UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

DEFENDANTS' RESPONSE TO OBJECTIONS TO PROPOSED CONSENT DECREE

INTRODUCTION

Defendants, each in his or her official capacity (collectively, "Defendants"),[1] through their attorney, hereby respond to the objections to the Proposed Consent Decree ("Decree"), specifically to Certain IMDs' Objections to Proposed Settlement and Consent Decree ("IMD Objections") (Doc. No. 295) and the Memorandum in Support of Objections to Proposed Consent Decree by Absent Class Members and Family Members ("Absent Class Member Objections") (Doc. No. 297). For the sake of efficiency, Defendants will respond to those objections that concern issues more within Defendants' knowledge or purview – *e.g.*, whether the State can pay for the obligations it has agreed to assume under the Decree. Defendants will leave to Plaintiffs to respond to objections more within their knowledge or purview.

[1] Defendants are: Pat Quinn, Governor of Illinois; Michelle R.B. Saddler, Secretary of the Illinois Department of Human Services; Dr. Lorrie Rickman-Jones, Director of the Division of Mental Health, Illinois Department of Human Services; Julie Hamos, Director of the Illinois Department of Healthcare and Family Services; and Dr. Damon Arnold, Director of the Illinois Department of Public Health. Please note that, as of August 24, 2010, Ms. Saddler has been appointed as Chief of Staff to the Governor, and Grace Hou has been named Acting Secretary of the Illinois Department of Human Services.

ARGUMENT

I. The Decree's impact on funding for services for IMD residents

Both the Absent Class Members and the IMDs assert a funding objection, contending in essence that the parties have not shown that the State can pay for the community-based services that will be provided under the Decree, while also being able to pay for the services for those individuals who remain in the IMDs. *See* Absent Class Member Objections at 20-24; IMD Objections at 3-6. Both sets of objectors ground their funding objection on their interpretation of what they describe as the third requirement or prong of the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999) – that the placement of individuals into community-based settings "can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *See* Absent Class Member Objections at 20 (quoting *Olmstead*, 527 U.S. at 607); IMD Objections at 3 (same).

The Defendants disagree with the objectors' interpretation of the *Olmstead* decision, and thus disagree that, in the context of approving a settlement and proposed Decree, the parties are obligated to prove that the State can fund both its existing obligations and proposed new obligations. Rather, the Defendants view the funding (or resource) issue as a component of the fundamental alteration defense to an *Olmstead* claim, an issue necessarily resolved, as here, as part of a settlement and requiring no additional proof.

Although the objectors accurately quote from the *Olmstead* decision, they fail to note the context in which the Court discussed the need to consider a state's available resources and obligation to provide services to other disabled individuals. In *Olmstead*, the Court was explicitly considering the dimensions of the fundamental alteration defense to a claimed

violation of the Americans with Disabilities Act ("ADA"). The district court had construed the defense very narrowly and, finding discrimination in violation of the ADA, granted plaintiffs partial summary judgment. *See Olmstead*, 527 U.S. at 594-95. The Court of Appeals for the Eleventh Circuit affirmed the finding of discrimination but remanded the case for the trial court to consider a broader interpretation of the fundamental alteration defense. *Id.* at 595-96. The Supreme Court also affirmed the finding of discrimination but further held

> that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of provided community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.

Id. at 597. Thus, the objectors' characterization notwithstanding, the Supreme Court did not command that, in every circumstance, including the evaluation of a proposed settlement, a district court must assess a State's resources and other obligations as an essential element of every ADA claim. Rather, a State's resources and other obligations are an essential component of a fundamental alteration defense and then only when that defense is at issue. Here, because the Defendants settled with Plaintiffs, Defendants necessarily resolved to their satisfaction all disputed issues, including their previously-asserted fundamental alteration defense.

Defendants acknowledge this Court's obligation to determine whether a proposed settlement is fair, reasonable and adequate, but that standard does not require the Court to reconsider compromised defenses. This Court is entitled to rely on the opinions of competent counsel for both Plaintiffs and Defendants that the obligations imposed under the Decree are fair, reasonable and adequate, and that implementing the Decree will not cause Defendants to violate

other existing obligations, such as their obligation to continue to provide services to other disabled individuals.

The objectors' other funding-related contentions are similarly unpersuasive. Both the Absent Class Members and the IMDs point to the State's financial condition and reports of reductions in funding for community mental health services as reasons for demanding that the parties provide more detail and/or more assurances about how the State will continue to fund both IMD and community-based services. *See* Absent Class Member Objections at 21, 24; IMD Objections at 3-6. The State's financial condition, however, whether good or bad, is a largely neutral factor as to the funding of IMD services because the State funds services on a per person basis. For an individual eligible for mental health services, and who receives those services in an IMD, the State will reimburse the IMD based on the services provided to that individual. If that individual instead were to receive services in a community setting, then the State would reimburse the community provider, also based on the services provided to that individual.

The objectors' references to proposed cuts to community mental health services are out of date and inaccurate. The objectors cite to newspaper articles from July 2010 and earlier that describe generally proposed reductions in funding for community mental health services. *See* Absent Class Member Objections at 21 (citing Ex. 8); IMD Objections at 4 (citing Group Ex. 3). Earlier this month, however, and before the objectors filed their objections, the Governor restored funding for community-based mental health residential services and made clear that the other reductions were to services not eligible for Medicaid reimbursement. *See* Ex.1.[2] Because

[2] Exhibit 1 can be found at: http://www2.illinois.gov/budget/Documents/FY2011%20Budget%20By%20Agency%20080210.pdf.

the class in this case is limited to Medicaid-eligible individuals, the reported cuts will not affect the State's ability to fund the obligations agreed to in the Decree.

Both sets of objectors also express concern that the State will not be able to adequately pay for services for those who move from IMDs into community-based settings and also to continue to pay for those who stay in the IMDs. *See* Absent Class Member Objections at 22- 23; IMD Objections at 3, 5-6. Although it contradicts their expressed concern, the Absent Class Members at least acknowledge that the State receives no federal Medicaid matching funds for the services provided to IMD residents and thus, on a per person basis, the State saves money on each person it serves in the community instead of in an IMD. *See* Absent Class Member Objections at 8-9. The IMDs surely know this fact as well but they do not acknowledge it in their objections. Thus, moving individuals from IMDs into the community will free up money that can be used to pay for anyone who is eligible for mental health services, including those who require nursing level of care (which is what is provided in IMDs).[3]

Finally, the Absent Class Members broadly speculate that "the State will decrease funding for [the Objectors'] IMDs, or perhaps cut it altogether" and that the parties may claim "that IMD services are not an „entitlement' – … that the State can do as it pleases with its IMD residents…." *See* Absent Class Member Objections at 21, 22. Not surprisingly, the Absent Class

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[3] To use a concrete example, assuming the State pays a per person average of $30,000 for services for IMD residents and would pay (after subtracting federal matching funds) a per person average of $20,000 for those residents served in the community, then the State would save $10 million if 1,000 IMD residents moved to community-based settings. Of course, there might not be automatic dollar-for-dollar savings for every transition, at least during the initial downsizing of a facility because there might be certain fixed costs associated with a facility that are not reduced on a per person basis as individuals move. And, at least initially, there likely will be some start-up and infrastructure costs that will be added to the overall cost of serving individuals in the community.

Members cite nothing to support their speculation because there is nothing in the Decree or record in this case to support it. What is an entitlement now for Medicaid-eligible individuals – and left unchanged under the Decree – is a nursing level of care for those individuals who, because of their diagnosis of serious mental illness, make them eligible for that level of care. As explained above, the State funds services on a per person basis, not on a facility basis, so as long as current IMD residents remain eligible for a nursing level of care and choose to stay in an IMD, the State will continue to fund the services provided to those individuals.

It is possible that some IMDs may choose to close voluntarily or might have their license or Medicaid certification revoked, as happened with the Somerset facility. If an IMD closes during implementation of the Decree, the State will evaluate the remaining residents to determine whether they are eligible for and would like to move to community-based settings. Then, as now, the State will fund the services provided to those individuals whether they move to community-based settings or into other nursing facilities.

II. The request for more implementation details

Both sets of objectors contend that the parties should draft the Implementation Plan before final approval so that the objectors and the Court will know exactly how individuals will be transitioned from IMDs to community-based settings and thus all will be able to more fully review the proposed settlement. *See* Absent Class Member Objections at 14-15; IMD Objections at 2, 7. The unspoken and erroneous assumption underlying this objection is that the State has no previous experience overseeing community transitions or the provision of services in community-based settings.

To the contrary, the State has been funding community-based placements for several years, which placements currently total about 640 individuals. *See* Affidavit of Lindsay Huth, filed herewith as Ex. 2. Many of these individuals were in nursing homes before they transitioned to community-based settings. These individuals have case managers and are served by community providers. The individuals work with their case managers and community providers to obtain housing, medication management and mental health services. Because the State will not be creating a brand new service system to implement the Decree, it is not necessary to advance the preparation of the implementation plan before final approval of the Decree.

III. The IMDs' role in the State's mental health services system

The Absent Class Members expressly or implicitly contend that IMDs are unique facilities – different than "traditional" nursing homes – that occupy a unique and necessary place in the continuum of the State's mental health care system. *See* Absent Class Member Objections at 6-9. Because of their supposedly unique role – impliedly providing specialized mental health services – the Absent Class Members suggest the need to protect their existence. The Absent Class Members are misinformed. Focusing on the only relevant characteristic – the services they are required to provide to their residents – IMDs are no different than any other so-called "traditional" long-term care facility. IMDs are nursing homes that are classified by the federal government as IMDs for one reason and one reason only – to identify their services as ineligible for federal matching funds. Thus, IMDs occupy no unique role in Illinois' mental health system – different from any other Illinois nursing home – that would require their protection.

Federal law defines an IMD as "a hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care of persons with

mental diseases, including medical attention, nursing care, and related services." 42 U.S.C. §1396d (i). As the Absent Class Members recognize, "primarily" means that more than half of the facility's residents have a diagnosis of serious mental illness.[4] Federal law also states that the services provided in IMDs are not eligible for federal matching funds. *See* 42 C.F.R. §441.13 (a). Thus, but for the fact that twenty-five facilities in Illinois have more than 50% of their residents with serious mental illness diagnoses, those facilities would not be classified as IMDs and the services they provide would qualify for federal Medicaid matching funds, just like all other "traditional" nursing homes.

Although the Absent Class Members imply that IMDs, because their residents have mental illness, provide specialized mental health services, that suggestion is simply not true. Although a given IMD might provide certain services that another IMD or nursing home does not provide, no IMD is required to provide any specific mental health service by virtue of it being classified as an IMD. In fact, under a new Illinois law enacted in July, 2010, all nursing homes, including IMDs, that seek to serve residents with a diagnosis of serious mental illness will be required to obtain a certification to provide psychiatric rehabilitation services. *See* 210 ILCS 45/3-202.2b (new) (excerpt of Public Act 096-1372 filed herewith as Ex. 3).[5] Once this specialized certification program is in place, the facilities that will occupy a unique place in the

[4] The Absent Class Members are wrong when they state that the "IMDs consist only of residents who are mentally ill…." Absent Class Member Objections at 7. Although the vast majority of IMD residents have diagnoses of mental illness, *see* D. Jones Report at 6 (approximately 95%), the Absent Class Members are wrong to imply that the IMDs are operated in a certain way because all (or even most) of their residents are mentally ill.

[5] Public Act 096-1372, of which this new provision is a part, can be found at http://www.ilga.gov/legislation/publicacts/96/096-1372.htm.

continuum of the State's mental health care system will be the certified facilities, not the nursing homes classified as IMDs, although a certified facility also might be classified as an IMD because of its population mix.[6]

IV. The neutrality and qualifications of the Qualified Professionals

The Absent Class Members complain that the Decree is flawed because it does not require that the Qualified Professionals be independent or that they be board-certified psychiatrists. Under the Decree, the Qualified Professionals are the individuals who will evaluate IMD residents for their appropriateness for community transition and then prepare their Service Plans. *See* Doc. No. 267 at 13, 14. The Decree provides that the Qualified Professionals be "appropriately licensed, credentialed, trained and employed by a [Pre-Admission Screening and Resident Review] PASRR Agency." *Id.* at 11. The Decree also provides for specific qualifications for the PASRR Agencies, including that they be independent, conform to federal screening requirements and receive sufficient training. *Id*. at 10.

As to the independence of the Qualified Professionals, the Absent Class Members do not explain why the requirement of independent PASRR Agencies, which employ the Qualified Professional, is not sufficient. Further, the new law enacted in July, 2010, will further ensure the

[6] The Absent Class Members also are wrong to assume that "[e]veryone seems to agree that most severely mentally ill individuals should *not* reside in „traditional' nursing homes, meaning nursing homes where most of the population is elderly and is *not* mentally ill…." Absent Class Member Objections at 8 n. 4 (emphasis in original). Although there might be general agreement that nursing homes should not mix vulnerable residents (including the elderly) with residents with a propensity toward violence (*see* Nursing Home Safety Task Force Final Report at 1) (http://www2.illinois.gov/nursinghomesafety/Documents/NHSTF%20Final%20Report.pdf), nursing homes that are properly run and have appropriate staffing and services should be able to serve residents both with and without mental illness. The Absent Class Members' erroneous assumption is again predicated on the inaccurate view that IMDs are designed to serve mentally ill residents, while other nursing homes are not.

independence of PASRR agents. *See* 210 ILCS 45/2-104.3 (new) (excerpt of Public Act 096-1372 filed herewith as Ex. 3).[7]

The Absent Class Members also provide no basis for their demand that all Qualified Professionals be board-certified psychiatrists. PASRR agents now must be qualified under federal requirements, which requirements must be met for the State to qualify for federal matching funds for PASRR services. The State will continue to abide by those requirements. Further, the new law enacted in July, 2010, provides further qualifications for the PASRR agents who screen individuals before and after admission to nursing facilities, and that law does not require that all PASRR agents be board-certified psychiatrists. *See* 210 ILCS 45/2-201.5 (excerpt of Public Act 096-1372 filed herewith as Ex. 3).[8]

V. The right to return to an IMD

The Absent Class Members also argue that the Decree should explicitly give an IMD resident who moves to a community setting the right to return to the same IMD or a different IMD. *See* Absent Class Member Objections at 19. Under current law, a person in a community setting who requires nursing level of care would be eligible to be admitted (or readmitted) to a nursing home, which could include a nursing home classified as an IMD. The Decree would not change current law on that point. However, under current law, no person has a right to be

[7] Public Act 096-1372, of which this new provision is a part, can be found at http://www.ilga.gov/legislation/publicacts/96/096-1372.htm.

[8] Public Act 096-1372, of which this new provision is a part, can be found at http://www.ilga.gov/legislation/publicacts/96/096-1372.htm.

admitted to any specific nursing home,[9] and the Decree would not change that aspect of current law. The Absent Class Members' request for additional language in the Decree is unsupported and unnecessary.

VI. The provision of community-based services to IMD residents

Finally, the Absent Class Members contend that the Decree should provide IMD residents who choose to stay in the IMDs access to the same community-based services that will be provided to those individuals who transition to community settings. *See* Absent Class Member Objections at19-20. If the Absent Class Members' complaint is that IMDs are not now providing services that IMD residents have a right to receive (inside or outside the IMDs), then the Absent Class Members should file their own claim. Because they do not identify any such deprivation, however, this Decree, which is intended to remedy the violations alleged by the Named Plaintiffs, should be approved without extending new rights to IMD residents. In any event, the new law enacted in July, 2010, provides further standards for the care and treatment of residents in facilities certified to provide psychiatric rehabilitation services, including treatment plans and psychiatric rehabilitation and behavior management services. *See* 210 ILCS 45/3-202.2b (new) (excerpt of Public Act 096-1372 filed herewith as Ex. 3).

WHEREFORE, Defendants respectfully request that, following a hearing and consideration of the objections to the Proposed Consent Decree, this Honorable Court overrule all objections and approve the Proposed Consent Decree, and for such other relief as this Court deems necessary and just.

[9] *See Boudreau ex rel. Boudreau v. Ryan*, 2002 WL 314794 at *5 (N.D. Ill. Feb. 28, 2002); *aff'd Bruggeman v. Blagojevich*, 324 F.3d 906 (7th. Cir. 2003).

DATED: August 24, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that, on August 24, 2010, he caused to be filed through the Court's CM/ECF system a copy of **Defendants' Response to Objections to Proposed Consent Decree**. Parties of record may obtain a copy of this filing through the Court's CM/ECF system.

/s/ Brent D. Stratton

Brent D. Stratton