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
	)	
Patrick Quinn, et al.,	)	
	)	
Defendants.	)	

CLASS MEMBERS' COMBINED RESPONSE TO THE PARTIES' JOINT MOTION FOR PRELIMINARY APPROVAL OF CONSENT DECREE AND REQUEST FOR HEARING

Class members Danny McLean and David Twomey, through their legal guardians, respond to the *Joint Motion for Preliminary Approval of Consent Decree and Approval of Notice Plan* (the "Motion") and request that the Court set the Motion for hearing, and in support respectfully state as follows:

INTRODUCTION

After a five year wait, the parties now seek preliminary approval of their proposed settlement, a settlement that will affect not only the lives of over 4,000 mentally ill residents living in an Institution for Mental Disease ("IMD"), but also their families and surrounding communities.

All would agree that the settlement requires careful scrutiny, especially since it has been five years in the making. As the saying goes, "an ounce of prevention is worth a pound of cure." Applied here, that means the Court will benefit from conducting a hearing *before* the Court grants preliminary approval to the proposed settlement and before the parties send notices to thousands of class members.

Unless the parties seek to monopolize the process and insulate the Court from addressing potential problems early on, they should have no principled objection to having their Motion fully briefed and aired before they distribute thousands of notices. In short, educating the Court sooner rather than later is, or should be, a good thing, which will give the Court the opportunity to perhaps fix some of the problems identified below now.

BACKGROUND

Danny McLean and David Twomey both live in an IMD. Specifically, McLean (25) lives at Clayton Home in Chicago's Lincoln Park neighborhood. He has already tried living independently in an apartment in the "community" and almost died as a result. In the IMD he is fully functioning, and as his mother explains, he is an active citizen of the City of Chicago. He has a bus pass and a cell phone and in some respects, he leads a life that parallels a "normal" 25 year-old. He volunteers at a pet shelter (PAWS), marches in protest marches, and goes to the opera and concerts at Millennium Park. He has friends and he goes to parties. People who live with him in Clayton House have jobs (Clayton sends them off with sack lunches each day). Some people finish college while at Clayton, something Danny hopes to do as well. As Danny's mother explains, he would not be able to do any of these things but for the fact that the IMD monitors his health, dispenses his medications, and provides meals and housekeeping and laundry services. All of that keeps him from reverting to severe mental illness, she explains.

Twomey (56) lives at Margaret Manor North in Chicago's Buena Park neighborhood. He has lived in an IMD for about 15 years. Prior to that he lived with family members. As David's brother Phil explains:

> My brother, and many like him, have long periods where they are not rational. The same misfired neurons in the brain that are the basis of the illness, also cause misfired thoughts. A question asked at 1 pm will get a different answer at 3 pm and again at 5 pm. And he could be easily led by the questioner to provide an answer that he thinks is desired, and two hours later claim he never said that and that the original question was different. A real life common example, if you ask David "how are you," he will get quite angry that you told him to go to hell with

> Howard Hughes. Even so, he walks in the neighborhood and goes to the Jewel or McDonald's. He has visitors. He goes to another IMD to visit friends. He has a room and a place to put his belongings and a place to eat. He even takes the bus and audits high level math courses at Loyola University. In short, he has a life, which is much different from being locked up in Chicago-Read Hospital, where he has been many times before stabilizing at Margaret Manor North. Asking him whether he "does not oppose moving to a community based setting" is ludicrous and horribly unaware of the reality of a severe mental illness.

Though both McLean and Twomey are quite different, they share at least one thing: both already live in vibrant "communities." Their respective IMDs provide them the care and services they need. Though each hope to one day live even more independently, for at least the time being, their IMDs serves them best, as they provide them necessary structure, support, and staff, including help with their daily medications.

The IMD serves as a bridge between two extremes for the mentally ill: a locked psychiatric ward on the one extreme and complete independence in an apartment at the other. Viewed in this light, Illinois' IMD system is actually progressive in that the IMD provides a bridge between the two extremes. The IMD is part of the continuum of care. Without the IMD, Illinois would essentially be a two class system, with the alternatives being only the two extremes.[1] Obviously for many people, including McLean and Twomey, a middle ground is needed. Unfortunately however, upon closer examination, the proposed settlement may threaten the viability of not only McLean's and Twomey's IMD, but all IMD's.[2]

[1] Or, even worse, for some the only other options would be homelessness, prison, or perhaps death.

[2] Also relevant, though this case focuses on the roughly 4000 mentally ill individuals who live in an IMD, there are at least 15,000 other mentally ill people in Illinois who live in traditional nursing homes with elderly people, as has been recently well publicized. In fact, there is a parallel class action lawsuit pending in this Court that addresses, at least in part, this issue. Colbert v. Quinn, No. 07-C-4737. As such, the logical question must be asked: if the 15,000 mentally ill people who currently live in traditional nursing homes are discharged, where will they go? Presumably, at least some are not good candidates for independent living, for whom an IMD would seem the logical choice. Finally, to be clear at the outset, McLean and Twomey are not against expanding choice for the mentally ill. They simply want to make sure that their choice – an IMD – is preserved, funded, and offered as a choice for all as well.

PRELIMINARY APPROVAL STANDARD

Preliminary approval of a proposed class action settlement is a meaningful step and not merely a rubber stamp. In fact, the Court has an independent duty to review the settlement since in most class action cases, there are no objectors – as nobody has received notice – at the preliminary approval stage. As such, in the normal instance, it is the court – *sua sponte* – providing an initial substantive review:

> The judge should raise questions at the preliminary hearing and perhaps seek an independent review if there are reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys. The parties then have an opportunity to resume negotiations in an effort to remove potential obstacles to court approval.

Manual for Complex Litigation, Fourth § 21.632 at 321 (2004) ("MCL"). See Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 280 (7th Cir. 2002) (explaining that some courts "have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class" and to impose "the high duty of care that the law requires of fiduciaries.").

Moreover, "[i]n settlement classes, [as is the case here], it is often prudent to hear not only from counsel but also from . . . attorneys who represent individual class members but did not participate in the settlement negotiations." MCL § 21.632 at 321. Similarly, holding a hearing on preliminary approval provides the Court an early opportunity to weigh in on the proposed settlement:

> Preliminary review of the proposed settlement affords you an opportunity to express any concerns you may have about the "hot button issues" discussed above. You don't have the power to decide what must be in a settlement agreement, but you do have the opportunity to state your concerns about provisions – or the absence of provisions – that would make a difference in your decision about whether to approve a proposed settlement. If you have such concerns, consider allowing the parties some time to respond to them by renegotiating the settlement so that the class notice can refer as closely as possible to a final settlement. If you hold back your concerns and reject a settlement at the fairness hearing, the parties will most likely have to send new notice of any

> revised settlement to the class. Consider seeking preliminary input into the fairness, reasonableness, and adequacy of the proposed settlement.

Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges, Federal Judicial Center (2005), at 16-17.

In sum, after five years, now is the time for the Court to hear from someone other than the parties as it mulls preliminary approval and perhaps instructs the parties to revise the proposed settlement before they send out thousands of notices.

DISCUSSION

This Court should either have a hearing on the Motion before granting preliminary approval or instead simply deny the Motion and direct the parties to address the following issues:

- **The "Implementation Plan" should come now, not later**

The parties are essentially asking the Court to approve a *concept*, not a settlement or working plan of any sort. The proposed settlement reads more like an aspirational summary than a detailed settlement or proposal. When it comes to details and implementation, it only provides that within 9 months ***after*** the Court approves the settlement, the parties shall develop the "Implementation Plan." Settlement at § VIII. In particular, the proposed settlement states that the parties "shall create and implement an Implementation Plan to accomplish the obligations and objectives set forth in the Decree." Id. Amazingly, the Court has no say in the Implementation Plan. Id.

Suffice it to say, given that this case is not about a $10 consumer rebate for a coffee maker – but instead about the most important life interests of where this vulnerable population of people will live their lives – the details on implementation should come now, for all to see, not nine months later behind closed doors with no Court oversight.

How will the residents get their medications? Who will check in on them? How often? How will their rent be paid? Is there a voucher system? What happens if a resident fails in the

"community"? Who conducts the evaluations and drafts the "Service Plans" and what are the standards for conducting same? These are all important questions. The proverbial devil is in the details, and the details here should be known and revealed now, not later.

Thus, as a threshold matter, the Court should instruct the parties to develop and reveal the Implementation Plan now so that the Court and the class know how the parties' minimalist blue print will be implemented and will work in practice.

- **Placement Should Be Medical Decision**

As now structured, the proposed settlement employs a standard that effectively removes the medical component from the decision of where class members will live. Apparently, so long as a class member "does not oppose moving to a Community-Based Setting," a Service Plan will be developed that moves him or her to the "community." Settlement at p. 9. Presumably, in application, this lax standard will be satisfied by the evaluator checking a box on a form stating that the class member "does not oppose" the move after being asked a couple generic questions. More precision and standards are required given the life interests at stake.

And perhaps most important, lost in the process is the important component that where the mentally ill live should, at least in part, be a medical decision. That is, the resident's physician, family members, and other caretakers should be part of the process, yet the proposed settlement seemingly ignores this component, or makes it wholly discretionary.

- **Funding Details Lacking**

The proposed settlement also lacks any details on how much implementing the proposed settlement will cost and how such costs will be funded. Similarly, it is not enough for the proposed settlement to say that for class members such as McLean and Twomey, their choice of an IMD will be respected. The settlement must also back up that choice with a funding

guarantee, no different than whatever guarantee the settlement will require for the new community services that will be necessary.[3]

- **Fees**

The settlement requires the Defendants – the State – to pay class counsel $2 million in fees plus an unspecified amount in costs. Such large amounts, especially in the context of a *pro bono* case, require some support and explanation.

CONCLUSION

As the proposed settlement seems to raise as many questions as it answers, it requires further explanation and perhaps revision before the Court is in position preliminarily approve it.

WHEREFORE, class members Danny McLean and David Twomey, by and through their guardians, respectfully request that the Court conduct a hearing on the Motion before it preliminarily approves the proposed settlement or, in the alternative, deny the Motion until the parties address the concerns noted above.

Dated: March 26, 2010

DANNY McLEAN, by and through his Mother and Legal Guardian, Karen Mellow, and DAVID TWOMEY, by and through his Brother and Legal Guardian, Philip Twomey,

By:/s/ Tonya G. Newman
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[3] On information and belief, the state pays 100% of the cost for the roughly 4,000 residents living in an IMD in Illinois. In contrast, the state pays "only" approximately 38% of the cost for the roughly 15,000 mentally ill individuals who live in traditional nursing homes with the elderly, with the remainder (62%) paid by the federal government. The same cost split applies for those individuals who move to the "community." As such, an obvious question is raised: are the parties motivated to settle because it is in the best interest of the class or because it is in the best interest of the state's pocket book? Such questions require scrutiny now.