IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JOAN BZDAWKA, et al.,

Plaintiffs,

v. Case No. 04-C-0193

MILWAUKEE COUNTY, et al.,

Defendants.

STATE DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE PROPOSED SETTLEMENT AGREEMENT

Defendants Wisconsin Department of Health and Family Services ("DHFS") and DHFS Secretary Kevin Hayden (together with DHFS, the "State Defendants"), by their attorneys, J.B. Van Hollen, Attorney General, and Maureen McGlynn Flanagan, Mary E. Burke, and David Dudley, Assistant Attorneys General, respectfully submit the following proposed findings of fact and conclusions of law regarding the proposed Settlement Agreement which the parties jointly have requested the Court to approve.

FINDINGS OF FACT

Procedural Background

1. This action was originally filed in Milwaukee County Circuit Court in January 2004, *sub nom. Gerald N. and Joan B. v. Milwaukee County*, Case No. 04-CV-0862. On the motion of Milwaukee County (the "County Defendants"), the action was removed to the U.S. District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1441, where the case was filed on February 25, 2004 (R. 1). The original complaint sought declaratory and

injunctive relief against Milwaukee County as the sole defendant asserting claims based on Wis. Stat. § 51.61, the Wisconsin Patient Rights law; 41 U.S.C. § 1983 and the Equal Protection Clause of the U.S. Constitution; the Equal Protection Clause of the Wisconsin Constitution; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, and § 504 of the Rehabilitation Act ("Rehabilitation Act"), 29 U.S.C. § 794.

2. Following preliminary proceedings and the filing of a First Amended Complaint and the County Defendants' Answer, the plaintiffs ("Plaintiffs") were permitted to file a Second Amended Complaint on April 30, 2004, adding additional plaintiffs and two additional defendants, the Wisconsin Department of Health and Family Services ("DHFS") and the Secretary of DHFS in her official capacity (together with DHFS, the "State Defendants," and collectively with DHFS and the County Defendants, "Defendants"), so that the case was then captioned *Gerald Nelson, Joan Bzdawka, et al. v. Milwaukee County, Wisconsin Department of Health and Family Services and Helene Nelson*[1] *in her official capacity as Secretary of DHFS* (R. 23). The Second Amended Complaint sought declaratory and injunctive relief based on eight claims alleging violations of the ADA (Counts 1, 2, and 3), the Rehabilitation Act (Counts 4, 5, and 6), civil rights claims under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the U.S. Constitution (Count 7); and the Wisconsin Patients' Rights statute (Count 8) (R. 23). Both the County Defendants and the State Defendants answered, asserting grounds for dismissal and various defenses, but without filing or briefing separate motions to dismiss (R. 27, 31).

[1]Helene Nelson has since been succeeded as DHFS Secretary by Kevin Hayden and he, in turn, has been substituted as a party defendant (R. 143, 147).

3. In August 2004, the Plaintiffs were permitted to file a Third Amended Complaint adding additional named plaintiffs and a ninth claim for relief based on § 1983 and 42 U.S.C. § 1396, *et seq.*, the federal Medical Assistance ("MA" or "Medicaid") statute, Title XIX of the Social Security Act (R. 37). The parties concurrently engaged in substantial initial discovery focusing on adequacy of the state and county Family Care rates, policies, and procedures during the years immediately prior to the filing of the original complaint through 2004. Plaintiffs deposed two employees of the County Defendants. Interrogatories promulgated by the State Defendants were answered by the Plaintiffs. Document requests promulgated by the State Defendants were answered by the Plaintiffs; document requests promulgated by the Plaintiffs were answered by the State Defendants and the County Defendants (Affidavit of Mary E. Burke, ¶¶ 7-10; Affidavit of Patricia Chiazor, ¶¶ 4-7). The County Defendants also allowed Plaintiffs' experts to access all Family Care Community Based Residential Facility ("CBRF") provider files, including audited financial statements, at the Milwaukee County Department on Aging ("MCDA") office (*cf.* R. 120:2-3). The initial discovery on these subjects was updated and expanded periodically as this lawsuit proceeded (Affidavit of Mary E. Burke, ¶¶ 7-11; Affidavit of Patricia Chiazor, ¶¶ 4-6, 8).

4. Following efforts by the parties to reach a stipulation identifying what matters were in dispute as required by the Amended Scheduling Order of the Court filed January 31, 2005 (*see* R. 46, 50), the Plaintiffs moved for permission to file a Fourth Amended Complaint (R. 51). Plaintiffs justified the motion on grounds that transactions and events that had taken place since the filing of the Third Amended Complaint needed to be included in the action, and because the Plaintiffs wished to clarify claims alleged in that complaint in order to avoid the Defendants' objections that certain matters were not fairly within the scope of the litigation (*id.*).

The Defendants subsequently stipulated to the filing of the Fourth Amended Complaint, the addition of other named plaintiffs, and the amendment of the caption, based on the Plaintiffs' assurances that they would seek no further substantive changes to the complaint, and the Defendants' stated intent vigorously to oppose any additional substantive amendments (R. 58). In granting the Plaintiffs' motion for permission to file the Fourth Amended Complaint, the Court also denied without prejudice the Plaintiffs' Motion to Certify a Class (R. 60).

5. Like its immediate predecessor complaint, the Fourth Amended Complaint asserted four pairs of claims seeking declaratory, injunctive, and retroactive monetary relief based, respectively, on the ADA and the Rehabilitation Act; and a statutory civil rights claim, 42 U.S.C. § 1983, based on a provision of the federal Medicaid statute, 42 U.S.C. § 1396a(a)(30)(A) ("(a)(30)(A)") (*see* R. 51, Att. 1). The named plaintiffs and their guardians or authorized representatives claim that their rights under the ADA, Rehabilitation Act, and (a)(30)(A) are being violated by the manner in which DHFS and Milwaukee County administer Family Care, a statutory Wisconsin MA waiver program designed to serve physically and developmentally disabled persons and the elderly (*id.*).

6. Family Care is a managed care MA waiver program currently operated by DHFS as a pilot program in a limited number of counties including Milwaukee, through which elderly persons with long-term care needs and adults who have physical or developmental disabilities may receive comprehensive community-based services (*see* R. 71:3 n.1 (citations omitted*[2]); *see also id.* at 4, n.5*). Services available under Family Care include both some of the services that would otherwise be provided under Wisconsin's regular State Medicaid Plan, as well as services

[2]"*" indicates full citation is available at indicated page of the record.

that would otherwise be available only under a Home and Community-Based Services ("HCBS") Waiver obtained from the federal government under § 1915(c) of the Social Security Act, 42 U.S.C. § 1396n(c) (*id.* at 3, n.2*).

7. Family Care is authorized by federal Medicaid authorities pursuant to two types of waivers, and an approved prepaid health plan that authorizes DHFS to contract for State Plan long-term care services on a prepaid basis (R.71 nn.3, 4*). The waivers permit Wisconsin to deliver services in a manner that is exempt from some otherwise-applicable federal Medicaid requirements. One type of waiver, the HCBS or "1915(c)" waiver, permits Wisconsin to use federal Medicaid funds for HCBS services instead of only institutional care for people who would qualify for Medicaid in a nursing home. *See* 42 U.S.C. § 1396n(c). The other type of waiver, the managed care or "1915(b)" waiver, permits Wisconsin to limit the services in the Family Care benefit to people who enroll in a care management organization ("CMO"). This waiver also limits participants' freedom of choice of provider. *See* 42 U.S.C. § 1396n(b) ("Waivers to promote cost-effectiveness and efficiency"). Family Care is designed to provide long-term community-based managed care to covered individuals who choose to enroll in the county CMO. *See* Wis. Stat. § 46.284.

8. In Milwaukee County, Family Care is available only for elderly individuals (60 years of age and older) with physical disabilities, as well as those with developmental disabilities. In other counties in which Family Care is operating, it is available for elderly individuals and adults of any age with physical or developmental disabilities (R. 71:4-5, n.6*). In Milwaukee County, physically or developmentally disabled persons under the age of 60 continue to receive community-based long term care services via pre-existing HCBS waivers,

including the Community Options Program ("COP") waiver, Community Integration Program ("CIP") and Brain Injury ("BI") waivers (R.71:5*).

9. Features of the Family Care program that distinguish it from the state Medicaid plan itself and from the traditional HCBS waiver programs include the following:

a) Wisconsin Medicaid pays Family Care CMOs on a capitated "per member per month" basis rather than a "fee-for-service" basis. Under both the State Plan and traditional HCBS Waivers, providers are usually paid on a fee-for-service basis: the provider renders a service to a Medicaid recipient, submits a claim to Medicaid, and is paid at a pre-established rate for the service. In contrast, under Family Care, the CMO agrees by contract with the State Medicaid Program to provide the services from the Family Care benefit package that meet most cost-effectively each participant's assessed long-term care needs, in exchange for a capitated, per member-per month payment from the State Medicaid Program. Wis. Stat. § 46.28(4)(d) and (5) (*see* R. 71:6-7, n.12*).

b) Under applicable federal regulations, DHFS is required to set these capitated payment rates at a level that is "actuarially sound," subject to annual review and approval by the Centers for Medicare and Medicaid Services ("CMS"). *See* 42 C.F.R. §§ 438.1(a)(1) and 438.6(c)(2). "Actuarially sound" refers to the federal requirement that the capitated rates must be developed and independently certified as appropriate for the populations covered and for the services to be furnished under the contract, and as providing for all reasonable, appropriate, and attainable

costs. *See* 42 C.F.R. § 438.6(c)(1)-(3). The Family Care capitated rates are developed by an actuarial firm under contract with DHFS (R. 71:7, n.14*).

c) Family Care is a Medicaid entitlement program. Unlike other HCBS waiver programs (COP, CIP, and BI), an individual who is eligible for Medicaid, and is functionally eligible for Family Care, may not be placed on a waiting list to await either participation in the program or receipt of any part of the services for which the individual has an assessed need. Wis. Stat. § 46.286(3)(a). A Family Care CMO is required to provide cost-effectively all services necessary to meet the participant's assessed needs, in exchange for the monthly capitated payment for that individual (*see* R.71:3, 8 nn.2, 15*).

d) Unlike provider reimbursement under the traditional HCBS waiver programs, DHFS, as the state Medicaid agency, does not make direct payments to the providers who render Family Care services. Instead, DHFS pays the respective CMO the capitated rate based on the total number of Family Care enrollees the CMO serves per month. The Family Care CMO pays its providers, and is responsible for setting payment rates, at a level that will attract a sufficient number of qualified providers to provide services to all entitled persons who seek enrollment in the CMO (R. 71:3, 8 nn.2, 16*).

10. The primary focus of Plaintiffs' claims set forth in the Fourth Amended Complaint is the allegedly inadequate capitated rates paid by the State to the MCDA which is the

CMO for Milwaukee County (the "MCDA CMO"), and the allegedly inadequate contracted rates that the MCDA CMO pays to providers of certain residential and day program services who serve Plaintiffs and the class they represent. According to the Fourth Amended Complaint, the allegedly inadequate state capitated rates and, in turn, the contracted rates the MCDA CMO pays to providers of services by CBRFs, adult family homes ("AFHs"), and adult daycare programs violate the ADA and Rehabilitation Act by: discriminating against persons with disabilities; providing services and using methods of administration that subject persons with disabilities to discrimination; violating the mandate of those statutes that services be administered in the most integrated setting; and violating the "reasonable modification" requirements of those statutes and related federal regulations; and, in addition, violate (a)(30)(A) of the Medicaid Act as well (R. 51, Att. 1).

11. The County and State Defendants each answered the Fourth Amended Complaint in May 2005, and then, pursuant to a briefing schedule ordered by the Court, filed their respective briefs in support of the State Defendants' Motions to Dismiss and the County Defendants' Motion for Judgment on the Pleadings (R. 60, 63, 64, 68-69, 70-71). The Defendants vigorously argued that some of Plaintiffs' claims should be dismissed because the individual plaintiffs lacked standing or because the claims were not ripe for adjudication, and that all nine claims failed to state claims on which relief could be granted (R. 69, 71). In addition, the State Defendants argued that Plaintiffs' claim for retroactive monetary and declaratory relief against them under either the ADA or (a)(30)(A) must be dismissed on grounds of sovereign immunity and the Eleventh Amendment to the U.S. Constitution (R. 71).

12. On February 7, 2006, the Court issued an interlocutory Decision and Order partially granting some of Defendants' motions, agreeing that Plaintiffs had alleged no past

injuries to themselves, and therefore lacked standing to pursue retroactive monetary and declaratory relief. The Court also limited Plaintiffs' discrimination claims to forms of discrimination based on the ADA or Rehabilitation Act, eliminating allegations of age discrimination or discrimination based on county of residency (*see gen.*, R. 86).

13. The Court denied the Defendants' remaining motions to dismiss or for judgment on the pleadings, concluding that Plaintiffs have standing to seek prospective relief based on the alleged inadequacy of the capitated rates paid by DHFS to the MCDA CMO and, in turn, the rates the MCDA CMO is willing to pay Plaintiffs' providers. In addition, the Court concluded that all eight claims based on the ADA and Rehabilitation Act survived, either entirely or in part, the Defendants' motions for dismissal alleging the failure to state claims that relief could be granted, Fed. R. Civ. P. 12(b)(6) and 12(c). Finally, the Court concluded that § (a)(30)(A) of the Medicaid Act creates a private right of action enforceable under the Civil Rights Act, 42 U.S.C. § 1983 (*see gen.*, R. 86).

14. On February 23, 2006, the State Defendants filed a motion seeking certification of the Court's February 7, 2006, Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on two grounds, arguing that the issues of whether Plaintiffs' claims are sufficiently ripe to confer standing, and whether there is a private right of action under (a)(30)(A), met the criteria required for an immediate interlocutory appeal (R. 93).

15. On March 1, 2006, the parties filed a stipulation agreeing to dismiss the Medicaid claim based on (a)(30)(A). They also stipulated to dismissal of the lead plaintiff, Gerald Nelson, who had passed away on February 6, 2006, thereby leaving Joan Bzdawka, the other original plaintiff, as lead plaintiff (R. 96).

16. On March 1, 2006, Plaintiffs, appearing by additional counsel on behalf of the putative class, filed their Renewed Motion for Class Certification pursuant to Fed. R. Civ. P. 23, seeking an order certifying a class composed of "[a]ll Milwaukee County residents with disabilities who are now or will in the future be: (1) eligible for the Family Care program, and (2) appropriate, based on reasonable professional judgment, for residential services in adult family homes and community-based residential facilities" (R. 101:1; *see also* R. 97).

17. On April 6, 2006, the Court denied the State Defendants' motion for certification of an interlocutory appeal on the remaining issue of standing set forth in the motion (R. 106).

18. On May 26, 2006, the State Defendants filed their response brief opposing the renewed motion for class certification, together with supporting affidavits (R. 114-17). In opposing the renewed motion, the State Defendants challenged Plaintiffs' claim that they had successfully established the requirements for certification of the proposed class and argued, in addition, that the declaratory and injunctive relief sought with respect to the putative class as a whole would not be appropriate under governing precedent (*see gen.*, R. 114).

19. On October 13, 2006, the Court issued its Decision and Order concluding that class certification under Fed. R. Civ. P. 23(b)(2) is appropriate, thereby granting Plaintiffs' motion, and certifying a class "consisting of disabled Milwaukee County residents who are now or will in the future be eligible to reside in a Family Care AFH or CBRF" (R. 125:10).

20. In preparation for the scheduling conference required by Fed. R. Civ. P. 16(b), the parties reached stipulations concerning the nature of remaining claims, defenses, and relief sought; the scope of anticipated discovery to prepare for trial; and the usefulness of exploring settlement of the litigation through an alternate dispute resolution process (R. 127).

21. With regard to the remaining claims and defenses, the parties agreed that the plaintiff class alleges, in general, that the capitated rates paid by DHFS to the MCDA CMO for each Family Care enrollee are insufficient and that the rates paid, in turn by the MCDA CMO to AFHs, CBRFs, and day programs for Milwaukee County Family Care enrollees are also insufficient (R. 127:2, ¶ 2). With one exception identified in (a) below, the parties agreed that the remaining claims and defenses are fairly summarized as follows:

a) Claims arising from Counts 1 and 5 (as summarized, respectively, by the Defendants and the Plaintiffs):

Defendants summarize the claims as follows: ADA and Rehabilitation Act claims of discrimination based on severity of disability, but not age or county of residence. Plaintiffs allege that Family Care recipients with more severe disabilities receive substantially inferior treatment because the Family Care program provides lesser funding for services in AFHs, CBRFs, and related day programs for these individuals, in comparison to those with less significant disabilities, so that the individuals with more severe disabilities will be forced, contrary to their wishes, to move into more restrictive, less integrated settings (R. 127:2, ¶ 5(a)*).

Plaintiffs summarize the claims as follows: ADA and Rehabilitation Act claims of discrimination based on severity of disability, but not age or county of residence. Plaintiffs allege that Family Care recipients with more severe disabilities receive substantially inferior treatment because the Family Care program provides lesser funding for services in AFHs, CBRFs, and related day programs for these individuals, in comparison to

those with less significant disabilities. This substantially increases the probability that the individuals with more severe disabilities will be forced contrary to their wishes to move into other AFHs, CBRFs, and day programs and/or more restrictive, less integrated settings (127:3, ¶ 5(a)*).

b) Claims arising from Counts 2 and 6: Claims under the ADA, Rehabilitation Act, and cited federal rules, alleging discrimination and the failure reasonably to accommodate people with disabilities by virtue of Family Care policies, procedures, and rates relating to funding for AFHs, CBRFs, and related day programs. Plaintiffs allege that the rates set by the defendants "aid or perpetuate discrimination against persons with disabilities and prevent them from obtaining the same result, gaining the same benefit or reaching the same level of achievement in the most integrated setting appropriate to their needs and have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the Family Care and Medicaid programs" (127:3, ¶ 5(b)*).

c) Claims arising from Counts 3 and 7: ADA and Rehabilitation Act integration claims. Plaintiffs allege that inadequate Family Care "policies, procedures and rates relating to funding for AFHs, CBRFs and [related] day programs" will substantially increase the probability that members of the plaintiff class will be placed into more restrictive, less integrated settings contrary to their wishes (127:3-4, ¶ 5(c)*).

d) Claims arising from Counts 4 and 8: ADA and Rehabilitation Act reasonable accommodation claims. Plaintiffs allege that defendants are

required to make reasonable modifications of capitated rates and methods used to determine provider rates, so as to make individualized determination of the services needed to place and maintain members of the plaintiff class in appropriate and integrated residential settings of their choice (127:4, ¶ 5(d)*).

22. The parties further agreed that the Defendants generally denied the validity of each of the claims, and that, in addition to other defenses available under the ADA and Rehabilitation Act, the Defendants had preserved claims that requested modifications of Family Care program procedures, including relief in the form of increases in either the State capitated rates or the Milwaukee County provider rates, would constitute a "fundamental alteration" of the Family Care managed care program. The parties also agreed that Defendants had preserved their claim that injunctive relief would be unjustified as a matter of law because the named plaintiffs and members of the certified class have an adequate remedy at law in the form of the right to a fair hearing concerning any denial, reduction, or termination of Family Care benefits (R. 127:4-5).

23. Concerning the scope of anticipated discovery needed before further dispositive motions or trial, the parties agreed that, in addition to updating responses to prior discovery demands, further discovery efforts should be forward-looking, consistent with the Court's February 7, 2006, order denying retroactive injunctive and declaratory relief. Thus, further discovery and litigation would focus on the setting of the capitated rates and provider rates for calendar years 2006 and 2007. To that end, counsel agreed that subjects on which additional discovery would be needed to prepare for trial include the process by which DHFS calculates the capitated rate paid to the MCDA CMO for each Family Care enrollee; the information upon

which the capitated rate is calculated; the adequacy and actuarial soundness of the capitated rates; the process by which the CMO calculates the rates paid to AFH, CBRF, and day program providers serving Milwaukee County enrollees in Family Care; the information upon which the provider rates are calculated; the adequacy of the provider rates; the factual bases upon which the Plaintiffs' allegations about inadequacy of the capitated rates and provider rates are based; and expert opinions about all of the foregoing subjects (R. 127:6).

24. Although the parties agreed, and the Court then ordered, that the case be referred to Magistrate Judge Gorence for mediation (R. 125:5, ¶ 11; 135), the Plaintiffs and State Defendants completed both the exchange of Rule 26(a)(1) initial disclosures and the updating of prior discovery responses before the formal mediation before Magistrate Judge Gorence began on February 26, 2007 (*see* R. 132; Affidavit of Mary E. Burke, ¶¶ 7, 8, 10, 11; Affidavit of Patricia Chiazor, ¶ 8).

25. Pursuant to the Order Re: Mediation issued by Judge Gorence (R. 136), the parties developed, exchanged, and had preliminary discussions concerning comprehensive settlement proposals developed both by the Plaintiffs, and jointly by the State and County Defendants. Because the interests of the State Defendants and the County Defendants, both in the litigation itself and in the formula for a potential settlement, are not identical, development of the Defendants' joint settlement proposal required both considerable cooperation and substantial mutual accommodation by the two sets of defendants as well (Affidavit of Mary E. Burke, ¶ 12).

26. Key representatives of each of the defendant parties and counsel of record for all parties and the class participated in a day-long mediation conducted by Judge Gorence on February 26, 2007 (R. 150). Tom Hlavacek, an experienced and respected advocate for the interests of the plaintiff class, assisted Plaintiffs' counsel throughout the mediation (R. 150).

Also participating in the mediation were various client representatives for the State Defendants and the County Defendants (R. 150). Client representatives participating in the mediation session for the State Defendants were DHFS Deputy Secretary Susan Reinardy, DHFS Managed Care Section Chief Monica Deignan, Family Care Program Manager Charles Jones, and Family Care Rate Setting Consultant Tom Lawless (R. 150; Affidavit of Mary E. Burke, ¶ 14). Client representatives participating in the mediation session for the County Defendants were MCDA Director Stephanie Sue Stein; MCDA Assistant Director for Long Term Care Maria Ledger (who serves as Director of the MCDA CMO); MCDA CMO Chief Financial Officer Jim Hodson; MCDA Assistant Director for Fiscal Services David Hopkins; and MCDA CMO Contract Manager James Hennen (R. 150; Affidavit of Mary E. Burke, ¶ 15). Although the parties made substantial progress in reaching agreement on a number of key issues and all agreed that further negotiations were desirable, they were not able to complete their negotiations concerning the terms of a substantive settlement at the February 26 mediation session (Affidavit of Mary E. Burke, ¶ 16). As a result, Judge Gorence ordered that the mediation be continued to a second session scheduled for March 27, 2007 (R. 149).

27. Prior to the scheduled March 27, 2007, mediation, the parties finalized language memorializing terms of the substantive settlement agreed to at the February 26 session, and continued to negotiate via e-mail and telephone concerning those terms on which agreement had not been reached (Affidavit of Mary E. Burke, ¶ 17). They were able to reach an agreement concerning all substantive terms of the settlement agreement prior to the March 27 session (R. 151).

28. After reporting to Judge Gorence concerning the completion of a substantive agreement, the parties began a separate arms-length negotiation concerning the single remaining

issue of attorney fees and costs, as ordered by Judge Gorence during a telephone conference conducted in lieu of the March 27 mediation (*id.*). No discussion or negotiation of attorneys' fees or costs took place until the parties already had reached agreement on the substantive terms of settlement (Affidavit of Mary E. Burke, ¶ 19). Plaintiffs' counsel provided counsel for both sets of Defendants with copies of itemized billing records, and defense counsel carefully reviewed them before responding to the offer for settlement of an award of fees and costs initially requested by Plaintiffs' counsel (Affidavit of Mary E. Burke, ¶ 20). Further offers and counter-offers were exchanged prior to counsel reaching a tentative agreement on the amount of attorney fees and costs (Affidavit of Mary E. Burke, ¶ 20). That agreement was communicated to Judge Gorence during a telephone conference with counsel for all parties on May 25, 2007 (R. 155).

29. Although the State Defendants were able to obtain approval of the tentative settlement within a relatively short time, the process for securing the successive approvals required by the Committee on Judiciary, Safety and General Services of the Milwaukee County Board, and by the County Board was not completed until July 26, 2007, when the full County Board formally approved the terms of the settlement (R. 158).

30. The parties promptly reported the approval of the settlement agreement to the Court at a telephone status conference on July 31, 2007 (R. 159). As ordered by the Court, the parties filed their Joint Motion for Preliminary and Final Approval of the Settlement Agreement, and for an Order Directing Distribution of Notice of Proposed Settlement Agreement and Scheduling Fairness Hearing, supporting brief, and proposed order, along with a copy of the Settlement Agreement signed by all counsel, on August 14, 2007 (R. 161-63). Pursuant to Fed. R. Civ. P. 23(e) and *Armstrong v. Board of School Dir.*, 616 F.2d 305, 314 (7th Cir. 1980),

overruled on other gds. by Felzen v. Andreas, 134 F.3d 873, 875 (7th Cir. 1998), the Court found that the terms of the proposed Settlement Agreement were within the range of possible approval, and that there was good reason to notify the class members of the proposed settlement and proceed with a fairness hearing (R. 165:2). The Court therefore issued the Order preliminarily approving the proposed settlement, directing distribution of notice of the proposed settlement, and scheduling the fairness hearing required by Fed. R. Civ. P. 23(e) on August 21, 2007 (R. 165). The Court also approved the contents of the Notice of Proposed Settlement Agreement (the "Notice") (R. 165:2).

The Proposed Settlement Agreement

31. The proposed Settlement Agreement consists of four major sections (R. 161:6-13).

32. The first major section of the proposed Settlement Agreement is entitled "Commitments of the County Defendants" (R. 161:6-8). Particular provisions, for which specific timeframes and other details are set forth in the proposed Settlement Agreement, include:

a. The MCDA CMO will provide care managers with continuing training and education regarding when notices of intended adverse action must be sent to Family Care participants pursuant to Wis. Admin. Code § HFS 10.52(3) and the Family Care contract (R. 161:6).

b. The MCDA CMO will make reasonable efforts to support enactment of Governor Doyle's proposed 2007-09 budget proposal that would provide funding for an independent advocacy program for Family Care participants (R. 161:6).

c. The MCDA CMO will expand its CBRF provider audit review process to include additional cost and staffing information, and will contractually require CBRF providers to submit additional information for consideration in the audit review process (R. 161:6-7).

d. The MCDA CMO will conduct bi-annual audit reviews of multifacility, corporate providers of 3-4 bed AFH services, and will contractually require those providers to submit audited financial statements, cost, and staffing information for consideration in the audit review process (R. 161:7).

e. In connection with quality performance and provider rate setting, the MCDA CMO will consider as a relevant factor data from provider surveys released on March 26, 2007. The MCDA CMO will retain its current discretion to establish the rate-setting methodology and negotiate provider rates, subject to the superintending authority of DHFS (R. 161:7).

f. The MCDA will complete provider network adequacy reviews twice a year, including needs assessments of future Family Care participants (R. 161:7-8). The MCDA CMO will disseminate the results of its provider network adequacy reviews at least once annually to the development and/or land use planning departments of all Milwaukee County municipalities (R. 161:8).

g. In connection with provider rate setting, MCDA will: (1) provide contracted CBRF, AFH, and day services providers the factors taken into account in developing the rates offered those providers; (2) post on its website a summary of the factors taken into account in developing the rates offered those providers; and (3) initiate

a process of soliciting input from CBRF, AFH, and day services providers that will be considered in rate-setting to the extent it is relevant (R. 161:7).

h. The MCDA CMO will at least once annually invite all Milwaukee County municipalities to provide input to address the issue of affordable CBRF, AFH, and other housing for Milwaukee County Family Care participants (R. 161:7-8).

i. The MCDA CMO will collaborate with the MCDA Resource Center to make materials available to all nursing homes located in Milwaukee County that explain the alternate residential options available through the Family Care program and provide contact information for the Milwaukee County Aging Resource Center (R. 161:8).

33. The second major section of the proposed Settlement Agreement is entitled "Commitments of the State Defendants" (R. 161:8-12). Particular provisions, for which specific timeframes and other details are set forth in the proposed Settlement Agreement, include:

a. DHFS will issue and post on its website a contract interpretation memo reiterating that Family Care participants may contest the choice of residential or day care provider services proposed by the CMO by pursuing Family Care grievance procedures or a fair hearing; and that the standard to be applied in resolving any such disputes is whether the proposed plan would provide care, treatment, or supports that are insufficient to meet a participant's needs or outcomes, or are provided in a setting that is unnecessarily restrictive or less integrated than is appropriate to the participant's needs (R. 161:8-9). DHFS will issue and post on its website a contract interpretation memo reiterating the importance of appropriate and adequate pre-transfer planning for Family Care participants transferring from one residential setting to another (R. 161:11). Similarly, DHFS will issue and post on its website additional informational materials

explaining the Resource Allocation Decision ("RAD") method used in the Family Care program to help participants identify personal outcomes (R. 161:9). DHFS will provide drafts of the contract interpretation memos and the RAD informational materials to plaintiff's counsel and certain advocacy organizations, and will accept written comments before finalizing the documents (R. 161:8-9, 11). DHFS will retain sole discretion to determine final content of the memos and the informational materials (R. 161:8-9, 11). DHFS also will provide the final RAD informational materials to Family Care grievance bodies and Division of Hearings and Appeals administrative law judges assigned to conduct Family Care hearings (R. 161:10).

b. If the MCDA CMO's 2008 annual certification application to DHFS includes submission of any revised form notices, before certifying the CMO for 2008 DHFS will provide copies of the revised form notices to plaintiffs' counsel and certain advocacy organizations (R. 161:9-10). DHFS will accept comments on the revised form notices, but will retain sole discretion to determine whether to certify the MCDA CMO for 2008 and to determine whether to require the MCDA CMO to make any changes in the revised form notices (R. 161:10).

c. The State Defendants will continue to support creation of the independent advocacy program for Family Care participants for which Governor Doyle included funding in his 2007-09 budget proposal (R. 161:10). Upon passage by the Legislature and inclusion of funding in the 2007-09 budget, DHFS will promptly issue a request for proposals and take other necessary steps to implement the program (R. 161:10). If the independent advocacy program is established, DHFS will include in any contract or other document governing that program a requirement for semi-annual reporting of referral

statistics (R. 161:10). The statistical reports will be posted on DHFS' Family Care website (R. 161:10).

d. DHFS will contract with its External Quality Review Organization to require semi-annual statistical reporting regarding referrals to the state's appeals and grievances program, referral outcomes, requests for fair hearings, and fair hearings conducted (R. 161:10). DHFS will post statistical reports received on its Family Care web site (R. 161:10).

e. DHFS will work with the MCDA CMO to enhance openness of the MCDA/provider rate-setting process by exploring alternate rate setting methods for CBRF and AFH providers (R. 161:10).

f. DHFS will provide information to CBRF and AFH members of the MCDA CMO's provider network about locations on DHFS' web site of information about the capitated rate setting process and the Family Care actuarial rate reports describing development methodology (R. 161:10-11).

g. DHFS will prepare technical assistance materials and convene a meeting of DHFS and MCDA staff regarding identification and implementation of additional practices to enhance planning for safe and effective residential moves for Family Care members, and pre-move assessments (R. 161:11).

h. DHFS will conduct a one-time review of Milwaukee County Watts[3] review procedures and pursue any corrective action as determined appropriate by DHFS

[3] *State ex rel. Watts v. Combined Comm. Svcs.*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985).

in its sole discretion (R. 161:11). DHFS will provide copies of the final report, any corrective action plan, and any compliance reports to plaintiffs' counsel (R. 161:11-12).

i. DHFS will amend the DHFS/MCDA Family Care contract to include language that MCDA will provide services in the most integrated level of residential setting consistent with the desired outcomes, preferences, and identified needs of a participant, and that is cost-effective when compared to alternate services that could meet the same needs and achieve similar outcomes (R. 161:12).

j. DHFS will direct its External Quality Review Organization to include in the care plan review process consideration of whether a Family Care participant would be more appropriately placed in a less restrictive/more integrated residence and whether the individual would prefer to move to a less restrictive/more integrated facility (R. 161:12).

34. The third major section of the proposed Settlement Agreement is entitled "Enforcement" (R. 161: 12-13). If plaintiffs believe in good faith that either the County Defendants or the State Defendants are out of compliance with any provision of the Settlement Agreement, plaintiffs must notify all Defendants and attempt to negotiate an agreement to address the alleged deficiency (R. 161:12). If the parties are unable to reach an agreement, the plaintiffs may file a remedial motion with the Court (R. 161:12).

35. The fourth major section of the proposed Settlement Agreement is entitled "Miscellaneous" (R. 161:13). The parties agree that Family Care participants who enter CBRFs and AFHs should not automatically be disqualified from participating in day programming services outside their residences (R. 161:13). The parties agree that it is appropriate to use the RAD to determine whether the outcomes of Family Care participants who reside in CBRFs and AFHs cannot be met without access to outside day programming services (R. 161:13). Except

for provisions of the Settlement Agreement for which some other compliance date or time period is specified, provisions of the Settlement Agreement will terminate and cease to be enforceable two years after the date of the Court's order approving the Settlement Agreement (R. 161:13). Plaintiffs' counsel will receive $130,000.00 in full settlement of their claim for attorneys fees and costs in connection with their representation of the plaintiffs in this lawsuit (R. 161:13).

Distribution of Notice of Proposed Settlement Agreement

36. The Notice approved by the Court was sent by First Class U.S. Mail on or about September 11, 2007, to each person included as of September 5, 2007, in the MCDA database of all current Milwaukee County Family Care members, legal guardians for those Family Care members, and persons serving as agents under activated powers of attorney for those Family Care members (Affidavit of James Hennen, ¶¶ 3-7).

37. A copy of the Notice was provided to each person, and/or the legal guardian or person holding activated powers of attorney for each such person, who enrolled in Milwaukee County Family Care between September 6, 2007, and October 16, 2007 (Affidavit of James Hennen, ¶ 8, and other submissions of the County Defendants).

38. On September 10, 2007, copies of the Notice and the Proposed Settlement Agreement were posted on the DHFS website at *http://www.dhfs.state.wi.us/LTCare* and remained posted through the close of business October 19, 2007 (Affidavit of Hollister Chase, ¶¶ 4-6).

39. Copies of the Notice and the proposed Settlement Agreement were sent by First Class U.S. Mail on September 11, 2007, to each agency or organization listed in the

Proposed Plan for Distribution of Notice of Proposed Settlement Agreement previously approved by the Court (R. 166).

40. The Notice was distributed to the persons, agencies, and organizations and in the manner required in the Court's Order Preliminarily Approving the Proposed Settlement Agreement, Directing Distribution of the Notice of Proposed Settlement Agreement, and Scheduling Fairness Hearing (R. 165).

Application of the Factors Required by *Armstrong*

Strength of the Plaintiffs' Case

41. Although the Court has concluded that Plaintiffs have alleged a sufficient threat of future injury to support standing in a constitutional sense (R. 86:7-10; 106:2-3), the Court has expressly recognized that none of the named plaintiffs has, as yet, been injured in a legal sense (R. 86:7). This is true whether injury consists of being forced to move involuntarily to another CBRF or AFH, as Plaintiffs insist, or being forced to move involuntarily to a less integrated more restrictive institutional setting, as defendants insist. *See* FOF 21(a), above.

42. The Defendants all deny that Plaintiffs or their class are being forced to move to different AFHs or CBRFs because of inadequate Family Care rates, and have preserved for possible appeal the legal argument that, even if proven, such forced moves would not constitute actionable claims under the Rehabilitation Act or the ADA. In addition, the Defendants strongly deny that Plaintiffs or their class are being forced into institutional (*i.e.*, more restrictive, less integrated) settings as a result of allegedly inadequate Family Care capitated or provider rates. During discovery so far, Plaintiffs have supplied the Defendants with very little evidence to

support a claim that Family Care enrollees are being forced into institutional settings because of inadequate Family Care rates.

43. Although the Court has concluded that all eight of Plaintiffs' four paired ADA and Rehabilitation Act claims survive in limited respects, it is conceptually difficult to distinguish between the four pairs of claims. *See* FOF 21(a)-(d), above. Moreover, some claims are sufficiently vague that they present difficult proof problems for the Plaintiffs, who have the burden of proof. For example, to the extent Plaintiffs claim discrimination on the basis of "severity of disability," as described in FOF 21(a), Plaintiffs have the burden of identifying and proving if and how members of the plaintiff class are treated differently as a result of the degree of individual disability, and, in addition, that the Family Care capitated or provider rates have a causal connection to such differential treatment. The defendants deny that plaintiffs have produced probative evidentiary support for this claim during the discovery conducted so far.

44. The Court has also limited the relief available to prospective injunctive and declaratory relief for the class as a whole (R. 86:22). As a result, the parties have agreed that further discovery and litigation would focus on the setting of the DHFS capitated rates and the County provider rates for calendar years 2006 and 2007 (FOF 23), and they have agreed that discovery would focus on a variety of technical, systemic, and factual questions requiring the gathering of extensive expert testimony concerning the legal adequacy of the rates (*id.*).

45. Obtaining the evidence Plaintiffs need to prove that the DHFS capitated rates for 2006 and 2007 have a discriminatory effect on the plaintiff class will necessarily require heavy reliance on expert testimony. Such technical expertise is expensive and Plaintiffs have not produced evidentiary support for this claim during the discovery conducted so far. Plaintiffs will almost certainly face difficult proof problems if they are to discharge their burden of proving that

the actuarially-calculated federally-approved state capitated rates are inadequate and are, in fact, causing actionable harm to the plaintiffs' class.

46. Plaintiffs' claim that the rates paid by the MCDA CMO to the many individual providers of AFHs and CBRFs serving current Family Care enrollees are inadequate and will force enrollees into institutional settings will both require substantial additional discovery and will present substantial proof problems as well. The Plaintiffs have conducted considerable discovery concerning the rates paid to Milwaukee Family Care providers, and may well have gathered evidence that the rates paid to AFH and CBRF providers are not satisfactory to at least some of those providers. However, the Defendants deny that such evidence alone is sufficient to prove that the provider rates are causing actionable harm to the Plaintiffs and deny that Plaintiffs have produced evidence sufficient to support such a claim during the discovery conducted so far.

47. The primary form of relief sought by the plaintiffs' class against the State Defendants is either an increase in the capitated rates or a change to a different form of reimbursement entirely. Assuming Plaintiffs are able to prove a claim of discrimination under the ADA or Rehabilitation Act warranting such relief, their primary prayer for relief faces an additional significant hurdle based on the State Defendants' affirmative defense that the relief sought will require a fundamental modification of the Family Care managed care program. Plaintiffs' challenge to the County provider rates must overcome the same affirmative defense. The State Defendants in particular have facially strong grounds to support their affirmative defense, based on their claim that court-mandated changes in the capitated rates or a court-ordered remedy that the Family Care program institute a different form of reimbursement would require a fundamental modification of Family Care.

Opinion of Counsel for the Parties

48. Plaintiffs have been represented throughout this case, since its initial filing in Milwaukee County Circuit Court, by Robert Theine Pledl (R. 1-1:1; 1-2:4-5).

49. In March 2006, Sarah J. Somers and M. Jane Perkins of the National Health Law Program, Inc. joined this lawsuit as co-counsel on behalf of Plaintiffs (97).

50. Plaintiffs' counsel unconditionally support the terms of the proposed Settlement Agreement (Plaintiffs' written and oral submissions).

51. Throughout this litigation, the State Defendants have been represented by the Wisconsin Department of Justice. Assistant Attorney General ("AAG") Maureen McGlynn Flanagan has appeared on behalf of the State Defendants since May 2004. AAG Mary E. Burke has appeared on behalf of the State Defendants since March 2005. AAG David Dudley has appeared on behalf of the State Defendants since December 2006.

52. Counsel for the State Defendants unconditionally support the terms of the proposed Settlement Agreement (State Defendants' written and oral submissions).

53. Throughout this litigation, the County Defendants have been represented by the Milwaukee County Corporation Counsel. Principal Assistant Corporation Counsel John Jorgensen has appeared on behalf of the County Defendants since April 2004 (R. 5).

54. Counsel for the County Defendants unconditionally supports the terms of the proposed Settlement Agreement (County Defendants' written and oral submissions).

55. All parties are represented by competent counsel (R. 53-3; R. 98; R. 99; R. 102:9-11; Affidavit of Maureen McGlynn Flanagan, ¶¶ 1-4; Affidavit of Mary E. Burke, ¶¶ 1-5; Affidavit of David Dudley, ¶¶ 1-3; County Defendants' written and oral submissions).

Stage of the Proceedings and the Extent of Discovery

See proposed findings of fact 3, 4, 5, 11, 12, 13, 16, 19, 20, 21, 22, 23, and 24.

56. During the course of this litigation, the County Defendants produced approximately 2,000 pages of documents in discovery, produced two persons for deposition, and provided plaintiffs with direct access to files maintained at MCDA (Affidavit of Patricia Chiazor, ¶¶ 4, 7; R. 120:2-3).

57. The Plaintiffs produced approximately 1,000 pages of documents in discovery (Affidavit of Patricia Chiazor, ¶ 5).

58. Discovery produced by the State Defendants included over 925 documents consisting of over 7,000 total pages, as well as 6 compact disks containing in the aggregate over 9,500 documents many of which consist of multiple pages and/or include attachments (Affidavit of Patricia Chiazor, ¶ 6).

59. The State Defendants promulgated 33 interrogatories to which the Plaintiffs responded (Affidavit of Mary E. Burke, ¶ 7).

Absence of Collusion

See proposed findings of fact 25, 26, 27, and 28.

60. The substantive and financial terms of the proposed Settlement Agreement result from fair arms-length negotiations among counsel for the parties, and not from any collusion between the parties or their counsel (Affidavit of Mary E. Burke, ¶¶ 14-20).

Reaction of the Class to Settlement and Extent of Opposition

No findings of fact regarding reaction of the class to settlement and the extent of any opposition to the proposed Settlement Agreement are proffered at this time. The deadline for

submission of any written comments or objections to the proposed Settlement Agreement is September 25, 2007, immediately prior to the date for submissions by the parties pursuant to which these proposed findings of fact and conclusions of law are being filed (R. 165:2, 166, 167). On or before October 9, 2007, the response date established by the Court, the State Defendants will submit additional proposed findings of fact and conclusions of law addressing the reaction of the class to settlement and the extent of opposition to the proposed Settlement Agreement. (R. 165:2, 166, 167).

CONCLUSIONS OF LAW

1. The contents of the Notice of Proposed Settlement Agreement comport with the requirements of procedural due process in that they were sufficient to apprise class members and others of the terms of the proposed settlement and of the opportunity to be heard in respect to the proposed settlement.

2. The Notice of Proposed Settlement Agreement was widely disseminated throughout the Milwaukee County community and was sufficiently provided to or made available to all interested persons or their legal representatives to comport with the requirements of procedural due process.

3. The interests of the plaintiff class have been adequately represented throughout the course of this litigation and the settlement negotiations.

4. The terms of the proposed Settlement Agreement are, in their entirety, fair, reasonable, and adequate.

5. It is unlikely that Plaintiffs would have secured any greater relief than achieved through the Settlement Agreement if this case had been fully tried.

Dated at Madison, Wisconsin, this 26th day of September, 2007.

Respectfully submitted,

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