1999 WL 1257284
United States District Court, E.D. Pennsylvania.

KATHLEEN S., et al., Plaintiffs,
v.
DEPARTMENT OF PUBLIC WELFARE, et al., Defendants.

No. CIV A 97–6610. | Dec. 23, 1999.

Opinion

MEMORANDUM

BRODERICK.

***1** Presently before this Court is Plaintiffs' unopposed Motion for final approval of the proposed Settlement Agreement between Plaintiffs and Defendants Department of Public Welfare of the Commonwealth of Pennsylvania and Feather O. Houstoun in her official capacity as Secretary of Public Welfare (collectively "the Commonwealth"), pursuant to Federal Rule of Civil Procedure 23(e). For the reasons which follow, the Court will grant final approval of the settlement between Plaintiffs and Defendants.

Background

This class action was commenced on October 27, 1997 by Plaintiffs, five individuals on behalf of themselves and others with mental illness who had been institutionalized at Haverford State Hospital, ("HSH"), a state-operated psychiatric hospital located in Delaware County, Pennsylvania. Plaintiffs alleged that Defendants' August, 1997 announcement of their decision to close HSH by June 30, 1998 and to transfer certain HSH residents to Norristown State Hospital, violated their rights under the Americans with Disabilities Act ("ADA"). Plaintiffs alleged that the Commonwealth failed to provide Plaintiffs with services in the most integrated setting appropriate to their needs and that the Commonwealth used methods of administration which had a discriminatory effect by continuing unnecessarily to institutionalize Plaintiffs who had been found eligible for community placement. On February 25, 1998, this Court certified a Plaintiff class which included all persons institutionalized at HSH as of August 26, 1997. And on June 26, 1998, the Court subsequently divided the class into three subclasses.

The Court held a bench trial on Plaintiffs' claims in May of 1998. In a Memorandum and Order dated June 26, 1998, (the "June Order"), this Court entered judgment in favor of all three of the Plaintiff subclasses. Before making its findings, this Court reviewed the history of the enactment of the ADA, pointing out that Section 504 of the Rehabilitation Act of 1973 was the first civil rights legislation for persons with disabilities. Although section 504 had limited success in achieving its purpose of ending disabilities-based discrimination, it paved the way for the passage of the ADA in 1990. In passing the ADA, Congress provided for implementation regulations. The ADA's "integration regulation," § 35.130(d), provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). This regulation closely mirrors 28 C.F.R. § 41.51(d), promulgated in 1981 under section 504, which mandates that all recipients of federal financial assistance "shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons."

Turning to Plaintiffs' claims, this Court specifically found that Defendants had discriminated against the members of subclass A. Subclass A consists of those persons identified by Defendant as appropriate for community placement who would be placed in community programs by June 30, 1998. The Court found that members of subclass A were being discriminated against in violation of the ADA in that they were being unnecessarily segregated at Haverford at a time when community placement was in fact the most integrated setting appropriate to their needs. The Court ordered Defendants to follow through on its plan to place those subclass A members into appropriate community settings no later than June 30, 1998.

***2** Further, the Court found that Defendants had also discriminated against the members of subclass B. Subclass B is comprised of those individuals identified by Defendant as appropriate for treatment in the community but who would not be fully placed into the community until June 30, 2001. The Court found that three years was an unreasonable amount of time for those class members to be unnecessarily segregated, and thus ordered Defendants to provide these class members with appropriate community treatment programs by December 31, 1999.

Finally, the Court found that Defendants also had discriminated with respect to members of subclass C. Subclass C consists of those individuals whom Defendants determined were not at that time appropriate for community treatment and would be transferred to Norristown State Hospital. The Court ordered that current

evaluations be conducted by an independent psychologist or psychiatrist no later than December 31, 1998, in order to determine the appropriateness of community treatment for these individuals. The Court also ordered that Defendants provide community placements for those members of subclass C for whom such placements are determined to be appropriate, within eighteen months after such a determination is made.

On July 2, 1998, Defendants filed a Notice of Appeal to the Third Circuit Court of Appeals. This Court subsequently denied Defendants' motion for a stay pending appeal on July 30, 1998. The parties therefore proceeded and continue to implement this Court's June 26, 1998 Order ("the June order").

The Third Circuit initially held oral argument on this case in October of 1998, and again on September 8, 1999. At the close of the September, 1999 argument the Third Circuit panel consisting of Chief Judge Becker, Judge Stapleton, and Judge Magill, suggested to the parties that, in light of the Supreme Court's June, 1999 issuance of a decision in *Olmstead v. L.C.,* 119 S.Ct. 2176 (1999), as well as the progress already made by the parties in implementing this Court's Order, the parties should attempt to resolve the matter before further disposition by the Third Circuit. Chief Judge Becker then asked Mediator Joseph Torregrossa, Esq., to assist the parties in their settlement negotiations.

The parties subsequently entered into settlement discussions. On October 14, 1999, the parties executed a Settlement Agreement. On October 25, 1999, the Court of Appeals granted the parties' joint Motion for Partial Remand to transfer jurisdiction to this Court to consider whether to approve the proposed Settlement Agreement.

The Proposed Settlement

The proposed Settlement provides that Defendants will assure that all members of subclass B will be provided with appropriate community services by March 31, 2000 and that all members of subclass C who have been identified by the independent evaluations or by DPW as appropriate for community placement will receive such services by June 30, 2000. The Settlement Agreement further provides that Defendants will notify Plaintiffs' counsel on a weekly basis of the names, addresses, and services provided to those class members transferred the previous week. The class members' rights will be enforceable through motions for specific performance. Finally, the Settlement Agreement provides that this Court will retain jurisdiction to enforce each class member's rights within ninety days after the person's placement and that this case will be dismissed ninety days after the placement of the last class member.

***3** In an Order dated November 15, 1999, this Court approved the Notice of Hearing and Proposed Class Action Settlement. The Court further ordered that notice be sent to members of Plaintiff class by November 23, 1999. The Court also set a hearing for December 14, 1999 to determine whether the proposed Settlement was sufficiently fair, reasonable, and adequate to merit final approval. Due to an emergency, this hearing was continued and was ultimately held on December 20, 1999.

Court Approval of Proposed Settlement

Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of a class action settlement. Rule 23(e) provides:

> 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.

The Third Circuit has recognized that "the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re General Motors Corp. PickUp Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 784 (3d Cir.1995). The Third Circuit in *In re General Motors* also noted "[t]he parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial." *Id.*

Although settlement is favored, the district court has a duty to scrutinize the agreement to insure its fairness to the members of the class before giving final approval under Rule 23(e). The Third Circuit has described the role of the district court as that of "a fiduciary who must serve as a guardian of the rights of absent class members ... [T]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *In re General Motors* at 785 (internal citations omitted).

The Court begins its analysis with a presumption that the proposed Settlement Agreement is valid. An initial presumption of fairness attaches to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery. *In re Residential Doors Antitrust Litigation,* 1998 WL 151804 at *6 (E.D.Pa. April 2, 1998); *In re General Motors* at 785. Both the Plaintiff Class and the Defendants are represented in this case by able and experienced counsel who have spent over two years contesting this litigation, which has included a trial on the merits and an appeal to the Third Circuit. Settlement was reached only after a

panel of the Third Circuit encouraged the parties to attempt to resolve their dispute. The parties jointly submitted a settlement agreement which they assert to be a fair resolution of their differences. This Court accords much weight to their assertion.

The Third Circuit has developed nine factors generally relevant to the court's evaluation of the fairness of a proposed settlement. See *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir.1975). The factors relevant to a proposed class settlement involving no money fund or determination of damages include: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; and (5) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Girsh* at 157.

***4** In applying these *Girsh* factors, the balance weighs in favor of approval of the Settlement Agreement. Continued litigation in this case would result in risk to both parties, especially those members of the Plaintiff Class who have not yet been placed into the community. In light of these risks, as well as the minimal nature of the changes to this Court's June order, this Court is of the opinion that the Settlement Agreement is sufficiently fair, reasonable, and adequate to warrant its approval.

This Court believes that its June Order and Memorandum is consistent with the Supreme Court's recent decision in *Olmstead.* Plaintiffs in *Olmstead,* two residents of a Georgia psychiatric hospital, claimed that Georgia violated the ADA's integration mandate in failing to provide them with community services that were recommended by their treating professionals. *Id.* at 2181. The Supreme Court held that the ADA requires states to provide community-based treatment of individuals with mental disabilities: (1) when a state's treatment professionals deem such treatment appropriate, (2) that treatment is not opposed by the affected individual, and (3) the placement "can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id.* at 2190.

A plurality of the Supreme Court stated that a state could effectively defend against such ADA claims by establishing that the burden of providing appropriate community services would constitute a fundamental alteration of the state mental health system. *Id.* at 2189. The plurality stated: "Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* The plurality suggested that a State could meet its burden under the reasonable-modifications standard by adopting "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace ..." *Id.*

At the time of trial, the Commonwealth conceded that the speed with which community placement for class members could be accomplished was not limited by funding concerns. (Def.'s PostTrial Mem. at 31). Instead, the Commonwealth argued that placing the amount of members in Plaintiff class into the community would cause it to be forced to fundamentally alter the extent and complexity of community services it provides. However, after a bench trial, this Court found that Defendant failed to put forth any evidence that would support a finding that the Commonwealth's providing community services to members of the Plaintiff class would result in a fundamental alteration of Defendant's health system. *Kathleen S. v. Department of Public Welfare of the Commonwealth of Pennsylvania,* 10 F.Supp.2d 460, 471. Moreover, this Court specifically found that the placement rate for subclass B members planned by Defendant was "unreasonable and impose[d] an unnecessary period of discrimination." *Id.* at 472. Further, the Court found that the Commonwealth's complete lack of provisions for community placement of any of the appropriate subclass C members violated the ADA. *Id.* at 474. This Court's June order compelled the Commonwealth to provide community-based treatment to those persons deemed appropriate for such treatment by the Commonwealth's own experts, and found that such treatment could be reasonably accommodated by the Commonwealthtaking into account the Commonwealth's resources and responsibilities with regard to all those with mental disabilities. *See Olmstead* at 2190. This Court therefore, believes its June Order is in accord with *Olmstead.*

***5** This Court, however, recognizes that the issuance of *Olmstead* does cast some uncertainty on the outcome of the case at bar. This Court is aware that in the event the parties' proposed settlement is not approved, the Third Circuit will rule on Defendant's appeal, possibly jeopardizing some of the rights secured by the Plaintiff Class by virtue of this Court's June Order. There is also the possibility that the Third Circuit might grant a stay of the implementation of this Court's June Order and remand the action back to this Court for reconsideration of its June Order in light of *Olmstead.* Such delay caused would effectively negate benefits ultimately secured by the class members who might continue to be unnecessarily institutionalized during the pendency of any further proceedings. On the other hand, approval of the Settlement Agreement does confer substantial benefits on members of the class without exposing them to the risk of further litigation and delay in a matter which has been

vigorously contested for two years. Therefore, this Court finds that the Settlement Agreement is in the best interests of the Class, as it alleviates any uncertainty and delay inherent in allowing further disposition of the case in the Third Circuit.

Furthermore, it must be emphasized that approval of the Settlement Agreement does not greatly change Defendants' obligations with respect to the Plaintiff class. Defendants have thus far complied with the Court's order, and in so doing have made admirable progress during the pendency of their appeal in placing the vast majority of class members into appropriate community placementsthe most integrated setting to fit their needs as is required by the ADA. *See Olmstead* at 2190; *Helen L. v. DiDario,* 46 F.3d 325, 333 (3d Cir.) *cert. den.,* 516 U.S. 813 (1995).

The settlement agreement makes no change in the Court's June Order with respect to subclass A. All 83 members of subclass A were placed in appropriate community settings prior to the Court issuing its Order on June 26, 1998. 52 of the 104 subclass B members have already been placed in appropriate community settings. Furthermore, the monthly reports from the Department of Public Welfare,[required by this Court's June Order], indicate that another 27 members will be placed in community settings appropriate to their needs by December 31, 1999, as ordered by this Court. 2 members of subclass B have died. Thus, the Commonwealth will have placed 77 of the 102 remaining members of subclass B by December 31, 1999. The Settlement Agreement asks only that Defendants be given an additional three monthsuntil March 31, 2000—to place the remaining members of subclass B. According to the Court's calculations, 16 members of subclass B would not be placed by December 31, 1999 as ordered by this Court. The Settlement Agreement provides Defendants an additional three months to place these individuals into appropriate community settings.[1]

All members of subclass C were given independent evaluations by December of 1998, as ordered by this Court. 45 of the 69 subclass C members have been determined to be appropriate for community placement. As of this date, 16 of those 45 individuals have been placed in community programs. In addition, 7 members of subclass C are scheduled for community placement by December 31, 1999. One subclass C member is to be placed by March 31, 2000. Thus, out of the 45 members of subclass C deemed appropriate for community placement, 24 will have been placed into the community by March 31, 2000, which is in accordance with the Court's order that they be placed within 18 months of their evaluations.

***6** With regard to subclass C, the Settlement Agreement provides that remaining subclass C members who have been deemed by this Court's ordered independent evaluations to be appropriate for community treatment will be placed in appropriate community settings by June 30, 2000. The Court's order that all subclass C members appropriate for community treatment be placed in such settings within 18 months of their independent evaluations is therefore only minimally changed by the Settlement Agreement. Of the 45 members of subclass C appropriate for community placement, 36 will have been placed within 18 months of their evaluations, in accordance with this Court's order. The remaining 8 members of subclass C appropriate for community placement will be placed within 20 months of their evaluations. Thus, the Settlement Agreement extends the placement waiting period an additional 2 months for the 3 subclass C members evaluated in October and an additional 1 month for the 5 subclass C members evaluated in November.[2]

In approving the parties' proposed Settlement Agreement, the Court recognizes that 16 members of subclass B and 8 members of subclass C may not be placed into the community as soon as they would have been according to the Court's June Order. This delay is not "minimal" to the members of subclass B and subclass C whose placements will be affected by the settlement. Nevertheless, the benefits of the proposed Settlement Agreement far outweigh the delay to those affected members of the two subclasses. The agreement guarantees that all remaining members of subclasses B and C currently at Norristown who are appropriate for community treatment will be placed in the community within a reasonable time. The minimal change contemplated by the Settlement Agreement is greatly outweighed by the benefits it bestows upon the members of subclasses B and C.

Finally, the reaction of the Plaintiff Class to the proposed settlement weighs heavily in favor of approving the Settlement Agreement. As has heretofore been stated, Defendant DPW distributed notice of the hearing and proposed settlement to all 245 members of the Plaintiff Class. The notices advised the class members of their right to submit letters regarding any comments they had involving the settlement. Three members of subclass B contacted Plaintiffs' counsel Robert Meek by telephone to indicate their support of the settlement. (Meek Aff. ¶ 16). Only one individual appeared at the December 20 hearing to testify. This man, the father of a member of subclass C, expressed concerns regarding the present treatment of his son at Norristown. Counsel for both parties and the Court agree however, that his concerns were in no way relevant to the fairness of the settlement agreement. The overall lack of objections from the Plaintiff Class militates strongly in favor of approval of the proposed settlement.

This case has been vigorously contested by the parties for two years. The proposed Settlement Agreement assures an amicable resolution that confers substantial benefits on the Plaintiff Class. The minimal amount of extra time

given to the Commonwealth under the Settlement Agreement insures that the remaining members of subclasses B and C who are appropriate for community treatment will be placed in the most appropriate community settings to fit their diverse needs within a reasonable period. The Court therefore approves the parties' proposed Settlement Agreement as fair, adequate, and reasonable in accordance with Federal Rule of Civil Procedure 23(e). *See also, In re General Motors* at 785.

***7** The Court believes that this settlement is an indication that the Commonwealth is now well aware of the duties imposed upon it by the Americans With Disabilities Act. The Court finds that the Commonwealth did in good faith carry out the mandates of this Court's June 26, 1998 Order. The settlement of this case appears to this Court as having paved the way for all individuals institutionalized for treatment of mental and emotional disorders to be cared for in the community within a reasonable period after their having been evaluated as appropriate for community treatment. An appropriate order follows.

ORDER

AND NOW, this day of December, 1999; the Court having considered Plaintiff Class's Motion for Final Approval of the Proposed Class Action Settlement Agreement between Plaintiff Class and Defendants Department of Public Welfare and Defendant Secretary of Public Welfare Feather O. Houstoun; for the reasons set forth in the Court's accompanying Memorandum of this date;

IT IS ORDERED: The proposed Settlement Agreement filed by Plaintiffs on October 27, 1999 is hereby APPROVED, pursuant to Federal Rule of Civil Procedure 23(e).

Parallel Citations

17 NDLR P 93

Footnotes

1 The placements of six subclass B members remaining at Norristown are delayed; one due to pending criminal charges and five for various clinical reasons. In addition, three subclass B members for whom the state has offered community placement, have rejected those options but are scheduled to be placed in alternate arrangements which will be available by June, 2000.

2 The sixth subclass C member evaluated in November of 1998, James H., died on October 29, 1999.