

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A.M., *et al.*,

Plaintiffs,

-against-

John B. Mattingly, in his official capacity as
Commissioner of the New York City Administration
for Children's Services,

Defendant.

10 CV 2181 (BMC)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT AND APPROVAL OF NOTICE**

Plaintiffs, by their undersigned counsel, and upon the Notice of Motion, Attorney Declaration of Lisa E. Cleary with attached Exhibits, and the Next Friend Declarations of Kinda Serafi, Cynthia Godsoe and C.B. Mobley, submitted herewith, respectfully submit this Memorandum of Law in support of their motion for an order preliminarily approving the agreed-upon settlement reflected in the Stipulation and Order of Settlement, signed October 12, 2010 (the “Settlement” or the “Stipulation”), and the proposed notice plan.

PRELIMINARY STATEMENT¹

This litigation was brought in the Eastern District of New York on May 12, 2010, to challenge practices and procedures by the New York City Administration for Children’s Services (“ACS”) that, Plaintiffs allege, improperly placed and detained children in foster care in acute-care psychiatric hospitals. As alleged in the Complaint, children in foster care languished in acute-care facilities for weeks and months beyond the dates on which they were cleared for release by doctors at these facilities. The Named Plaintiffs, three children currently in the care of ACS, sought, on behalf of a class of similarly-situated children, injunctive relief prohibiting such detention and designed to prevent such improper detention from occurring again in the future. After bringing the litigation and a preliminary injunction motion, engaging in discovery, having a Plaintiff class certified, and engaging in extensive, arms-length negotiations with counsel for the Defendant, the Plaintiffs now seek approval of a Settlement providing injunctive relief to the class.

The Settlement, set forth in a detailed Stipulation submitted herewith, is the result of careful and complex arm’s-length negotiations between experienced and informed counsel on both sides. Under the Stipulation, the class receives injunctive relief to remedy the practices complained of as unlawful, and the Defendant has agreed to extensive data collection and

¹ All capitalized terms used herein are defined in the attached Stipulation.

monitoring to review the level of success of the injunctive relief. As discussed further below, the Settlement provides fair, adequate and reasonable relief for the Class in light of the risks and obstacles that might be faced were the case litigated to judgment.

Accordingly, with the consent of Defendant, the plaintiffs respectfully seek entry of an order:

- (1) preliminarily approving the settlement;
- (2) approving notice to the Class in substantially the forms attached hereto as Exhibits A and B to the Attorney Declaration of Lisa E. Cleary ("Settlement Notice") and the proposed plan for disseminating the Settlement Notice; and
- (3) setting a date for the fairness hearing on the proposed Settlement.

BACKGROUND OF LITIGATION

This litigation was brought under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a); the Fourteenth Amendment of the U.S. Constitution; Article 1, § 6 of the New York Constitution; and various provisions of the New York Social Services Law and its implementing regulations. As noted above, the case is brought by children under the age of 18 who are in the custody of the ACS and who are currently admitted or will be brought to and admitted to acute psychiatric hospitals and who, once admitted and deemed ready for discharge, are not moved by ACS and/or one of its contract foster care agencies to the least restrictive setting appropriate to their needs.

The Court so-ordered the parties' Stipulation for Class Certification on June 10, 2010. The Court also so-ordered the parties' Stipulation for preliminary injunctive relief on June 15, 2010. The parties have engaged in five months of settlement negotiations.

Plaintiffs and Defendant reached agreement on a settlement resolving all of the Plaintiffs' claims against the Defendant. The Stipulation and Order of Settlement was signed on October 12, 2010.

PRIMARY TERMS OF THE STIPULATION

1. Injunctive Relief

The Stipulation provides that ACS promulgate and implement a mandatory policy for its own staff and its foster care contract agencies that would require ACS and its foster care contract agencies to monitor each of the children in ACS's care who are admitted to acute psychiatric hospitals, immediately inform the child's parents and attorneys of any and all hospitalizations, ensure family visits for children who are hospitalized, and ensure that the children's education needs are being met while hospitalized. The policy provides for the creation of a Mental Health Coordination Unit ("MHCU") which is charged with assisting ACS foster care contract agencies with the responsibilities described above as well as creating and providing training to ACS's and its foster care contract agencies' administrators and staff concerning the prevention of unnecessary psychiatric hospitalization, compliance with state and federal law regarding psychiatric hospitalization, and implementation of the tracking and monitoring relief described below. Stip. ¶¶ 8, 9, 11. In anticipation of the approval of the agreement, ACS has begun its efforts to implement the measures that have been agreed to in the Stipulation.

2. Monitoring

The Stipulation provides for ACS to report data to Plaintiffs' Counsel. Stip. ¶¶ 12, 14. ACS will provide Plaintiffs' Counsel monthly with aggregate reports containing information about the:

- (i) Number of children hospitalized and being tracked by the newly-formed Mental Health Coordination Unit of Children's Services ("MHCU");
- (ii) Number of new hospitalizations as of the last day of that month's reporting period;

- (iii) Number of children discharged from a hospital during the reporting period;
- (iv) Number of MHCU-related training sessions provided to staff.

The information about the specific children in these aggregate reports will include:

- (i) their length of stay;
- (ii) the number of children who returned to their previous placement, and the number who had a change of placement;
- (iii) of children with a placement change, the number who remained at the same level of care, moved to a higher level of care, or moved to a lower level of care than their previous placement;
- (iv) number of children referred to the clinical resources (e.g., B2H) prior to discharge and at the time of discharge;
- (v) barriers to discharge, if any; and
- (vi) the number of children for whom a family team conference was held during the hospitalization.

ACS has also agreed to produce and provide to Plaintiffs' counsel monthly reports containing individual case information for each child admitted to or discharged from an acute psychiatric facility during that month. These reports will include the child's:

- (i) Name;
- (ii) Date of Birth;
- (iii) Gender;
- (iv) Case planning agency;
- (v) Hospital that admitted the child;
- (vi) Date of admission;

- (vii) Symptoms/behaviors that led to the child being brought to the hospital for assessment;
- (viii) Diagnoses prior to admission (if available);
- (ix) Level of placement prior to admission;
- (x) Date of Discharge (if applicable); and
- (xi) Level of care to which child was discharged (if applicable).

3. Retention of Jurisdiction and Enforcement

The Court will retain jurisdiction over this action for the purpose of enforcing the Settlement . If the Defendant fails to comply with the terms of the Stipulation, Plaintiffs may make a motion for enforcement and/or contempt before this Court and may also seek to extend the injunctive and monitoring provisions of the Stipulation for up to one year at a time from the date the Court's jurisdiction was scheduled to terminate. Stip. ¶ 23. Unless otherwise ordered, the injunctive and monitoring provisions will sunset sixty months after the Court enters the Stipulation as an order of the Court. Stip. ¶ 22.

ARGUMENT

I. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

A. The Standard for Preliminary Approval

Federal Rule of Civil Procedure 23(e) provides that before a class action may be settled, notice of the proposed settlement must be given in the manner directed by the court and judicial approval must be obtained. The first step of this process is for the court to review the proposed terms of settlement and make a preliminary determination as to the fairness, reasonableness, and adequacy of the settlement terms. *See Manual for Complex Litigation, Fourth* § 21.632. If “a proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential

treatment to class representatives or segments of the class, and falls within the range of possible approval, preliminary approval” should be granted. *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). “Fairness is evaluated by examining (1) the negotiations that led up to the settlement, and (2) the substantive terms of the settlement.” *Sheppard v. Consol. Edison Co.*, No. 94 Civ. 0403, 2002 U.S. Dist. LEXIS 16314, at *8-9 (E.D.N.Y. Aug. 1, 2002). The proposed Settlement is indeed fair, adequate, and reasonable, because it affords the plaintiff class injunctive relief directly targeting the Defendant’s policies and practices complained of as unlawful. We therefore respectfully ask the court to preliminarily approve the settlement.

B. The Proposed Settlement Is Within the Range of Reasonableness

The Second Circuit has set forth a nine-factor test to assess the fairness, adequacy, and reasonableness of a class action settlement. *See City of Detroit v. Grinnell Corp.*, 495 F. 2d 448, 463 (2d Cir. 1974). These factors include: “(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.” *Id.* (internal citations omitted). A full analysis of the fairness of a settlement is not necessary at the preliminary stage, but courts often consider the *Grinnell* factors in granting preliminary approval. *See, e.g. Ayzelman v. Statewide Credit Serv. Corp.*, 238 F.R.D. 358, 366-67 (E.D.N.Y. 2006). The “most significant” of the nine factors is the strength of the Plaintiffs’ case balanced against the settlement offer. *See Selby v. Principal Mut. Life Ins. Co.*, No. 98 Civ.

5283, 2003 WL 22772330, at *2 (S.D.N.Y. Nov. 21, 2003). Courts routinely hold that there is a range of reasonableness with respect to settlements. *See, e.g., Teachers Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814, 2004 U.S. Dist. LEXIS 8608, at *15 (S.D.N.Y. May 14, 2004) (quoting *Newman v. Stein*, 464 F. 2d 689, 693 (2d Cir. 1972)).

The Settlement specifically addresses the issue alleged in the complaint. As noted above and set forth in the Stipulation, the Defendant is agreeing to set up a system of requirements and training, in addition to extensive monitoring and notification in order to prevent improper admission to, and unnecessary detention in, acute-care psychiatric hospitals. Stip. ¶¶ 7-14.

Although the Plaintiffs fully expect to successfully establish the liability of Defendant at trial, they also fully expect that the Defendant would challenge the Plaintiffs' case at all points prior to judgment and on appeal. This could not only ultimately prevent further injunctive relief from being obtained by Plaintiffs but would also at least significantly delay the implementation of injunctive relief. During this period, many foster children could be improperly placed or kept in acute-care psychiatric hospitals.

A trial would not necessarily guarantee that Plaintiffs would achieve the full relief that the Parties have agreed to in the Stipulation. These risks should be taken into account in assessing the proposed Settlement. *See Grinnell*, 495 F.2d at 463. The proposed Settlement will mitigate the uncertainty inherent in this lawsuit and create a framework for future legal compliance.

C. The Proposed Settlement is the Result of Arm's-Length Negotiations

When a proposed settlement is the result of arm's-length negotiations conducted by capable counsel experienced in class action litigation and occurring after meaningful discovery, it is presumed to be fair and reasonable. *See Teachers' Ret. Sys.*, 2004

U.S. Dist. LEXIS 8608, at *5. The attached Settlement is the result of lengthy and vigorous litigation and negotiation between counsel for the Plaintiffs and counsel for the Defendant. Declaration of Lisa E. Cleary in Support of Preliminary Approval of the Settlement, ¶¶4, 5. Counsel have engaged in intensive negotiations, participating in numerous in-person meetings and telephone calls and exchanging letters and drafts of operative documents. *Id.* The Stipulation itself has been exchanged numerous times. The parties have participated in multiple settlement conferences. Further, counsel for Plaintiffs have discussed the Settlement terms with Next Friends for the Named Plaintiffs and have received their approval of its terms.

Counsel for Plaintiffs recommend preliminary approval of the Settlement based upon their experience, their intimate knowledge of the strengths and weaknesses of the case, the likely recovery at trial and on appeal, and all other relevant facts. Courts have recognized the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *See In re Salomon Inc. Sec. Litig.*, No. 91 Civ. 5442, 1994 U.S. Dist. LEXIS 8038, at *42 (S.D.N.Y. June 15, 1994); *see also Mayer v. MacMillan Pub. Co.*, No. 78 Civ. 2133 (MEL), 1986 WL 15676, at *5 (S.D.N.Y. Mar. 28, 1986) (“In view of the fact that judgment of counsel in this case is based on their thorough knowledge of the strength and weakness of their respective positions . . . that judgment is entitled to deference.”). This factor weighs heavily in favor of preliminary approval.

II. THE PROPOSED NOTICE TO THE CLASS IS APPROPRIATE

Rule 23(e)(1) provides that, for a Settlement, “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” For a class certified under Rule 23(b)(2), “the court may direct appropriate notice to the class.” Fed. R. Civ. P. 23(c)(2)(A). As more fully set forth below, the proposed notice complies with the requirements of Rule 23.

A. The Notice Plan

The plan for providing notice to Class Members is comprehensive. The Defendant, at ACS's expense, will be posting an 18 x 24 poster containing a condensed form of the notice in public areas of ACS's and their related agencies' offices, as well as the hospitals operated by the New York City Health and Hospitals Corporation. Furthermore, full notices will be distributed, at ACS's expense, to the directors of 38 local hospitals and the Executive Directors of 8 local organizations. A copy of the notice will be sent, at ACS's expense, to the Executive Director of Mental Hygiene Legal Services, while the Plaintiffs will distribute the notice to 12 other advocacy groups. The notice will also be posted on the website of the Legal Aid Society and in the Legal Aid Society offices in each Family Court building in New York City. The Legal Aid Society had obtained a dedicated telephone number that will be provided in all copies and variations of the notice in order to provide an informational resource for those interested in the Settlement.

B. The Proposed Notice Plan Satisfies Rule 23 and Due Process

There is no bright-line rule to be met for notice of a settlement to satisfy the requirements of the 14th Amendment and Rule 23. Still, the notice must fairly give prospective class members notice of the settlement, information as to the terms of the settlement, and explain the options available to the class members. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). For a Rule 23(b)(2) class, individual notice is not required. Fed. R. Civ. P. 23(c)(2)(A); *Foti v. NCO Fin. Sys., Inc.*, No. 04 Civ. 00707, 2008 U.S. Dist. LEXIS 16511, at *13 (S.D.N.Y. Feb 20, 2008) ("Because this class action is filed under Rule 23(b)(2), due process is satisfied without individualized notice to prospective class members."). Indeed, because the Class Definition includes future class members, individual

notice is not practicable. For a Rule 23(b)(2) class, notice “is flexible and may consist entirely of published notice in appropriate circumstances.” *In re NASDAQ*, 169 F.R.D. at 515 n. 19.

The form and manner of notice are sufficient to properly notify the Class.

The proposed form describes the nature, history and status of the litigation, sets forth the definition of the Class, states the claims alleged and issues involved, describes Class rights under Rule 23 and the Stipulation, and advises the Class that they may object to the Settlement. The Notice will include the date, time, and place of the Fairness hearing and the procedures for commenting on the Settlement. For all of the above reasons, the proposed notice is appropriate and satisfies all of the requirements of Rule 23.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court preliminarily approve the Stipulation and approve the proposed notice as adequate.

Dated: New York, New York
November 17, 2010

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A.M., *et al.*,

Plaintiffs,

-against-

John B. Mattingly, in his official capacity as
Commissioner of the New York City Administration
for Children's Services,

Defendant.

10 CV 2181 (BMC)

**CONSENT ORDER PURSUANT TO FED.
R. CIV. P. RULE 23(e)**

WHEREAS, Plaintiffs commenced the instant lawsuit on May 14, 2010 in the United States District Court for the Eastern District of New York, alleging that Defendant violated federal and state law by keeping children who are in foster care in acute-care psychiatric hospitals longer than necessary and failing to move these children to the least restrictive placements appropriate to their needs; and

WHEREAS, Plaintiffs and Defendant have negotiated and entered into a proposed Stipulation and Order of Settlement ("Stipulation"), which is subject to review under Rule 23 of the Federal Rules of Civil Procedure; and

WHEREAS, pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure and by Order dated June 10, 2010, this action was certified as a class action; and

WHEREAS, the Court has read and considered the Stipulation and the accompanying documents, and the parties to the Stipulation have consented to the entry of this Order; and

WHEREAS, the Plaintiff Class has been certified as:

Children under the age of 18 who are in the custody of the New York City Administration for Children's Services ("ACS") and who are currently admitted or will be brought to and admitted to acute psychiatric hospitals and who, once admitted and deemed ready for discharge, are not moved by ACS and/or one of its contract agencies to the least restrictive setting appropriate to their needs.

IT IS HEREBY ORDERED that:

1. Defendant, at ACS's expense, shall cause a condensed notice of the terms of the proposed settlement to be distributed in both English and Spanish versions to and posted in an appropriate public area of the below listed agencies and offices with the form and text attached as Exhibit A, in a poster sized 18 x 24 inches, on or before _____, and shall ensure that notice remains posted through the end of the notice period:

- (a) All ACS Field Offices;
- (b) ACS's Office of Advocacy;
- (c) ACS's Children Center;
- (d) All ACS Contract Foster Care Agencies; and
- (e) All the hospitals listed below operated by the New York City Health and Hospitals Corporation ("HHC"):
 - (i) Bellevue Hospital Center;
 - (ii) Coney Island Hospital;
 - (iii) Elmhurst Hospital;
 - (iv) Harlem Hospital;
 - (v) Jacobi Medical Center;
 - (vi) Jacobi-NCB Behavioral Health;
 - (vii) Kings County Medical Center;
 - (viii) Lincoln Medical and Mental Health Center;

- (ix) Metropolitan Hospital;
- (x) Morisania Diagnostic and Treatment Center;
- (xi) North Central Bronx Hospital;
- (xii) Queens Hospital Center;
- (xiii) Renaissance Health Care Network Diagnostic and Treatment Center; and
- (xiv) Woodhull Medical and Mental Health Center.

2. Defendant, at ACS's expense, shall cause notice of the terms of the proposed settlement to be distributed to the Directors of the below listed hospitals with the form and text attached as Exhibit B, on or before _____:

- (a) Bronx-Lebanon Hospital Center;
- (b) Brookdale University Hospital;
- (c) Brookhaven Hospital;
- (d) Brooklyn Hospital;
- (e) Brunswick Hospital;
- (f) Flushing Hospital;
- (g) Four Winds – Westchester;
- (h) Gouveneur Healthcare Services;
- (i) Holliswood Hospital;
- (j) Interfaith Medical Center;
- (k) Jamaica Hospital;
- (l) LIJ-Zucker-Hillside;
- (m) Long Island College Hospital;

- (n) Lutheran Medical Center;
- (o) Maimonides Medical Center;
- (p) Montefiore Medical Center – Children’s Hospital;
- (q) Mount Sinai Medical Center;
- (r) New York Hospital – Columbia Presbyterian;
- (s) North General Hospital;
- (t) New York Methodist Hospital;
- (u) New York Hospital – Weill Cornell Payne Whitney Clinic;
- (v) New York Hospital – Westchester;
- (w) New York University Tisch Hospital;
- (x) Our Lady of Mercy;
- (y) Richmond University Medical Center;
- (z) Rye Hospital;
- (aa) Schneider Children’s Hospital (Zucker);
- (bb) St. Barnabas;
- (cc) St. Johns – Queens Hospital;
- (dd) St. Luke’s Roosevelt Medical Center – Roosevelt Hospital;
- (ee) St. Luke’s Roosevelt Medical Center – St. Luke’s Hospital;
- (ff) St. Vincent’s – Westchester;
- (gg) South Oaks Hospital;
- (hh) Staten Island University Hospital – North Site;
- (ii) Staten Island University Hospital – South Site;
- (jj) Stony Lodge – Westchester;

(kk) Westchester Medical Center; and

(ll) Wyckoff Medical Center.

3. Defendant, at ACS's expense, shall cause a notice of the terms of the proposed settlement with the form and text attached as Exhibit B to be distributed to the Executive Directors of the below listed organizations and offices with a request that it be distributed to the sites that serve class members.

(a) Advanced Center for Psychotherapy;

(b) Addabbo Health Center;

(c) Bleuler Psychotherapy Center;

(d) The Child Center of New York;

(e) FEGS Health and Human Services System;

(f) Soundview Mental Health Center;

(g) Steinway Children's Center; and

(h) Western Queens Consultation Center.

4. Defendant, at ACS's expense, shall cause a notice of the terms of the proposed settlement to be distributed to the Executive Director of Mental Hygiene Legal Services at 170 Old Country Road, Mineola, NY, 11501 with a request that it be distributed to all offices.

5. Defendant shall provide to plaintiffs' counsel 20 (twenty) copies of the notice poster.

6. Plaintiffs, at their own expense, shall provide notice of the terms of the proposed settlement to the following, with the form and text attached as Exhibit B, on or before _____, to the following persons, with a request that they post the notice where children in ACS's care and their families have access to it:

- (a) Lawyers for Children;
- (b) Children's Law Center;
- (c) Children's Rights, Inc.;
- (d) Jane Schreiber, Director of the Attorney for the Child Program,
Appellate Division, First Department;
- (e) Harriet Weinberger, Director of the Attorney for the Child Program,
Appellate Division, Second Department;
- (f) The Door;
- (g) Children's Aid Society's The Next Generation Center;
- (h) LIFT – Legal Information for Families Today;
- (i) Administrative Judges of the New York City Family Courts;
- (j) Center for Family Representation;
- (k) Bronx Defenders; and
- (l) Brooklyn Family Defense Project, Legal Services of New York.

7. Plaintiffs' counsel shall cause the notice to be posted during the notice and comment period on the website of the Legal Aid Society and in the Legal Aid Society offices in each Family Court building in New York City.

8. The form and content of the settlement notice, and the method set forth herein of notifying the class of the settlement and its terms and conditions, meet the requirements of Rule 23 of the Federal Rules of Civil Procedure and of the Due Process Clause, and constitute the best notice practicable under the circumstances to all persons entitled to notice.

9. The Court will hold a hearing to consider the fairness and adequacy of the proposed settlement on _____, in the United States Courthouse at

225 Cadman Plaza East, Brooklyn, New York 11201. Attendance at the fairness hearing by those seeking to comment on the settlement is not necessary.

10. Persons who wish to present comments or objections to the settlement must do so in writing with a statement that the comments relate to A.M. et al. v. Mattingly, 10 CV 2181 (BMC), and must mail them so as to be received by _____, to:

CLERK OF THE COURT
Brooklyn Courthouse (Main Office)
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

11. The Legal Aid Society will set up a hotline at telephone number 212-577-3933 for those seeking to obtain information related to the proposed settlement.

12. Counsel for Plaintiffs and Defendant shall make submissions in support of the fairness and adequacy of the proposed settlement, together with copies of all comments received and responses to any objections made, or on before _____.

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SO ORDERED:

The Hon. Brian M. Cogan, U.S.D.J.