THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

T.R., by and through his guardian and next friend, R.R.; S.P., by and through her mother and next friend, D.H.; C.A., by and through her mother and next friend, A.A.; T.F., by and through her father and next friend, D.F.; P.S., by and through his mother and next friend, W.S.; T.V., by and through his guardian and next friend. C.D.; E.H. by and through his mother and next friend, C.H.; E.D., by and through his mother and next friend, A.D.; and L.F.S., by and through his mother and next friend, B.S.,

Plaintiffs,

v.

KEVIN QUIGLEY, not individually, but solely in his official capacity as Secretary of the Washington State Department of Social and Health Services; and DOROTHY TEETER, not individually, but solely in her official capacity as the Director of the Washington State Health Care Authority,

Defendants.

No. 2:09-cv-01677-TSZ

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT

NOTE FOR MOTION CALENDAR:

Friday, September 13, 2013

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I. INTRODUCTION

Four years ago, Plaintiffs filed this lawsuit alleging that Washington's low-income children were being wrongly denied access to the intensive mental health services to which they were entitled under federal law. Asserting that "[c]hildren should grow up at home, not in institutions," Plaintiffs sought declaratory and injunctive relief to enforce their rights to adequate mental health treatment in their homes and local communities. Dkt. 1, ¶ 7.

After months of intensive, arms-length negotiations, the parties have now reached a Settlement Agreement that, if approved by this Court, will provide substantial benefits to Medicaid-eligible children with mental health needs throughout Washington. The proposed Settlement Agreement, attached as Exhibit 1, obligates Defendants to implement a five-year plan to integrate intensive home and community-based mental health services for class members into the state Medicaid program. These new services will provide the single most important relief sought in this lawsuit: access to intensive mental health services that will maintain class members in their homes and communities.

The proposed Settlement Agreement is fair, reasonable, and adequate and meets the minimum threshold required for approval at the preliminary stage. First, the Agreement is the product of informed, arms' length negotiations conducted over the course of many months by counsel experienced in these types of lawsuits. Second, it provides Plaintiffs with more expedient and comprehensive reforms than would be available through continued litigation. Finally, all of the named plaintiffs support approval of this Agreement, and experienced class counsel believe that it is a very strong agreement on behalf of the plaintiff class.

Accordingly, Plaintiffs respectfully request an order from this Court preliminarily approving the proposed Settlement Agreement, approving the proposed Notice, and directing that notice to the class be given in the time and manner described in the Notice Plan. Plaintiffs also seek an order setting a schedule for the final fairness hearing to determine whether the

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settlement should be granted final approval, as well as a deadline for Plaintiffs to file a motion for attorneys' fees and costs so that it may be heard at the final fairness hearing.

II. FACTUAL BACKGROUND

A. Procedural History

1. Litigation

Plaintiffs filed this class action lawsuit on November 24, 2009, seeking declaratory and injunctive relief against the Secretary of the Washington State Department of Social and Health Services (DSHS). Dkt. 1, ¶¶ 1-10. The named plaintiffs were ten Medicaid-eligible children who needed intensive home and community-based mental health services to correct or ameliorate their psychiatric and behavioral health disorders. *Id.* at ¶ 5. Plaintiffs claimed that, by failing to provide these services, Defendants violated the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions of the federal Medicaid Act, as well as the Integration Mandate of the Americans with Disabilities Act (ADA).[1] *Id.* at ¶ 3.

Plaintiffs filed a motion to certify the class along with a joint stipulation as to the class definition. On July 23, 2010, this Court granted the motion and certified the following class:

> All persons under the age of 21 who now or in the future:
>
> (1) meet or would meet the State of Washington's Title XIX Medicaid financial eligibility criteria;
>
> (2) are determined and documented by a licensed practitioner of the healing arts operating within the scope of their practice as defined by Washington state law, to have a mental illness or condition, or had a screen or an assessment been conducted by such practitioner, would have been determined and documented to have a mental illness or condition;
>
> (3) have a functional impairment, which substantially interferes with or substantially limits the ability to function in the family, school or community setting; and
>
> (4) for whom intensive home and community based services coverable under Title XIX Medicaid and eligible for Federal Financial Participation, have been, or

[1] On October 27, 2011, Plaintiffs filed the First Amended Complaint, which added the Director of the Washington State Health Care Authority (HCA) as a defendant and dismissed one named Plaintiff. Dkt. 83, ¶ 29. The First Amended Complaint is the operative pleading in this case.

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> would have been recommended by a licensed practitioner in order to correct or ameliorate a mental illness or condition.

Dkt. 60 at 2.

Throughout this time, Plaintiffs vigorously litigated their claims and Defendants vigorously denied liability and asserted their defenses. *See, e.g.,* Carlson Decl. ¶ ¶ 26-27, 29-30; Ex. 1 ¶ 80.

2. Settlement Negotiations

In October 2010 the parties agreed to enter into mediation to attempt to resolve all of the issues in this case. Upon application, the Court vacated the case scheduling order so that mediation could proceed. Dkt. 68 at 1. Initially, the parties worked with the assistance of mediators Theresa Wakeen and Kathleen Noonan. Gardner Decl. ¶ 17. The parties then continued direct negotiations without mediators in approximately eighteen in-person sessions conducted over the course of the next fifteen months. Gardner Decl. ¶ 18.

As a result of these efforts, the parties reached an Interim Agreement approved by this Court on March 7, 2012. Dkt. 100. The Interim Agreement's objective was to "establish the infrastructure and necessary collaboration towards readiness to provide intensive home and community based mental health treatment and supports …." Dkt. 99, Ex. 1, ¶ 1. Defendants worked, with input from Plaintiffs' counsel, to "undertake those planning and development activities necessary to lay a foundational base to implement the services demanded in the Complaint." Dkt. 99 at 3.

Although a significant milestone, the Interim Agreement did not resolve Plaintiffs' claims completely. Dkt. 99, Ex. 1, ¶ 8. In February 2013, the parties reinitiated settlement discussions. Over the next five months, the parties engaged in approximately eleven days of negotiating, including several days with the assistance of mediator Kathleen Noonan. Carlson Decl. ¶ 42; Gardner Decl. ¶ 23. The parties reached agreement on the proposed Settlement Agreement in July. Carlson Decl. ¶ 55.

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B. Summary of Settlement Provisions

The purpose of the proposed Settlement Agreement "is to direct development of a sustainable service delivery system of intensive home and community based mental health services to Medicaid eligible children and youth …." Ex. 1, ¶ 1. To effectuate this purpose, Defendants have agreed that Intensive Care Coordination, Intensive Home and Community Based Services, and Mobile Crisis Intervention and Stabilization Services are covered under Washington's State Medicaid plan. *Id.* at ¶ 79. These services are collectively referred to as Wraparound with Intensive Services (WISe), and are defined in Appendix A to Exhibit 1 attached to this motion. Practically speaking, these services will allow class members to access intensive mental health services while remaining in their homes, minimizing the need for costly and unnecessary institutionalizations. Experts agree that providing services to children in their homes and communities is both more successful and more cost-effective than serving them in institutions. Dkt. 1, ¶ 14.

Subject to this Court's final approval of the proposed Agreement, Defendants agree to expand statewide program capacity to provide WISe services to all youth for whom intensive home and community based services are medically necessary. Ex. 1 ¶, 27. According to Defendants' estimates, as many as 23,000 children and youth in Washington may have risk factors that indicate a need for WISe services and supports. *Id*., App. D at 5. Defendants will establish a protocol for identifying, screening, and referring at-risk youth to WISe using a transparent process and in consultation with a mutually agreed clinical expert. Ex 1. ¶ 27. Following this protocol, there will be an individualized determination as to which youth are eligible for WISe services. Defendants also agree to establish, within ninety days following this Court's final approval, an initial estimate of the number of children and youth who are expected to utilize WISe. *Id.* Subsequently, Defendants will provide a schedule for increasing system capacity over the course of the next five years. *Id.*

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Defendants will deliver services to class members in accordance with the WISe Access Protocol, as described in Appendix C to Exhibit 1. *Id.* at ¶ 22. This protocol dictates that children will be screened for the need for WISe using the Child and Adolescent Needs and Strengths, a data tool that evaluates children's needs and the efficacy of the services they receive. *Id*. at ¶ 29. Defendants agree to develop a manual that describes WISe and instructs practitioners and providers on documentation and operational requirements. *Id*. at ¶ 62.

Additionally, the proposed Agreement affords class members important due process protections. Defendants will establish due process procedures to ensure Plaintiffs and their families understand their right to challenge Medicaid determinations. *Id*. at ¶¶ 34-38. Defendants will also modify regulations, issue directives, and require that Prepaid Inpatient Health Plans monitor and collect data, in order to ensure due process compliance. *Id*. at ¶¶ 35, 37, 38.

Defendants will complete an Implementation Plan within six months after this Court gives its final approval of the Agreement. *Id.* at ¶ 55. The plan will identify the tasks necessary to fulfill the Defendants' obligations in the Agreement. *Id.* at ¶ 57. Defendants will submit the plan to this Court for approval and provide annual status reports. *Id.* at ¶¶ 58-59.

The parties anticipate completing implementation of the proposed Agreement on or around June 30, 2018. *Id.* at ¶ 65. At that time, Defendants' obligations in the lawsuit will terminate if they are able to demonstrate substantial compliance with the Exit Criteria set forth in the proposed Agreement. *Id.* at ¶¶ 2, 65.

C. Attorneys' Fees and Costs

Defendants have agreed to pay a liquidated amount of $3.1 million to Plaintiffs for attorneys' fees, costs, and expenses incurred in litigating this matter through August 31, 2013. Carlson Decl. ¶ 53. The negotiated fee amount represents a roughly 40% reduction from Plaintiffs' total lodestar claim. *Id*. at ¶ 56.

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The parties negotiated this amount in two phases—first at the conclusion of mediation on the Interim Agreement, and again after agreement had been reached on the proposed Settlement Agreement. *Id*. at ¶¶ 54-55. Subsequent to filing the Interim Agreement on March 7, 2012, the parties negotiated an amount of $2.1 million to be paid to Plaintiffs for fees and costs incurred from pre-filing through March 7, 2012. *Id*. at ¶ 54; *see* Ex. 1 ¶ 90. After finalizing the proposed Settlement Agreement in July 2013, the parties initiated negotiations of attorneys' fees and costs.[2] Carlson Decl. ¶ 55. The parties reached an agreed amount of $1 million for the period March 8, 2012 through June 30, 2013, with forbearance of any claim for the period July 1 through August 31, 2013. *Id*. at ¶ 53.

Pursuant to Federal Rule of Civil Procedure 23(h), Plaintiffs will file a separate motion seeking court approval of the attorneys' fees and costs award. Plaintiffs request that this Court set the hearing on the fee motion at the same time as the fairness hearing.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

Federal Rule of Civil Procedure 23(e) requires parties to obtain court approval prior to settling the claims of a certified class. The court approval process occurs over several stages: (1) the court preliminarily approves the proposed settlement; (2) class members receive notice of the proposed settlement; and (3) the court conducts a final fairness hearing to determine whether the settlement is fair, reasonable, and adequate and thus should be approved. *Manual for Complex Litig*. §§ 21.632-34 (4th ed. 2004). In analyzing the fairness, reasonableness, and adequacy of an agreement, courts weigh a number of factors, including "the risk, expense, complexity, and likely duration of further litigation; … the amount offered in settlement; … [and] the experience and views of counsel …." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

[2] The Settlement Agreement does not provide for a set amount of attorneys' fees and costs; instead, it requires the parties to engage in good faith negotiations to reach agreement on this amount. Ex. 1, ¶ 89.

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At the preliminary approval stage, the court's inquiry is a limited one. The court should grant preliminary approval if "the 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 …." *In re NASDAQ Market-Makers Antitrust Litig*., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing *Manual for Complex Litig*., § 30.41 (3d ed. 1995)); *see also Manual for Complex Litig*., § 21.63 (4th ed. 2004). As discussed in more detail below, the proposed Settlement Agreement far surpasses this standard.

A. The Settlement Provides Important Benefits to the Class that Outweigh the Risks of Continued Litigation

The proposed Settlement Agreement is fair, reasonable, and adequate. Under this Agreement, Plaintiffs will recover the most important relief they sought at the outset of this suit: to have intensive home and community-based mental health services for children available statewide and covered under Washington's Medicaid plan. In their Complaint, Plaintiffs alleged that class members could "access only a limited tool kit of weekly office-based therapy and medication management." Dkt. 1, ¶ 4. Under the proposed Agreement, children would receive individualized mental health services in their homes or communities so that they may avoid unnecessary hospitalization or other institutional or group care. These new services include intensive care coordination, intensive home and community based services, and mobile crisis intervention and stabilization services. Ex. 1, ¶ 20. Additionally, these new services will be coordinated by child and family teams that place the child and his or her caregiver at the center of the decision-making process. *Id*. at ¶ 21. Plaintiffs will also obtain other significant relief such as the screening of children for potential need for WISe, trainings that educate children and their families on the availability of WISe, and implementation of due process protections. *Id*. at ¶¶ 22-23, 29, 32, 34-38, 57(g).

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Plaintiffs' counsel believe the proposed settlement achieves a significant victory for the class that would be far from guaranteed through further litigation. Plaintiffs filed this suit nearly four years ago. The Plaintiff children do not have years to wait for greater hypothetical relief when Defendants are offering to change their system now. While Plaintiffs contend they have strong legal claims, Defendants have consistently denied liability, and resolution of Defendants' legal defenses could have resulted in protracted appeals and lengthy delays. *See* Ex. 1 ¶ 80. Given this case's long history, both parties are keenly aware that, if this settlement attempt fails, another opportunity to settle may not be possible in the near future.

Class counsel has met with the named Plaintiffs and/or their next friends to discuss the proposed settlement. Carlson Decl. ¶ 57. The named Plaintiffs are supportive of the Agreement and have not expressed any objections to counsel. *Id*. Class members will have the opportunity to ask questions and object pursuant to the proposed Notice Plan attached as Exhibit 3. Recognizing that "the very essence of a settlement is compromise," Plaintiffs seek the certainty of settlement and the guarantee of covered mental health services that this proposed Agreement provides. *See Officers for Justice*, 688 F.2d at 624.

Class counsel agree that this Settlement Agreement commits the Defendants to a range of critical obligations that are not worth sacrificing for an undefined outcome that *might* be gained in the courtroom. Class counsel are national experts in litigating broad injunctive relief cases and in reforming mental health care systems and believe this settlement to be fair, reasonable, and adequate. Carlson Decl. ¶ 45; Foster Decl. ¶ 15; Gardner Decl. ¶¶ 29-30; Lewis Decl. ¶ 10; Welch Decl. ¶ 12.

On balance, the immediate and long-term benefits to the class set forth in the proposed Settlement Agreement outweigh the risks of continued litigation.

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B. The Settlement Is the Result of Informed, Non-Collusive Negotiations

Although courts will not delve into the merits of a proposed settlement, the court must be satisfied that the agreement is free from collusion before it will grant preliminary approval. *NASDAQ*, 176 F.R.D. at 102. Preliminary approval should be granted "[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations [and] does not improperly grant preferential treatment to class representatives or segments of the class …." *Id*. (citing *Manual for Complex Litig.*, § 30.41 (3d ed. 1995)). In determining whether collusion existed, courts will look to whether the agreement "was negotiated in haste or in the absence of information illuminating the value of plaintiffs' claims." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

In this case, there can be no question that the agreement is free from collusion. Prior to filing this lawsuit, Plaintiffs engaged in extensive fact investigation. Carlson Decl. ¶¶ 21-26; Foster Decl. ¶ 6. The four years since the initiation of this suit have afforded the parties the opportunity to take a realistic and informed view of their respective positions in the lawsuit. From the beginning, Plaintiffs engaged outside experts to assess Defendants' Medicaid system. Carlson Decl. ¶ 26; Foster Decl. ¶ 11; Gardner Decl. ¶ 14. The parties conducted discovery, both sides propounded requests for production of documents, and Plaintiffs deposed DSHS personnel. Carlson Decl. ¶¶ 27, 30; Foster Decl. ¶ 8. The parties vigorously litigated this case from the outset. Only when Plaintiffs were on the cusp of filing a motion for preliminary injunction did the parties agree to sit down to explore settlement options. Foster Decl. ¶ 10. At various points the parties engaged outside mediators to facilitate their settlement talks. Carlson Decl. ¶¶ 36, 42. Having engaged in formal and informal discovery for several years, the parties came to the table with "sufficient information to make an informed decision about settlement." *See In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 459 (9th Cir. 2000).

In summary, the settlement was not negotiated in haste. This case was filed in November 2009, and settlement negotiations began in January 2011. Gardner Decl. ¶¶ 15, 18. Over one

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year later, the parties agreed to the Interim Agreement, which laid the groundwork for the current proposed reforms. Carlson Decl. ¶¶ 37-38. The parties returned to the negotiating table in February 2013, and after five months of intensive negotiations reached agreement on the proposed Settlement Agreement. Gardner Decl. ¶ 23. All told, the parties have spent roughly nineteen months in settlement discussions. Carlson Decl. ¶¶ 34, 41.

The Settlement Agreement does not give preferential treatment to named plaintiffs nor does it distinguish between subgroups of the class. Carlson Decl. ¶ 52. Rather, the Agreement sets the stage for a statewide system in which every class member has equal access to WISe regardless of his or her geographic location. Ex. 1, ¶ 1.

Finally, there is no hint of collusion regarding the fee payments. When negotiating fees under the Interim Agreement and again under the Settlement Agreement, the parties refrained from negotiating fees and costs until after they had resolved the merits of Plaintiffs' claims. Carlson Decl. ¶¶ 54-55. That Plaintiffs are settling their fee claim at roughly 60% of their lodestar should eliminate any further concern about collusion on the fees. *See* Carlson Decl. ¶ 56.

The proposed Settlement Agreement falls well "within the range of possible approval" and should be approved. *See NASDAQ*, 176 F.R.D. at 102.

IV. THE PROPOSED NOTICE AND NOTICE PLAN ARE REASONABLE

Where a proposed settlement would bind class members, Federal Rule of Civil Procedure 23(e)(1) requires that the class receive notice "in a reasonable manner." Individualized notice is not required, so long as the notice "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Mendoza v. United States*, 623 F.2d 1338, 1350, 1353 (9th Cir. 1980). Notice must also be directed "in a manner that does not systematically leave any group without notice …." *Officers for Justice*, 688 F.2d at 624.

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Plaintiffs' proposed Notice and Notice Plan, attached as Exhibits 2 and 3, are appropriate and reasonably calculated to reach class members. The proposed Notice describes the lawsuit and key settlement terms in clear, easily understood language. It also provides the class with notice of the proposed fee amount and that the amount is subject to this Court's approval. Ex. 2 at 5. The parties will make the Notice accessible in a variety of formats and media—including in print newspapers, online, in hard copy at offices where class members seek services, via interactive video conferences, and through in-person information sessions conducted at several locations. Ex. 3. The Notice makes clear that class members may object to the proposed Agreement, and provides adequate opportunity for such objection or comment. Ex. 2 at 6.

V. CONCLUSION

Through this Settlement Agreement, the parties have developed a shared vision to provide class members with high-quality, individualized, intensive mental health care services. The proposed Settlement Agreement is fair, reasonable, and adequate. More importantly, it promises to bring much needed support to thousands of Washington's children, helping them remain safely in their homes and communities and avoid institutionalization. For the foregoing reasons, Plaintiffs respectfully urge this Court to enter the proposed order: (1) granting preliminary approval of the proposed Settlement Agreement; (2) approving the proposed Notice; (3) directing that notice to the class be given pursuant to the Notice Plan; (4) setting a deadline for Plaintiffs to file their motion for attorneys' fees and costs so that it may be heard at the final fairness hearing; and (5) setting a schedule for the final fairness hearing.

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Dated: August 29, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: John McIlhenny Jr. (JohnM5@atg.wa.gov), Bill G. Clark (BillC2@atg.wa.gov), and Eric Nelson (EricN1@atg.wa.gov).

DATED this 29th day of August, 2013.

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