist to enroll the individual on the Waiver.

Additional time frames are provided for a determination of Medicaid eligibility (90 days) and DS eligibility (consistent with state law) - however, if a person is neither Medicaid eligible nor DS eligible at the time of application for Wavier services, the time frames run concurrently.

For individuals in crisis, the Department will make reasonable efforts to provide necessary services as quickly as possible.

H. By December 31, 2001, the Waiver Support Coordinators will be required to provide service counseling to all Waiver clients currently in sheltered workshops or segregated work environments to apprise them of the options available to them for meaningful work activities.

The Department will enhance adult day training standards to assure or reemphasize that meaningful day activities relate to the person achieving his or her life goals. The Advocacy Center will have input into the proposed modification of provider assurances. The Department will implement modification of provider assurances with the provider enrollment cycles beginning on or after July 1, 2001.

I. The Department agrees that, by November 30, 2000, it will conduct and complete a rate and standardization study (rate study) relating to provider rates. The purpose of this study will be to determine the methodologies currently being used to set rates, and to develop

appropriate rate setting methodologies for different provider types. The rate study will include consideration of the cost of provider training.

After completion of the rate study, but no earlier than January 1, 2001, based upon the findings of the rate study, the Department agrees to provide a rate adjustment increase of up to 3% to equitably increase rates to providers, to the extent that funds are available in Specific Appropriation 344. To the extent that the rate study reflects a need for rate adjustment increases, the direct care workers shall be paid a 3% raise first.

By November 30, 2000, the Agency and the Department will submit the results of the rate study to the Florida Legislature for consideration during the 2001 Session. Further, the Agency and the Department agree to use their best efforts to obtain any additional funding from the Legislature for the rate study, and to implement the recommendations of the rate study, including equitable changes to minimize disparities in provider rates among the same provider types.

If additional funding is required to implement the results of the rate study, over and above what has been authorized for the 2000-2001 fiscal year, the parties understand that full implementation of the rate study is subject to Legislative funding.

J. The Department agrees to substantially comply with the most current version of its Due Process Policy as it relates to both individuals requesting enrollment on the Waiver and individuals on the Waiver requesting Waiver services.

K. By June 30, 2001, the Department and the Agency will publish a Waiver handbook which will establish statewide policies regarding administration of the Waiver.

In the interim, as a need is identified to create and implement statewide policies on particular issues, the Department, in conjunction with the Agency, agrees that it will issue written interim policies to address these needs.

L. The Department agrees that it will translate the Florida Status Tracking Survey (FSTS) into both Spanish and Creole, as quickly as possible, but no later than November 1, 2000. Upon completion of the translation, the Department intends to allow Spanish and Creole speaking consumers, and their families, to provide input regarding the accuracy of the translations. This may necessitate further revisions, so that the translated versions of the FSTS accurately communicate the necessary information. The Department anticipates that it will be able to fully implement the translated versions of the FSTS (with any necessary revisions), by no later than January 31, 2001.

Further, the Department will exercise its best efforts to ensure that interviewers who meet with clients (and families), who do not speak English, but rather speak Spanish or Creole, be able to competently communicate in Spanish or Creole as indicated.

M. The court will retain jurisdiction in this lawsuit until December 31, 2001, at which time the matter will be dismissed *with prejudice*, unless plaintiffs can show a material breach as evidenced by systemic deficiencies in the Defendants' implementation of the plan of compliance. Prior to filing a motion asserting material breach, plaintiffs must comply with the notice and cure provisions contained in the agreement.

II. STANDARD FOR APPROVAL OF SETTLEMENT FOR CLASS ACTION LITIGATION

The standards to be applied in determining whether to approve a class action settlement are well-established. "Compromises of disputed claims are favored by the Courts." Williams v. First National Bank, 216 U.S. 582, 595 (1910). Nowhere is this policy more appropriate than in class actions.

In the class action context in particular, "there is an overriding public interest in favor of settlement." Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977). Settlement of complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources. Armstrong v. Board of School Directors, 616 F.2d 305, 313, (7th Cir. 1980); accord Franks v. roger Co., 649 F.2d 1216, 1224 (6th Cir. 1981).

Under the Federal Rules of Civil Procedure, a court should approve a class action settlement if it is "fair, adequate and reasonable." Fed. R. Civ. P. 23(e); *accord*, Piambino v. Bailey, 757 F.2d 1112, 1139 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); Protective Committee v. Anderson, 390 U.S. 414,434 (1968). In assessing a proposed settlement, "[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amounts and form of the relief offered in the settlement." Carson v. American Brands, Inc., 450 U.S. 79, 88 n. 14 (1981).

The Eleventh Circuit has enumerated a number of elements which a district court may consider in evaluating the fairness of a class settlement, including the following:

(1) the likelihood of success at trial;
(2) the range of possible recovery;

(3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable;
(4) the complexity, expense and duration of litigation;
(5) the substance and amount of opposition to the settlement; and
(6) the stage of proceedings at which the settlement was achieved.

Bennett v. Behring, 737 F.2d 982, 986 (11th Cir. 1984). Despite the multitude of factors identified above, courts should "not decide the merits of the case or resolve unsettled legal questions." Carson v. American Brands, Inc., 450 U.S. 79, 88 n. 14 (1981)

In appraising the fairness of a proposed settlement, the view of experienced counsel favoring a settlement is entitled to significant weight. See Ressler v. Jacobson, 822 F. Supp. 1551, 1552 (M.D. Fla. 1992) citing Cotton v. Hinton, 559 F.2d 1326, 1330-1332 (5th Cir. 1977). In reviewing a settlement, the court should be "hesitant to substitute his or her own judgment for that of counsel." In re Smith, 926 F.2d 1027, 1028 (11th Cir. 1991). A judge must "'guard against the temptation to become an advocate'" and should favor neither party nor "'those who are opposed or absent.'" *Id.*, at 1029. Nor should the court disapprove a settlement because of "generalized notions of unfairness or unacceptability." *Id.*

The Settlement in this case was the result of non-collusive, intensive negotiations by counsel who are seasoned litigators with many years of experience in comparable litigation.

A. Class Counsel are Experienced

Plaintiffs were represented by an experienced team of attorneys from the Advocacy Center for Persons with Disabilities, Inc. Peter L. Nimkoff has practiced law extensively in this Court and served as a United States Magistrate from 1982-1986. Since September 1996, Mr. Nimkoff has been the Litigation Director or Chief Counsel at the Advocacy Center. Ellen M.

Saideman is an experienced lawyer in the field of class action litigation and litigation involving individuals with developmental disabilities.

B. Class Counsel Support Approval of the Settlement

After full review and analysis of the evidence and legal issues, Plaintiffs' counsel are satisfied that this Settlement confers significant, concrete benefits upon the class members and is fair, reasonable and adequate in light of the complexity, delay and possible risks attendant to continued litigation. There is strong judicial policy favoring settlement as well as the realization that compromise is the essence of settlement. Bennett v. Behring Corp, 737 F.2d 982, 986(11th Cir. 1984); U.S. v. City of Miami, 614 F.2d 1322 (5th Cir. 1980); Florida Trailer and Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960).

Further, this Settlement is a deviation from the long held policy of the State of Florida not to permit continued federal court jurisdiction. This Court is well aware that the Governor and the Attorney General have taken the position that the State of Florida will not enter into any stipulated settlements or consent decrees where any court retains jurisdiction.

II. EVALUATION OF THE SETTLEMENT

Examining the Settlement in light of the criteria outlined above, it must be concluded that it is fair, adequate, reasonable and in the best interest of the class.

A. Likelihood of Success on the Merits

The State has made a number of changes in the administration of the Waiver since this lawsuit was filed. Further, significant new funding appropriated by the Florida Legislature for fiscal years 1999-2000 and 2000-2001 has enabled the Defendants to provide needed services to individuals already enrolled on the Waiver, and to enroll over 6,000 new persons on the

Waiver already. This is an action for injunctive and declaratory relief only, and includes no action for damages. Such relief is prospective in nature. In light of increased funding for the Waiver, the ongoing expansion of the Waiver, and increases in the delivery of Waiver services, the Court must, in evaluating Plaintiffs' claims determine, among other things, whether there exists a likelihood that plaintiffs will suffer future harm at the hands of defendants. Cone Corp. v. Florida Dept. of Transp., 921 F.2d 1190, 1204 (11th Cir. 1991).

The order certifying class is on appeal. In order to appeal that order, the Defendants had to obtain permission from the Eleventh Circuit Court of Appeals to file the appeal. That permission was given, suggesting that the appeal was not frivolous in nature. An adverse decision on appeal might have significantly narrowed the class and the issues which remained for class resolution.

Similarly, Defendants believe that Plaintiffs' claims are barred by the Eleventh Amendment to the United States Constitution, and would have challenged Plaintiffs' statutory claims under section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, and particularly the use of those statutes to suggest that the state is affirmatively obligated to provide services to individuals for their disabilities in order to avoid institutionalization. Although Plaintiffs believe

that they would prevail on these issues,[2] there is the attendant risk that the Eleventh Circuit might hold the Eleventh Amendment bars the requested relief.

B. Range of Possible Recovery

The parties believe that the Settlement Agreement provides a broader range of recovery than might otherwise be available in this case. The central issues in the Second Amended Complaint were the lack of funding to provide needed Waiver services, the failure to provide due process notice when Waiver services were denied, delays which class members experienced in receiving Waiver services, and the scope of Waiver services provided. Thus, any injunctive and declaratory relief would be directed to those issues. However, the Settlement Agreement goes beyond the issues pleaded in the Second Amended Complaint, including matters such as provider training, quality assurance, the training of Waiver Support Coordinators, provider rates, the nature of adult day training programs and supported employment programs (as distinct from the availability of such programs), and other miscellaneous issues.

C. Fairness, Adequacy and Reasonableness of the Settlement

The determination of "reasonable" settlement is not susceptible to a mathematical equation yielding a particularized sum. As the court explained: "[T]here is a range of

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[2]/*See Olmstead v. L.C. by Zimring*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999); Helen *L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995), *cert denied*, 116 S.Ct. 64 (1995)(holding that the ADA required DPW to place plaintiff in an attendant care program in the community as it was the most integrated setting to meet her needs); *Martin v. Voinovich*, 840 F. Supp. 1175, 1192 (S.D. Ohio 1993) (refusing to dismiss claims that state violated Section 504 and ADA by excluding people with severe disabilities from community programs); and *Jackson v. Fort Stanton School & Hospital*, 757 F.Supp. 1243, 1299 (D. N.M. 1990) (holding that defendants violated Section 504 by failing to integrate persons with severe disabilities into community programs).

reasonableness with respect to a settlement . . ." Newman v. Stein, 464 F.2d 689, 693 (2d Cir.), cert. denied, 409 U.S. 1039 (1972).

In the instant case, the Settlement Agreement is imminently reasonable because it ensures that the expansion of the Waiver occurs in a safe and effective manner, and that the individuals served through the Waiver are provided with medically necessary services with reasonable promptness. The Settlement Agreement ensures that there are quality assurance mechanisms to oversee the operation of the Waiver. Also, the Settlement Agreement ensures that the Due Process policy now in place will be followed.

D. Complexity, Expense and Duration of Litigation

The complexity of the factual and legal issues involved in this litigation cannot be underestimated. The case deals with a variety of services to persons on the Waiver, and persons who wish to be enrolled on the Waiver. There are over 18,000 persons on the Waiver alone.

The expense of continuing to litigate would be substantial. Plaintiffs' litigation costs are anticipated to be extensive.

The parties emphatically prefer to devote these resources to productively meeting the human needs of the class of individuals who need to be served.

Even if the class obtained a favorable decision and it was upheld on appeal, the class would not be assured of a judgment more favorable than the present settlement, particularly in view of the likelihood of extensive appeals. In addition to the complexity and expense of continued litigation regarding remedy, the Court must also consider the potential impact on scarce judicial resources. In the absence of this Settlement, the class might receive fewer benefits, even assuming a favorable decision, for years. *Cf.* Ressler v. Jacobson, 822 F. Supp.

1551, 1553-55 (noting that litigation of these types of cases often consumes extensive judicial resources).

The Parties agree that the time and expense of continued litigation is to be avoided, if at all possible.

E. Stage of Proceedings at which the Settlement was Achieved

The purpose of considering the stage of the proceedings is to ensure that Plaintiffs have had access to sufficient information to evaluate the case and to assess the adequacy of a settlement proposal with an informed judgement of the strengths and weaknesses of their position. See In re General Motors Corp., 846 F. Supp. 330, 334-35 (E.D. Pa. 1993). In the instant case, there has been extensive discovery over the past two years. Plaintiffs have had the opportunity to depose Defendants' fact and expert witnesses, to the extent that they chose to do so. Plaintiffs have had an opportunity to review thousands of pages of documents relating to Defendants' case. The Settlement Agreement was executed only eleven (11) days prior to the trial.

Additionally, the settlement discussions have included numerous discussions relating to the viability of the different claims brought by plaintiffs.

CONCLUSION

The Parties respectfully request that the Court enter an order approving the Stipulation of Settlement for all of the foregoing reasons, after a fairness hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent, by United States Mail to: **Mark Dubin, Esquire,** *Civil Rights Division, United States Department of Justice*, 1425 New York Avenue N.W., Room 4042, Washington, D.C. 20005, **Veronica Harrel-James, Esquire, Assistant U.S. Attorney**, and **Thomas E. Scott, Esquire, United States Attorney**, Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132, on this 31st day of July, 2000.

STEPHANIE A. DANIEL
Assistant Attorney General