IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ETHEL WILLIAMS, *et al.*,	)	
	)	
Plaintiffs,	)	No. 05 C 4673
	)	
vs.	)	Judge Hart
	)	Magistrate Judge Denlow
PAT QUINN, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CONSENT DECREE AND APPROVAL OF NOTICE PLAN

Plaintiffs Ethel Williams, Jan Wrightsell, Edward Brandon, and Gilbert Parham, on behalf of themselves and all others similarly situated ("Plaintiffs"), and Defendants Pat Quinn, Michelle R.B. Saddler, Lorrie Rickman Jones, Barry Maram, and Damon T. Arnold, (collectively, the "Parties"), submit this joint memorandum in support of their Motion for Preliminary Approval of Consent Decree and Approval of Notice Plan ("Motion"). For the reasons explained below, the Parties' proposed Consent Decree ("Decree") is fair, adequate and reasonable, and provides substantial benefits to the entire class while removing the delay, risk, and expense inherent in the trial of a complex case such as this. The Parties respectfully urge this Court to grant preliminary approval of the proposed Decree, attached to the Motion as Exhibit A, adopt the Notice Plan, attached to the Motion as Exhibit B, and schedule a Fairness Hearing to address the fairness and adequacy of the proposed Decree pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

BACKGROUND

Plaintiffs filed this action on August 15, 2005, seeking to prevent their unnecessary segregation in large institutions referred to as Institutions for Mental Diseases ("IMDs"). The Named Plaintiffs are adults with mental illness institutionalized in IMDs. Defendants are Governor Pat Quinn, named in his official capacity as Governor of the State of Illinois, Michelle R.B. Saddler, named in her official capacity as Secretary of the Illinois Department of Human Services ("DHS"), Lorrie Rickman Jones, named in her official capacity as Director of the Illinois Department of Human Services, Division of Mental Health ("DMH"), Barry Maram, named in his official capacity as Director of the Illinois Department of Healthcare and Family Services ("HFS"), and Damon T. Arnold, named in his official capacity as Director of the Illinois Department of Public Health ("DPH"). Defendants are responsible for administering Illinois' system of services for individuals with mental illness.

As set forth in Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief ("Complaint"), Plaintiffs contend that Defendants are violating the integration mandates of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA") and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) ("Section 504"), which require that services, programs and activities be provided in the most integrated setting appropriate to the needs of individuals with disabilities. As the United States Supreme Court affirmed in *Olmstead v. L.C.*, "unjustified institutional isolation of persons with disabilities is a form of discrimination." 527 U.S. 591, 600 (1999). Plaintiffs allege that Defendants have failed to comply with federal law by failing to ensure that individuals with mental illness who live in IMDs receive services in the most integrated setting appropriate to their needs, and that offering such opportunities would not fundamentally alter Defendants' system of services for individuals with mental illness.

Defendants deny many of the Complaint's allegations and specifically deny that they have violated any of the federal statutes cited therein.

Plaintiffs asserted their claims on behalf of themselves and all others similarly situated. On November 13, 2006, the Court certified this case as a class action.[1] The Parties engaged in substantial written, oral and expert discovery. By the time they reached agreement on the proposed Decree, hundreds of thousands of pages of documents had been produced and the Parties had conducted over 30 depositions. Plaintiffs worked extensively with five experts who submitted expert reports regarding Illinois' heavy reliance on IMDs and other components of the manner in which Illinois delivers services to individuals with mental illness. Defendants worked with two experts who also submitted expert reports. The Parties deposed five of the experts.

At the urging of this Court, in September 2009, the Parties began to discuss a resolution of the litigation. The Parties exchanged and negotiated proposed language to be incorporated in a formal consent decree. A settlement conference supervised by United States Magistrate Judge Morton Denlow was held on October 24, 2009. After several more negotiations, an agreement in principle regarding the contours of a consent decree to be entered by the Court was reached on February 4, 2010. (CM/ECF Doc. No. 235.) Since that time, the Parties have drafted a proposed Consent Decree and agreed upon a proposed strategy to provide notice to class members and others who provide services to class members. Accordingly, the Parties now jointly move this Court to grant preliminary approval of the proposed Consent Decree, approve the Notice Plan

[1] As set forth in the Court's Order (CM/ECF Doc. No. 69), the class was defined as:

> Illinois residents who: (a) have a mental illness; (b) are institutionalized in a privately owned Institutions for Mental Diseases; and (c) with appropriate supports and services may be able to live in an integrated community setting.

and schedule a hearing to address the fairness and adequacy of the proposed settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

THE COURT SHOULD PRELIMINARILY APPROVE THE CONSENT DECREE

A. THE PRINCIPAL TERMS OF THE DECREE PROVIDE FAIR AND REASONABLE RELIEF.

The Decree fairly, reasonably and adequately affords relief to class members. The essence of Plaintiffs' Complaint is that Defendants must ensure that individuals with mental illness living in IMDs are afforded opportunities to live in the most integrated setting appropriate and to make meaningful, informed choices regarding where they live, and that Defendants must ensure that sufficient supports and services are available to enable class members to live successfully in integrated settings. The relief afforded under the Decree addresses and achieves that goal.

1. Development of Community Capacity.

The Decree requires Defendants to ensure the availability of sufficient services, supports and other resources necessary to meet their obligations under the Decree, including supportive housing, Assertive Community Treatment, case management, and other services, such that class members can meaningfully exercise the choice to live in the most integrated setting appropriate.

2. Relief Afforded to Class Members Currently Residing in IMDs.

The Decree ensures that individuals currently residing in IMDs who do not oppose placement in a Community-Based Setting (as defined in the Decree) will receive services in the most integrated setting appropriate to their needs and preferences. Specifically, within two years of the finalization of the Implementation Plan ("IP") (described in Paragraph 4 below), class members will receive appropriate evaluations to determine the supports and services required for them to live in the most integrated setting appropriate to their needs. For class members who do

not oppose moving to a Community-Based Setting, a Qualified Professional (as defined in the Decree) will develop a Service Plan (as defined in the Decree) specific to each individual, in conjunction with the class member as well as his or her legal representative, if any, and may consult with any other appropriate people of the class member's choosing. The Service Plan will describe the services required; where and how such services will be developed and obtained; and a timetable for promptly completing the move to a Community-Based Setting.

Within five years of finalization of the IP, all persons residing in IMDs who do not oppose placement in Community-Based Settings will be afforded the chance to move to such Settings consistent with their Service Plans. The Decree sets forth interim benchmarks to assure continual progress toward that goal.[2] The Decree does not force anyone to move out of an IMD if they do not wish to do so.

3. Monitoring and Compliance.

Under the proposed Decree, the Court will appoint an independent and impartial Monitor who is knowledgeable concerning the management and oversight of programs serving individuals with mental illness. The Monitor will be responsible for gauging Defendants' compliance with the Decree, identifying actual and potential areas of non-compliance with the Decree, and recommending appropriate action by the Court in the event that any issues cannot be resolved by discussion and negotiation among the Monitor and the Parties. The Monitor will file

[2] Benchmarks include the following: Defendants will have offered placement to a minimum of 640 individuals residing in IMDs who are appropriate for living in a Community-Based Setting and who do not oppose moving to a Community-Based Setting within two (2) years of finalization of the IP; Defendants will have offered placement to a minimum of forty percent (40%) of all individuals residing in IMDs who are appropriate for living in a Community-Based Setting and who do not oppose moving to a Community-Based Setting within three (3) years of finalization of the IP; and Defendants will have offered placement to a minimum of seventy percent (70%) of all individuals residing in IMDs who are appropriate for living in a Community-Based Setting and who do not oppose moving to a Community-Based Setting within four (4) years of finalization of the IP.

annual, publicly available reports with the Court to provide information sufficient for the Court to evaluate Defendants' compliance or non-compliance with the Decree.

4. Implementation Plan.

The proposed Decree requires Defendants (with assistance from the Monitor and class counsel) to develop an "Implementation Plan" to accomplish the obligations and objectives set forth in the Decree. The Implementation Plan will set forth specific tasks, timetables, and protocols to ensure that Defendants fulfill the requirements of each provision of the Decree; describe the hiring, training and supervision of the personnel necessary to implement the Decree; describe necessary activities to develop Community-Based Services (as defined in the Decree) and Community-Based Settings; identify any services or supports required in Service Plans that are not currently available in sufficient quantity; identify any services and supports which, based on demographic or other data, are expected to be required to meet Defendants' obligations under the Decree; identify any changes to regulations governing IMDs that would strengthen services for persons with mental illness and to provide for effective oversight and enforcement of all regulations and laws; describe the methods by which Defendants will ensure compliance with their obligations related to evaluations; and describe the methods by which Defendants will ensure compliance with their obligations related to outreach to class members.

5. Attorneys' Fees and Costs.

In full settlement of attorneys' fees incurred to date in connection with the litigation, Defendants will pay $1,990,000.00 to class counsel. This sum accounts for less than half of the value of the total time spent by class counsel. Additionally, Defendants will pay all costs and expenses incurred by class counsel through and including the approval of the Decree and any appeal thereof.

B. THE PROPOSED CONSENT DECREE MERITS PRELIMINARY APPROVAL.

Preliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled. David F. Herr, MANUAL FOR COMPLEX LITIGATION, FOURTH ("MANUAL FOURTH"), § 30.4 (2005). In considering preliminary approval, the court must first determine whether the proposed settlement is within the range of reasonableness that ultimately could be given final approval. *See Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 312 (7th Cir. 1980). The court must review the settlement for fairness, adequacy, and reasonableness. *Id.* at 313 ("The courts of appeals have required that district court approval of a settlement pursuant to Rule 23(e) be given only where the district court finds the settlement fair, reasonable and adequate."). If the court finds that a settlement is "within the range of possible approval," it then proceeds to the second step in the review process, the fairness hearing. *Id.* at 310; *see also* 4 Robert Newberg, NEWBERG ON CLASS ACTIONS § 11:25 at 38 (4th ed. 2002) ("NEWBERG") ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies . . . and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing . . . ."). The purpose of the fairness hearing is to "provide class members an opportunity to present their views on the proposed settlement and to hear arguments and evidence for and against the terms." MANUAL FOURTH § 21.633.

The Seventh Circuit has identified six factors for analyzing whether a class action settlement should be given final approval. These factors are equally germane in deciding whether to grant preliminary approval:

1. the strength of the plaintiff's case on the merits balanced against the settlement;

2. the complexity, length and expense of continued litigation;

3. the amount of opposition to the settlement;

4. the presence of collusion in gaining a settlement;

5. the opinion of competent counsel regarding the reasonableness of the settlement; and

6. the stage of the proceedings and the amount of discovery completed.

See GE Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1082 (7th Cir. 1997); *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 308 (7th Cir. 1985). The district court should refrain from resolving the merits of the case or resolving unsettled legal questions. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985). Because the object of settlement is to avoid, not confront, the determination of contested issues, the approval process should not be converted into an abbreviated trial on the merits. *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988) ("the district court need not undertake the type of detailed investigation that trying the case would involve"). Instead, the court's inquiry should be "limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and adequate." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). As set forth in the following sections, application of these six factors in the context of this litigation merits preliminary approval of the Decree.

1. Strength of the Plaintiffs' Case on the Merits Balanced Against the Terms of the Consent Decree.

The terms of the Decree are fair, reasonable and adequate when balanced against the strength of the Plaintiffs' case on the merits. Plaintiffs allege that Defendants have failed to comply with the integration mandates required by the ADA and Section 504, and specifically allege that the vast majority of IMD residents with mental illness are not being served in the

most integrated setting appropriate to their needs, their lives often are damaged because they lose the opportunity to participate fully in their co mmunities, most would choose to liv e in a m ore integrated setting if given a meaningful choice, and it would not fundamentally alter Defendants' service system to afford these indiv iduals the opportunity to live in the most integra ted setting. Plaintiffs believe they have developed the neces sary proof to support these claim s, including the retention of experts who would te stify, among other things, that m ost class members can live in supportive housing, a far m ore integrated setting th an an IMD; that m ost class m embers would choose to live in m ore integrated settings if given a meaningful choice; that supportive ho using can and has served individuals w ith mental illness with a wide variety of needs, including individuals with very challeng ing needs; that Defendants have the ability to make supportive housing and other Community-Based Settings av ailable to class m embers and co uld do so without incurring undue cost s (and would in fact realize savings from doing so); that there are service providers in Illin ois who have the capab ility and willingness to s erve IMD residen ts in more integrated settings; and that Defendants do not have a com prehensive, effectively working plan for moving individuals from IMDs to more integrated settings. Defendants' experts disagreed with some of these conclusions bu t acknowledged that m any people living in IMDs could live in more integrated settings, including supportive housing.

Despite the strengths of Plaintiffs' case, Plain tiffs are mindful of the hurdles to establish Defendants' liability and overcome any affirmative defenses. Plaintiffs also are m indful of the possibility of an adverse ruling on appeal if they prevail at trial. Im portantly, however, because the proposed Decree ensures that individuals with mental illness are offered the opportunity to make informed, meaningful choices as to w hether or not their needs can bes t be m et in Community-Based Settings or institutiona l settings, and ensures the av ailability of integrated

settings for those who do not oppose them, the Decree grants much of the relief sought in Plaintiffs' Complaint, which Defendants acknowledge is appropriate for the individuals that their agencies are intended to serve. In addition, without conceding the merits of the Plaintiffs' allegations, Defendants believe that the services and supports required by the Decree are consistent with their vision of the future direction of the mental health services system in Illinois, including the need to develop integrated housing and Community-Based Services for individuals with mental illness. Accordingly, all Parties jointly submit that the Decree is fair, reasonable and adequate.

2. Complexity, Length and Expense of Continued Litigation.

The Parties submit that if the proposed Decree is not approved, expensive and protracted litigation will ensue. A trial would be contentious and cumbersome. Collectively, the Parties would likely call over thirty witnesses, including at least five expert witnesses who reside outside Illinois, and several State employees who reside in Springfield, Illinois. The costs and expenses of preparing for trial would be enormous.

In addition, both Plaintiffs and Defendants submit that if they do not prevail at trial, they would likely appeal the matter to the Seventh Circuit Court of Appeals. An appeal would all but guarantee that this litigation would drag on for months and possibly years without resolution or the implementation of any relief for class members. One of the primary benefits of the Decree is that it provides reasonably prompt relief to the class, without these additional major expenditures of time and money. These factors strongly weigh in favor of preliminary and final approval of the Decree.

3. Opposition to the Settlement.

The Parties anticipate that some may oppose the Decree. The Decree, however, like Plaintiffs' Complaint, respects the preferences of class members. Under the Decree, class members who are currently residing in IMDs are afforded the opportunity to choose between an institutional and a Community-Based Setting. The Decree does not force anyone to move out of an institution against his or her will. Accordingly, the Parties fully expect that there will be no persuasive opposition to the settlement.

4. Lack of Collusion.

As a matter of law, a court should presume that negotiations were conducted in good faith and that the resulting agreement was reached without collusion in the absence of evidence to the contrary. *Mars Steel v. Cont'l Ill. Nat'l Bank & Trust*, 834 F.2d 677, 681-81 (7th Cir. 1987); *Armstrong*, 616 F.2d at 325; NEWBERG § 11.41. Nothing supports a different result here. This Court has had an opportunity to see the Parties' vigorous advocacy throughout the pendency of the case. The Parties have engaged in extensive written and deposition discovery and several contested motions, including Plaintiffs' motion for class certification.

In addition, the proposed Decree took months to negotiate. Numerous in-person meetings and settlement conferences were conducted. Counsel for the Parties exchanged several drafts, advocating forcefully for language most advantageous to their clients. *See, e.g., Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 366 (S.D.N.Y. 2002) (finding negotiations leading to class action settlement were arm's-length in part because they had occurred over several months and involved several in-person meetings). Because the Decree resulted from arm's-length negotiations between experienced counsel after significant discovery had occurred, and no evidence exists to the contrary, the Decree should be presumed to have been reached without collusion. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir.

2005) ("presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery" (internal quotations omitted)).

5. Opinion of Competent Counsel as to the Reasonableness of the Settlement.

The court is "entitled to rely heavily on the opinion of competent counsel." *Armstrong*, 616 F.2d at 325. Counsel for the Parties, who are competent and experienced in class action and civil rights litigation, all recommend acceptance of the proposed Decree. The proposed Decree provides a fair, reasonable, and adequate disposition of the lawsuit. Indeed, the Decree embodies the single most important aspect of the relief sought by Plaintiffs – that residents of IMDs are provided opportunities to receive services in the most integrated setting appropriate to their needs.

6. Stage of the Proceeding and Amount of Discovery Completed.

Another factor strongly supporting approval of the Decree is the extent of written, oral, fact and expert discovery conducted in this case before settlement was reached. The Parties have thoroughly explored the factual and legal underpinnings of this case. The Parties reached agreement regarding a settlement after having spent more than four years actively litigating the case.

The Parties have produced and reviewed hundreds of thousands of pages of documents, conducted over thirty depositions, and worked extensively with experts. Considerable third-party discovery was conducted. There was a complete factual record that experienced class counsel could evaluate to decide what would be a fair resolution for Plaintiffs and the Class.

THE PROPOSED NOTICE PLAN SATISFIES THE REQUIREMENT OF RULE 23 AND DUE PROCESS

Rule 23(e)(1) requires the court to direct notice of a proposed settlement in a "reasonable manner to all class members who would be bound by the proposal." Although notice is mandatory to satisfy due process considerations, the extent of the notice is discretionary, particularly with a Rule 23(b)(2) class with no right of opt-out. *See Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 962 (3d Cir. 1983) (Rule 23(c)(2)'s requirement of "the best notice practicable" is inapplicable for notice of settlement of a Rule 23(b)(2) class); *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987) (notice not required after certification of a Rule 23(b)(2) class). In a Rule 23(b)(2) class action, "mechanics of the notice process are left to the discretion of the court subject only to the broad 'reasonableness' standards imposed by due process." *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979).

In determining what type of notice is reasonable, courts consider whether the notice is sufficient to "bring the proposed settlement to the attention of representative class members who may alert the court to inadequacies in [class] representation, or conflicts in interest among subclasses, which might bear upon the fairness of the settlement." *Walsh*, 726 F.2d at 963-64 (upholding notice by publication and mail to representative members in Rule 23(b)(2) class). Courts have routinely approved notice plans in Rule 23(b)(2) cases, such as this one, where notice consisted of publication and/or other reasonable forms of direct or indirect notice. *Fresco v. Auto Data Direct, Inc.*, No. 03-61063-CIV, 2007 WL 2330895, at *8 (S.D. Fla. May 14, 2007) (approving a notice plan that included a combination of publication and Internet notice but did not require individual notice); *Hawker v. Consovoy*, 198 F.R.D. 619, 621 (D.N.J. 2001) (publication notice in two newspapers as well as in all relevant prisons and jails was sufficient). For example, in *Kaplan v. Chertoff*, No. 06-5304, 2008 WL 200108, at *13 (E.D. Pa. Jan. 24,

2008), the court approved a notice plan on behalf of a Rule 23(b)(2) class of approximately 50,000 non-US citizens seeking injunctive relief from the government, and the proposed notice included posting the notice on the appropriate governmental websites and providing notice to a network of community-based and non-profit immigration organizations. Of particular relevance here was the court's finding that "the organizations that receive[d] the notice are well-positioned to spread information regarding the settlement to their clients by posting the notice in their facilities or on their websites." *Id.*

The Parties submit that the proposed Notice Plan (attached as Exhibit B to the Motion) provides for the most reasonable notice under the circumstances. The Notice Plan includes: (1) publication notice in nine newspapers throughout Illinois with a collective circulation of over 1 million readers; (2) posting notice on the websites of the Illinois Department of Human Services, Division of Mental Health, Equip for Equality, the not-for-profit corporation appointed by the State of Illinois to implement the federally-mandated Protection and Advocacy System in Illinois for individuals with, among other things, psychiatric disabilities, Access Living, the American Civil Liberties Union of Illinois, and the Bazelon Center for Mental Health Law; (3) mailed notice to all preadmission screening ("PAS") agencies throughout Illinois, which are responsible, by contract with the State of Illinois, for determining an individual's eligibility for placement in an IMD; (4) mailed notice to numerous disability rights-related organizations; and (5) mailed notice to all 26 private IMDs in Illinois, which will be asked to display the notice conspicuously and provide a copy of the notice to the residents and their guardians, if any. The cost of the Notice Plan will be fully borne by Defendants. The Notice Plan is reasonable and clearly satisfies due process.

In conjunction with the proposed Notice Plan, the Parties request that the Court approve the form and content of the proposed Notices. (*See* Exhibits B-1 and B-2 to the Motion.) The Notices are written in simple terminology and include (i) a description of the class; (ii) a description of the proposed Decree; (iii) an explanation of the rights of class members; (iv) the names of class counsel; (v) the fairness hearing date; (vi) a statement regarding attorneys' fees and expenses; (vii) a statement of the deadline for filing objections to the Decree; and (ix) instructions for obtaining further information. Those notices satisfy the content requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* MANUAL FOURTH § 21.633.

CONCLUSION

For the foregoing reasons, and pursuant to Rule 23, the Parties respectfully request that the Court enter an Order (1) granting preliminary approval of the proposed Decree; (2) requiring notice in the form and method of the Parties' proposed Notice Plan; and (3) setting a date for a Fairness Hearing on the proposed Decree.

Dated: March 15, 2010

Respectfully submitted,

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By: s/ Angela D. Marston

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