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

ETHEL WILLIAMS, *et al.*, on behalf of themselves and all others similarly situated, Plaintiffs, vs. PAT QUINN, *et al.*, Defendants.	)	No. 05 C 4673 Judge Hart Magistrate Judge Denlow

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPROVAL OF CONSENT DECREE AND RESPONSE TO OBJECTIONS

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Plaintiffs Ethel Williams, Jan Wrightsell, Edward Brandon, and Gilbert Parham, on behalf of themselves and all others similarly situated ("Plaintiffs"), submit this memorandum in further support of final approval of the proposed Consent Decree ("Decree")[1] and in response to objections to the Decree[2] ("Objections").

[1] The proposed consent decree was first submitted to the Court on March 15, 2010 (Dkt. No. 238, Exhibit 1) and was modified when the Court granted preliminary approval on May 27, 2010. (Dkt. No. 267, Exhibit A).

[2] The objections addressed in this brief were included with Plaintiffs' Notice of Filing, dated August 10, 2010 (Dkt. No. 296), and with Plaintiffs' Supplemental Notices of Filing, dated August 16, 2010 (Dkt. No. 301) (providing additional objections received by plaintiffs' counsel after August 10, 2010, but postmarked by that date) and August 20, 2010 (Dkt. No. 312) (additional objections received on or after August 16, 2010). Additionally, this brief responds to the briefs filed in support of objections (Dkt. Nos. 295 & 303). Throughout this brief, citations to particular objections will be by reference to the record cite.

SUMMARY OF ARGUMENT

Plaintiffs respectfully urge this Court to approve the proposed settlement of this case in which defendants have agreed to end the policies that unnecessarily isolate and institutionalize people with mental illness in Institutions for Mental Diseases.

Plaintiffs contend that Illinois has violated federal law by requiring thousands of people to live in large, segregated Institutions for Mental Diseases ("IMDs") in order to receive the mental health services they need. Highly qualified experts retained by plaintiffs and defendants concluded that most of the people now housed in IMDs could live safely and appropriately in community-based settings with appropriate supports and services and would choose to move to those settings if offered the opportunity. The Governor's Nursing Home Safety Task Force recently endorsed this conclusion, acknowledging that "[m]ental health experts unanimously advised the task force that nursing homes are inappropriate places to help individuals recover from mental illness." (NHSTF Final Report at 4 (attached as Exhibit 3 to Dkt. No. 256)).

After the close of discovery, the parties entered into settlement negotiations at the Court's urging and ultimately came to an agreement, memorialized in a proposed Consent Decree ("Decree") which the Court modified and preliminarily approved. (Dkt. No. 267 (5/27/10 Order)). Under the Decree, class members will be offered the opportunity to receive independent evaluations to determine the supports and services they need to live in community-based settings. Following the evaluations, class members who agreed to be evaluated will receive individualized service plans describing the services to be provided and will be offered opportunities, if appropriate, to move into more integrated settings over a five-year period. The Decree mandates

that defendants will provide the services and supports these class members need to transition into and succeed in the community.

The Decree also requires the defendants, with input from a court-appointed Monitor and plaintiffs' counsel, to develop an Implementation Plan that describes in detail the specific tasks, services, supports, timetables, protocols and other actions necessary to achieve compliance with the Decree. (Decree ¶¶ 11, 12.) The Court retains the authority to resolve any disputes about the content of the Implementation Plan after the parties and the Monitor have had an opportunity to review and discuss it. (*Id.* ¶ 12.)

The Decree is similar to remedies other federal courts have approved after contested proceedings and settlements in cases challenging unnecessary institutionalization of people with disabilities. (*See* Dkt. No. 288 (Comments by the United States of America), at 1–2 (observing that the Decree "is consistent with approved class action settlement agreements reached in other community integration cases alleging similar discrimination")). The district court for the Eastern District of New York, for example, recently ordered New York State to provide thousands of residents of large private institutions for individuals with mental illness ("Adult Homes") the opportunity to live in community-based settings. *Disability Advocates, Inc. v. Paterson* ("*DAI*"), No. 03-CV-3209 (NGG), slip op. (E.D.N.Y. March 1, 2010) (attached as Exhibit 1 to Dkt. No. 256). The Adult Homes at issue in *DAI* are very similar to IMDs. After presiding over a five-week bench trial, the court ruled that New York violated the Americans with Disabilities Act and the Rehabilitation Act by failing to provide Adult Home residents "the opportunity to receive services in the most integrated setting appropriate to their needs." *DAI*, 653 F. Supp. 2d 184, 187–88 (E.D.N.Y. 2009); *see also Rolland v. Patrick*, No. 98-30208, 2008 WL 4104488, at *8 (D. Mass. Aug. 19, 2008).

The Decree offers fair, reasonable and adequate relief to all class members. More than one hundred class members have filed comments supporting the Decree, expressing their hope for a future life away from the institutions and in their own homes. In contrast, many of the objections filed with the Court are the regrettable result of the campaign of fear and misrepresentation engineered by the IMDs. (*See* Dkt. No. 285 (7/27/10 Order) at 8–10 (detailing misrepresentations contained in notices distributed by IMDs)). The objections almost uniformly focus on issues unrelated to the fairness or adequacy of the Decree and are based on a misunderstanding about the relief it offers. They emphasize that some class members want to remain in IMDs but fail to acknowledge that nothing in the Decree requires anyone to move out of an IMD if they want to stay. The Decree enhances the choices available to all class members.

Plaintiffs ask this Court to approve the Decree, with the parties' agreement, so that Illinois IMD residents with mental illness will have the opportunity to enjoy their fundamental civil right to live in an integrated setting appropriate to their needs.

ARGUMENT

I. THE STATUS QUO IN ILLINOIS VIOLATES THE LAW AND REQUIRES REDRESS

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. 581, 600 (1999). The Court found that "unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II" of the Americans with Disabilities Act ("ADA"). *Id.* at 596. "Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Id.* at 600.

The shameful history of isolation and segregation of people with disabilities has been recognized by courts and the United States Congress. In 1990, in passing the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(2) (1991). Indeed, in signing the ADA, President George H.W. Bush said: "Let the shameful walls of exclusion finally come tumbling down." *See* http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html (Remarks of President George Bush at the Signing of the Americans with Disabilities Act). Two years ago, in justifying amendments to the ADA, Congress found that such discrimination and segregation continues to be a problem, nearly 20 years after the original passage of the ADA. 42 U.S.C. § 12101(2) (2008).

Plaintiffs' complaint alleges that defendants have failed to comply with federal law by maintaining a segregated, outmoded system that relies heavily on institutions, and by failing to have "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings" as required by *Olmstead*. 527 U.S. at 605-06. Plaintiffs contend that defendants are violating the integration mandates of Title II of the ADA, 42 U.S.C. § 12132 and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), which require that services, programs and activities be provided in the most integrated setting appropriate to the needs of individuals with disabilities.

Plaintiffs have developed the necessary proof to support these claims, including the retention of five experts[3] who would testify, among other things, that:

- most class members can live in supportive housing, a far more integrated setting than an IMD, and the remainder can live in supervised settings that are smaller and more integrated than an IMD;
- most class members would choose to live in more integrated settings if given a meaningful choice;
- supportive housing can and has served individuals with mental illness with a wide variety of needs, including individuals with very challenging needs;
- 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);
- there are service providers in Illinois who have the capability and willingness to serve IMD residents in more integrated settings; and
- defendants do not have a comprehensive, effectively working plan for moving individuals from IMDs to more integrated settings.

Defendants' experts disagreed with some of these conclusions but acknowledged that many people living in IMDs could live in more integrated settings, including supportive housing.

II. THE PROPOSED CONSENT DECREE OFFERS A FAIR, REASONABLE AND ADEQUATE REMEDY FOR DEFENDANTS' VIOLATIONS OF THE LAW

A. The Standard for Approving a Consent Decree

[3] The reports prepared by plaintiffs' experts, Dennis Jones, Elizabeth Jones, and Drs. Jacob Tebes, Madelon Baranoski and Paul Amble ("Yale Team"), are attached as Exhibit 1 ("D. Jones Report"), Exhibit 2 ("E. Jones Report") and Exhibit 3 ("Yale Report").

Courts favor the resolution of class actions by way of settlement and will approve such a settlement if it is fair, reasonable, and adequate when viewed in its entirety. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). In considering final approval, the court is not called upon to determine whether the settlement reached by the parties is the best possible deal or whether all class members approve such a settlement. *See Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 312 (7th Cir. 1980); *see also Association for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002) ("Even when the Court becomes aware of one or more objecting parties, the Court is not 'required to open to question and debate every provision of the proposed compromise. The growing rule is that the trial courts [sic] may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision.'") (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)).

A district court should refrain from resolving the merits of the case or resolving unsettled legal questions. *Carson v. American 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). 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." David F. Herr, *Manual for Complex Litigation, Fourth*, § 21.633 (2005). 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. 1987) ("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*, 75 F.3d at 1196.

The Seventh Circuit has identified six factors for analyzing whether a class action settlement or consent decree meets these requirements and should therefore be given final approval. These are:

1. the strength of the plaintiffs' 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); *In re Mexico Money Transfer Litigation*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000).

As set forth in the following sections, this six-part analysis leads to the conclusion that the Decree is fair, reasonable and adequate, and should therefore be approved.

B. Plaintiffs Have Negotiated a Settlement that Reflects the Strength of Their Case

Plaintiffs have put together a strong case that defendants are violating the law. On the strength of that case, the plaintiffs negotiated an excellent settlement – one that achieves all of the important goals of the litigation. Indeed, class counsel is not aware of a single objection arguing that the Decree offers an inadequate remedy for the violations of law challenged in this lawsuit.

The Decree fairly, reasonably and adequately affords relief to all class members. The essence of plaintiffs' complaint is that all IMD residents with mental illness must be provided

opportunities to make meaningful, informed choices regarding where they live, and that defendants must ensure that supports and services are available in integrated, non-institutional settings. The Decree gives each and every class member the option of undergoing an evaluation to determine what supports and services they need to live in a community-based setting, and it requires defendants to provide community-based services for those eligible class members who choose to move out of an IMD. (Decree ¶¶ 6(a), 7(b), 9(b)). Accordingly, the Decree addresses and achieves the goals of the litigation. Additionally, the Decree provides explicit, detailed provisions regarding the means by which such relief will be granted.

A detailed description of key provisions of the Decree was set forth in the Memorandum in Support of Joint Motion for Preliminary Approval of the Consent Decree and Approval of Notice Plan (Dkt. No. 239), and a summary description of some key provisions and features of the Decree follows. The Decree requires defendants to provide meaningful choices and opportunities for people with mental illness. Within two years after finalization of the Implementation Plan, every class member will be given the option of receiving an independent, professionally appropriate and person-centered evaluation of his or her preferences, strengths and needs with respect to living in a community-based setting. For each class member who is deemed appropriate for and is not opposed to moving to a community-based setting, defendants will be required to develop an individualized service plan setting forth the needs and preferences of the class member, the services the class member will need to transition to the community, and a timetable for that transition. The service plans will be developed by qualified professionals and will include input from appropriate people of the class member's choosing, including family members and treatment providers.

Within five years, all persons residing in IMDs who may handle and benefit from, and who choose placement in, a community-based setting will transition to such settings consistent with their service plans. The Decree requires defendants to develop 256 units of Permanent Supportive Housing in the first year of implementation and a total of 640 units by the end of the second year. This ensures that a material number of class members will be afforded relief quickly, while giving defendants adequate time to expand the community system to meet the needs of class members. Importantly, nothing in the Decree prevents those persons who oppose placement in a community-based setting from continuing to reside in an IMD.[4]

The Decree vindicates the rights asserted in the litigation and, therefore, reasonably reflects the merits of plaintiffs' case.

C. A Trial would be Complex, Long and Expensive

If the proposed Decree is not approved, expensive and protracted litigation will ensue. No objection contests this point, nor has anyone suggested that it was premature to settle the lawsuit. Any trial will be complex, contentious and cumbersome. *See e.g.*, *DAI*, 653 F. Supp. 2d at 187–88 (similar case involving individuals with mental illness residing in adult homes in New York resulted in a five-week bench trial). 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 these witnesses, and for trial in general, would be enormous. In addition, both plaintiffs and

[4] The Consent Decree provides class members with relief much like what they would likely obtain if they prevailed at trial. In the analogous *DAI* case discussed above, the District Court for the Eastern District of New York recently ordered the state of New York to provide thousands of residents of Adult Homes with the opportunity to live in community-based settings. *Disability Advocates, Inc.*, No. 03-CV-3209 (NGG), slip op. (E.D.N.Y. March 1, 2010). The Adult Homes at issue in *DAI* are very similar to IMDs, and plaintiffs believe that the likely outcome of a trial in this case would be substantially similar to the result in *DAI*.

defendants submit that if they do not prevail at trial, they would likely appeal the matter to the Court of Appeals, which could extend the litigation even further. One of the primary benefits of the Decree is that it provides reasonably prompt relief to the class, without these additional expenditures of time and money. Many class members already have been waiting an extremely long time to move into the community. These factors strongly weigh in favor of approval of the Decree.

D. Many of the Comments Submitted to the Court Support the Decree's Fairness, Reasonableness and Adequacy, and the Remaining Objections Reflect a Misunderstanding of the Decree

1) Overview of Comments and Objections

As of August 21, 2010, class members and their guardians have submitted approximately 1154 comments and objections to this Court.[5] Non-parties, such as relatives and friends of residents, have submitted 649 comments and objections.[6] Approximately 1034 of the submissions by class members and their guardians were on forms provided by the IMDs obtained pursuant to their campaign to mislead and frighten people into opposing the Decree. (*See* Dkt. No. 285 (7/27/10 Order) ("Order") at 10). These comments and objections are addressed below.

A. Comments Not on IMD Forms

[5] Paralegals working with plaintiffs' counsel have reviewed every comment or objection that has been filed with the Court as of August 20, 2010, and have attempted to eliminate any duplicate submissions to ensure an accurate tally in the attached Exhibit 4. Exhibit 4 includes a breakdown by parties and non-parties, and a further breakdown by IMD form versus non-form comments or objections.

[6] Non-class members who are not legal guardians do not have standing to object to the settlement. *See, e.g.*, *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 246–47 (7th Cir. 1992) (non-party lacks standing to object to settlement agreement absent a showing of "plain legal prejudice").

Almost all of class members' comments that were not submitted on the IMD forms express support for the proposed settlement. The following examples illustrate residents' desire to live more independently.[7]

- "I have lived at Clayton House for about 12 years…If I lived in the community I could do a lot of things I can't do here. It's like living in prison here. I could choose what to eat for breakfast. I could make my own meals, go to the grocery store, take my medication…I would like to just live a normal life. I had my own apartment for 11 years." (Dkt. No. 296-1 (Letter from Linda Warren) at 66);
- "I support the settlement because I think I could live on my own or with a few other people. I would try to get a job. I would cook on my own so I can eat things I want to eat. I would be able to do my own laundry the way I want to do it. The process of getting out of here is harder than getting in here." (Dkt. No. 296-1 (Letter from Alan E. Prisco) at 70);
- "I've lived at Greenwood Care for 12 years and when I asked about leaving they told me I don't have enough money…It is a very stressful situation. I am very sick of it here. The public address speakers are blaring and very loud. It seems like they're scrutinizing my every movement. There's not much privacy." (Dkt. No. 296-2 (Letter from Art Levin) at 4);
- "I am a resident at Greenwood Care and have been here almost eight years. I don't have privacy. I share a room with two other girls and sometimes we get along and

[7] Class counsel made presentations about the proposed consent decree at all 25 IMDs during the month of July and revisited many of the IMDs in August in an effort to allay the fears generated among residents by the IMDs' misinformation campaign. Most of these statements were collected by counsel on these visits. Counsel who transcribed statements made every effort accurately to reflect the views of the class members.

sometimes we don't. I did not choose my roommates. You have to wait in line for breakfast, lunch and dinner. Then you have to wait in line to get your medication. Then you share the same shower room as the men." (Dkt. No. 296-2 (Letter from Judy Krown) at 7);

- "I'm 32 years old. It doesn't make you feel right to live at a nursing home. I want to live at my own place. They might say they have a lot of programs but they really don't. If you're out by yourself you'll be more active, have more freedom. When you want to do something you do it…I think I would be healthier living on my own. I want to make my house my own way, not the way someone else wants it." (Dkt. No. 296-2 (Letter from Juan Manual Orozco) at 9);
- "I am a resident at Margaret Manor North and have been here 12 years…I want a place to call my own, where I can have my own thoughts. I know I can live independently because I lived independently and owned my own business before I got here." (Dkt. No. 296-2 (Letter from Rinnam Wiggins) at 28).

See also Dkt. No. 296-3 (Letter from Fred Friedman) at 9-13 (former resident describing life in an IMD and expressing support for the Decree).

The Office of the Illinois State Guardian also submitted comments supporting the Decree on behalf of more than one hundred state wards now housed in IMDs. (*See* Dkt. No. 296-3 at 21 ("[V]ery few community placement opportunities have been available to our wards with mental illness who wish to move into community based settings. By default, many of our wards with mental illnesses were faced with few meaningful alternatives other than IMDs, despite efforts by their guardians to advocate for more individualized service options.")). In addition, a number of consumer and advocacy organizations endorse the Decree. (*See e.g.*, Dkt. No. 296-3 (Statement

of Anthony Zipple, CEO of Thresholds, provider of support services for individuals with mental illness) at 2-8; (Letter from six members of the Illinois General Assembly) at 15, 16; (Letter from Anthony Kopera, President and CEO of Community Counseling Centers of Chicago) at 17, 18; (Letter from Lora Thomas, Executive Director of National Alliance on Mental Illness (NAMI) Illinois) at 19, 20; (Letter from Joel Rubin, Executive Director of the National Association of Social Workers, Illinois Chapter (N A S W) at 23-25; (Letter from Summit Facilitator, Mental Health Summit) at 26-28; (Letter from Mark Heyrman, Chair, Public Policy Committee, Mental Health America of Illinois) at 29, 30; (Letter from Janet Hasz, Executive Director, Supportive Housing Providers Association) at 31, 32; and (Letter from J. Srinivasaraghavan, President, Illinois Psychiatric Society) at 33, 34).

B. Comments and Objections on IMD Forms

The form objections and other comments submitted by class members on the forms provided by the IMDs reflect the inappropriate tactics they employed. Several class members who had signed form objections later submitted comments supporting the Decree after they received more accurate information about its contents. (*See, e.g.*, Dkt. No. 296-2 (Letter from David Daugherty) at 20; (Letter from Ann Wakey) at 43.)

Many objections paraphrase or simply quote the misleading statements in the so-called IMD Fact Sheets distributed by the IMDs. (*See, e.g.*, Dkt. No. 296-22 (Objection Form of Kim Henriksen, guardian of Abbott House resident) at 12-13); Dkt. No. 296-28 (Objection Form of Willa M. Huffman) at 48). Others reflect IMD staff members' efforts to encourage objections and to reward class members who cooperate. (*See, e.g.*, Dkt. No. 296-16 (Letter from Barbara Hopmayer) at 26 (positive comments apparently from staff member in the margin of resident's "support letter" suggesting that the resident was encouraged by staff to write an objection);

Declaration of Cesar Vera (attached as Exhibit 5) (stating that IMD staff at Sacred Heart offered residents cigarettes to sign objections to the settlement)). In some instances, it appears that class members were frightened or simply coerced into signing objections. (*See, e.g.*, Dkt. No. 296-2 (Email from Pete Peng) at 37) (citing fear of retaliation by staff members for expressing support of the settlement)).

The objections reveal little real opposition to what the Decree actually says. In fact, hundreds contain no explanation at all of the reason for the objection. (*See* Group Exhibit G, Dkt. Nos. 296-8 – 296-10). These "blank" objections should be given little, if any, consideration. *See Gaddis v. Campbell*, 301 F. Supp. 2d 1310, 1314 n. 3 (M.D. Ala. 2004) (court treated blank forms that did not state any basis for objection as just one objection); *Austin v. Hopper*, 28 F. Supp. 2d 1231, 1236-37 (M.D. Ala. 1998) (grouping into a single category "objections" that were blank or expressed approval or did not object to the settlement).

The forms that include some explanation in many instances tacitly support the Decree by suggesting, for example, that although the resident signing the form may want to remain, he or she supports the right of others to move out if they choose and may want that option for himself or herself in the future. (*See, e.g.*, Dkt. No. 296-20 (Objection Form of Mattie McGuire) at 2 ("I believe that [these] residents should have the right to choose were [sic] they live…); (Objection Form of Venancio Rodenas) at 19 ("I'm getting better now and I'd like to eventually be discharged and move to my own place…"); Dkt. No. 296-19 (Objection Form of Roosevelt Wallace) at 127; (Objection Form of James B. Johnson) at 56; (Objection Form of Tanya Glass) at 37).

The remaining objections from class members manifest a misunderstanding of the Decree. Most of them express fears that the Decree will force residents into homelessness or

order that IMDs be closed. (*See, e.g.*, Dkt. No. 296-18 (Objection Form of Erika W. Flores) at 39; (Objection Form of Henry Hughes.) at 61-62; (Objection Form of Lisa Gruzlewski) at 67-68; (Objection Form of John Wollschlager) at 72-73; (Objection Form of Steven Goldfine) at 78). Some of them poignantly describe a class member's painful experiences living independently, often without access to essential services and supports. (*See e.g.*, Dkt. No. 296-22 (Objection Form of Jon Kalscheur) at 8-9; Dkt. No. 296-5 (Letter from Connie Dillman) at 5). These objections reflect a misunderstanding of the Decree's terms, which provide a choice to eligible class members but do not require anyone to move out of an IMD or even to consent to an evaluation. For those who choose to move, the Decree also requires defendants to provide the services delineated in each individual's service plan. For those who do not choose to move, the Decree does not mandate the closure of a single IMD. (*See* Order at 8-9; Decree ¶¶ 7(b), 8).

As this Court found, the IMDs provided residents with notices which "expressly exhort residents and their families to object to the settlement." (Order at 7). This Court found that the IMD notices "appeal to residents' and family members' fears by overstating, as a foregone conclusion, the possibility that approval of the Settlement would result in IMDs being closed and residents being out on the street with no provision for food, medicine and shelter." (*Id.* at 8). It is not surprising that most of the forms from family members object to the closing of the IMDs, not to the terms of the Decree. (*See, e.g.*, Dkt. No. 296-25 (Objection Form of Kathy Christopher) at 4 ("I feel that Janice will choose to become homeless, if her (sic) or all intermediate care facilities are suddenly closed…."); Dkt. No. 296-26 (Objection Form of Jacquelyn McDonald) at 15 ("I believe that the closing of Central Plaza would cause my Uncle, Dennis Gates, unnecessary stress. He would be forced to be responsible for his own care, medication, rent & other bills."). Many are not objections at all but merely express praise for the

IMD where their family member resides and opposition to placement in the community for their loved one. (*See, e.g.*, Dkt. No. 296-24 (Objection Form of Kenneth Runmore) at 10 ("Please let my Brother Ross continue to receive the care at Abbot House that he so desperately needs."); (Objection Form of Grace Shaw) at 12 ("Finding Abbott House was truly an answered prayer. It is unlike any other facility we had visited."); (Objection Form of Teresa Fischer) at 33-34 ("I have been fortunate, as has been my brother to find Abbott House…Other IMDs and group homes are not situated in such a safe and pleasant setting."). The Court should consider the misrepresentations in the IMD notices in weighing the objections on the IMD forms and grant them little, if any weight.

What the objections do not say is more telling than what they do say. Class counsel is unaware of a single objection arguing that class members who can and would like to live in a community-based setting should be denied that option. Those objections stating that a particular class member will never be able to function outside of an institutional setting still do not seek to limit the options of others with different capacities and aspirations.

Even if some objecting class members who want to stay in IMDs had advocated denying others the opportunity to leave – which they do not – the case law would not support them. *Imasuen v. Moyer*, 1992 U.S. Dist. LEXIS 1449, *4 (N.D. Ill. Feb. 7, 1992) ("[T]he fact that some class members may be satisfied with an unconstitutional system and would prefer to leave violations of their rights unremedied is not dispositive under Rule 23(a)."); *Wyatt v. Poundstone*, 169 F.R.D. 155, 161 (M.D. Ala. 1995) (denying class certification where some institutional residents opposed community placement "would, in effect, preclude the use of the class action device in many of the very cases where it could be the most advantageous"); *Waters v. Berry*, 711 F. Supp. 1125, 1131-32 (D.D.C. 1989); *Lanner v. Wimmer*, 662 F.2d 1349, 1357 (10th Cir.

1981); *Wilder v. Bernstein*, 499 F. Supp. 980, 993-94 (S.D.N.Y. 1980). Plaintiffs' experts concluded that a substantial majority of class members would like to live in community-based settings and are able to do so with appropriate supports and services. (Yale Report at 18-23; E. Jones Report at 6-9.) These individuals are entitled to relief from unnecessary institutionalization.

In addition, the mere fact that class members filed a large number of objections does not resolve the issue of whether a settlement is fair, adequate and reasonable. *Armstrong v. Board of School Directors*, 616 F.2d 305, 326 (7th Cir. 1980). Courts routinely approve settlements over the objections of significant numbers of class members. *See*, *e.g.*, *EEOC v. Hiram Walker & Sons, Inc.*, No. 83-1024, 1984 WL 48941 (C.D. Ill. Jan. 26, 1984), *aff'd* 768 F.2d 884 (7th Cir. 1985) (concluding that the substantial risks of litigation and the time and expense a long trial would require justified approving settlement, despite the fact that fifteen percent of the original charging parties objected); *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1022-23 (E.D. Wis. 1984) (approving settlement over objections of 108 out of approximately 200 class members); *Armstrong v. Board of School Directors of City of Milwaukee*, 471 F. Supp. 800, 805 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980) (approving proposed settlement agreement despite the fact that only eight to ten of forty-five class members who appeared at fairness hearing supported the settlement and numerous others sent letters opposing the agreement); *see also Reed v. General Motors Corp.*, 703 F.2d 170, 174-75 (5th Cir. 1983) (approving settlement over objections of more than 600 of 1,469 class members and twenty-three of twenty-seven named plaintiffs); *Ragsdale v. Turnock*, 734 F. Supp. 1457, 1459 (N.D. Ill. 1990), *aff'd*, 941 F.2d 501 (7th Cir. 1991), *cert. denied*, *Murphy v. Ragsdale*, 502 U.S. 1035 (1992) (approving

settlement despite hundreds of telephone calls and 1,266 letters from plaintiff and defendant class members objecting to settlement).

2) This Court Should Reject the Objectors' and IMDs' Attacks on the Proposed Consent Decree.

Counsel for approximately thirty class members and relatives filed a lengthy Memorandum supporting their objections.[8] (Dkt. No. 303 ("Objectors' Memorandum")). Counsel for several IMDs also filed a Memorandum containing similar objections to the proposed settlement.[9] (Dkt. No. 295 ("IMD Memorandum")). Neither Memorandum argues that this Court should reject the Decree in its entirety. Instead, they present a jumble of overlapping objections that trivialize the rights of people with disabilities, misstate the terms of the Decree, and impose unworkable burdens on the parties.

The IMDs' and the Objectors' arguments start by minimizing the class members' civil rights. The Objectors' Memorandum criticizes the parties for treating this as a "civil rights case" when "[t]he medical issues – not the civil rights issues – are the most important issues." Objectors' Memorandum at 24. The IMDs, similarly, criticize the parties for emphasizing that IMD residents are people with rights under the ADA. IMD Memorandum at 1.[10]

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[8] For all of the reasons stated in Plaintiffs' Motion to Strike Expert Reports Submitted by Absent Class Members and Family Members (Dkt. No. 306), plaintiffs believe this Court should give no weight to the three expert statements that were submitted as exhibits to Objectors' Memorandum. If this Court intends to rely on any of the opinions in those reports in determining the fairness of the settlement agreement, plaintiffs are entitled to cross examine the purported experts. *See United States v. Tenn.*, Nos. 03-6389, 03-6628, 2005 WL 1506480 at *4-6 (6th. Cir. June, 23, 2005) (upholding parties' due process right to challenge opinions of objectors' experts).

[9] The IMDs are not parties to this action and have no standing to object. *See, e.g.*, *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 246–47 (7th Cir. 1992) (non-party lacks standing to object to settlement agreement absent a showing of "plain legal prejudice").

[10] Residents of IMDs often experience inadequate medical care and medication management. *See*, *e.g.*, Illinois Department of Public Health, Complaint Investigation of Bayside Terrace, Form CMS 2567(02-99) at 2 (April 28, 2008), http://www.idph.state.il.us/ltc/docs/SurveyResult/6000764FA04282008.pdf

The notion that people with serious mental health needs do not have the same civil rights as other citizens, and that as a result they must spend their lives confined in large institutions for their protection, is flatly contrary to federal law and medical practice. The ADA condemns the shameful history of isolating and segregating people with disabilities, including those that require ongoing medical treatment. *See* 42 U.S.C. § 12101(2) (1991) (finding that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."); *see also Olmstead*, 527 U.S. at 600 ("[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."). Plaintiffs' expert Dennis Jones confirmed that "[t]he national standard of care today is for persons with serious mental illness to live in integrated community settings with the supports necessary for them to succeed." (D. Jones report at 15; *see also* Yale Report at 5–6 (describing current standard practice in mental health field as consumer and recovery centered with an emphasis on community integration)).

(reporting on the death of a 66-year-old resident due to the IMDs' failure to follow resident's care plan); Illinois Department of Public Health, Complaint Investigation Recertification State Licensure of Abbot House, Form CMS 2567(02-99) at 2 (October 18, 2007), http://www.idph.state.il.us/ltc/docs/SurveyResult/6000038FAIK10182007.pdf (observing multiple laceration marks on both of a resident's arms and no care plan addressing his history of suicidal attempts); Illinois Department of Public Health, Recertification of Albany Care, Form CMS 2567 (02-99) at 2 (December 14, 2006), http://www.idph.state.il.us/ltc/docs/SurveyResult/6007959FI12142006.pdf (failure to address resident's drug use and behavioral issues); Illinois Department of Public Health, Recertification State Licensure of Greenwood Care, Form CMS 256L at 11 (November 20, 2003), http://www.idph.state.il.us/ltc/docs/SurveyResult/6000202FIK11202003.PDF (finding that medications were provided to residents without a care plan to address the effectiveness and side effects of the medications); Illinois Department of Health, Recertification Complaint Investigation of Albany Care, Form CMS 2567(02-99) at 5 (October 17, 2008), http://www.idph.state.il.us/ltc/docs/SurveyResult/6007959FIA10172008.pdf (facility failed to obtain consent of residents for medication changes).

The Objectors and IMDs mount a series of attacks on the Decree based largely on these paternalistic and outdated views.

a) The Decree is sufficiently clear and detailed

The Objectors and IMDs claim that the Decree is not sufficiently detailed. They argue that the Implementation Plan should be developed now so that class members will know how their needs will be met if they choose to leave IMDs and how the State will pay for those services. They add that the Decree should require that the Implementation Plan be filed with and approved by the Court. (*Compare* Decree ¶¶ 11, 12 *with* Objectors' Memorandum at 14-15; IMD Memorandum at 7).

The Decree provides that the Court will resolve any disagreements regarding the Implementation Plan or compliance with the Decree. (Decree ¶ 12). To the extent the Decree does not make clear that the parties will file the Implementation Plan with the Court and seek the Court's approval even if they agree on its terms, the parties are willing to amend the language of the Decree to specify those steps. The parties have every expectation that the Court will remain involved as necessary throughout this process.[11]

The Objectors' argument that approval of the Decree should be delayed until every detail of the Implementation Plan is completed ignores the fact that the Decree already includes much more than a court order likely would have if plaintiffs prevailed at trial. Due to principles of federalism and comity, the usual course in institutional reform cases is to permit state government defendants to submit a proposed plan providing details about how they would remedy their unlawful conduct. The court in *DAI* adopted this approach, 653 F. Supp. 2d at 312,

[11] Of course, the Court may determine the extent to which non-parties may be involved in issues related to the Implementation Plan, but there is no need to mandate such involvement at this stage of the proceedings.

reasoning that "the court must give appropriate consideration to principles of federalism, as 'remedies that intrude unnecessarily on a state's governance of its own affairs should be avoided.' Unnecessarily detailed remedial orders may needlessly inject federal courts into the business of 'regulating a state's administration of its own facilities.'" *Id.* at 312 (citations omitted). Other cases are in agreement. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 362 (1996) ("[T]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons."); *Memisovski v. Maram*, No. 92-CV-1982, slip op. (N.D. Ill. Sept. 14, 2004) (ordering state officials to submit proposed remedial plan following finding that they violated federal law) (attached as Exhibit 2 to Dkt. No. 256). As a practical matter, Defendants are in the best position to figure out the details of implementation without unnecessary court micromanagement at this juncture, as "courts are ill-equipped 'for formulation and day-to-day administration of detailed plans' to assure compliance with the law." *DAI*, 653 F. Supp. 2d at 312 (citation omitted). The Decree makes clear, however, that the court-appointed Monitor and class counsel will have an active role in developing the Implementation Plan and are authorized to bring any problems to the Court's attention. (Decree ¶¶ 11-12).

Notably, the order granting injunctive relief in *DAI* covers roughly the same categories that the Decree covers, but it does so in just eleven pages with much less detail. (*Compare* Decree *with DAI*, No. 03-CV-3209 (NGG), slip op. (E.D.N.Y. March 1, 2010)). For example, the Decree devotes six subparagraphs to service plans, describing what they must contain, who will develop them, their focus and timing, Decree ¶ 7, while the *DAI* order simply provides that the state must arrange for providers of community-based services to identify "the services each

eligible individual needs to successfully transition to and live in supported housing and arrange for the individual to timely receive those services." *DAI,* No. 03-CV-3209 (NGG)*, slip op.* ¶ 6(g) (E.D.N.Y. March 1, 2010).[12]

The Decree ensures that every IMD resident who is capable of and chooses to live in the community will receive the services and supports he or she needs. (Decree at ¶¶ 5, 6(a), 7(b), 9(b)). Nevertheless, the Objectors and IMDs ask the Court to delay approval of the Decree until each class member knows each specific service he or she will receive. (Objectors' Memorandum at 14; IMD Memorandum at 2, 7). The menu of services and supports that will be offered are described in detail in the specific regulations incorporated by reference in the Decree. (Decree at ¶¶ 4(ii), 4(x)) (citing 59 Ill. Adm. Code Part 132 (Medicaid Community Mental Health Services Program) (including provision of services such as medication administration, monitoring, and training; therapy/counseling; community support; assertive community treatment; and psychosocial rehabilitation, among others) and 42 U.S.C. §§ 1396a-1396t (describing contents of Medicaid State Plan)). Deciding which of the available services will be offered to individual class members requires individual evaluations to determine each class member's needs and preferences, a process that will take two years. (Decree ¶ 6(a)). The Decree amply describes the framework for those decisions. To wait for the determination of every option that will be offered to every class member is unnecessary and unworkable.

[12] The level of detail Objectors seek is far more than would even been appropriate for the Implementation Plan, much less a consent decree. Questions such as how residents will get their medications and who will check in on them will be answered on an individual basis in each class member's service plan (the general contents of which the Decree clearly spells out). Similarly, how rent will be handled will depend on the type of setting the class member is transitioned to, which will be determined on a case-by-case basis. Other questions regarding who will conduct the evaluations and draft the service plans are answered in the Decree. (*See* Decree ¶¶ 6(b), 7(c)).

The IMDs also argue that the parties should specify "how the State will pay for [class members'] care." IMD Memorandum at 1. The IMDs ignore the fact that funding for residents' care will follow the resident wherever the resident decides to live. Determining where class members will live under the Decree depends on their evaluations and the choices they make. If more of them choose to live in the community, more funding will be made available to meet their needs, and the State will need to fund fewer beds in IMDs. Each person who chooses to move into the community will save the state money, in part because of an increased opportunity to recover federal Medicaid funds. (D. Jones Report at 17-19). Out of respect for principles of federalism and comity, the Decree wisely avoids dictating every detail of how defendants will fund its implementation. *See United States v. Bd. of Educ. of the City of Chicago*, 717 F.2d 378, 385 (7th Cir. 1983) (vacating portion of order mandating specific remedies for noncompliance with consent decree, including requirement that the Executive Branch designate specific funds, stating that "the district court should provide the Department an opportunity to fashion its proposed remedy for past noncompliance, as well as a chance to show that it intends to comply in the future, before structuring detailed remedial action that may still be necessary").

There is no question, however, that this Court has the authority to enforce the Decree once it is approved, including its requirement that the State ensure the availability of all necessary supports and services. (Decree ¶ 5; *see Frew v. Hawkins,* 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."); *Wisconsin Hospital Ass'n. v. Reivitz*, 820 F. 2d 863, 868 (7th Cir. 1987) ("Against a state that violates a valid court decree the court has the power to issue any order necessary to enforce the decree, including an order to pay.")).

b) The class definition is sufficiently clear

The Objectors' assert that the class definition is "problematic," because it is limited to IMD residents who "'with appropriate supports and services may be able to live in an integrated community setting.'" (Objectors' Memorandum at 12). This class definition is similar to those courts have approved in similar cases. *See, e.g., Colbert v. Blagojevich*, No. 07 C 4737, 2008 WL 4442597, at *10 (N.D. Ill. Sept. 29, 2008) (certifying class of "all Medicaid-eligible adults with disabilities in Cook County, Illinois, who are being, or may in the future be, unnecessarily confined to nursing facilities and who, with appropriate supports and services, may be able to live in a community setting"). The class definition includes virtually every resident of IMDs, because everything provided in an IMD – including medication management, group and individual therapy, housing, food, even the presence of staff 24 hours a day when necessary – can be provided in a community-based setting. (*See* Dkt. No. 296-3 (Letter from Anthony M. Zipple) at 3-4 (describing comprehensive range of community rehabilitation services provided by community mental health service provider Thresholds); *see generally* 59 Ill. Adm. Code Part 132 (describing community-based services)). Every IMD resident will be offered an individualized evaluation conducted by a qualified professional to determine under what circumstances he or she can live safely in a community-based setting. Once IMD residents have received those evaluations, there will be no question about whether a particular IMD resident is someone who meets the class definition.

In any event, this argument is a distinction without a difference. If the Court believes it would clarify the class definition, plaintiffs would not object to a definition that would include all adults in Illinois who have a mental illness and are institutionalized in a privately owned IMD, omitting the additional requirement limiting the class to individuals who may be able to live in a community-based setting.

c) Class members should be offered the opportunity to leave the IMDs unless they oppose moving to a community-based setting

The Objectors propose that the Decree require class members to "opt in" to have the opportunity to live in a community-based setting. (Objectors' Memorandum at 15-17). If they express no opinion or cannot make up their minds, the Objectors apparently would leave them institutionalized indefinitely, even if they could function well in a more integrated setting. This approach may benefit the IMDs' profits, but it conflicts with common sense and the approach of the Supreme Court. *See Olmstead*, 527 U.S. at 607 (holding that under Title II of the ADA, states are required to provide community-based treatment for people with mental illness when the state's treatment professionals determine that such placement is appropriate, the affected people "do not oppose" such treatment and the placement can be reasonably accommodated).

d) The Decree provides for competent evaluations by qualified professionals

The Objectors raise two concerns about the evaluation process described in the Decree. First, they argue that the evaluations should be conducted by people who have no relationship with the non-profit, community-based agencies that actually provide supportive housing and other community-based services and settings. (Objectors' Memorandum at 18-19). Second, they argue that individuals should be required in every case to consult family members and IMD psychiatrists no matter how little those people know the resident. (*See id.* at 17-18). Neither of these proposals is a good idea.

The Decree requires that evaluations be conducted by professionally qualified individuals who are independent of the IMDs and are employed by the pre-admission screening agencies that now approve applicants for admission to IMDs. *See* Decree ¶ 4(viii), (xix). Plaintiffs are not aware of any complaints the IMDs and their allies made in the past about the competence of those agencies when they approved the admission of every class member into an IMD; yet they

now question the agencies' ability to make similar determinations about whether IMD residents can live elsewhere. The Decree correctly provides that pre-admission screening agencies that are familiar with community-based services are appropriate to evaluate whether class members' needs can be met outside of the IMDs.

This Court also should reject the Objectors' suggestion that the Decree require evaluators to consult relatives and medical personnel who may have very little contact with class members. The Decree already requires that evaluations include consultations with a class members' psychiatrist and other IMD staff "where appropriate," Decree ¶ 4(viii), and that they include family and friends at the class member's request, as required by applicable laws concerning medical confidentiality. *See, e.g.*, 410 ILCS 50/3(d). The Decree does not alter in any way the authority under state law of guardians and other legal representatives to act on behalf of IMD residents. (*See, e.g.,* Decree ¶ 7(c)) (requiring involvement of class member's "legal representative" in development of service plan). There is no reason to add additional requirements.

e) This Court need not expand the scope of the Decree by creating new entitlements to services or funding for people who remain in IMDs

The Objectors and IMDs ask this Court to deny approval of the Decree unless the parties agree to add various provisions guaranteeing funding and services to IMD residents. (*See* Objectors' Memorandum at 20-24; IMD Memorandum at 5-6). They point to nothing in the Decree that would restrict whatever rights class members currently have to those services and funds. Instead, they suggest that, because *Olmstead* recognized that a state may assert a defense in a community integration case based on the state's need to consider how it provides services to everyone with disabilities, this Court should assure the continued financial vitality of all of the IMDs. (*See* Objectors' Memorandum at 20-24; IMD Memorandum at 5-6; *Olmstead*, 527 U.S.

at 607).[13] As this Court has already noted, "there is not presently any guarantee that Illinois will fund IMDs. If an IMD closes, residents would have the same procedural rights as they presently have." (Order at 9).

Moreover, this case is about the unnecessary segregation of people in IMDs. It is not about whether people who want to stay in IMDs should have access to additional services or whether the IMDs should be financially secure. Nothing in the Decree alters whatever rights people may have to IMD funding or services. *See id.* The Decree focuses on remedying the problem that gave rise to this case – the fact that people in IMDs do not have a choice, where appropriate, to live in a more integrated setting – not the countless other problems people may have in IMDs. Because the Decree will save the State money there will be more funds available to meet the needs of people with disabilities and others who depend on state services. (*See, e.g.*, D. Jones Report at 17-19 (community-based settings are "significantly less costly to the State than serving individuals in IMDs" and savings are even greater when considering costs for ancillary services; these savings are due, in part, to the fact that the State is not eligible for a federal Medicaid match for the money it spends on most IMD residents, while federal matching funds are available when individuals are served in the community); NHSTF Final Report at 16 ("The state can realize significant savings when those residents transition to community settings."); *DAI*, 653 F. Supp. 2d at 285 (district court found it less expensive for New York to

[13] Objectors inappropriately rely on circumstances where state institutions have been required to continue to fund the infrastructure that keeps the institution open to suggest that the State will have to operate a dual system during the term of the Decree. Objectors' Memorandum at 22-23. The State pays the IMDs on a per bed per day basis, and while defendants' counsel may be correct that there will be some additional costs at the beginning of the transition, overall moving people out of institutions and into the community will save the State money. (*See* D. Jones Report at 17-19).

serve people in the community than in institutional settings)).[14] The Objectors cannot reasonably expect more than that.

The financial future of the IMDs under the Decree will be determined by the choices of class members. The Decree does not and should not require Illinois to pay for IMD beds that class members have chosen to leave. If very few class members choose to leave the most popular IMDs under the Decree, residents of those IMDs will be in substantially the same position they are in now. The State has long demonstrated a commitment to maintain funding in such circumstances. If many residents choose to leave other IMDs – which plaintiffs believe is likely in light of the inadequate conditions and services many of them offer[15] – some facilities

[14] The Decree would ensure for the first time that residents who are discharged from an IMD, including residents of an IMD that closes, will be offered appropriate housing. Decree ¶ 15. This provision was included in part as a response to the State's problems finding appropriate alternatives when a large IMD, Somerset, closed after its license was revoked. Plaintiffs disagree with the Objectors' assumption that housing was chosen for people leaving Somerset based on anything other than an urgent need to find a bed. (*See* Objectors' Memorandum at 9).

[15] The underlying assumption inherent in this argument – that IMDs are safe and provide high quality services to residents – is belied by the many official reports of neglect, abuse and unhealthy conditions in IMDs. *See*, *e.g.*, Illinois Department of Public Health, Complaint Investigation of Rainbow Beach Care Center, Form CMS-2567(02-99) at 1 (July 31, 2008), http://www.idph.state.il.us/ltc/docs/SurveyResult/6008734FA07312008.pdf (detailing fire safety concerns); Illinois Department of Public Health, Annual Licensure and Certification Survey of Wincrest Nursing Center Corp., Form CMS-2567(02-99) at 6 (October 16, 2008), http://www.idph.state.il.us/ltc/docs/SurveyResult/6010060FIK10162008.pdf (detailing violations of living space requirements); Illinois Department of Public Health, Annual Licensure and Recertification of Columbus Manor Residential Care Home, Form CMS-2567(02-99) at 1 (April 24, 2009), http://www.idph.state.il.us/ltc/docs/SurveyResult/6001994FIA04242009.pdf, (detailing abuse of resident, lack of mental health assessment and appropriate services for resident, and lack of a discharge plan for resident); Illinois Department of Public Health, Annual Licensure and Certification Survey of Wincrest Nursing Center Corp., Form CMS-2567(02-99) at 7 (October 16, 2008), http://www.idph.state.il.us/ltc/docs/SurveyResult/6010060FIK10162008.pdf (detailing failure of IMD to properly monitor the blood sugar of several residents). Moreover, plaintiffs' expert, Elizabeth Jones, observed conditions that led her to conclude "it is my strong observation that the IMDs are not 'safe havens' for people with serious mental illness." (Report of Elizabeth Jones at 6). Her observations include filthy clothing and lack of shoes for residents, residents who appeared groggy and detached, deafening noise that made it difficult to hear, speak or think, and overall, a chaotic environment with "crowding, noise, lack of private space, poor supervision and lack of meaningful activities [that] create emotional stress and physical discomfort for the residents." *Id.*

may not survive and others probably will be consolidated. That would be the result of class members' choices, not this Court's mandates.[16] Inadequate IMDs do not have a right to continue to make profits if their prosperity rests only on the fact that people with mental illness who could and want to receive the services they need in a more integrated setting are denied that choice in violation of federal law.

f) Plaintiffs are entitled to attorneys' fees

The misleading IMD materials encouraged Objectors to criticize the fact that the Decree awards plaintiffs compensation for their reasonable expenses and some of their attorneys' fees. Many of the form objections echoed this theme. (*See, e.g.*, Dkt. No. 296-24 (Objection Form of Jordan Sims) at 46; (Objection Form of William Scheurer) at 64; (Objection Form of Irene Lilienheim Angelico) at 69). The IMDs now make passing mention of this issue as part of the discussion of broader financial concerns. (*See* IMD Memorandum at 5).

The law and facts are undisputed. First, if the Decree is approved, plaintiffs would be entitled to an award of attorneys' fees and costs pursuant to applicable statues. *See* 42 U.S.C. § 12205 ("any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs"); 29 U.S.C. § 794a(b) (similar); 42 U.S.C. § 1988 (similar); Fed. R. Civ. P. 54(d).[17] Second, the agreed award of

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[16] The IMDs do not argue that a class member has a right to live in a particular IMD. Even people with disabilities whose right to live in certain types of facilities is protected by a Medicaid entitlement do not have the right to live in the specific place of their choice. *See Boudreau ex rel. Boudreau v. Ryan*, No. 00 C 5392, 2002 WL 314794 at *5 (N.D. Ill. Feb. 28, 2002); *aff'd Bruggeman v. Blagojevich*, 324 F.3d 906 (7th. Cir. 2003).

[17] These provisions are not limited to judgments on the merits; "settlement agreements enforced through a consent decree" like the one proposed here "may serve as the basis for an award of attorney's fees." *See*

$1,990,000 in attorneys' fees represents a negotiated compromise between the parties that is substantially less than 50% of the value of the legal work plaintiffs have received during five years of hotly contested litigation. That entire sum will be contributed to the organizations that provide representation to the plaintiff class, so that they can continue their work providing legal services without charge to their clients in this and other cases. Third, if this case went to trial and plaintiffs prevailed, they would almost certainly be entitled to a far larger award of attorneys' fees and costs. Fourth, the agreed award is comparable to fees awarded in similar cases. *See, e.g.*, *K.L. v. Edgar*, No. 92 C 5722, 2000 WL 1499445 (N.D. Ill. Oct. 6, 2000) (awarding the Roger Baldwin Foundation of ACLU and its pro bono counsel $1.9 million in attorneys' fees in a class action on behalf of people with mental illness residing in state-operating institutions); *Gaskin v. Pennsylvania*, 389 F. Supp. 2d 628, 643 (E.D. Pa. 2005) (finding a $1.825 million fee award in consent decree was fair and reasonable where plaintiffs had actually expended over $2.6 million); *Memisovski v. Maram,* No. 92-C-1982, slip op. (N.D. Ill. Feb. 21, 2006) (awarding public interest organizations and their *pro bono* counsel $4.4 million in fees and expenses in a class action Medicaid case involving access to medical care for children) (attached as Exhibit 5 to Dkt. No. 256).

This Court should authorize the award of attorneys' fees the parties have negotiated.[18]

E. The Decree Was Negotiated in Good Faith and Without 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

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Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598, 604 (2001) (citation omitted).

[18] If requested by the Court, plaintiffs are willing to provide specific documentation relating to the "lodestar" value of their legal work in litigating this action.

contrary. *Mars Steel v. Continental Ill. Nat'l Bank & Trust*, 834 F.2d 677, 681-82 (7th Cir. 1987); *Armstrong*, 616 F.2d at 325; Newberg at § 11.41. Nothing supports a different result here, and no Objector has accused the parties of collusion in reaching a settlement. The parties have vigorously represented their clients throughout the pendency of the case. The parties have engaged in extensive written and deposition discovery, several contested discovery motions, as well as 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, 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)).

F. Competent Counsel Support the Settlement

The court is "entitled to rely heavily on the opinion of competent counsel." *Armstrong*, 616 F.2d at 325. Counsel for the plaintiffs and defendants, who are competent and experienced in class action and civil rights litigation, all support approval of the Decree. The Decree provides a fair, reasonable, and adequate disposition of the lawsuit. The Decree finally allows class members a real opportunity to abandon the segregation that has been forced on thousands of

adults with mental illness in this state. Indeed, the Decree embodies the single most important aspect of the relief sought by plaintiffs: that all class members are provided opportunities to make meaningful and informed choices to receive services in the most integrated setting appropriate to their needs.

G. The Settlement Was Reached After Comprehensive Discovery

Another factor strongly supporting approval of the Decree – and about which there is no opposition from Objectors – is the extent of written, oral, fact and expert discovery which had been completed in this case before settlement was reached. Plaintiffs and defendants have thoroughly explored the factual and legal underpinnings, as well as the merits, of this case. The parties reached final agreement regarding the Decree after spending 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 on the merits, and worked extensively with seven experts in related fields. Thus, there was a complete factual record upon which experienced class counsel could evaluate what would be a fair resolution for plaintiffs and the class.

III. INTERESTED PARTIES WERE INFORMED OF THE SETTLEMENT AND HAD THE OPPORTUNITY TO VOICE THEIR OBJECTIONS

The Court and parties ensured that notice of the proposed settlement was directed in a reasonable manner to all class members who would be bound by the proposal, in accordance with Rule 23(e) of the Federal Rules of Civil Procedure.

The parties provided notice of the Decree pursuant to the court-approved notice plan, and interested parties were informed of the settlement and were advised of the opportunity to submit written comments and to appear at the fairness hearing. (*See* Notice Plan at (Dkt. No. 267, Exhibit B) and Order granting preliminary approval (Dkt. No. 267)). On June 9, 2010, the court-

approved notice was mailed to many of the individuals and entities who care for and work with people with mental illness and to the IMDs, with instructions to distribute the notice to all IMD residents. In plain language, the notice highlighted the substantive terms and requirements of the Decree; explained the rights of class members and specified the process for making objections; identified the date, time and place for the fairness hearing; and detailed alternative means for reviewing copies of the Decree and asking questions about the terms of the Decree. Additionally, notice was published in nine newspapers across the state and posted on the websites of the Illinois Department of Human Services, Division of Mental Health, Equip for Equality, Access Living, the American Civil Liberties Union, and the Bazelon Center for Mental Health Law. Class counsel visited all 25 IMDs to make presentations to residents, their guardians and family members about the proposed Decree.

CONCLUSION

Illinois' current system of housing for people with mental illness violates federal law. The status quo simply cannot be maintained.

The Decree offers all class members the option to live in the most integrated setting appropriate to their needs. While not all class members will exercise that option, the settlement offers a fair, adequate and reasonable remedy to the violations of plaintiffs' civil rights alleged in the complaint.

Accordingly, for the reasons set forth above, plaintiffs respectfully request that the Court enter an Order overruling all objections and approving the proposed Decree.

Dated: August 24, 2010

Respectfully submitted,

By: /s/ Benjamin S. Wolf
One of the attorneys for Plaintiffs

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