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United States District Court,
D. South Dakota, Southern Division.

CHRISTINA A., by and through her parent and Next Friend, Jennifer A., et al., Plaintiff,
v.
Jeff BLOOMBERG, in his official capacity as Secretary of the South Dakota Department of Corrections; Owen Spurell, in his official capacity as Superintendent of the State Training School at Plankinton, South Dakota, Defendants.

No. Civ. 00–4036. | Filed Feb. 24, 2000. | Dec. 13, 2000.

Attorneys and Law Firms

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Wally Eklund, Charles Rick Johnson, Stephanie E. Pochop, Mark I. Soler, Marc A. Schindler, Michael Finley, for Hillary B., by and through her next friend mnr Patricia B., plaintiff.

Wally Eklund, Charles Rick Johnson, Stephanie E. Pochop, Mark I. Soler, Marc A. Schindler, Michael Finley, for Robert C., by and through his parent and next friend mnr Philip C., plaintiff.

Wally Eklund, Charles Rick Johnson, Stephanie E. Pochop, Mark I. Soler, Marc A. Schindler, Michael Finley, for Melissa D., by and through her parent and next friend mnr Shannan D., plaintiff.

Wally Eklund, Charles Rick Johnson, Stephanie E. Pochop, Mark I. Soler, Marc A. Schindler, Michael Finley, for Sandra E., by and through his parent and next friend mnr Todd E., plaintiff.

Wally Eklund, Charles Rick Johnson, Stephanie E. Pochop, Mark I. Soler, Marc A. Schindler, Michael Finley, for Hillary B., by and through his next friend mnr Carl F., plaintiff.

James Ellis Moore, William G. Beck, Woods, Fuller, Shultz & Smith, PC, Sioux Falls, SD, for Jeff Bloomberg, in his official capacity as Secretary of the South Dakota Department of Corrections, defendant.

James Ellis Moore, William G. Beck, (See above), for Owen Spurrell, in his official capacity as Superintendent of the State Training School at Plankinton, South Dakota, defendant.

Clerk, USCOA, St. Paul, MN, Interested Party, pro se.

Opinion

MEMORANDUM OPINION AND ORDER

PIERSOL, Chief J.

***1** The parties to this class action have presented a Settlement Agreement for the Court's approval. For the reasons set forth below, the Court approves the Settlement Agreement pursuant to Federal Rule of Civil Procedure 23(e).

BACKGROUND

Plaintiffs filed this action on February 24, 2000, seeking declaratory and injunctive relief. In their Complaint, Plaintiffs claim that the conditions of confinement and the policies, practices, acts and omissions at the South Dakota State Training School at Plankinton ("Plankinton") subjected Plaintiffs to a denial of their due process rights under the First and Fourteenth Amendments. Plaintiffs also allege violations of the Individuals with Disabilities Education Act ("IDEA"). On July 7, 2000, the Court granted class certification to Plaintiffs.[1] Extensive discovery was conducted in this case and, with certain exceptions, was to be complete by September 15, 2000. The trial was set for November 28, 2000.

In October, shortly after the Court had ordered a status conference, it was informed that the parties had entered into settlement negotiations. At the status conference on November 6, 2000, the parties presented the Court with a Settlement Agreement. At that time the Court preliminarily approved the Settlement Agreement and set a date for a Fairness Hearing. In addition, after making a few changes to the Notice to Class Members, such as how the Notice was distributed to the members of the class, the Court approved the Notice. The distribution plan required Defendants to post the Notice and a copy of the Settlement Agreement in conspicuous places within the Juvenile Prison, other secure units and in all the cottages at Plankinton. In addition, the Court ordered Defendants to identify those youths with reading difficulties or those whose primary language was not English (and who,

therefore, might have difficulty reading the Notice in English) and to provide those youths with the opportunity to have the Notice read to them. In the Notice class members were given a brief summary of the issues covered by the Settlement Agreement and told that they were required to file any objections to the Settlement Agreement with the plaintiff class attorneys by mail or by a toll-free telephone number no later than December 8, 2000. The Notice also informed the youth of the time and place of the Fairness Hearing which was held on December 11, 2000.

The Plaintiffs' attorneys received three written responses and three phone calls from youth at Plankinton as well as a written response from the South Dakota Coalition for Children. The three letters and the response from the South Dakota Coalition for Children were provided to the Court. The Fairness Hearing was held on December 11 as scheduled. Although the Court offered, none of the persons that attended the Fairness Hearing chose to speak. As a result, the Court only considered the written communications noted above, as well as the arguments of counsel and the files and records in this case.

DISCUSSION

***2** Before the Court rules on the fairness of the Settlement Agreement, it must be satisfied that Notice was given to all the interested members of the class and that those persons had an opportunity to voice their opinions. *See Cody v. Hillard,* 88 F.Supp.2d 1049, 1056 (D.S.D.2000) (Piersol, J.). Federal Rule of Civil Procedure 23(e) provides that notice "shall be given to all members of the class in such manner as the court directs." As noted, after some revisions, the Court approved the Notice and plan of distribution. At the Fairness Hearing, Plaintiffs' attorney stated that he was satisfied that the Notice had been posted in accordance with the Court's order. Indeed, counsel for Plaintiffs did receive letters and phone calls from youth at Plankinton in response to the Notice, which testifies to its proper distribution. In light of this and the fact that there were no claims that the Notice was not properly distributed, the Court finds that the members of the class were given proper notice of the proposed settlement.

Next, the Court may not approve the Settlement Agreement unless it determines that it is "fair, reasonable, and adequate." *Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir.1975). In deciding if the Settlement Agreement is fair, reasonable and adequate the Court may look to four factors: (1) "the merits of the plaintiff's case, weighed against the terms of the settlement"; (2) "the defendant's financial condition"; (3) "the complexity and expense of further litigation"; and (4) "the amount of opposition to the settlement." *Van Horn v. Trickey,* 840 F.2d 604, 607 (8th Cir.1988); *Cody,* 88 F.Supp.2d at 1057.

A. *The Merits of the Plaintiffs' Case*

Plaintiffs' allegations in this case covered a variety of issues. Plaintiffs made several allegations regarding the use of restraints, such as claiming that the use of restraints was excessive and unreasonable through "four-pointing" and "bumpering." Claims were also made regarding the use of excessive force during "cell extractions." Plaintiffs also alleged that the disciplinary procedures were arbitrary in several ways. For example, Plaintiffs claim they were put in lockdown or isolation for arbitrary reasons for excessive periods of time without any procedure by which a qualified individual could determine if or how long a youth required isolation. Also, Plaintiffs allege they were subject to an arbitrary disciplinary system generally which deprived them of any procedural due process. Plaintiffs also complained about the conditions of cell confinement. particularly the availability of counseling and education while the youth was "locked down." Plaintiffs also made several allegations regarding the inadequacy of the mental healthcare available; the abuse of Plaintiffs' First Amendment right to privacy in relation to the monitoring of letters and phone conversations; the inadequate provision of education generally; and the inadequate provision of special education for those in need in violation of those Plaintiffs' rights under IDEA.

***3** The parties assert, and the Court's review of the Settlement Agreement confirms, that most of these issues have been dealt with to some degree. The Settlement Agreement provides several benefits to Plaintiffs with regard to the use of restraints. For example, fixed restraints may not be used for any minimum set period of time. In the case of self-injurious or suicidal youth, if restraints are necessary, non-fixed restraints must first be used with fixed restraints being used only after consultation with a mental health clinician. In addition, defendants will remove all the metal rings used for restraints from the beds in all the units with the exception of three beds in the Female Secure Unit. Under the agreement, Defendants also will not use restraints when escorting youth to and from their cells except in the extreme situation of aggressive or assaultive behavior. Defendants will also not maintain "less than lethal" devices inside Plankinton's fence perimeter except when approval is given during a major disturbance. The Settlement Agreement also provides that Defendants will videotape for one year all incidents in which youth are placed in restraints and provides for the maintenance and review of reports regarding the use of restraints.

Under the Settlement Agreement, there is also a dramatic

improvement in the amount of mental healthcare available to the youth at Plankinton. The agreement provides for a minimum of 100 hours per week of clinical mental health services, which will include two full-time mental health clinicians. In addition, the Settlement Agreement also provides for 16 hours a month of psychiatric care. For self-injurious and suicidal youth, the agreement calls for face-to-face intervention during normal business hours and monitoring of those youths by mental health clinicians. Some concern was raised by the South Dakota Coalition for Children that face-to-face intervention would not be available at night or on the weekends when incidents involving suicidal behavior often occur. Plaintiffs' attorneys believe, however, that a mental health clinician will be on call during non-business hours and that at least one mental health clinician lives nearby.

The procedures by which youth are placed in cell confinement and the conditions of that confinement are also improved by the Settlement Agreement. Among other things, a youth will only be confined for as long as he maintains any violent or dangerous behavior. A youth may only be confined for 72 hours (with a review of that confinement occurring every 24 hours) prior to a hearing. Further, while a youth is confined to a cell. Defendants will authorize staff to enter the cell to speak with the youth. Also, during a room restriction the youth will have visual contact with a staff member every 15 minutes. Thus, the Settlement Agreement appears to adequately deal with many of the due process and confinement issues discussed in the Complaint.

Defendants also agreed to provide general and special education services that comply with state law and IDEA. The staff at the facility will be trained annually in many areas that, according to Plaintiffs' attorneys, are consistent with the recommendations by both Plaintiffs' and Defendants' experts. Further, Defendants will put into place policies that will safeguard the privacy of the youths' correspondence and phone conversations.

***4** The Settlement Agreement also provides for a one-year monitoring period during which Plaintiffs' attorneys and their experts will make quarterly visits to Plankinton to interview youth and inspect records.

Since the Plaintiffs were requesting injunctive relief, the case would have been tried on the basis of the conditions existing at the time of trial. Due to the fact that improvements were being made at Plankinton after this lawsuit was commenced, the Plaintiffs' proof became more difficult as time passed.

It appears that many of Plaintiffs' claims have been address in some way through the policies and procedures outlined in the Settlement Agreement. The Court attributes significant weight to Plaintiffs' attorney's assertion that the Settlement Agreement is fair, reasonable and provides significant benefits to the Plaintiff class. Indeed, Plaintiffs' lead attorney, Mr. Mark Soler, based this assertion on his 22 years of experience in this field and his participation in similar cases in 15 other states. Thus, the Court finds that the Settlement Agreement more than adequately addresses the merits of Plaintiffs' claims.

B. ***Defendant's Financial Condition***

Since Plaintiffs are seeking injunctive relief here and not monetary damages, this factor is not an issue. *See Cody,* 88 F.Supp.2d at 1059.

C. ***Complexity of the Litigation***

Plaintiffs' counsel asserted, and this Court believes rightly so, that the settlement of this case benefits the Plaintiff class given the costs of further litigation and the complexity of the case. First, the settlement will likely result in significant savings to Plaintiffs as this trial was expected to last three weeks and would have included the costs of several experts. Second, the complexity of proving constitutional violations given the "fluid situation" at Plankinton presented a challenge to Plaintiffs at trial. Defendants have asserted all along that prior to and after the commencement of this action changes have been instituted at Plankinton. Thus, as Plaintiffs' attorney noted, the situation at Plankinton presented a "moving target" for Plaintiffs. As a result, the settlement of this case is more beneficial to Plaintiffs because the positive results here are more certain than they might be at trial.

D. ***Amount of Opposition to the Settlement***

The Court does not believe there is a significant amount of opposition to the settlement in this case, if any. The Court received copies of letters from three of the youths at Plankinton. The Court finds that these youths did not object to the settlement in their letters but instead presented incidences of some of the problems addressed in the Settlement Agreement. While these letters do not amount to objections to the Settlement Agreement, given the nature of the complaints in these letters, the Court expressed some concern that the changes Defendants' claim were made have not really taken place. The Court was satisfied, however, by the Plaintiffs' response. The Court agrees that it is necessary to look at the actual policies and practices of the facility because, as Plaintiffs' attorney noted, there are problems at even the best run facilities. The job for this Court is to ensure that the Settlement Agreement provides beneficial changes to the Plaintiffs in this case and, as noted above, the Court believes it does. In addition, it is important to note that it is difficult to know from these letters what has actually happened. It is the expectation of Plaintiffs and of this

Court that the complaints from these youths will be addressed by the policy changes incorporated in the Settlement Agreement. The Court is also satisfied that Plaintiffs' attorneys have in the past, and will continue in the future, to take such complaints seriously and to respond and contact the youths about these concerns. Certainly, the monitoring provisions included in the Settlement Agreement will help Plaintiffs' counsel to do that.

***5** The Court also received a copy of a letter from the South Dakota Coalition for Children. Again, this letter seemed to support the Settlement Agreement overall but presented some legitimate suggestions for ways to improve it. In particular, the Court echoed the Coalition's concern that a one year monitoring period was not sufficient, especially in light of the significant transitions that Plankinton is undergoing. Plaintiffs' explained, however, that while the Settlement Agreement provides for a shorter monitoring period, it is more intensive, providing for four extensive visits during that time. As a result, Plaintiffs' believe the shorter overall monitoring period is balanced out by this intensive monitoring. In addition, Defendants reiterated that changes have already been implemented at Plankinton and that, therefore, there are not many new policies to be implemented over the next year. As a result, Defendants believe the one year monitoring period is sufficient. The Court would have preferred a longer monitoring period but is guided by the experience of the parties and their experts and finds that the shorter period with more intensive monitoring is adequate.

The Court also raised the issue of its jurisdiction to enforce the Settlement Agreement. Both sides agree that Plaintiffs may move to enforce the Settlement Agreement at any time within the one year that the Settlement Agreement is in effect. The Court would have jurisdiction of those claims and that jurisdiction would not end in one year with the Settlement Agreement, but would continue for as long as those enforcement actions were pending. The Court was concerned, however, that it would not have jurisdiction over violations occurring close to end of the one year period if the Plaintiffs did not bring an enforcement action on those violations within the one year period. According to Plaintiffs, their intention is to schedule the final monitoring visit close to the end of the one year period and they expect that Plaintiffs would have time to bring suit for any violation found at that time prior to the expiration of the one year period. As a result, the Court is satisfied that adequate provision has been made for the Court's jurisdiction to address any violations.

Although the Court invited anyone present in the courtroom to voice an objection, no person came forward.

As noted, the Court is guided to a good extent by the experience of counsel and their reliance on their experts in determining the fairness of this agreement. An analysis of the agreement, the complexity of the litigation and the lack of any real objections, however, independently supports the fairness of the agreement. The Court finds the Settlement Agreement to be fair, reasonable, and adequate and commends both sides for seeking a resolution that is beneficial to the youth of the plaintiff class.

In accordance with the terms of the Settlement Agreement and the parties' request at the status conference on November 6, 2000, the Court will enter a final judgment in this case dismissing all claims without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) but retaining jurisdiction for the purpose of enforcing the Settlement Agreement. Accordingly.

***6** IT IS ORDERED:

> (1) that the Settlement Agreement is approved pursuant to Federal Rule of Civil Procedure 23(c);
>
> (2) that the Court will enter a final judgment and order approving the class settlement and dismissing the action without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) but retaining jurisdiction for the purpose of enforcing the Settlement Agreement; and
>
> (3) that, if Plaintiffs so choose, they may file an application for attorney's fees and costs 14 days after entry of the judgment, that Defendants may file a response to such application within 14 days, and that Plaintiffs may file a reply within 7 days.

Footnotes

1 The class included all juveniles who are now or in the future will be confined at Plankinton.