

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
TIME: _____

JUL 7 - 2004

JAMES BONINI, Clerk
COLUMBUS, OHIO

NANCY MARTIN,
et al.,

Plaintiffs,

vs.

Case No. C2-89-362
Judge Edmund A. Sargus, Jr.
Magistrate Judge Norah McCann King

ROBERT TAFT,
et al.,

Defendants.

ORDER

This class action for declaratory and injunctive relief seeks to establish and enforce the rights of Ohio residents with mental retardation or other developmental disabilities to obtain appropriate, meaningful and integrated services in the community. This matter is before the Court for preliminary approval of the settlement and consent order proposed by the Plaintiff Class and Defendants Bob Taft, Governor of the State of Ohio; Kenneth W. Ritchey, Director of Ohio Department of Mental Retardation and Developmental Disabilities; and Thomas J. Hayes, Director of Ohio Department of Job and Family Services ("Defendants"). Consistent with the requirement under Fed. R. Civ. P. 23(e), Plaintiffs and Defendants indicate that they have settled this case following extensive compromise negotiations and now request the Court's approval of the terms of their settlement as set forth in the form of a Consent Order.¹

¹ The parties have concurrently filed a motion for approval of notice and to set a fairness hearing. That motion is addressed by separate Order.

Rule 23(e) provides in full: "Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed. R. Civ. P. 23(e). In this regard, three steps must be taken: (1) the Court must preliminarily approve the proposed settlement; (2) members of the class must then be given notice of the proposed settlement; and (3) a hearing must be held, after which the Court must decide whether the proposed settlement is fair, reasonable and adequate. *Tennessee Ass'n of Health Maintenance Organizations, Inc. v. Grier*, 262 F.3d 559 (6th Cir. 2001)(citing *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)).

Plaintiffs filed this action on April 27, 1989. On February 5, 1990, the Court certified the following class pursuant to Fed. R. Civ. P. 23(b)(2):

[A]ll mentally retarded or developmentally disabled Ohioans who are, or will be, in need of community housing and services which are normalized, home-like and integrated, and a subclass who, in addition to being members of the class, are or will be, Medicaid recipients.

By agreement of the parties, the Court appointed a mediator on December 11, 1992 to preside over the parties' preliminary settlement negotiations. For several months, the parties, their representatives and the Court-appointed mediator met regularly in a concerted effort to arrive at a final compromise of the difficult and complex issues involving the role of the State of Ohio in providing services to a large and diverse population of mentally retarded and developmentally disabled persons. Despite the parties' earnest and conscientious attempts to settle, their efforts continued through July 1993 but in the end failed.

Plaintiffs filed a second amended class action complaint on August 17, 1993. On September 23 1993, Defendants moved to dismiss, which the Court granted in part and denied in part on December 14, 1993. On January 5, 1994, the Court granted Defendants' motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b). Ultimately, on June 12, 1995, the Court of Appeals for the Sixth Circuit declined to accept the interlocutory appeal.

During the time the parties attempted to appeal, they engaged in discovery. On August 30, 1996, however, the parties agreed to stay all discovery to participate in focused settlement negotiations. The case remained in a stay while these voluntary settlement negotiations continued for almost two years. Again, because of the complexities of the legal issues and the numerous governmental agencies that were involved, these compromise efforts failed. The Court continued to facilitate the settlement process through the filing of Plaintiffs' third amended complaint on April 25, 2000.

Plaintiffs' third amended complaint reflected major changes in the law with respect to the Americans with Disabilities Act, and in particular, the United States Supreme Court watershed decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). Defendants moved to dismiss on May 12, 2000. Plaintiffs moved for partial summary judgment on their ADA claim under *Olmstead* on July 31, 2000. Subsequently, several parties intervened as *amicus curiae*, the parties litigated discovery disputes, and Plaintiffs filed several memoranda supplementing their motion with additional authority. On September 19, 2002, the Court issued a comprehensive Opinion and Order denying Plaintiffs' motion for partial summary judgment and denied in part and granted in part Defendants' motion to dismiss.

For the next several months, the parties proceeded to prepare for trial, indicating to the Court that settlement was unlikely. In September 2003, the case was reassigned to the undersigned and scheduled for trial. At the insistence of the Court, the parties once again engaged in comprehensive settlement negotiations which, at this last attempt, proved to be successful.

After reviewing the terms of the proposed class settlement agreement, the Court gives its preliminary approval. Upon first impression of the record before the Court, the agreement appears to be fair, adequate, reasonable and consistent with the public interest. *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986). Counsel represent that they arrived at the settlement following extensive discovery, full consultation with experts and arms-length negotiations. The Court preliminarily regards the settlement as fair, adequate and reasonable under the circumstances of this case, giving due regard for the merits of the claims and defenses advanced by the parties, the uncertainty of litigation and the costs of proceeding to trial.

Under its terms, the proposed consent decree outlines the continued efforts of the State of Ohio to implement programs and policies to assure the health and safety of individuals with MR/DD residing in the community and publicly funded supports, as well as individuals receiving residential services. Defendants make no admission of liability or wrongdoing by entering into the settlement. Under the terms of the consent decree, Defendants agree to take steps to ensure that class members are provided an opportunity to choose community based services. In particular, the Governor of the State of Ohio, Bob Taft, agrees to include in his Executive Budget for state fiscal years 2006 and 2007 a proposal for the elimination of intermediate care facilities for the mentally retarded (ICF/MR) as an optional service under the State of Ohio's Medicaid program. If the Governor's proposal is adopted by the State General Assembly, the Defendants will develop with, and seek approval by, the

U.S. Department of Health and Human Services (HHS), a waiver to provide services to current and future residents of the existing ICFs/Mr. This waiver will insure for each resident the ability to choose the setting in which to have services provided to them. The parties agree to use their best efforts to seek the enactment of the Governor's Executive Budget on these issues.

Further, under the terms of the settlement, the parties agree to provide interim priority of I/O waiver slots for community integration, subject to specific terms and calculations. Defendant Ritchey will file a rule to implement this priority. Moreover, Defendant Ritchey agrees to conduct a survey of the residents of developmental centers operated by the Ohio Department of Mental Retardation and Developmental Disabilities to determine which of the residents may wish to choose community placement if one would be available. The results of the survey will be shared with Plaintiffs and will be used solely for informing the budget cycle. Similarly, Defendant Hayes will conduct a survey of residents of private ICF/MRs in Ohio and ICF/MRs operated by county boards of mental retardation and developmental disabilities and/or boards of county commissioners in Ohio to determine which of the residents may wish to choose a community placement if one would be available. These results also will be shared with Plaintiffs and used solely for informing the budget cycle.

Defendants will provide quarterly reports to class counsel as to the status of the implementation of the settlement. Class counsel will have access to all documents related to the implementation of the consent order. In the event of a dispute over the production of any record, Plaintiffs may seek any remedy available under the Ohio Public Records Act.

Each party is to bear their own costs and attorneys' fees, except that Defendants shall pay up to \$80,000.00 in litigation related expenses and costs to the Plaintiffs following adequate

documentation of such expenses.

Based on the materials presented to the Court and counsel's representations, the Court concludes that the proposed settlement appears to be in the interests of the parties. *ARO Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976). The Court concludes that the compromise embodied in the decree is neither illegal nor tainted with collusion. *See Tennessee Ass'n of Health Maintenance Organizations*, 262 F.3d at 565 (holding that court must preliminarily determine whether compromise is illegal or tainted with collusion).

Accordingly, the Joint Motion for Approval of Settlement of Class Action is **PRELIMINARILY APPROVED**. The terms of the parties settlement, as set forth in the Consent Order, are subject to final disposition following the fairness hearing. The **FAIRNESS HEARING** is hereby scheduled for **SEPTEMBER 14, 2004 AT 10:00 A.M.**

IT IS SO ORDERED.

7-7-2004
DATED

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EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE