

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
(Northern Division)

L.J., et al., \*

Plaintiffs, \*

v. \*

Civil Action No. JFM-84-4409

RUTH MASSINGA, et al., \*

Defendants. \*

\* \* \* \* \*

**MEMORANDUM IN SUPPORT OF  
JOINT MOTION FOR PRELIMINARY APPROVAL OF MODIFIED CONSENT  
DECREE, FOR AN ORDER FOR NOTICE OF PROPOSED MODIFIED CONSENT  
DECREE AND SCHEDULING OF A FAIRNESS HEARING,  
AND FOR FINAL APPROVAL OF MODIFIED CONSENT DECREE**

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs L.J., et al. and Defendants the Maryland Department of Human Resources (“DHR”) and the Baltimore City Department of Social Services (“BCDSS”), by their undersigned counsel, hereby submit this Memorandum in Support of Joint Motion for Preliminary Approval of Modified Consent Decree, for an Order for Notice of Proposed Modified Consent Decree and Scheduling of a Fairness Hearing, and for Final Approval of Modified Consent Decree. For the reasons set forth below, the parties respectfully request that the Court (1) grant preliminary approval of the proposed Modified Consent Decree, which is appended to this Memorandum as Attachment A; (2) approval of the process set forth in a proposed order for providing notice to the class and other interested parties of the proposed Modified Consent Decree and a fairness hearing scheduled for

August 5, 2009 at 9:00 a.m. ; and (3) to grant final approval of the proposed Modified Consent Decree after the conclusion of the fairness hearing.

**I. Factual Background.**

Plaintiffs in this action are the certified class of all children and youth placed in the custody of BCDSS. See L.J. v. Massinga, 699 F. Supp. 508, 510 (D. Md. 1988) (“L.J. I”), as modified, 778 F. Supp. 253 (1991) (“L.J. II”). Defendants are DHR and BCDSS. The action was filed in December 1984 seeking, inter alia, orders requiring Defendants to meet certain needs of Plaintiffs while in BCDSS custody, including certain protections against maltreatment of children in foster homes and other protections for their welfare. Following a trial of Plaintiffs’ motion for preliminary injunction, this Court’s grant of a preliminary injunction, and affirmance by the Fourth Circuit, the parties settled Plaintiffs’ claims for declaratory and injunctive relief by agreeing to a decree (the original “Consent Decree”), effective August 1988, with the final approval of the Court in September 1988. See L.J. I, 699 F. Supp. at 518 (setting forth terms of the Consent Decree). The original Consent Decree left open for further study and possible litigation issues involving children in BCDSS custody placed with unlicensed relatives. The parties then settled those claims for declaratory and injunctive relief by agreeing to a modification of the original Consent Decree that, in inter alia, provided most of the same protections to Plaintiffs placed in unlicensed relative homes. In December 1991, the Court approved this modification (the “Modification”) to the original Consent Decree. See L.J. II, 778 F. Supp. at 527. Both the original Consent Decree, as modified, and the Modification still are in effect.

In May 1989, the Court entered an order calling for a “monitor” of Defendants’ implementation of the Consent Decree, to conduct dispute resolution. George Beall, Esq. was appointed as monitor and remained in this position until he resigned in 2007. No new monitor was appointed. In December 2005, the Court entered certain orders to facilitate monitoring of Defendants’ utilization of a BCDSS office facility located on Gay Street, Baltimore (“Gay Street”) to house some Plaintiffs overnight.

In November 2007, Plaintiffs filed a Petition for Orders of Enforcement and to Show Cause Why Defendants Should Not Be Held in Contempt of Consent Decree, and Motions to Modify Consent Decree and Monitoring Order (the “Petition”). Defendants filed a Response on March 14, 2008, and, on July 24, 2008, Plaintiffs filed a Reply Memorandum. After the commencement of a hearing on the Petition on September 9, 2008, but before the Court heard arguments on the Petition, the parties requested leave to negotiate a new agreement addressing the terms for compliance and exit. The Court approved the request and administratively dismissed the Petition so that it could be held in abeyance pending the negotiations.

From October 2008 through May 2009, the parties engaged in negotiations with the assistance of mediators Judith Meltzer and Kathleen Noonan. As a result of those negotiations, the parties have agreed to the proposed Modified Consent Decree.

## **II. Summary of the Proposed Modified Consent Decree.**

If approved by the Court, the proposed Modified Consent Decree will replace the 1988 Consent Decree, the 1991 Modification, the 1989 Order Appointing a Monitor, and all Orders relating to Gay Street. It addresses all of the substantive issues discussed in those orders (family preservation, permanency planning, placements, safety, health, education, and workforce issues)

and sets forth more specific outcomes, definitions, internal success measures, and exit standards. In general, it follows the approach used in more recent foster care consent decrees approved in other jurisdictions, some of which have led to successful resolution of those cases and termination of federal jurisdiction. It includes specific terms and standards upon which the Defendants will be deemed to be in compliance and allowed to terminate the Consent Decree and exit from active supervision by this Court.

Under the proposed Modified Consent Decree, Defendants will hire an Independent Verification Agent, Dr. Mark Testa, the Director of the Children and Family Research Center at the University of Illinois at Urbana-Champaign. A copy of Dr. Testa's website bio is attached as Attachment B. Dr. Testa will examine Defendants' compliance data, certify those data that are accurate and reliable, and, where he deems necessary, conduct additional information-gathering activities to measure compliance accurately. Furthermore, the proposed Modified Consent Decree requires the parties to utilize a variety of resolution procedures to facilitate compliance and resolve disputes without resort to the Court.

The proposed Modified Consent Decree is divided into two parts. Part One includes general sections governing jurisdiction, the scope and effect of the agreement, compliance reporting by Defendants, verification of Defendants' compliance data, information sharing with Plaintiffs' counsel, procedures for dispute resolution and problem-solving by the parties, and termination of the Modified Consent Decree. The rights of the Plaintiffs and obligations of the Defendants are set out in Part Two, which is divided into five sections, "Preservation and Permanency Planning," "Out-of-Home Placements," "Health Care," "Education," and "Workforce."

A general summary of these provisions follows.

**A. Part One (general provisions) of the proposed Modified Consent Decree.**

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1. **General provisions on jurisdiction and scope.** In Section I of Part One, the proposed Modified Consent Decree generally incorporates, with some modification, the provisions of the decrees presently in force regarding jurisdiction, terms for the Court's enforcement powers, notice to the class, and other issues of general application. In this Section, Plaintiffs agree to dismiss voluntarily the Petition after entry of an order of judicial approval and expiration of the appeal period without an appeal.

2. **Compliance reporting, verification, and information -sharing.** Under the current decrees, Defendants are required to file compliance reports with the Court every six months. The decrees do not provide for independent verification of the Defendants' compliance reports. The proposed Modified Consent Decree would continue to require six-month compliance reporting by Defendants, but, pursuant to Section II of Part One, all such data will be subject to verification by an "Independent Verification Agent," who will be responsible for ensuring that (1) the data and other information reported by Defendants are accurate, valid, and reliable; (2) the measures and methods used by Defendants to report data and other information are accurate, valid, and reliable; (3) Defendants have in place sufficient quality control and review processes to verify accurately and regularly the accuracy of data provided through their management information systems; and (4) Defendants' case review process is accurate, valid, and reliable.

Generally, Dr. Testa's verification activities will have two key functions: (1) to provide accurate, independent information to the Court and the parties about system performance to

implement the requirements of this Decree; and (2) to provide feedback to Defendants that supports self-correcting measures and ongoing quality improvement by Defendants. Under this agreement, Defendants are required to provide Dr. Testa with reasonable access to all documents, data, and interested persons within their control and or accessible to them.

Should Dr. Testa determine that the Defendants have not provided sufficiently reliable and accurate information to measure their performance on the requirements of the Modified Consent Decree, he may conduct additional information-gathering activities that he believes are necessary to measure performance accurately. These may include, but are not limited to, case record reviews, quality service reviews, interviews, surveys of children and other stakeholders, and review of data available to Defendants. Plaintiffs' counsel have the right to all documents considered by the Independent Verification Agent as well as to other documents through the processes set forth in the proposed Modified Consent Decree. Through these provisions, Plaintiffs' counsel will have substantially greater access to information than they currently have available under the current Consent Decrees. Moreover, Defendants must notify Plaintiffs' attorneys immediately of the death or serious injury of any Plaintiff and must notify both Plaintiffs' attorneys and the children's Child in Need of Assistance ("CINA") attorneys within five days of any allegation of maltreatment of a Plaintiff in his or her placement. The former requirement is new, and the latter requirement expands the protections in the current decrees.

**3. Dispute resolution.** The proposed Modified Consent Decree encourages the parties to communicate regularly to resolve problems and discuss barriers to compliance. A Forum Facilitator will chair a quarterly meeting for this purpose. Before any party brings an issue (other than one affecting the health and safety of the Plaintiffs) to the Court, the parties

must attempt to resolve the issue through a dispute resolution process. The Forum Facilitator will mediate disputes arising under the proposed Modified Consent Decree and may be asked by either party to issue a report with recommendations. If the dispute is not resolved, it may be taken to the Court for resolution. This Forum also will be used to address concerns concerning Plaintiffs' access to information, the Independent Verification Agent's decision (if it occurs) not to certify Defendants' compliance data, and other related issues.

**4. Enforcement, termination, and exit.** The existing decrees do not specifically address the terms upon which the Court may lift the Consent Decree and allow the Defendants to exit its supervision. In contrast, the Modified Consent Decree provides clear terms and standards for enforcement, termination, and exit. At any time after Court approval of this proposed Modified Consent Decree, Plaintiffs may file proceedings if they believe that immediate and irreparable harm to a group of children will result from Defendants' non-compliance with the Modified Consent Decree. Beginning January 1, 2011, if Defendants are not in compliance with a requirement of the decree, Plaintiffs may initiate proceedings to enforce compliance with any provision of the decree. If the Independent Verification Agent validates that Defendants have met the Exit Standard(s) for an Outcome for three consecutive six-month reporting periods, he will certify compliance with that Outcome, after which Defendants no longer are required to report to the Court on compliance. They must continue to report such information in their regular management reports on at least a quarterly basis. If Defendants' performance on the Outcome over the course of a year falls a certain amount below the Exit Standard requirement, Plaintiffs can ask the Independent Verification Agent to "decertify" compliance with that Outcome, in which case Defendants' reporting obligations to the Court would resume.

Defendants may ask the Court to terminate the Modified Consent Decree and allow them to exit from Court supervision at such time as they are certified as compliant with every Outcome.

**B. Part Two (substantive provisions) of the proposed Modified Consent Decree.**

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The substantive requirements of the Modified Consent Decree are divided into five sections: (1) preservation and permanency planning; (2) out-of-home placements; (3) health care; (4) education; and (5) workforce. Each section includes six components: (1) Statements of Principles; (2) Defendants' Responsibilities; (3) Outcomes with Definitions; (4) Internal Success Measures; (5) Exit Standards; and (6) Additional Commitments by Defendants. The Statements of Principles are general explanations of the goals of the section; they are not enforceable but may be used to interpret the decree's terms and requirements. The Responsibilities subsections set forth the general responsibilities of Defendants in each subject area. Following the Responsibilities, each section contains specific Outcomes for Plaintiffs that Defendants must achieve. These Outcomes include Definitions, which set forth defined terms for the Outcomes as well as policies, procedures and practices to achieve compliance with the Outcomes. Defendants' performance under the Outcomes will be measured by Internal Success Measures, which track many of the specific Definitions, and by Exit Standards, which set forth various standards for certification of compliance and eventual exit from the Decree. Finally, in addition to the Outcomes, the Modified Consent Decree requires Defendants to perform various Additional Commitments, which will complement and advance the other commitments specified for the Outcomes.



It is impracticable to set forth and discuss here all terms and provisions of the Substantive Requirements. Therefore, the parties will set forth the Outcomes in full and briefly discuss certain other provisions.

**1. Preservation and Permanency Planning.** As set forth in Section I of the Substantive Requirements, Defendants are responsible for making reasonable efforts to prevent or eliminate the need for placement of each child into out-of-home placement (“OHP”), and to reunify each child who has been placed in OHP, by providing to families and children at risk of OHP, and to families whose children are in OHP, a range of sufficient services to support the families and avoid unnecessary placements into OHP or unnecessarily prolonged stays in OHP. This responsibility builds upon similar provisions in the current decrees, but, as set forth both in the “Responsibilities” subsection and in the Outcomes and other provisions, the commitments by Defendants are more specific and clearly defined. The Modified Consent Decree, for instance, will require achievement of each of the following outcomes:

1. **Preserve Families:** Except in cases where safety requires the emergency removal and shelter care of a child, BCDSS shall provide each family of a child at risk of removal with assistance, or referral for services as appropriate, to address identified problems, and BCDSS shall provide or obtain and shall monitor such services in a duration and intensity reasonably calculated to enable the child to remain with the family without removal.

2. **Minimize Length of Stay:** BCDSS shall implement and achieve the child’s permanency plan quickly. BCDSS shall provide each child in OHP and each family of a child in OHP with assistance, or referral for services as appropriate, to address identified problems and needs, and BCDSS shall provide or obtain and shall monitor such services in a duration and intensity reasonably calculated to implement expeditiously and finalize the child’s permanency plan. This requirement shall continue until the Juvenile Court ends BCDSS’s obligations to the child.

3. **Families Involved in Decision-Making:** BCDSS shall utilize a planning and decision-making model in which BCDSS makes reasonable efforts to fully involve the family of origin, the extended family members, the child (as clinically appropriate),

the child's attorney, and other individuals able to contribute to positive outcomes for the child at each critical decision-making point.

4. Each Child Has a Case Plan that Guides the Permanency Plan: Within sixty days of entering OHP, each child shall have a case plan that shall be updated and approved by an internal review team at least once every six months and which shall guide the permanency plan for the child.

5. BCDSS Will Provide Services Consistent with a Comprehensive Plan to Prepare Youth in OHP for Independence: Each child ages fourteen and over shall receive services, including independent living services, that are reasonably calculated to successfully transition the child to adulthood by age twenty-one.

Three of these five Outcomes (preserve families; involvement of families in decision-making, and provision of services to prepare youth in achieving independence) are either new or significantly updated from corresponding provisions in the current decrees. Each Outcome has Definitions that set forth defined terms for the Outcome as well as policies, procedures and practices to achieve compliance with the Outcome. Furthermore, the new decree sets forth seven Additional Commitments that supplement the requirements of the Outcomes as defined in the Definitions, such as provisions for funding of in-home family preservation services and for needed reunification services.

2. **Out-of-Home Placement.** In Section II of the Substantive Requirements, Defendants are responsible for establishing and maintaining a continuum of out-of-home placements and caregiver supports that is reasonably calculated to ensure that each child in OHP is placed in a stable, least restrictive and appropriate placement. This responsibility extends to consideration of the proximity to the child's home prior to entering OHP and utilization of available extended family members (kin) or other available individuals known to the child. While the original Consent Decree also requires a continuum of placements, the Modified Consent Decree will require achievement of each of the following Outcomes:

1. Each child shall be placed promptly in the least restrictive appropriate placement type for that child's needs.

2. No child under the age of thirteen shall be placed in congregate care unless it is medically or therapeutically necessary and the child is placed in a program that has services specifically designed to meet that child's needs.

3. DHR/BCDSS shall maintain a continuum of placements reasonably calculated to assure that each child is placed in the least restrictive placement for that child.

4. Each child in OHP and the child's caregiver shall be provided those services necessary and sufficient (1) to meet the child's immediate and long-term needs; (2) to support the stability of the child's placement and to support the caregiver's ability to meet the child's needs; (3) to avoid placement of the child in a more restrictive setting; and (4) to move the child, if appropriate given the child's needs, to a less restrictive setting.

5. Each kinship care provider shall be informed promptly of his or her right to apply to become a licensed foster parent, and each application for licensure shall be timely processed with retroactive benefits provided to the date of application. Each kinship care provider will be given an application and afforded the opportunity to file an application on the date the child is placed in the home. An application will be deemed to have been made when the caregiver indicates in writing his or her desire to become a licensed foster parent. Each kinship care provider shall be afforded the same opportunities for training and other services as licensed foster parents.

6. BCDSS shall employ a staff of specialists to provide technical assistance to caseworkers and supervisors for cases that require specialized experience and/or knowledge.

7. Each child's placement shall meet all safety, health, sanitation, licensing and other legal requirements for that placement. Each placement provider shall receive all training required by law.

8. For each child, DHR/BCDSS shall provide the caregiver with all available information about the child's status, background, and needs.

9. Each child shall be protected from maltreatment in the child's placement to the maximum extent possible.

10. No child may be housed in an office, motel, hotel, or other unlicensed facility.

11. Each child shall be given the opportunity to be informed about and, as clinically appropriate, to participate actively in placement decisions being made for the child.

12. Each child in OHP shall be visited by the child's assigned caseworker or designated substitute at least once every month in the child's placement.

Among the specific requirements for these Outcomes are provisions requiring Defendants to support child care and respite care for foster parents and kinship caregivers under certain circumstances and to conduct a biennial needs assessment of the Plaintiffs' placement needs and to have an array of placements matching the assessment recommendations. The proposed decree also sets forth nine Additional Commitments that supplement the requirements of the Outcomes, such as regular increases in foster parent and Semi-Independent Living rates for youth transitioning to independence; child care for elementary school-age children; emergency shelter homes; and a kinship caregiver support center.

**3. Health Care.** In Section III of the Substantive Requirements, Defendants are responsible for developing, establishing, and maintaining a medical care system reasonably calculated to provide comprehensive health care services to children in OHP in a continual and coordinating manner in accordance with their needs. Specifically, the Modified Consent Decree will require achievement of each of the following Outcomes:

1. Each child in OHP must receive an initial health screen prior to placement, but, in any event, not later than five working days following placement in OHP.
2. Each child in OHP must receive a comprehensive health assessment within sixty days of entry into OHP.
3. Each child in OHP must receive timely periodic EPSDT examinations, and all other appropriate preventive health assessments and examinations, including examinations and care targeted for adolescents and teen parents.
4. Each child in OHP must receive timely all health services that the child needs, consistent with either of the COMAR regulations addressing OHP medical care in effect as of December 9, 2008 (07.02.11.28(M) and (N)).
5. Each child in OHP must have a completed health passport and a medical assistance card, which are provided promptly to each child's caregiver.

Of these Outcomes, numbers 1 and 2 continue the requirements under the current decrees but set forth specific procedures and requirements to achieve those Outcomes. Numbers 3 and 5 contain

new terms requiring preventive health assessments and prompt distribution of medical assistance cards. Number 4 is new. Among the Additional Commitments are requirements that the Defendants continue to implement their Health Care Initiative for meeting these standards, including the development and maintenance of a health services management unit, a medical director, and the utilization of medical case managers to track and oversee the health outcomes and to perform medical case management. Defendants must develop and present a plan for full implementation of the Health Care Initiative for FY 2011 and must operationalize a system to meet the mental health needs of children in OHP by December 2010.

**4. Education.** In Section IV of the Substantive Requirements, Defendants are responsible for ensuring that all children and youth in OHP are provided with appropriate assistance to attend and succeed in school, including having the opportunity for school choice and to participate in school and school-related activities. In appropriate circumstances, BCDSS should encourage the child's caregiver to take primary responsibility for communication with the child's school and meeting the child's day-to-day educational needs. Otherwise, BCDSS is responsible for (1) monitoring educational progress, working with school personnel and caregivers to ensure that educational problems are identified and addressed, and maintaining an educational plan for each child; (2) taking all reasonable steps to obtain from the school system or third parties all necessary educational services for the child to support the child's educational achievement and to ensure that all goals and tasks in the child's educational plan are accomplished; and (3) documenting in the child's case file and notifying the child's caregiver, parents (if appropriate), and attorney of all significant events in the child's education, including, but not limited to, report cards, awards or other recognition, suspension, expulsion, significant

truancy, change of schools, school failure, and the need for special education or other services.

Specifically, the Modified Consent Decree will require achievement of the following Outcomes:

1. Each child in OHP shall be enrolled in and begin attending the child's home school or a new school immediately after entry into OHP and after any change of placement.
2. Each child's case plan shall include an educational plan for ensuring the child's educational stability and progress while in foster care and BCDSS shall monitor the child's educational progress.
3. Each child in OHP shall receive all necessary special education services.

Here, the Modified Consent Decree builds upon current provisions for school enrollment and special education by setting forth certain additional measures, requiring an educational plan (Outcome 2), and setting forth requirements for monitoring the child's educational progress.

**5. Workforce.** Finally, Section V of the Modified Consent Decree addresses requirements for BCDSS workforce serving Plaintiffs and their families. Generally, Defendants shall be responsible for recruiting, supporting, and retaining a well-trained workforce and supervisory system that provides for accountability at every level. Specifically, the Modified Consent Decree will require achievement of each of the following Outcomes:

1. Appropriate Caseload Ratios : Permanency (foster and kinship care, including adoption) workers' caseload of fifteen children (or any lower ratio required by Maryland state law); Family Resource and Support ("R&S") workers' caseload of forty families (or any lower ratio required by Maryland state law); and supervisors' caseload of six caseworkers (or any lower ratio required by Maryland state law).
2. Qualified Workforce with appropriate training and supervision.
3. Case Transfer Policies: Case re-assignment in five working days. Case re-assignment conference in ten working days.

The caseload requirements in Outcome 1 represent a significant reduction from the levels set forth in the current decrees (an average of twenty children/worker for continuing foster care workers and thirty children/worker for kinship care cases). Moreover, the caseload requirements

will apply to caseworkers individually and not as an aggregate average. The second and third Outcomes carry forward the requirements of the current decrees.

**III. The Proposed Modified Consent Decree Fully Protects the Interests of the Class.**

Pursuant to Fed. R. Civ. P. 23(e), this Court must approve any proposed settlement in a class action. Rule 23(e) sets forth the following requirements:

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The Court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires approval under this subdivision (2); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e). The Fourth Circuit has not yet considered these specific terms of Rule 23(e), which were promulgated in 2003. Nevertheless, prior decisions mandated these and additional elements. In Scardeletti v. DeBarr, Case Nos. 99-2619, et al., 43 Fed. Appx. 525 (4th Cir. Aug. 8, 2002), the Fourth Circuit set forth its standard for approval of a settlement of a class action dispute, requiring the Court to conduct a "judicial inquiry into the fairness and adequacy of the proposed settlement," Scardeletti, 43 Fed. Appx. at 538 (citing Kovacs v. Ernst & Young, 927 F.2d 155, 158 (4th Cir.1991)), applying the following factors:

In determining whether a settlement is fair, the district court should examine “(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that has been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel” in the relevant area of class action litigation. [Kovacs, 927 F.2d] at 159. In determining whether a settlement is adequate, a district court should consider “(1) the relative strength of the plaintiffs’ case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.” Id.

Scardeletti, 43 Fed. Appx. at 538. The 2003 amendments to Rule 23(e) have confirmed the requirements of approval by the Court after notice, hearing and a finding that the settlement is “fair, reasonable, and adequate.”

The parties believe that the proposed Modified Consent Decree protects the interests of the class and is fair, reasonable, and adequate. See Attachment C, Declaration of Plaintiffs’ attorney Mitchell Y. Mirviss<sup>1</sup> (“Mirviss Decl.”), Attachment D, Declaration of Plaintiffs’ attorney Rhonda B. Lipkin (“Lipkin Decl.”), Attachment E, Declaration of Defendants’ attorney David E. Beller (“Beller Decl.”).

#### **IV. This Court Should Approve the Proposed Modified Consent Decree.**

Review of a proposed class action settlement generally involves two stages. First, the Court makes a preliminary fairness evaluation on the fairness, reasonableness, and adequacy of the proposed settlement terms and, upon a preliminary finding of fairness, reasonableness, and adequacy, directs the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing. See Federal Judicial Center, Manual for Complex Litigation (Fourth)

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<sup>1</sup> Defendants do not adopt Plaintiffs’ interpretation and characterization of the proposed Modified Consent Decree as set forth in the declarations of Plaintiffs’ counsel. Moreover, Defendants specifically do not agree with the characterizations of this litigation, the current decree, and the proposed Modified Consent Decree contained in the Mirviss Declaration.



§§ 21.632-21.633 (2004); DeJulius v. New England Health Care Employees Pension Fund, 429 F.3d 935, 939 (10th Cir. 2005). The purpose of the preliminary approval process is to determine whether any reason exists not to notify the class members of the proposed settlement and to proceed with a fairness hearing. See, e.g., Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982); 4 Robert Newberg, Newberg on Class Actions, § 11:25 at 38 (4th ed. 2002). After the fairness hearing and consideration of any objections, the Court “must ensure that there is a sufficient record as to the basis and justification for the settlement. ... The record and Court’s findings must demonstrate to a reviewing court that the judge has made the requisite inquiry and has considered the diverse interests and the requisite factors in determining the settlement’s fairness, reasonableness, and adequacy.” Manual for Complex Litigation, supra, at § 21.635. These tests are amply satisfied here.

**A. The Proposed Modified Consent Decree Meets the Requirements for Preliminary Approval.**

As fully set forth in the attached declarations, the proposed Modified Consent Decree meets all requirements for preliminary approval. See Exs. C-D, Mirviss and Lipkin Decls. at ¶¶ 5; Ex. E, Beller Decl. at ¶ 5. The proposed Modified Consent Decree was the result of extensive, non-collusive, arms-length negotiations by experienced counsel. See Mirviss and Lipkin Decls. at ¶¶ 5; Beller Decl. at ¶ 6. Since October 2008, the parties have held numerous meetings to negotiate the proposed Modified Consent Decree and exchanged many drafts. See Mirviss and Lipkin Decls. at ¶¶ 5, 8; Beller Decl. at ¶¶ 4, 6. Both sides have zealously represented the positions of their clients. Id. In addition, the parties agree that the benefit to the class outweighs the possibility of future relief after litigation. See Mirviss Decl. at 5, 11-17 and Lipkin Decl. at ¶¶ 4, 5; Beller Decl. at ¶ 7. The proposed Modified Consent Decree protects the interests of the

Plaintiff class and is fair, reasonable, and adequate. See Mirviss Decl. at 5, 11-17 and Lipkin Decl. at ¶¶ 4, 5; Beller Decl. at ¶ 5. It does not provide preferential treatment to any particular members or segments of the class, nor does it provide for monetary relief to any members of the class. See Mirviss and Lipkin Decls. at ¶¶ 5; Beller Decl. at ¶ 5. Finally, the parties have agreed to defer any consideration of attorney's fees until the conclusion of the judicial approval process. In short, the proposed Modified Consent Decree meets all requirements of Rule 23(e).

**B. The Parties' Proposed Notice Will Fairly Apprise the Class of the Parties' Proposed Settlement.**

Rule 23(e) requires that notice be given "in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e). The content and form of that notice are left to the Court's discretion. Under Rule 23, the standard for the settlement notice is that it must "fairly apprise" the class members of the terms of the proposed settlement and of their options. 3B Moore's Federal Practice ¶ 23.80[3], at 23-484 (citing Gottlieb v. Wiles, 11 F.3d 1004, 1012 (10th Cir. 1993)).

The parties' proposed form of notice is attached as Attachment F. This proposed notice fairly apprises class members of this important juncture in the lawsuit and satisfies the due process concerns of Rule 23(e). It provides the class with information on the date and time of the fairness hearing; a description of the class and this action; a summary of the key terms of the parties' agreement; and the procedure for filing any appearances or objections to the agreement. (See Attachment G, proposed "Objection to Proposed Modified Consent Decree" form.)\_It also informs the class that, if the Court approves the proposed Modified Consent Decree, and upon the expiration of any appeal period, Plaintiffs will voluntarily dismiss their pending petition for

contempt, enforcement and modification. The parties propose that this form of notice be communicated to the class in the following manner:

- (1) The notice, the proposed Modified Consent Decree, the Motion, and this Memorandum and its attachments will be posted on the DHR, BCDSS, and Public Justice Center websites.
- (2) Defendants will either mail or hand deliver the notice and a copy of the Motion, this Memorandum and its attachments, including the proposed Modified Consent Decree, to DHR's contract providers that represent Plaintiffs in CINA cases in the Circuit Court for Baltimore City, Division of Juvenile Causes.
- (3) The notice (with directions on how to find a copy of the Motion, this Memorandum and its attachments, and the proposed Modified Consent Decree) will be distributed by Defendants to the Judges and Masters of the Circuit Court for Baltimore City, Division of Juvenile Causes, the Baltimore City Court Appointed Special Advocate ("CASA") program, the Citizens' Review Boards for Baltimore City and for the State, the Baltimore City foster parent association, the Office of the Public Defender, the Maryland Association of Resources for Families and Youth, the Maryland Disability Law Center, the Superintendent of the Baltimore City Public Schools, the Commissioner of the Baltimore City Health Department, the Coalition to Protect Maryland's Children, Advocates for Children and Youth, the Foster Care Alumni Association of Maryland, the Maryland Foster Youth Resource Center, the members of the BCDSS Health Advisory Group, and University of Baltimore and University of Maryland Law School Professors Barbara Babb and Susan Leviton.
- (4) Defendants will notify individually all Baltimore City foster parents, unlicensed kinship care providers, licensed foster care providers, and parents of Plaintiffs as follows: Defendants will mail to each a postcard, attached as Attachment H, that contains a statement that the parties have moved to modify the existing decrees and that provides the web site addresses where the proposed Modified Consent Decree, the Motion, and this Memorandum and their attachments are posted. In addition, the postcard will have a toll free telephone number that recipients may call to request more information, a copy of these items, or a form for filing an objection.

The parties' proposed process for giving class members notice of the Agreement meets the requirements of Rule 23 and satisfies procedural due process concerns. First, Plaintiffs' counsel have certified that they are authorized to agree to this proposed Modified Consent Decree on behalf of the Plaintiff class. Second, the parties agree to provide notice to Plaintiffs

via their authorized representatives, i.e., their attorneys in their CINA cases in the Circuit Court for Baltimore City, Division of Juvenile Causes. In addition, this process is calculated to reach other interested parties who play a key role in advocating for class members, such as foster parents and kinship caregivers, CASAs, members of the Citizens' Review Board for Children and other community advocates for children.

#### **V. Conclusion.**

The parties' proposed Modified Consent Decree and proposed notice satisfy all requirements of Rule 23. Accordingly, the parties respectfully request that this Court enter the proposed orders preliminarily approving the terms of the Modified Consent Decree and allowing Defendants to move forward with providing notice of the proposed settlement and fairness hearing to class members and other interested parties in the manner set forth herein. Finally, the parties further request that, after the fairness hearing and any further briefing required, this Court enter the proposed order granting final approval of the proposed Modified Consent Decree.

Respectfully submitted,

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