

1. Plaintiffs, individuals with diagnoses of mental retardation who were institutionalized in state-operated psychiatric hospitals, filed this class action lawsuit in June 2009. Plaintiffs alleged that Defendants, the Department of Public Welfare and the Secretary of Public Welfare (collectively, DPW), violated Title II of the Americans with Disabilities Act, [42 U.S.C. §§ 12131-12134](#), and Section 504 of the Rehabilitation Act, [29 U.S.C. § 794](#), by, *inter alia*, failing to offer them mental health and mental retardation services in the community, which is the most integrated setting appropriate to meet their needs. Plaintiffs also alleged that DPW violated the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 by, *inter alia*, failing to provide them with habilitation services to address their mental retardation in the state hospitals and failing to adapt the mental health treatment to take into account their mental retardation.

2. Plaintiffs filed an uncontested Motion for Class Certification. By Order dated September 8, 2009, this Court certified this case to proceed on behalf of the following class pursuant to [Federal Rule of Civil Procedure 23\(b\)\(2\)](#): "All individuals with mental retardation who are institutionalized in state psychiatric facilities and who are not subject to the jurisdiction of the criminal courts."

3. Defendants filed a Motion to Dismiss, which the Court denied. Defendants subsequently filed an Answer to the Complaint.

4. The parties began discovery. Plaintiffs requested and received extensive documents, including the treatment records of all of the potential class members identified by Defendants, and also received interrogatory answers. Plaintiffs also retained several potential experts, including two psychologists who reviewed a sample of the class members' records as well as DPW policies to assess the treatment provided to class members in the state hospitals. Meek Declaration ¶ 2 (Exh. 1).

5. In February 2010, the parties began settlement negotiations. Meek Decl. ¶ 3. As part of the negotiation process, the psychologists retained by Plaintiffs as experts met with DPW officials and staff to discuss issues relating to treatment and discharge. *Id.* ¶ 4.

6. After extensive arm s-length discussions, the parties finalized a Settlement Agreement (Agreement) to resolve this case, Meek Decl. ¶ 5, a copy of which is submitted as Exhibit 2. The key provisions of the Agreement are summarized as follows:

a. ***Assessments of Eligibility for Services*** -- The Agreement requires DPW's Office of Mental Health and Substance Abuse Services (OMHSAS) to identify state hospital residents who have diagnoses of mental retardation and are not subject to the jurisdiction of the criminal courts. Agreement ¶ III.1. DPW's Office of Developmental Programs (ODP), which is responsible for providing

services to Pennsylvanians with mental retardation, will assess all persons identified as possible class members to determine whether they meet the eligibility criteria to receive community mental retardation services. *Id.* ¶¶ III.2-3. Plaintiffs' counsel can request that an independent expert review ODP's determinations that a particular person does not meet the eligibility criteria for mental retardation services. The independent expert's determinations will be conclusive. *Id.* ¶ III.7.

b. ***Funding for Community Mental Retardation Services*** -- The Agreement requires DPW to request that the Governor seek funding from the Legislature to provide appropriate community mental retardation and mental health services for at least 20 class members in Fiscal Year (FY) 2010-11, 35 class members in FY 2011-12, and any remaining class members in FY 2012-13. Agreement ¶¶ IV.B.1.a-c.¹ If the Governor does not request or the Legislature does not appropriate sufficient funds, the parties will attempt to negotiate a framework to revise the timelines and, if necessary, will request mediation by a United States Magistrate. *Id.* ¶ IV.B.4.a-c. If DPW has not provided community services to at least 75 percent of those individuals identified as eligible for community mental retardation services by July 1, 2013, the Plaintiffs may seek to reinstate the litigation. *Id.* ¶ IV.B.4.d.

¹ DPW did seek and the Legislature has appropriated funding to provide community services to 20 class members this fiscal year.

c. ***Discharge Planning*** -- Specially-trained staff at the state hospitals, together with staff who work in the community mental health and mental retardation systems, will oversee discharge planning for class members to assure that all of their community service needs -- including needs for community mental retardation services -- are addressed. Agreement ¶¶ IV.A.1-2; Agreement ¶ V.1 (incorporating Protocol ¶¶ V.A- V.F). The Agreement bars inappropriate placements in personal care homes and requires active involvement by providers in transitioning class members to community programs, which provisions will improve the prospects for successful community placements. *Id.* ¶¶ IV.A.3-4. DPW will also establish a Review Committee to address impediments that arise to implementation of discharge plans for class members. *Id.* ¶ IV.A.5.

d. ***Gaps in Community Services*** -- A Statewide Task Force will be created to assess community services for individuals with dual diagnoses of mental illness and mental retardation and to make recommendations to address any gaps in services. Agreement ¶ 5.1 (incorporating Protocol ¶¶ VIII.A-D).

e. ***Improved Services in State Hospitals*** -- The Agreement includes a comprehensive Protocol to address the unique needs of individuals with dual diagnoses of mental illness and mental retardation. Agreement ¶ 5.1 & Att. 1.

(i) ***Integrative Mental Health Treatment Model*** -- DPW must use an integrative treatment model to provide services to individuals with

dual diagnoses of mental illness and mental retardation. This Model integrates mental health treatment with treatment to address the individuals' habilitation, psychological, and vocational needs and encompasses therapies, methods, and approaches that are designed for the unique needs of individuals who have intellectual disabilities. Protocol ¶¶ IV.A.

(ii) ***Multidisciplinary Teams for Residents with Intellectual Disabilities*** -- DPW will establish a Multidisciplinary Team for Residents with Intellectual Disabilities (MDIT) at each state hospital that includes specialists from the hospitals and from community mental health and mental retardation programs. Protocol ¶ II.A-II.E. The Teams will have primary responsibility to assure that the appropriate treatment is provided to oversee the clinical and treatment needs of class members. *Id.* ¶ II.E.

(iii) ***Comprehensive Assessments*** -- Under the MDIT's oversight, all class members and all persons with mental retardation admitted in the future to state hospitals will receive comprehensive multimodal diagnostic and functional behavioral assessments. Protocol ¶¶ IV.B.

(iv) ***Individualized Treatment Plans*** -- Under the MDIT's oversight, all class members and all persons with mental retardation admitted to state hospitals in the future will have new Individualized Treatment Plans (ITPs) developed based on the Integrative Mental Health Treatment Model and include

treatments that address: patient-specific learning, emotional, and motivational features of individuals with mental retardation; specific behavioral difficulties; and the reasons for admission that may represent barriers to community placement.

Protocol ¶ IV.C.

(v) ***Behavioral Issues*** -- For each class member, the incentive/privilege level system that is used in state hospitals will be tailored to meet his/her individual needs, cognitive ability, and motivational characteristics as determined by the diagnostic assessments. Contingencies, reinforcements, and consequences will be determined based on the individual's ability to understand and modify his/her behavior accordingly. Protocol ¶ IV.D.

(vi) ***Case Coordination*** -- The MDIT will be responsible to provide case coordination to class members and future state hospital residents with mental retardation. This includes ongoing monitoring of the individuals from intake through discharge planning as well as reviewing all incidents involving the individuals that result in their restraint or isolation, administration of STAT medication, denial of privileges, and allegations of abuse. Protocol ¶ VI.A-IV.C.

(vii) ***Staff Training*** -- DPW will retain an independent contractor to provide specialized training to state hospital clinical and direct care staff who work with people with mental retardation. The training will focus on the

integrative mental health treatment model and the unique needs of people with mental retardation. Protocol ¶¶ III.A-III.J.

(viii) ***Independent Monitoring and Evaluation of the Efficacy of Services*** -- DPW will contract with an Independent Monitor to annually assess its implementation of the Protocol. The Independent Monitor will issue reports on compliance and review any necessary plans of correction. The Independent Monitor will also develop a tracking system to collect data to evaluate measurable outcomes against best practice standards for individuals with dual diagnoses and the tracking system will be used to monitor services provided to class members and other state hospital residents with dual diagnoses. Protocol ¶¶ VII.A-VII.C.

f. ***Status Reports*** -- To assure that the Agreement is being implemented, DPW will provide to Plaintiffs' counsel periodic status reports. Agreement ¶ VII.1-VII.2.

g. ***Enforcement and Jurisdiction*** -- If the Court grants final approval to the Agreement, it will retain continuing jurisdiction over the case for purposes of interpretation and enforcement of the Agreement. Agreement ¶ VIII.6. Plaintiffs may seek the remedy of specific performance, but not contempt sanctions, if Defendants fail to comply with the terms of the Agreement with two exceptions. *Id.* ¶ VIII.2-3. First, the sole remedy for disagreements concerning DPW's determinations as to class members' eligibility for community mental

retardation services and HCB Waiver services is review by an independent expert.

Id. ¶ VIII.2.a. Second, the sole remedy if the Governor fails to submit it or the Legislature declines to appropriate full funding to develop community services for class members is to negotiate an extended time line or to reinstate the litigation.

Id. ¶ VIII.2.b.

h. ***Termination of the Agreement*** -- Absent reinstatement of the litigation, the Agreement will terminate 90 days after the provision of community services to the last person identified as eligible for community mental retardation services under the Agreement. Agreement ¶ VIII.7.

i. ***Attorneys' Fees, Litigation Expenses, and Costs*** -- Defendants will pay to Plaintiffs' counsel, subject to the Court's approval pursuant to [Federal Rule of Civil Procedure 23\(h\)](#), the sum of \$210,000 for attorneys' fees, litigation expenses, and costs incurred through the final approval of the Settlement Agreement. Agreement ¶ VIII.8.

7. Plaintiffs request that the Court preliminarily approve the proposed Settlement Agreement. “[I]f 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, then the [C]ourt [will] direct that ... notice be given to the class members of a formal fairness hearing.”

[Kaplan v. Chertoff](#), Civil Action No. 06-5304, 2008 WL 200108 at * 11 (E.D. Pa. Jan. 24, 2008) (citation omitted); *see also* [Hanlon v. Aramark Sports, LLC](#), Civil Action No. 09-465, 2010 WL 274765 at *5 (W.D. Pa. Feb. 3, 2010) ; [Mehling v. New York Life Ins. Co.](#), 246 F.R.D. 467, 472 (E.D. Pa. 2007) . Each of these criteria for preliminary approval of the Settlement Agreement is satisfied.

a. First, there can be little doubt that the Agreement is the result of “serious, informed, non-collusive negotiations.” The Agreement was reached only after Plaintiffs' counsel received and reviewed extensive document discovery and interrogatories. In addition, the psychologists retained by Plaintiffs reviewed many class members' treatment records and DPW policies. The parties met on multiple occasions to discuss the potential settlement, and the psychologists retained by Plaintiffs met with DPW staff and officials. The negotiations were conducted by experienced counsel at arms-length. *See* Meek Decl. ¶ 67

b. Second, the Agreement does not give preferential treatment to the class representatives or any particular segments of the class. All class members are treated equally. *See* [Kaplan, 2008 WL 200108](#) at *11.

c. Finally, the Agreement falls within the range of possible approval analyzed in accordance with the criteria set forth by the Third Circuit's decision in [Girsh v. Jepson](#), 521 F.3d 153, 157 (3d Cir. 1975), and its progeny. *See*

In re AT & T Corp., 455 F.3d 160, 164-65 (3d Cir. 2006) ; *Kaplan*, 2008 WL 200108 at *11.

(1) The complexity, expense, and likely duration of the litigation weigh in favor of approval. This case was filed nearly one year ago. Although the parties have conducted extensive document discovery, additional discovery -- including depositions -- would need to be taken. Dispositive motions would likely follow and, if the Court did not decide the case at summary judgment, trial would be necessary. Lengthy appeals would likely ensue regardless of which side ultimately prevailed in this Court. See *Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 330-31 (E.D. Pa. 2007).

(2) The stage of proceedings weighs in favor of the Agreement. Plaintiffs have conducted substantial document discovery and had significant input from psychologists they retained as potential experts. Plaintiffs and their counsel had the knowledge they needed to make an informed decision about the merits of the Agreement. See *Kaplan*, 2008 WL 200108 at *11; *Bradburn Parent Teacher Store, Inc.*, 513 F. Supp. 2d at 331-32.

(3) The risks of establishing liability weigh in favor of the Agreement. Although Plaintiffs are confident that they could establish liability, the case raises complex legal and factual questions that cannot be disregarded.

(4) Plaintiffs had to consider the risk that they would not be able to secure greater relief than that afforded by the Agreement, which provides Plaintiffs with much of the relief they sought. First, DPW must seek funding for community services for class members as a top priority with the aim of discharging all class members within three years. Second, DPW must take steps to improve its discharge planning for class members to increase the likelihood that their transitions to community services are successful and to prevent repeated hospitalizations. Second, DPW must fundamentally revise the treatment methods used in its state hospitals for individuals with diagnoses of mental retardation, including providing adequate training to staff regarding the new methods and procedures to be used. Moreover, DPW has already begun to implement the Agreement, thus affording Plaintiffs and class members relief far sooner than any relief they might secure following further litigation in this Court and subsequent appeals that could take several years. Accordingly, the benefits afforded by the Agreement far outweigh the potential risks of seeking further relief through continued litigation.

(5) Consideration of the range of reasonableness of the settlement in light of the best possible recovery and the risks of litigation also weighs in favor of approval of the Agreement. The benefits conferred by the Agreement compare favorably to the best possible recovery that Plaintiffs could

have secured and fall well within the range of reasonableness. Again, the Agreement provides the Plaintiffs and class members with almost all of the relief that they ultimately could have secured if they prevailed at the hearing and following appeals and if the Court, using its discretion to shape injunctive relief, afforded the Plaintiffs all of the relief they had sought. Given the attendant risks of litigation (including, but not limited to, the delays that would accompany further litigation and appeals), the Agreement's benefits to class members are significant.

8. Rule 23(e)(1) requires that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." The Court should consider both the method of dissemination and its content to determine whether the notice is sufficient. [Kaplan, 2008 WL 200108](#) at *11.

a. The parties propose to notify the Class through individual notice in the form submitted as Exhibit 3. The notice summarizes the litigation and the terms of the Agreement (including the provision relating to attorneys' fees and the release of claims); informs class members about the fairness hearing and their right to object to the Agreement; affords them information about how to receive a copy of the Agreement; and provides contact information for class counsel. The content of the notice is thus sufficient. Cf. [Kaplan, 2008 WL 200108](#) at *12; [Bradburn Parent Teacher Store, Inc., 513 F. Supp. 2d at 329](#) (similar).

b. Notice will be provided in the following manner:

(1) No later than four (4) weeks after the Court approves the notice, an advocate employed by Plaintiffs' counsel, the Disability Rights Network of Pennsylvania and/or the Mental Health Association of Pennsylvania will hand deliver copies of the written notice all class members who remain in the state hospitals. This will provide class members with an understandable explanation of the notice and an opportunity to ask questions. It should also help to allay any fears that might arise with the delivery of a legal notice. If the class member is unavailable or unwilling to speak with the advocate, the advocate will have state hospital staff deliver the written notice to him together with contact information for the advocate.

(2) No later than three (3) weeks after the Court approves the notice, DPW will assure that written notices are sent by first class mail, postage prepaid to all class members who no longer reside in state hospitals.

(3) No later than two (2) weeks after the Court approves the notice, Plaintiffs' counsel will have the notice delivered by first class mail, postage prepaid to the remaining class representatives (whose addresses DPW will provide) and their next friends.

c. Counsel for Plaintiffs and DPW will file certifications of notice with the Court no later than ten (10) days prior to the date of the hearing on final

approval of the proposed Settlement Agreement to certify their compliance with their respective notice obligations.

9. Plaintiffs also request that: (a) the Court establish a date for the hearing on final approval of the proposed Settlement Agreement; (b) that any objections to the proposed Settlement Agreement and notices of intention to appear be submitted no later than fourteen (14) days prior to the hearing date; and (c) that Plaintiffs' memorandum of law in support of the final approval of the proposed Agreement be submitted no later than ten (10) days prior to the hearing date.

WHEREFORE, Plaintiffs respectfully request that the Court grant this Motion.

Respectfully

submitted,

Dated: July 30, 2010

By: /s/ Robert W. Meek

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CERTIFICATE OF SERVICE

I, Robert W. Meek, hereby certify that at Plaintiffs' Unopposed Motion for Preliminary Approval of the Class Action Settlement and Approval of Class Notice and proposed Order were filed with the Court's ECF system on July 30, 2010 and are available for viewing and downloading from the ECF system by the following counsel who consented to electronic service:

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/s/ Robert W. Meek

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