UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOAN BZDAWKA, et al.

Plaintiffs,

v. Case No. 04-C-0193

MILWAUKEE COUNTY, et al.

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(e), this Court must determine whether to give final approval to the proposed Settlement Agreement. The parties have agreed that this settlement is fair, adequate and reasonable and that, if given final approval by the Court, it will dispose of all claims in this action. The rights of all class members were given due regard throughout the negotiations. There is no evidence of any collusion or other improper behavior between the negotiating parties. Accordingly, the plaintiffs request that the court give final approval to this settlement agreement after considering any written objections and comments as well as those presented at the fairness hearing scheduled for October 19, 2007.

FACTUAL BACKGROUND

Litigation History

This lawsuit was filed on January 28, 2004, in Milwaukee County Circuit Court. (Case No. 04-CF-0862). The County defendants removed the case to federal court on February 25, 2004. [Eastern District Docket No. 1]. Plaintiffs filed an Amended Complaint against the

County on April 13, 2004. [Dkt 18]. A Second Amended Complaint adding the State defendants was filed on April 30, 2004. [Dkt 23]. The Third Amended Complaint was filed on August 19, 2004 [Dkt 37]; and the Fourth Amended Complaint was filed on March 30, 2005. [Dkt 51 & ECF court order dated April 25, 2005]. The State and County defendants ("defendants") filed motions to dismiss the Fourth Amended Complaint on June 15, 2005. [Dkt 68 & 70].

On February 7, 2006, the court entered an order partially granting and partially denying Defendants' motions to dismiss and, on April 5, 2006, denied Defendants' motion to certify the denial of the motion to dismiss for interlocutory review. *See* Decision and Order on Motion to Dismiss [Dkt 86]; Decision and Order Denying Certification for Interlocutory Appeal (Apr. 6, 2006) [Dkt 106]. On October 13, 2006, the court certified a plaintiff class consisting of Milwaukee County residents with disabilities who are now, or will in the future, be eligible to reside in a Family Care-funded community-based residential facility ("CBRF") or an adult family home ("AFH"). Decision and Order Certifying Class [Dkt 125].

Settlement Process

The case was referred to Magistrate Judge Patricia Gorence on December 4, 2006. [Dkt 135]. Judge Gorence held telephone conferences on December 19 [Dkt 139] and December 21 [Dkt 140]. There was a full day of negotiations on February 26. [Dkt 150]. There were follow-up telephone conferences with Judge Gorence on March 27 [Dkt 151] and May 25. [Dkt 155]. Throughout the time period from January to May of 2007, counsel had numerous telephone conferences and exchanged detailed written settlement proposals and responses. There was some delay in getting final approval from the Milwaukee County Board and the parties filed a joint motion for preliminary approval on August 14. [Dkt 160]. The Court granted preliminary approval of the class settlement on August 21. [Dkt 165].

The August 21 order also approved the joint proposal for notice to the known members of the class. *Id.* Plaintiffs mailed a copy of the Notice along with a complete copy of the proposed Settlement Agreement to community agencies on September 11. Affidavit of Mailing [Dkt. 166].

State's Proposed Findings of Fact

The State has submitted detailed findings of fact and conclusions of law. They contain an extensive recitation of the discovery, motion and settlement phases of the case. (The plaintiffs appreciate the State's substantial efforts in producing the findings and conclusions.) Not surprisingly, plaintiffs characterize the strength of their own case somewhat differently from the defendants, and this will be discussed below in the appropriate section. With this modification, plaintiffs accept the State's proposed findings of fact and conclusions of law.

The Input and Comment Process

The class Notice instructed the recipients to call Atty. Pledl with any questions. The number of calls from Family Care members, guardians and family members received each day are listed by date as follows:

September 13	66
September 14	42
September 17	14
September 18	9
September 19	8
September 20	3
September 21	3
September 24	7
September 25	4
September 26	1
TOTAL	157

Approximately 25 other people who called after hours and on the weekends apparently received sufficient information about the proposed Settlement from a voicemail greeting that provided answers to the most frequent questions. These callers did not request a return call. A total of 10

callers (included in the daily totals above) requested a copy of the complete Settlement Agreement which was sent to them by mail.

Most of the callers requested more information about the lawsuit and whether it would have any impact on their current services. Very few of the callers made any comment about the proposed Settlement. Some of the callers had concerns or complaints about the Family Care program that are outside the scope of this lawsuit. Atty. Pledl spoke with each of them about their specific concerns. He referred some to their Family Care case manager with suggestions about how to obtain additional information or clarify their options for different types of care. He referred a few to local no-cost advocacy agencies. The defendants have expressed their interest in getting additional information about any "non-lawsuit" complaints and concerns. Atty. Pledl will provide a summary to DHFS and Milwaukee County after the fairness hearing so that they will be able to utilize this information for quality assurance purposes.

Five calls were received from AFH/CBRF providers in response to the mailed Notice.[1] The residential providers each complained about the method by which the Milwaukee County Department on Aging set their rates and said that they were unable to cover their expenses. These callers were supportive of the Settlement. They were especially pleased with the portion of the Settlement that calls for MCDA to collect actual AFH/CBRF cost data and utilize that information in setting provider rates.

A few additional calls were received from human service agencies in Milwaukee County. They had already received a copy of the complete Settlement Agreement. They had various

[1] HIL and SRCA are not included in this total. Atty. Pledl has had contact with them throughout the lawsuit to monitor the AFH/CBRF rate issues that affect the name plaintiffs. Counsel has had ongoing contact with the guardians of the name plaintiffs (both current and past) to discuss the same issues. The guardians of the current name plaintiffs who are served by HIL approve of the settlement. No current name plaintiff is served by SRCA.

questions about the settlement and each caller said that the settlement appeared to correct various issues in the Family Care program about which they were concerned.

Written Comments Filed with the Court

The Notice invited class members, or others on their behalf, to file written comments with the Court. Four people have done so: Estelle Stewart [Dkt 168], Rinda McClendon [Dkt 169], Jessie Larson [Dkt 170] and Bonnie Van Landingham [Dkt 171]. Ms. Stewart requested to address the Court while the others did not. The specific concerns and how they pertain to the class settlement are discussed in a later section of the brief.

ARGUMENT

The Proposed Settlement Agreement was reached through arms-length negotiations, and is fundamentally fair, reasonable and adequate.

In order to approve a settlement agreement in a class action, a court must ascertain that a settlement is fair, reasonable, adequate and the product of arms-length negotiations. *Great Neck Capital Appreciation Investment Partnership, L.L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 409 (E.D. Wis. 2006). Settlement of class action litigation is favored. *Isby v. Bayh,* 75 F.3d 1191, 1196 (7th Cir. 1996). Courts in the Seventh Circuit have formulated the same essential class settlement criteria in different ways. Ultimately, district courts are to consider the following factors: (1) the strength of the plaintiffs' case, balanced against the settlement offer; (2) the defendants' ability to pay; (3) the stage of the proceedings and the amount of discovery that has been completed; (4) the complexity, length and expense of continued litigation; (5) whether there was fraud or collusion in the settlement; (6) the amount of opposition to the settlement from affected parties; and (7) the opinion of competent counsel. *EEOC v. Hiram Walker & Sons, Inc.,* 768 F.2d 884, 889 (7th Cir. 1985); *Great Neck Capital Appreciation*, 212

F.R.D. at 409; *Mangone v. First USA Bank*, 206 F.R.D. 222, 224 (S.D. Ill. 2001), citing see *Isby*, 75 F.2d at 1199; and *Hispanics United of DuPage County v. Village of Addison*, 988 F.Supp. 1130, 1150 (N.D. Ill. 1997).

There is a presumption in favor of class action settlements. "The district court may not deny approval of a consent decree unless it is unfair, unreasonable or inadequate." *Hiram Walker*, supra. All of the above factors weigh heavily in favor of approving this settlement as the following discussion will show.

A. The strength of the plaintiffs' case, balanced against the settlement offer.

This first factor is the most important in the court's consideration. *Isby v. Bayh*, 75 F.2d. at 1199; *Hiram Walker*, 768 F.2d at 889. This determination is a practical one and the court "should refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." *Id.* (citations omitted).

The plaintiffs have already prevailed in a number of motions, including surviving a motion to dismiss and winning certification of the plaintiff class. Plaintiffs do not agree with the negatives characterizations in the State's proposed findings of fact such as "[m]oreover, some claims are sufficiently vague that they present difficult proof problems for the Plaintiffs." [State PFOF, Para. 43]. Also, statements like the one concerning the plaintiffs' failure to supply proof about individuals who were forced into more restrictive setting seems to confuse the procedural posture of the case prior to settlement. [State PFOF, Para. 42]. The evidence of client transfers is in the possession of the County and their contract agencies. Plaintiffs' counsel chose to pursue settlement instead of the extensive discovery that would be necessary on this issue. Nonetheless, plaintiffs do have some concerns about the legal issues in this case. The law concerning program access and reasonable accommodation in public benefit programs is still developing and this

alone presents a substantial risk. Given the state of the law in this area, it is virtually certain that the losing side would take an appeal. There is never a guaranteed outcome in litigation, and the class plaintiffs have a significant interest in eliminating any risk of loss.

Moving from the legal to the factual aspects of this litigation, plaintiffs do face substantial challenges in proving their case. Counsel and their experts would have to conduct numerous depositions and review a mountain of documents. Unfortunately, it is a growing and changing mountain. Each year, the State revisits the capitation formulas that determine monthly per client payments to Milwaukee County. And each year, County Family Care staff evaluate and revise the provider rate structure after receiving the State rate information. Our experience here shows that it would be nearly impossible to do the necessary discovery and then litigate dispositive motions and/or try the case before another yearly cycle changes the landscape.

Any concerns about whether the plaintiffs would prevail at the end of this litigation are to be balanced against the benefits of the settlement. The proposed Settlement Agreement provides significant benefits to the current and future members of the plaintiff class. Consideration of this factor clearly calls for approval of the proposed Settlement.

B. The defendants' ability to pay.

This criterion involves a series of interlocking questions. On the one hand, both DHFS and Milwaukee County probably have the ability to fund whatever changes in the Family Care program that the Court might order. This means that ability-to-pay is not a constraint like a corporation's impending bankruptcy or the limits of a liability insurance policy.

However, one way for a public entity to pay for any court-ordered program changes is to redirect funds from another part of the same program or from another State or County program that also serves the class members. This could result in a zero sum (or worse) outcome for class

members. Plaintiffs and defendants in many class action cases will not have any dealings with each other after the settlement. Here we have the opposite situation because most class members will remain in the Family Care program for the remainder of their lives. They will benefit if the program is financially healthy. Other things being equal, the class members and the defendants have a similar interest in resolving the case in a cost-effective way.

C. The stage of the proceedings and the amount of discovery already taken.

There has already been extensive document discovery by all sides. The State's Proposed Findings provide a good summary of the documents discovery efforts. [State PFOF, Para. 56 – 59]. In addition, plaintiffs' counsel and the experts have been able to access a great of additional information from the DHFS website.

Plaintiffs' counsel spoke with numerous Family Care residential and other service providers to obtain information about program and financial issues. In addition, plaintiffs' accounting expert conducted two on-site reviews of residential provider financial records at the MCDA offices. Thus, counsel's evaluation of the case was based upon significant information about the facts of the case. See *Great Neck Capital,* 212 F.R.D. at 410; *EEOC v. Hiram Walker,* 768 F.2d at 891.

D. The complexity, length and expense of continued litigation.

This is a very significant factor in this case. The amount of time that the parties have already spent on discovery and litigating legal issues is a fraction of the time that would be spent preparing the case for trial. There would be extensive depositions of State and County administrators, yet more document review and coordination of experts who would review discovery documents and additional sources of information. The time and money saved by both sides are a significant incentive to settle. *Great Neck Capital,* 212 F.R.D. at 409.

E. The presence of fraud or collusion.

The negotiations in this case were extensive and conducted at arm's length. Plaintiffs' counsel consulted with advocates for people with disabilities and the elderly in formulating a substantial list of demands. The parties participated in mediation overseen by Magistrate Judge Gorence over the course of several months. Negotiations were intense and motivated by a desire to reach a settlement that would benefit plaintiffs and the entire Family Care program.

The parties did agree to an award of attorney's fees. The negotiations for fees, however, were completely separate from and independent of the negotiations on the merits. Moreover, plaintiffs' counsel ultimately accepted payment for only about one-half of the hours actually expended on this case in the interest of reaching settlement. This is being paid by the defendants and does not reduce or impact the outcome for the class in any way. There is no evidence of collusion or other improper motive.

F. The amount of opposition to the settlement from affected parties.

Many Family Care members and others called plaintiffs' counsel to complain about various aspects of the program.[2] However, virtually all of the complaints relate to issues that were not a part of the case or the proposed Settlement and no one actually opposed the settlement. Four individuals filed comments with the Court and they will be discussed in detail.

Estella M. Stewart

Ms. Stewart filed her comment on September 24. [Dkt 168]. Atty. Pledl spoke with her by telephone on September 26. Ms. Stewart's concerns fall into two categories. Ms. Stewart

[2] It is unfortunate that there were any complaints at all, but plaintiffs' counsel do not mean to draw any conclusions here about the type of complaints or the number of complaints in comparison to the total Milwaukee County Family Care membership. Counsel will be providing a summary of the complaints to the defendants so that the information may be used for program evaluation or improvement. Many of the callers were satisfied with the services they receive through Family Care and the purpose of their calls was solely to seek additional information about the legal case.

objects to the requirement that all long-term care services for people over 60 in Milwaukee County must be delivered through the Family Care system. She would prefer to receive those services through Medicaid. This is a fundamental question in Medicaid managed care systems like Family Care. The Medicaid waiver agreement between the State of Wisconsin and the Federal Government that established Family Care requires that all of the previous community-care waiver programs to be rolled into the new managed care system. People cannot choose to receive long-term care services under the old system. Allowing that would have a huge effect on the viability of the system. Taking this position amounts to opposing the entire Family Care system. Ms. Stewart has asked to address the Court on this issue and her point of view may deserve some exploration. However, plaintiffs' counsel and their consultants felt very strongly that the best approach was to pursue improvements to the entire Family Care system rather than allowing individuals to dis-enroll and still receive waiver services. That is what was achieved in the proposed Settlement.

Ms. Stewarts's other concerns involve her interaction with case managers and nurses employed by Family Care contract agencies in Milwaukee County. She has worked with three different agencies over the years and says that she has had problems with each revolving around requests for specific services and a lack of responsiveness by the agencies and their staff. While this case is focused more on AFH/CBRF residential services rather than services provided in the client's own home like Ms. Stewart's situation, the proposed Settlement Agreement is intended to address concerns of this type. For example, Section II-D of the Agreement describes changes in the Resource Allocation Decision process. Improving the RAD process and particularly providing additional information about the process to consumers and agencies should alleviate many situations such as those Ms. Stewart's. Also, she and others in her situation could receive

assistance from the Individual Advocacy Program described in Section I-B and II-M of the Settlement in any disputes with Family Care agencies.

Rinda McClendon

Ms. McClendon's comment was received by the Court on September 24. [Dkt 169]. She is concerned about the financial eligibility reports for her husband that are prepared by Milwaukee County. This appears to be a situation where they have some financial resources and so they are expected to pay a "cost share" each month to cover part of the husband's care. Concerns about how the cost share is computed and then explained to clients surfaced throughout the litigation. Many of the callers complained about this issue and it comes up at almost any meeting about Family Care. Plaintiffs' counsel considered raising the cost share issue, but determined that it would have very little impact on the individuals with more significant disabilities who live in AFH's and CBRF's. Most have SSI payments as their only income and no savings or other financial assets. Cost-share is not an issue for those who only receive monthly SSI payments. The more general question raised by Ms. McClendon is responsiveness and, once again, the Independent Advocacy Program would be helpful to her. She has not requested to address the Court.

Jessie Larson

Ms. Larson's comment was filed on September 25. [Dkt 170]. She is writing about her mother, Edna Craven, who lives in an "assisted living facility." This could be an AFH or CBRF. Ms. Larson says that her family was not given proper information about room and board costs and they found (apparently while looking for an appropriate residential facility) that "many of the room and board rates are higher than the average social security benefits." *Id.*

A basic principle of the Federal-State waiver programs (including Family Care) is that a person's own money or Social Security/SSI check must be used to pay for their housing and food in an AFH or CBRF. Federal waiver funding may be used to pay for disability-related services in the residential facility, but not the building itself. Many AFH/CBRF residents receive only SSI payments and many others receive only Social Security. The cost of housing is the major determinant of room and board costs and many residential facilities in Milwaukee County have R&B rates that exceed what most people can afford. This is one dimension of the financial problems facing residential providers. Some have empty beds because their R&B rate is too high to attract residents. Others set their R&B rates lower than their actual real estate cost. Either way, R&B rates have a significant negative effect on the financial condition of residential providers.

Numerous items in the County's portion of the Settlement Agreement address the financial condition of residential providers. [Section I-C through I-N]. The Milwaukee County Department on Aging will be collecting detailed cost data from AFH and CBRF providers. MCDA will then use that data to set 2008 provider rates, although it retains the discretion to set and negotiate provider rates. [Sec. I-G]. It will also publicize the factors it uses in developing provider rates. [Sec. I-I & J]. All of these provisions will improve the process of setting provider rates by making it more objective and transparent. This should prevent unpleasant surprises for both residential providers and Family Care clients who are shopping for an AFH or CBRF. That would help people like Ms. Craven in the future. Plaintiffs are also hopeful that the financial data along with the future needs assessment will be used by both MCDA and municipalities in the County to plan for the future housing needs of people who require AFH and CBRF services.

Ms. Larson's letter contains concerns about the responsiveness of agency staff. She also has problems with the way in which MCDA interacts with her in her capacity as power of

attorney. These issues are not within the scope of the lawsuit. However, as with Ms. Stewart and Ms. McClendon's concerns, the Individual Advocacy Program would be helpful in dealing with these issues. Ms. McClendon did not request to address the Court.

Bonnie Van Landingham

Ms. Van Landingham's comment was filed on September 25. [Dkt 171]. They concern her father, Mitchell. Her letter raises the same issues concerning responsiveness discussed above. The improvements in the Resource Allocation Decision process and the Independent Advocacy Program would both be helpful to her in the future. She did not request to address the Court.

None of these four individuals who filed comments with the Court have objected to the Settlement Agreement. None of the community agencies has filed any object on behalf of the class or any individual class member. 157 Family Care members, guardians and family members called plaintiffs' counsel with questions or complaints about the Family Care program, but not one single caller objected to the proposed Settlement. This factor obviously calls for approval.

G. The opinion of competent counsel.

Plaintiffs' counsel have significant experience in class action litigation. Order Certifying Class, at 9. [Dkt 125]. In addition to their own review of the legal and factual issues in this case, they solicited extensive input from community agencies that provide advocacy or direct services to people with disabilities in Milwaukee County. They also consulted other experts. Based on all of that information, plaintiffs' counsel recommend approval of the proposed Settlement.

CONCLUSION

The parties believe that this settlement agreement fully disposes of the claims in the Fourth Amended Complaint and that it is fair, adequate and reasonable. The State and County

Defendants have agreed to take numerous actions with regard to the Family Care program, including sharing information and soliciting input into the establishment of reimbursement rates, dissemination of information, creating independent advocacy programs, and providing assistance and support to enhance and improve services. These measures are expected by all of the parties to improve the Family Care program and benefit the plaintiff class significantly. Accordingly, it is requested that this Court approve the proposed Settlement Agreement.

Dated: September 26, 2007

Respectfully submitted,

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