IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FRANKLIN BENJAMIN, by and through his next friend, Andreé Yock; RICHARD GROGG and FRANK EDGETT, by and through their next friend, Joyce McCarthy; SYLVIA BALDWIN, by and through her next friend, Shirl Meyers; ANTHONY BEARD, by and through his next friend, Nicole Turman, on behalf of themselves and all others similarly situated, Plaintiffs, v. DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA and GARY ALEXANDER, in his official capacity as Acting Secretary of Public Welfare of the Commonwealth of Pennsylvania, Defendants.	Civil Action No. 1:09-cv-1182-JEJ Class Action Complaint Filed June 22, 2009

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF THE PROPOSED CLASS ACTION SETTLEMENT AGREEMENT AND FOR APPROVAL OF THE CLASS NOTICE

Plaintiffs and the Class, through their counsel, submit this Motion for Preliminary Approval of the Proposed Class Action Settlement Agreement and for Approval of the Class Notice. The Motion is unopposed as set forth in the Certificate of Concurrence submitted with this Motion. In support of this Motion, Plaintiffs state as follows:

1. Plaintiffs, individuals with diagnoses of intellectual disabilities who are institutionalized in state-operated intermediate care facilities for persons with mental retardation (state ICFs/MR), 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 retardation services in the community, which is the most integrated setting appropriate to meet their needs.

2. Plaintiffs filed a Motion for Class Certification. By Order dated September 2, 2009, this Court certified this case to proceed as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) on behalf of all individuals who: (1) currently or will in the future reside in one of Pennsylvania's state ICFs/MR; (2) could reside in the community with appropriate supports and services; and (3) do not or will not oppose community placement.

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

4. In October 2009, nine residents of the state ICFs/MR filed a Motion for Intervention. The residents, through their families or guardians, asserted that they were opposed to discharge from the state ICFs/MR. DPW concurred, but

Plaintiffs opposed this Motion. In March 2010, this Court denied the Motion for Intervention, holding that the proposed intervenors failed to meet three of the four criteria required for intervention as of right and that permissive intervention was not warranted. The proposed intervenors appealed. In April 2011, the Court of Appeals affirmed this Court's denial of intervention, concluding that the proposed intervenors' "interest in maintaining their current form of care is not directly in jeopardy in this litigation. The current parties have deliberately defined the class and the relief sought so that the Intervenors' right to choose institutional treatment would not be affected." *Benjamin v. Dep't of Public Welfare*, No 10-1908, 2011 WL 1243683 at *3 (3d Cir. Apr. 5, 2011). The court further explained that the possibility that "providing additional community placements will occasion some reallocation of the limited resources of DPW" did not create an interest that warranted intervention. *Id.* "[A]ny possible impact on Intervenors' interest in maintaining their current institutional care is not the kind of direct impact that gives rise to a right to intervene." *Id.*

5. The parties completed extensive fact discovery in late 2009 and early 2010. Plaintiffs requested and received numerous documents, including Community Placement Plans for all state ICF/MR residents and information concerning DPW's budgets, costs for state ICF/MR services, and costs for community services. Plaintiffs also served and received answers to interrogatories and requests for

admissions. In addition, Plaintiffs deposed five fact witnesses and defended the depositions of five witnesses. Meek Declaration ¶ 2 (Exh. 1).

6. Plaintiffs retained two experts; one expert assessed the methodology used by DPW to determine opposition to community placement and the other expert analyzed the costs and savings associated with the provision of community services to class members. DPW retained an expert to rebut Plaintiffs' expert on costs and savings. Plaintiffs defended the deposition of their financial expert and deposed DPW's rebuttal expert. Meek Decl. ¶ 3.

7. In June 2010, the parties filed cross-motions for summary judgment.

8. In October 2010, with the parties' agreement, the Court referred the case to the Honorable Martin C. Carlson, United States Magistrate Judge, for mediation. The parties met with the Magistrate Judge, but ultimately informed the Court that they were unable to reach consensus. Meek Decl. ¶ 4.

9. In January 2011, this Court issued a Memorandum and Order granting summary judgment for Plaintiffs and the Class and denying DPW's motion for summary judgment. *Benjamin v. Dep't of Public Welfare*, Civil Action No. 09-cv-1182, 2011 WL 1261542 (M.D. Pa. Jan. 27, 2011). The Court declared that DPW violated the ADA's and RA's integration mandates. *Id.* at *9. As the Court observed, there was no dispute that Plaintiffs and class members are appropriate for community placement if they receive necessary supports and services. *Id.* at

*6. The Court further found that some state ICF/MR residents are not opposed to discharge. *Id.* The Court rejected DPW's fundamental alteration defense, specifically its presentation of an integration "plan" developed on June 18, 2010. *Id.* at *8-*9. The Court concluded that "based upon the plain terms of the Plan," the possibility that class members will be placed in the community is "quite remote." *Id.* at *8. Pointing to the Plan's provision that gave DPW "broad authority" to use funding received under the Plan to serve people who are not institutionalized, rather than class members, the Court explained: "[T]hose who are currently receiving no services should have the opportunity to acquire supports; but within the dictates of the law DPW cannot continue to ensure this by relegating institutionalized individuals to second-class status in order to avoid subjecting any new individuals to the same segregation." *Id.*

10. Although the Court held that DPW violated the ADA's and RA's integration mandate, it did not rule on the remedy. *Benjamin*, 2011 WL 1261542 at *10. At the Court's suggestion, the parties agreed to return to mediation with Magistrate Judge Carlson to attempt to resolve that issue. Meek Decl. ¶ 5.

11. The parties met in person twice with Magistrate Judge Carlson for extensive, arms-length negotiations and subsequently continued those discussions on their own. Meek Decl. ¶ 6. Those negotiations yielded the Settlement Agree-

ment (Agreement), *id*. ¶ 7, a copy of which is subm itted as Exhibit 2. The key provisions of the Agreement are summarized as follows:

a. ***Identification of Class Members*** -- DPW will create a Planning List that includes all state ICF/MR reside nts who are not opposed to discharge. Agreement § III.1. To determine who is on this list, DPW' s Office of Developmental Programs (ODP) will assess opposi tion to discharge by residents, their involved families, and guard ians no later than Septem ber 30, 2011 and at least annually thereafter. *Id.* § III. 2.[1] These assessments will be undertaken by the residents' social workers or Comm unity Transition Specialists and the Facility Advocates based on discussi ons with the residents and t heir involved fam ily or guardian. *Id.* § III.2.a.[2] State ICF/MR residents who do not express a preference for discharge will be placed on the Planning List unless th ey have involved fam ily or guardians who are opposed. *Id.* § III.2.b. State ICF/MR residents who express a preference for community pl acement will be placed on the Planning List unless they have guardians who oppose such placement. *Id.* § III.2.c.

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[1] The Agreement defines "involved fa mily" to be fam ily members who are designated in the state ICF/MR resident' s records as their substitute decision makers. Agreement § II.13. A "guardian" is a pe rson appointed by a court pursuant to Pennsylvania law to serve as a state ICF/MR resident' s guardian of the person. *Id.* § II.12.

[2] "Facility Advocates" are individuals em ployed by the Disability Rights Network of Pennsylvania (DRN), Plainti ffs' counsel, and assigned to each of the state ICFs/MR to advocate for residents. Agreement § II.10.

b. ***Education about Community Placement Options*** -- To assure that state ICF/MR residents and their involved families and guardians have access to appropriate information about community options, DPW will establish a Community Partnership Steering Committee (Committee) to develop and implement a program to provide information. Agreement § IV.1. The Committee will develop a training curriculum and offer trainings to residents and their families and guardians at the state ICFs/MR, in the community during the course of the Agreement, and on DPW's website. *Id.* § IV.1.c. The Committee will also distribute written information about community placement options and offer opportunities to visit community placements. *Id.* §§ IV.1.e, IV.1.f. In addition, DPW will develop and implement a plan to offer one-to-one outreach to state ICF/MR residents and their involved families and guardians. The outreach will be conducted by family members of individuals with intellectual disabilities who currently live in the community. *Id.* § IV.2. After these training and outreach events, state ICF/MR residents, their involved families, and their guardians will be offered the opportunity to change their position on community placement, and the Planning List will be amended to reflect any such changes. *Id.* § IV.3.

c. ***Integration Plan*** -- DPW will develop and implement an Integration Plan to provide community placements to: (1) at least 50 persons on the Planning List in Fiscal Year (FY) 2011-12; (2) at least 75 persons on the

Planning List in FY 2012-13; (3) at least 100 persons on the Planning List in FY 2013-14; (4) at least 100 persons on the Planning List in FY 2014-15; and (5) at least 75 persons on the Planning List in FY 2015-16 and each fiscal year thereafter until all persons on the Planning List have been discharged. Agreement § V.1.[3]

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

e. ***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 § VII.5. Plaintiffs may seek the remedy of specific performance, but not contempt sanctions, if Defendants fail to comply with the terms of the Agreement. *Id.* §§ VII.2, VII.3. Plaintiffs will not file a motion for specific performance unless and until they give DPW 30-days' notice of the alleged violation and offer to meet with DPW to discuss resolution of the dispute. *Id.* § VII.2.

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[3] The Agreement allows DPW to divert funding appropriated and allocated to implement the Integration Plan to provide community services for no more than five persons living in the community who are at imminent risk of institutionalization. Agreement § V.5. To the extent DPW does so, it must increase the number of state ICF/MR residents to receive community services in the following fiscal year. *Id.*

f. ***Termination of the Agreement*** -- The Agreement will terminate 90 days after the provision of a community placement to the last person on the Planning List. Agreement § VII.6.

g. ***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 $432,500 for attorneys' fees, litigation expenses, and costs incurred through the final approval of the Settlement Agreement by this Court. Agreement § VII.7.

12. 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, the Agreement is the result of "serious, informed, non-collusive negotiations." Although the parties engaged in settlement negotiations prior to the Court's issuance of its ruling that DPW violated the integration mandates, Plaintiffs were unwilling to agree to the offers DPW made at that time. Plaintiffs resumed negotiations only after the Court issued its decision, holding that DPW violated the ADA's and RA's integration mandate. The parties' subsequent negotiations were informed not only by the Court's ruling, but also by extensive fact and expert discovery. The parties met twice in person with Magistrate Judge Carlson and then continued negotiations through telephone and email communications. *See* Meek Decl. ¶¶ 6, 8

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.[4]

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*

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[4] The Agreement provides that the named Plaintiffs will be placed on the Planning List immediately. Agreement § III.3. This does not give Plaintiffs preferential treatment, but merely recognizes that there is no need to assess their opposition to community placement since they have already expressed their preference for such placement. Immediate placement on the Planning List does not assure that the named Plaintiffs will receive community services ahead of other persons who will join that list through the evaluation process.

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 two years ago. Although Plaintiffs have secured a judgment as to liability, a remedy hearing would take additional time. More significantly, DPW would have likely appealed and Plaintiffs might have appealed if a remedy devised by the Court was not adequate. *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 not only completed discovery, but they secured a liability judgment. Plaintiffs and their counsel had the knowledge they needed to assess the effectiveness of potential remedies and to make an informed decision about whether the Agreement provided Plaintiffs and class members with an adequate remedy for DPW's violations of the law. *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 neither favor nor disfavor the Agreement. Plaintiffs have established liability. Although DPW could challenge that ruling on appeal, it would be unlikely to prevail in light of the Court of Appeals' precedent. DPW would have to secure a writ of certiorari from

the Supreme Court review to have any possibility of overturning the liability judgment, which would be unlikely.

(4) Plaintiffs, however, 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. The Agreement closely tracks the relief requested by Plaintiffs in their summary judgment motion, including most critically establishing a comprehensive, multi-year Integration Plan with timelines and benchmarks to develop community placements for at least 400 class members in the first five years. Given evidence that indicated there are approximately 300 state ICF/MR residents who are not opposed and whose family or guardians are not opposed to discharge, it may be that most class members will receive community services within five years. Meek Decl. ¶ 9. It is questionable whether the Court would have been willing to order DPW to require more community placements at a faster pace given DPW's likely arguments that it could not do so in light of current budget constraints and the administrative burdens of developing new community services. 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) 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. The benefits conferred by the Agreement compare favorably to the best possible recovery that Plaintiffs could have secured. The Agreement provides the Plaintiffs and class members with almost all of the relief that they ultimately could have secured if the Court, using its discretion to shape injunctive relief, afforded the Plaintiffs all of the relief they had sought and the appellate court upheld the remedy. 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.

13. 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 state ICF/MR residents and their involved families and guardians 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); informs potential

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 information about how to contact class counsel. The content of the notice is thus sufficient. *See Kaplan*, 2008 WL 200108 at *12; *Bradburn Parent Teacher Store, Inc.*, 513 F. Supp. 2d at 329.

b. Notice will be provided in the following manner:

(1) No later than four (4) weeks after the Court approves the notice, the Facility Advocates at each of the state ICFs/MR, who are employed by Plaintiffs' counsel, will hand deliver copies of the written notice to all state ICF/MR residents. The Facility Advocates will be able to answer any questions and allay any fears that might arise with the delivery of a legal notice.

(2) No later than four (4) weeks after the Court approves the Notice, DPW will assure that the notice is delivered by first class mail, postage prepaid to all involved family members or guardians of state ICF/MR residents.

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.

14. Plaintiffs also request that: (a) the Court establish a date for the hearing on final approval of the proposed Settlement Agreement; (b) that any objec-

tions 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 suppor t of t he final appr oval 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: May 26, 2011

By: /s/ *Robert W. Meek*

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CERTIFICATE OF SERVICE

I, Robert W. Meek, hereby certify th at Plaintiffs' Unopposed Motion for Preliminary Approval of the Class Action Settlement and Approval of Class Notice and proposed Order were filed with th e Court's ECF system on May 26, 2011 and are available for vie wing 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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