Honorable Ronald B. Leighton

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHARON ALLEN; THE WASHINGTON PROTECTION AND ADVOCACY SYSTEM, INC., a Washington corporation; and THE ARC OF CLARK COUNTY, Plaintiffs, v. WESTERN STATE HOSPITAL and ANDREW PHILLIPS, in his capacity as the Chief Executive Officer of Western State Hospital; et al., Defendants.	No. C99-5018RJB JOINT MOTION AND MEMORANDUM FOR FINAL APPROVAL OF PARTIAL CLASS SETTLEMENT

I. INTRODUCTION

The parties through their counsel, respectfully request that the Court grant their motion for final approval of partial class settlement and enter the attached Order after consideration of records and files herein, the parties' motion and supporting documents including the declarations of Deborah Dorfman, S. Morgan Pate, William Gardner, Ph.D., and Mark Stroh with attached exhibits, and any comments on the settlement received by the Court at or before the fairness hearing to be held on February 15, 2006. The parties agree that the partial settlement is fair,

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

reasonable, and adequate and therefore should be approved by the Court on behalf of the plaintiff class.

II. FACTS

After extensive settlement negotiations, the parties reached a new proposed partial settlement on all issues relating to the claims raised by Plaintiffs' Complaint that address conditions of care and protections for class members who are receiving inpatient services at Western State Hospital ("WSH").

The named plaintiffs, individuals who resided at WSH and who were developmentally disabled under state law, filed their class action complaint in January 1999. In their Complaint plaintiffs alleged that they had been denied minimally adequate care and treatment at WSH. They further alleged that they had been unlawfully denied adequate community-based services and supports. The claims raised by plaintiffs include, but are not limited to, claims under the First and Fourteenth Amendments to the U. S. Constitution, Title II of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973. Along with the individually named plaintiffs, the Washington Protection and Advocacy System ("WPAS"), pursuant to its federal mandate, and the ARC of Clark County were organizational plaintiffs.

Defendants filed an answer denying plaintiffs' allegations. In April 1999, Judge Robert J. Bryan granted plaintiffs' motion to for class certification. After discovery, the parties engaged in mediation. The parties engaged in wide-ranging and intensive formal settlement discussions, mediated by the Honorable J. Kelly Arnold of the U. S. District Court for the Western District of Washington, over a period of four months between August through November 1999. Declaration of Deborah Dorfman ("Dorfman Decl."), ¶ 5. Experts for both sides actively participated in the

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

negotiations and review and drafting of the terms of the settlement. *Id.*, ¶ 6. As a result of negotiation, the parties reached a settlement resulting in a stay of proceedings allowing DSHS to implement its three-phased collaborative work plan, which included the development of a specialized habilitation mental health unit at WSH for class members. The settlement also provided for appointment of a mutually agreed upon monitoring committee to oversee and monitor the implementation of the settlement. Judge Bryan approved the settlement by court order entered on December 2, 1999.

During the period of December 2, 1999 through the spring of 2005, defendants worked to implement the collaborative work plan. In the spring of 2005, the monitoring committee made its final visit. Following the issuance of the final monitoring committee report in the summer of 2005, the parties entered into new settlement negotiations. *Id.*, ¶ 8; Declaration of S. Morgan Pate ("Pate Decl."), ¶ 3. During these negotiations, the parties consulted with *Allen* monitor, William Gardner, Ph.D., regarding the provisions of the new proposed partial settlement. Dorfman Decl., ¶ 9, Pate Decl., ¶ 3; Declaration of William I. Gardner ("Gardner Decl."), ¶ 4.

III. ARGUMENT

A. The Proposed Settlement Should be Approved.

Fed. R. Civ. Pro. 23(e) provides that "[a] class action shall not be dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs." *See, Does v. The Gap, Inc.*, No. CV-01-0031, 2002 WL 1000073 at 11 (D.N. Mari. Is. May 10, 2002) (Rule 23(e) requires federal court approval of settlement of all class actions.) *In re First Databank Antitrust Litigation*, 205 F.R.D. 408, 410 (D.D.C. 2002). The purpose of Rule 23(e) is to protect

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

"'unnamed class members from unjust or unfair settlements affecting their rights when the [class] representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by compromise.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249 (1977) (quoting 7B Wright, Miller & Kane, *Fed. Prac. and Pro.*, Sec. 1797 at 340-41 (2d ed. 1986).

Before a court can approve dismissal or compromise of a class action, it must evaluate whether the proposed class settlement is "fundamentally fair, adequate, and reasonable." *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). There is a "strong judicial policy" favoring settlements of complex class actions. *San Francisco NAACP v. San Francisco Unified School District*, Nos. C-78-1445 WHO & C-94-2418 WHO, 2001 WL 1922333 at 5 (N.D. Cal. Oct. 24, 2001), *citing Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). In reviewing class settlements the issue is "not whether [the settlement] could be better, but whether it is fair, reasonable, and adequate and free from collusion." *Hanlon*, 150 F.3d at 1027. Courts may not delete, modify or substitute provisions; the settlement stands or falls in its entirety. *Id.* at 1026.

The determination to approve or reject a class settlement is "committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof." *Hanlon*, 150 F.3d at 1026. In making this determination, courts must balance some or all of the following factors: 1) the strength of the plaintiffs' case, 2) the risk, expense, complexity, and duration of any further litigation in the case, 3) the risk involved in maintaining class action status throughout the trial, 4) the amount offered in settlement, 5) the extent of discovery completed in the case, 6) the experience and views of counsel, 7) whether there is a

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

governmental participation in the case, and 8) the reaction of the class members to the proposed settlement. *Id.* at 1026. Other factors to be considered include whether the number of objectors or interests that they represent is large when compared to the class as a whole. Newberg, *Newberg on Class Actions* § 11.41 (3d ed. 1992). The district court must show that it explored these factors comprehensively to survive appellate review. *Hanlon*, 150 F.3d at 1026; *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th cir. 1998).

While a court should ensure that the proposed class settlement is not the product of collusion between the parties, it should give "proper deference to the private consensual decision of the parties" to settle. *Hanlon*, 150 F.3d at 1026; *Officers for Justice v. City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Nonetheless, judicial assessment of a proposed settlement must ensure that "taken as a whole [it] is fair, reasonable, and adequate to all concerned." *Hanlon*, 150 F.3d at 1026. As discussed below, the parties' proposed settlement satisfies all the criteria applicable here that the Court must consider in making this determination.

1. Settlement Negotiations Were Conducted at Arm's Length

Class action settlements must be reached in good faith, without collusion between the parties. *In re Pacific Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1993). In determining whether a settlement was reached without collusion, courts look at the length and nature of the settlement process and the timing of discussion and settlement of attorneys' fees. Settlements reached through negotiations conducted over a significant period of time and at arm's length carry "a strong initial presumption" of substantive fairness. *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass 2000). Moreover, "[a]s long as the integrity of the negotiating process is ensured by

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

the Court, it is assumed that the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides." *In re Paine Webber Ltd. Partnerships Litigation*, 171 F.R.D. 104, 132 (S.D.N.Y. 1997), *aff'd.* 117 F.3d 712 (2nd Cir. 1997).

The settlement negotiations here were conducted over several months. Within limits, all parties compromised in order to reach settlement. Dorfman Decl., ¶ 10; Pate Decl., ¶ 3. At various stages of the settlement negotiations the parties discussed proposed terms with William I. Gardner, Ph.D., chair of the Allen monitoring committee. Dorfman Decl., ¶ 9; Pate Decl., ¶ 3; Gardner Decl., ¶ 8. Dr. Gardner has reviewed the settlement and supports its provisions. Gardner Decl., ¶ 9. The fact that the partial settlement was negotiated with the advice and participation of Dr. Gardner indicates that the process was thorough in its consideration of psychological and psychiatric elements affecting class members. *See Rolland v. Cellucci*, 191 F.R.D. at 10-11 (opinion of plaintiff's expert that settlement was reasonable and fair in its treatment of class of persons with developmental disabilities was a factor favoring approval of settlement).

Finally, the parties have not settled or resolved the issue of liability for or valuation of attorneys' fees and costs. Dorfman Decl., ¶ 15; Pate Decl., ¶ 3. The parties did not address counsels' remuneration while reaching consensus on the terms of the settlement. The parties' decision to forgo resolution of counsels' fees as part of the settlement suggests that the substantive terms of the settlement are fair. *See Bussie v. American Financial Corp.*, 50 F. Supp.2d. 59, 77 (D. Mass. 1999).

2. Extent of Discovery

The amount of discovery conducted is a factor considered in determining whether a proposed class settlement is fair, adequate, and reasonable. *Officers for Justice*, 688 F.2d at 625.

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

The primary inquiry, however, is whether there has been "sufficient development of the facts to permit a reasonable judgment of the possible merits of the case." *Flinn v. FMC Corp.* 528, F.2d 1169, 1173 (4th Cir. 1975). Consequently, "formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement." *In re Mego*, 213 F.3d at 459. Moreover, the settling parties' consultation with experts while developing a case and negotiating its resolution may provide adequate information to support class settlement where formal discovery may be less extensive than otherwise desirable. *Id.*

Defendants worked to implement the collaborative work plan from the time it was approved and the stay of proceedings was issued. Until May 2005, the monitoring committee monitored the implementation of the work plan. Dorfman Decl., ¶ 16 and Gardner Decl., ¶ 5. Throughout that time, the monitors issued quarterly reports to the parties regarding defendants' progress. *Id.* During this period WPAS also regularly monitored implementation of the work plan and had full access to treatment records, incident reports, and other data regarding class members. Dorfman Decl., ¶ 16. Thus, although no formal discovery was conducted prior to reaching the new proposed partial settlement, the parties nevertheless had ample information to evaluate the fairness, adequacy, and reasonableness of the settlement.

Moreover, the parties reached the new proposed partial settlement in the case after intensive settlement negotiations involving an expert in habilitative mental health treatment, William I. Gardner, Ph.D. *Id.*, ¶ 9, Pate Decl., ¶ 3, & Gardner Decl., ¶ 8. Dr. Gardner has detailed knowledge of the issues raised in the lawsuit, reviewed patient records, monitored the implementation of the initial settlement in this case at WSH, and has specific experience with the

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

clinical and systemic issues presented in this case. *Id.*, ¶ 6. Dr. Gardner believes that the clinical provisions of the proposed partial settlement improve areas that are the subject of plaintiffs' complaint relating to the claims addressing the conditions of care and protection for class members at WSH. *See id.*, ¶ 9. In sum, the parties had ample information to evaluate the case and to determine what was needed in a partial settlement to ensure that it was fair, adequate and reasonable the class.

3. Adequate Representation of Class Members

"Adequate representation" depends "on the qualifications of counsel for the [class] representatives, an absence of antagonism, a sharing of interests between [class] representatives and absentees, and the unlikelihood that the suit is collusive." *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994). When counsel are experienced attorneys who are knowledgeable about the facts and claims, their representation to the court that the class settlement is fair, reasonable, and adequate strongly favors settlement. *See San Francisco NAACP*, 59 F. Supp.2d at 1031-32; *Rolland*, 191 F.R.D. at 10.

Here, plaintiffs' counsel have extensive experience litigating similar cases, and WPAS is federally mandated to advocate for disabled individuals, such as the class members at bar. Dorfman Decl., ¶ 12, Ex. 1. Plaintiffs' counsel are well qualified to make, and did make, in consultation with their experts, a comprehensive assessment of the partial settlement to ensure that it was fair, reasonable and adequate. *Id.*, ¶ 13. Moreover, all class members, both representatives and absentees, have common interests in adequate treatment and placements and will benefit from the terms of the proposed partial settlement. *Id.*, ¶ 14. All class members will receive adequate services and care at WSH if the partial settlement is properly implemented. *Id.*

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

Notably, the partial settlement does not confer any benefits that inure only to named plaintiffs and not to unnamed class members. *Id.*

4. Reaction of the Class Members to the Proposed Settlement

In assessing a class settlement, courts must also consider the reaction of the class members to the proposed settlement. *Hanlon*, 150 F.3d at 1026. A relatively small number of objectors indicates fairness and supports judicial approval. *Guisti Bravo v. U.S. Veterans Administration*, 853 F. Supp. 34, 40 (D.P.R. 1993). Counsel are unaware of any significant potential objections to the partial settlement. Dorfman Decl., ¶ 17; Pate Decl., ¶ 4. Absent overwhelming objections made at or before the fairness hearing, the settlement should be approved, as it is fair, adequate and reasonable and will significantly improve the care and protection of the patients at WSH.

5. Strength of Plaintiffs' Case

Courts also look to the strength of plaintiffs' case in determining the fairness of a class settlement. *Hanlon*, 150 F.3d at 1026. In this case, the monitors' final report recommended that further improvements in the conditions of care of the class members at WSH should be implemented. The defendants acknowledged the concerns of the plaintiffs, and wished to expend the available resources to improve services instead of on further litigation. A settlement need not impose all the obligations and duties of applicable law to be acceptable under Rule 23(e). *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). Thus, litigation would have only delayed the implementation of the relief. *See D.M. v. Terhune*, 67 F. Supp.2d 401, 410-411 (D.N.J. 1999) (settlement was fair, reasonable and adequate in class action brought against prison officials for failure to provide adequate mental health care where plaintiffs achieved most

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

of their goals through settlement).

6. Risk, Expense, Complexity, and Probable Duration of Litigation Absent a Settlement

The risk, expense, complexity and potential duration of the litigation here support settlement. *See Class Plaintiffs*, 955 F.2d at 1292. Absent the partial settlement, the scope of discovery and trial would have been broad and significantly more costly. Proceeding to trial would have required expedited and extensive discovery involving many depositions, review of thousands of additional documents, and additional expert discovery.

Additionally, the Court might have concluded that plaintiffs' claims had merit but might not have ordered the scope of relief obtained by plaintiffs through the partial settlement. Any litigated resolution might have resulted in a lengthy appeal process. In the meantime, class members may not have received the relief sought by plaintiffs. The potential duration of the litigation, particularly when weighed against the immediate needs of the class, heavily favors approval of the proposed settlement.

B. The Procedural Requirements of Rule 23(e) Have Been Satisfied.

Fed. R. Civ. P. 23(e) requires notice of any proposed settlement to class members to ensure that the rights of the unnamed class members are protected and fully considered in the negotiation and approval of the settlement. *Officers for Justice*, 688 F.2d at 624. Notice for approval of a class settlement must fairly apprise class members of the subject matter of the suit, the proposed terms of the settlement, and the class members' opportunity to be heard. *Torriso v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977).

Rule 23(b)(2) notice requirements include that: 1) notice of the proposed settlement be

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

made in a manner that does not systemically leave any group without notice; 2) the notice clearly state that any dissidents may object to the proposed settlement and to the definition of the class; 3) each objection must be made part of the record; 4) those members raising substantial objections be afforded an opportunity to be heard with the assistance of privately retained counsel; if so desired; and 5) the court make a reasoned response on the record to the objections, except for frivolous objections which require only a statement by the court on the record of the reasons for finding the objection frivolous. *Id.*, *San Francisco NAACP*, 59 F. Supp.2d at 1029.

Plaintiffs' counsel have individually notified all known class members or their guardians by first class mail of the terms of the proposed class settlement, the nature, date, time and location of the fairness hearings and how they might object to the proposed settlement in person or in writing. Dorfman Decl., ¶ 24. Such individualized notice of a proposed class settlement more than satisfies the notice requirements for a Rule 23(b)(2) class. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974) (individualized mailings to members of class of disabled drivers, using names obtained from state DMV, satisfies more stringent "best notice practicable" requirements of notice to Rule 23(b)(3) class). Here, the more stringent notice requirements of Rule 23(b)(3) have been met, although not required, in that this is a Rule 23(b)(2) class. *See* Fed. R. Civ. Pro. 23(c) ("best notice practicable" requirement applies only to Rule 23 (b)(3) classes). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

Moreover, pursuant to the Court's January 26, 2006 Order, notice of the proposed settlement has been published in all major newspapers in the WSH catchment area, a copy of the notice has been posted on each ward at WSH in plain view of the patients residing there and in the entry area of the hospital's administration building, and copies of the notice have been

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

distributed to all public defender and legal services offices in the catchment area of WSH, to the Regions III, IV, V and VI DDD offices and to regional mental health centers in the hospital's catchment area for prominent posting. Dorfman Decl., ¶¶ 21, 22.

Plaintiffs' counsel have also conducted trainings for class members currently admitted to WSH to explain the terms of the partial settlement and their opportunity to comment on it. This ensures that affected persons receive actual notice of the settlement and that they are able to have its terms personally explained to them and any specific questions they may have about it answered. The parties' actions here comply with Rule 23(e), due process and the Court's Order.

IV. CONCLUSION

For the foregoing reasons, the Joint Motion to Approve the Settlement should be granted.

DATED this 3rd day of February, 2006.

Respectfully submitted,

Sharon Allen, et al., Plaintiffs

s/Deborah Dorfman
Deborah Dorfman, WSBA #23832
WA Protection & Advocacy System
315 Fifth Avenue South, Suite 850
Seattle, WA 98104

Rob Denton
Disability Law Center
205 North 400 West
Salt Lake City, UT 84103

Attorneys for Plaintiff

ROB McKENNA, Attorney General

s/S. Morgan Pate
S. Morgan Pate, WSBA #32269
Edward Dee, WSBA #15964
Office of the Attorney General
670 Woodland Square Loop, SE
P.O. Box 40124
Olympia, WA 98504-1024

Attorneys for Defendants

Washington Protection & Advocacy System
315 5TH Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521 · Fax: (206) 957-0729

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: S. Morgan Pate (morganp@atg.wa.gov) and Edward Dee (edward.dee@atg.wa.gov).

I also certify that I caused to be mailed on this 3rd day of February, 2006 a true copy of the foregoing document to the following:

Robert B. Denton
Disability Law Center
205 North 400 West
Salt Lake City, Utah 84103

s/Deborah Dorfman
of Washington Protection & Advocacy System
Attorney for Plaintiffs
Telephone: (206) 324-1521
Fax: (206) 957-0729
Email: DebbieD@wpas-rights.org