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

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

CERTAIN IMDs' OBJECTIONS
TO PROPOSED SETTLEMENT AND CONSENT DECREE

Introduction

The parties primarily view IMD residents as a disabled minority in need of protection under the Americans With Disabilities Act to help them succeed. The parties believe that the IMD residents can decide whether to accept or object to the proposed settlement now, without knowing the implementation plan details or how the State will pay for their care.

The IMDs primarily view IMD residents as suffering from a psychiatric illness who require treatment and supervision to succeed. The IMDs believe that the IMD residents should know the implementation plan details and how the State will pay for their care before deciding whether to favor or object to the proposed settlement.

Therein lies the distinction which has led the IMDs to suggest to the parties and the Court that the Court should not approve the proposed settlement unless and until the parties detail their implementation plan and how the State will pay for community-based care. The IMDs submit that neither the Court nor society as a whole should view the chronically mentally ill *primarily* as a minority whose civil rights need protection, but must *also* accept the fact that the chronically mentally ill have an illness helped only by strict adherence to therapy, treatment, and medication.

Other protected minorities do not have disabilities rendering many of them unable to exercise informed consent or logical judgment.

One small example demonstrates why IMD residents need the implementation plan details now to make an informed decision about the proposed settlement.

People with mental illnesses who regularly take their appropriate medication often function well, suffer fewer symptoms, and are hospitalized less, resulting in lower health care costs. (Group Exhibit 1). The inherent problem is just when their medication seems to be working well, the mentally ill decide to stop taking their medication, because they feel good and think that their medication is no longer necessary. (Group Exhibit 2). Non-adherence to a medication regimen - - even for short time periods - - increases the likelihood of symptom relapse, hospitalization, and leads to higher health care costs, and even criminal behavior by the mentally ill. (Group Exhibit 2).

The IMD residents and their families know this all too well from personal experience. And yet, the parties have asked them to make a decision *now* about whether to favor or object to the settlement, without providing them with any detail about who will monitor residents' medication compliance, how this will be done, how often it will occur, or what happens if the State finds residents non-compliant with their medication.

It is this kind of minutia of the daily life of the mentally ill - - how will the State monitor their medication compliance? - - that will determine if the proposed settlement helps or harms the mentally ill, their families, the communities in which they live, and even the State's budget. The IMDs submit that the parties' proposed implementation plan must detail this kind of minutia of daily life now to allow residents to make an informed choice about whether to support or object to the proposed settlement.

The Parties Have Not Met The Olmstead Requirement
That The State Has Resources Available To Pay For The Implementation Plan

Under Olmstead v. L.C., 527 U.S. 581 (1999), States must provide community-based services for people with mental disabilities who would otherwise be entitled to institutional services when (1) the State's treatment professionals determine that such placement is appropriate; (2) the affected persons do not oppose treatment; and (3) the placement can be reasonably accommodated, *taking into account the resources available to the State and the needs of others with mental disabilities*. 527 U.S. at 607 (emphasis added).

Five years ago, the State itself asserted a "fundamental alteration" affirmative defense. This affirmative defense allows the State to show that, in allocating available governmental resources, immediate relief for the plaintiffs would prove inequitable, given the State's responsibility to care for and treat a large and diverse population of mentally disabled people. (Doc. 28 at p. 27-28, citing *Olmstead*, 527 U.S. at 604). The State's affirmative defense expressly states that the relief that Plaintiffs seek "would fundamentally alter the State's service, programs, and activities by disrupting the progress the State has made and continues to make. Furthermore, *the cost of plaintiffs' requested relief would jeopardize the State's ability to care for and treat other mentally disabled persons that require institutional or other services under a limited State mental health budget by forcing the State to cut other services in paying for plaintiffs' requested relief.*" (Doc. 28 at pp. 27-28, emphasis added).

The State's financial position has changed for the worse since it asserted this Affirmative Defense five years ago. Yet, the State now asks the Court to accept, without inquiry or proof, the State's representation that it can pay for both community-based care and IMD care. Surely there is something wrong here.

Notably absent from the parties' Joint Motion For Preliminary Approval of Consent Decree (Doc. 239) is any substantive statement regarding the State of Illinois' ability to fund the implementation plan contemplated by the Consent Decree. The IMDs request that the Court take judicial notice of the State of Illinois' current financial crisis. This crisis has, among other things, caused the State to cut already sparse community-based mental health services to the bone. (Group Exhibit 3). Mental health advocates have warned that the State's $90 million in proposed cuts in its mental health budget would leave the State "without infrastructure needed to start moving psychiatric patients from nursing homes to community housing," as agreed to by the parties in this case. (Group Exhibit 3, p. 1).

The Court should not grant final approval to the settlement unless the parties satisfy the Court that the proposed settlement meets all three *Olmstead* requirements. Because the parties' Memorandum In Support Of Joint Motion For Preliminary Approval Of Consent Decree (Doc. 239) does not even address the third *Olmstead* requirement that the State can reasonably accommodate the community placement of IMD residents, while taking into account the State's available resources and the needs of others receiving disability services, the Court must require further proof of the State's ability to actually pay for implementing the proposed settlement.

The State's current financial condition in general, and its dramatic cuts in community-based mental health services in particular, may explain the parties' reluctance to provide details of their proposed implementation plan before seeking final approval of the settlement. After all, putting pen to paper and actually figuring out who will do what to care for the class members who move to the community would force the parties to start thinking about how the State will actually pay for the proposed implementation plan.

Instead of trying to meet the third *Olmstead* requirement, the parties' Memorandum In Support Of Joint Motion For Preliminary Approval Of Consent Decree makes enthusiastic

predictions and sets broad-brush optimistic goals about community placement, monitoring and compliance, and the implementation plan. (Doc. 239 at pp. 3-6). But the only mention of money comes in the "Attorneys' Fees and Costs" section (Doc. 239 at p. 6) and in the perfunctory platitude that "Defendants have the ability to make supportive housing and other Community-Based Settings available to class members and could do so without incurring undue costs (and would in fact realize savings from doing so) . . ." (Doc. 239 at p. 9). The mentally ill and their families should not have to base their decision of whether to approve or object to the settlement based upon such an ephemeral promise from a State on financial life support. The Court should not base its decision on whether to approve a settlement which so fundamentally alters the lives of so many IMD residents on such an ephemeral promise, when *Olmstead* requires consideration of the State's available resources.

Given the State of Illinois' current financial condition, such perfunctory platitudes do not satisfy *Olmstead's* third requirement of proving that the State can reasonably accommodate residents, taking into account the State's available resources and the needs of others receiving disability services.

The last part of this third *Olmstead* requirement requires the parties to prove that the State can "meet the needs of others requiring disability services" while also moving eligible residents into the community. The "others requiring disability services" in this context are the IMD residents who are either inappropriate for community placement or who choose to stay in their IMD.

The parties have offered the Court no proof that the State can pay for community-based services and for care to residents who remain in the IMDs. The parties guess that community placement might save the State money (Doc. 239 at p. 9) is not the proof of the availability of resources required by *Olmstead*. *Ligas v. Maram,* Slip Copy, 2010 WL 1418583 (N.D. Ill. 2010)

at p. 3 (settlement that fails to consider State's ability to pay for proposed relief contradicts *Olmstead*); *Bruggeman v. Blagojevich*, 219 F.R.D. 430, 435 (N.D. Ill. 2004) (*Olmstead* requires inquiry into available resources under State's mental health budget).

The parties have repeatedly argued that no guaranty of continued IMD funding exists. That's true. But that fact does not alter the parties' obligation under *Olmstead* to "meet the needs of others requiring disability services" who remain in the IMDs, especially given the proposed Consent Decree's assurances that residents who do not want to move will not have to.

The Consent Decree itself provides for a five year transition period, during which some undetermined number of IMD residents will move into community settings. The Consent Decree therefore contemplates at least five years during which the State must pay for both community-based care and IMD care. No one knows whether the State can afford such a dual system, especially given the State's current fiscal crisis, because the parties have not provided the Court with any proof of the State's ability to pay as *Olmstead* requires.

Court orders are powerful. But they cannot make more money available to the State to pay for the implementation plan. *Olmstead* requires that the Court consider the financial viability of the proposed Consent Decree. The parties have provided little for the Court to consider.

In the end, the question for the Court is simple: given the State's financial condition, should the Court approve a settlement which will fundamentally alter *every aspect* of IMD residents' lives without *first* receiving *substantiation* that the State can afford to pay for both community-based care *and* for residents who remain in IMDs? If the Court were an IMD resident, or the parent of an IMD resident, then the IMDs suggest that the answer is quite obvious.

Without Implementation Plan Details, IMD Residents Cannot Make An Informed Decision About Approving Or Objecting To The Proposed Settlement

The parties' Memorandum In Support Of Joint Motion For Preliminary Approval Of Consent Decree And Approval Of Notice Plan (Doc. 239) accurately summarizes the proposed implementation plan by stating that the plan "will set forth specific tasks, timetables, and protocols to ensure that Defendants fulfill the requirements of each provision" of the proposed Consent Decree, and that the plan will address all aspects of the Consent Decree. (Doc. 239 at p. 6). Such promises of future details of how Defendants will provide the care involved in the minutia of daily life, made by a near-bankrupt government, does not give the IMD residents or their families any basis upon which to decide whether to support or object to the proposed settlement.

The proposed settlement leaves the IMD residents and their families to guess about whether the State will actually consult with a resident's psychiatrist, doctor, or family member before offering a resident community placement. The Consent Decree merely says that the State shall hold such consultations "when appropriate," but provides no guidance on when the State will consider such consultations so obviously crucial to such a decision "appropriate."

The proposed settlement leaves the IMD residents and their families to guess about every aspect of how the State will help them manage the minutia of their daily lives, such as who will remind them to take their medication, keep their doctor's appointments, and attend group sessions so crucial to their ability to succeed in the community.

Leaving IMD residents and their families to guess about how the well-oiled machine that is Illinois government will exercise its discretion and provide the care involved in the minutia of mentally ill residents' daily lives while the State runs deficits that would bankrupt any private entity hardly inspires confidence, even for those not suffering from mental illness.

When coupled with many IMD residents' mental illnesses, which often preclude rational thought and decision making, such guesswork seems a recipe for disaster for the residents, their families, the community, law enforcement, and for the State itself.

Conclusion

A person not suffering from mental illness asked to decide to settle a lawsuit that might change where they will live and how they receive care would insist on knowing the who, what, when, where, why, and how minutia of such a settlement, and knowing how the defendant would pay for such services. Depriving the mentally ill of such details when their illnesses often interfere with rational thought and decision makes no sense.[1]

Dated: August 10, 2010

Respectfully submitted,

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By: /s/Robert K. Neiman
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[1] The IMDs request that their counsel and one or two IMD administrators be allowed to speak about the issues raised in this brief at the September 7, 2010 fairness hearing.

CERTIFICATE OF SERVICE

I, Robert K. Neiman, an attorney, certify that on August 10, 2010, I electronically filed **CERTAIN IMDS' OBJECTIONS TO PROPOSED SETTLEMENT AND CONSENT DECREE** with the Clerk of the Court using the CM/ECF system, which will send notification of such filings to:

See Attached Service List

By /s/Robert K. Neiman

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