

1993 WL 757634

United States District Court, W.D. Pennsylvania.

RICHARD C., by his next friend KATHY B., on behalf of himself and all others similarly situated, et al., Plaintiffs,
 Allegheny County, Plaintiff–Intervenor,
 Western Center Board of Trustees, Western Center Parents Group, Lee Nock and Cecelia Wrana, Plaintiff–Intervenors,
 v.
 Karen SNIDER, Secretary, Department of Public Welfare, Commonwealth of Pennsylvania, et al., Defendants.

Civ. A. No. 89–2038. | June 22, 1993.

Attorneys and Law Firms

Ilene W. Shane, Disabilities Law Project, Philadelphia, PA, Mark J. Murphy, Disabilities Law Project, Pittsburgh, PA, Richard C., by his next friend, Kathy B., on behalf of himself and all others similarly situated, Mark Lunz, John C. Lunz, III, Wayne Lunz, Pennsylvania Protection and Advocacy, Inc., Ass’n for Retarded Citizens/Pennsylvania, Ass’n for Retarded Citizens/Allegheny, Larry Harris, Michael Caruso and David Garris.

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Opinion

ADJUDICATION

STANDISH, District Judge.

I

*1 This is a civil action in which plaintiffs, as class representatives, seek relief under 42 U.S.C. §§ 1396 *et seq.*, 1983 and 29 U.S.C. § 794 from defendants. An eight day public hearing began on February 24, 1993 and addressed the following issues: 1) whether the case should be continued as a class action and 2) whether the proposed settlement agreement was fair, adequate and reasonable and should be approved by the court. At the hearing plaintiffs, plaintiff-intervenor Allegheny County and the Department of Public Welfare jointly presented evidence and argument in support of the settlement agreement, and plaintiff-intervenors the Western Center Board of Trustees, the Western Center Parents Group, Lee Nock and Cecelia Wrana (the opposing intervenors) presented evidence and argument in opposition to the settlement and in favor of decertifying the class.

After consideration of the evidence, argument and submissions of counsel, the court confirms its previous certification of the class. The court also finds that the settlement agreement is fair, adequate and reasonable. It will be approved.

II

Findings of Fact: Class Certification

1. On September 29, 1989, resident of Western Center Richard C., by his next friend Kathy B., on behalf of himself and all others similarly situated, joined by Mark Lunz, John C. Lunz, III and Wayne Lunz¹, Pennsylvania Protection & Advocacy (PP & A)², the Association of Retarded Citizens–Pennsylvania and the Association for Retarded Citizens–Allegheny, filed this class action lawsuit against the Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, the Deputy Secretary for Mental Retardation of the Department of Public Welfare and the Facility Director of Western Center (collectively DPW). The complaint was amended on December 12, 1989 to include Western Center residents Larry H., Michael C. and David G..³

2. Plaintiffs seek relief under 42 U.S.C. §§ 1396 *et seq.* and 1983 and 29 U.S.C. § 794 claiming that defendants have: 1) failed to maintain and operate Western Center in accordance with applicable standards and to provide residents with appropriate care and treatment; 2) failed to keep residents free from harm and undue restraints; and 3) discriminated against residents on the basis of their disability.

3. On November 29, 1991, the court granted Allegheny

County's motion to intervene as a plaintiff. Allegheny County intervened to protect its interest on the ground that it is the county in which approximately 60% of Western Center residents resided before being institutionalized.

4. By a stipulation of the parties, the action was certified as a class action under Fed.R.Civ.P. 23(b)(2) on February 21, 1992. The class is defined as follows:

(a) all persons who, as of February 1, 1992, resided at Western Center; and

(b) all persons who resided at Western Center on or after September 29, 1989, who were transferred from Western Center, to another state-operated facility for persons with mental retardation after that date, and who, as of February 1, 1992, were residents of a state-operated facility for persons with mental retardation.

*2 At the time of the stipulation, there were 383 class members. Seven class members have since died. At the time of the hearing, approximately 360 class members resided at Western Center.

5. On September 10, 1992, after lengthy negotiations, counsel for plaintiffs and for DPW signed a Settlement Agreement. On February 3, 1993, after additional negotiations, primarily between defendants and Allegheny County, counsel for the county signed the Settlement Agreement. (Defendant's Exhibit 2).

6. On October 7, 1992, with the consent of the parties, the court granted the motion of the Western Center Board of Trustees, the Western Center Parents Group, Lee Nock and Cecelia Wrana (opposing intervenors) to intervene as plaintiffs. Lee Nock is currently a resident of Western Center. Cecelia Wrana is a former Western Center resident who now resides in a community living arrangement in Connellsville, Pennsylvania.

7. The opposing intervenors, opposing the settlement, filed a Statement Concerning Class Certification/Decertification on February 3, 1993.

8. After several conferences with counsel for all parties the court held a hearing on the issues of class settlement and class decertification. Notice of the proposed settlement was provided to all members of the class pursuant to Fed.R.Civ.P. 23(e).

9. Western Center is an intermediate care facility for persons with mental retardation (ICF/MR) under Title XIX of the Social Security Act. Western Center receives more than half of its funding from the United States, and is required to comply with federal regulations relating to the health, safety and well-being of its residents. Under

regulations of the Department of Health and Human Services, 42 C.F.R. 483.400 *et seq.*, an ICF/MR is required to provide continuous active treatment and habilitation to its residents.

10. Eric Bost became the facility director in July, 1989. Western Center was then operating under its second provisional license. It was subject to intermediate sanctions. (Plaintiffs' Exhibit 6). A facility may receive as many as three provisional licenses after which it loses its certification. A decertified facility no longer is eligible to receive federal funds.

11. In July, 1990, Western Center was fully licensed. Its licensure was made provisional, however, following an inspection in January, 1992, after which it was found not to be in compliance with federal standards. A July, 1992 inspection report again declared that Western Center had failed to meet the applicable federal standards. (Plaintiffs' Exhibits 4 and 5). The deficiencies found in 1992 were similar to those for which Western Center had been cited repeatedly in the past, specifically in 1985 and 1989. (Plaintiffs' Exhibits 6 and 7).

12. The abuse of residents at Western Center was "pervasive" when Mr. Bost became facility director in July, 1989. Mr. Bost terminated a number of employees for abusing residents. Many were reinstated, however, following appeals of their terminations. Although the pervasiveness of the abuse lessened during Mr. Bost's tenure, abuse nevertheless continued. He was unable to discharge permanently many employees responsible for such abuse.

*3 13. Russell F. Delp, Jr., an employee at another state facility, was transferred to Western Center in 1989. He was assigned by the Department of Public Welfare from May, 1989 to August, 1989 to work undercover as a direct caregiver and report his observations. While working undercover Mr. Delp witnessed many incidents of physical and verbal abuse of residents at every living area to which he was assigned. Mr. Delp reported that Center employees struck residents with brass key rings. He also reported that they kicked, taunted, slapped and threatened residents.

14. Mr. Delp was directed by other members of the staff of the Center to falsify records to report, incorrectly, that residents had been accorded treatment and therapy which had not been delivered. He noted, generally, that Western Center was understaffed, often smelled, and was not adequately air conditioned. He described the dining experience as neither leisurely nor comfortable, but rather, a rushed and pressured "situation" in which no talking or interaction was permitted.

15. Steven Eidelman, the Deputy Secretary for Mental Retardation for the Commonwealth of Pennsylvania's

Department of Public Welfare from 1987 to January, 1993, believed that residents were in danger of being beaten at Western Center. He stated that there were more substantiated incidents of abuse at Western Center than at any other state facility and that the reports of abuse were substantially more serious at Western Center than at any other facility. Mr. Eidelman further stated that the poor condition of Western Center's physical plant contributed to its lack of certification.

16. Kevin Casey, Executive Director of PP & A, described Western Center as a "troubled facility." He noted that the complaints that PP & A received about Western Center were significantly more serious than those concerning any other state facility. He said that they were of a very severe nature.

17. Co-counsel for the class, the Disabilities Law Project and the Public Interest Law Center of Philadelphia, were retained by plaintiffs, in part, because of their experience in advocating for the rights of people with disabilities and in part, because of their familiarity with similar types of cases. Their competence is apparent.

III

Conclusions of Law: Class Certification

18. In order for a class action to be maintained, the four requirements of Fed.R.Civ.P. 23(a), numerosity, commonality, typicality and adequacy of representation, and at least one of the requirements of 23(b), must be established. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 248 (3d Cir.1975), *cert. denied* 421 U.S. 1011 (1975); *Goldy v. Beal*, 429 F.Supp. 640, 648 (M.D.Pa.1976).

19. Plaintiffs have brought this class action under Fed.R.Civ.P. 23(b)(2) claiming that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. As a Rule 23(b)(2) class action, plaintiffs need not show that common questions predominate over individual questions or that proceeding as a class action is superior to prosecuting each claim individually. Plaintiffs must only satisfy the court of the mere existence of common issues. *Kelly v. General Motors Corp.*, 425 F.Supp. 13, 17 (E.D.Pa.1976).

*4 20. As noted above, this class was certified pursuant to a stipulation by all parties then included in the action. While all class certification orders remain conditional

pending the entry of final judgment, the burden is on those seeking to revoke the class certification to demonstrate some newly discovered facts requiring decertification. *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D.Pa.1975).

Numerosity

21. "Numerosity is a flexible standard and often the practicalities of the situation, rather than a strict application of the numerosity requirement will be determinative of the question." *Weiss v. York Hospital*, 745 F.2d 786, 807-08, 808 n. 35 (3d Cir.1984), *cert. denied* 470 U.S. 1060 (1985).

22. At the time this matter was certified as a class action, 369 people comprised subclass (a) and 14 people comprised subclass (b). Currently, the class consists of 377 members. Clearly, with 377 individuals, joinder is impracticable, and the numerosity requirement has been met.

Typicality and Commonality

23. Although Rule 23(a) establishes the two prerequisites of typicality and commonality as separate and distinct, the analyses overlap. *Hassine v. Jeffes*, 846 F.2d 169, 176 n. 4 (3d Cir.1988). To maintain a class action, there must be questions of law and fact common to the class, and the claims of the class representatives must be typical of those of the entire class.

24. The opposing intervenors, who favor decertification of the class, argue that the class representatives are not typical of the class as a whole because their disabilities are far more severe than the majority of the residents at Western Center. These intervenors misconstrue the typicality and commonality requirement. To sustain the class, plaintiffs need only show that the legal claims of the class representatives are typical of, and in common with, the class as a whole.

The 'typicality' and 'commonality' prerequisites of Rule 23 do not require that all of the putative class members share *identical* claims. These prerequisites mandate only that complainants' claims be common, and not in conflict. 'Typicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.

Id., at 176–77. (citations omitted) (emphasis in original).

25. Moreover, in a Rule 23(b)(2) action, plaintiffs need only show that the interests of class members are so like those of the individual representatives that injustice will not result from their being bound by such a judgment in the subsequent application of principles of *res judicata*. *Id.*, at 179; *Taylor v. White*, 132 F.R.D. 636, 647–48 (E.D.Pa.1990); *Yearsley v. Scranton Housing Authority*, 487 F.Supp 784, 787 (M.D.Pa.1979).

26. In this case, although each named plaintiff’s level of disability is unique to himself, each alleges a deprivation due to the set of circumstances created by defendants. The theory upon which each named plaintiff pursues his individual claims is the same theory upon which he will pursue the claims of the putative class. *Taylor*, 132 F.R.D. at 648. Accordingly, the class representatives have established the commonality and typicality requirements.

Adequacy of Representation

*5 27. The adequacy of representation depends on two factors: “(a) the plaintiff’s attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.” *Wetzel*, 508 F.2d at 247.

28. It is clear from the manner in which plaintiffs’ counsel have conducted themselves throughout the proceedings leading to this point that counsel, in part based on past experience with similar litigation, are extremely qualified and well able to conduct the proposed litigation.

29. Turning to the second factor, class counsel owes a duty to the entire class, and not to any one interest or group of interests represented by the named plaintiffs. *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 964 (3d Cir.1983); *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir.1982). Generally, an attorney who secures a fair and adequate settlement for the class has represented the client class fairly and adequately. *Id.*

30. Here, the opposing intervenors assert that counsel for the representative individual plaintiffs (Richard C., *et al.*) cannot also represent the organizational plaintiffs (PP & A and the ARCs) because the organizational plaintiffs “follow a philosophy that institutions such as Western Center are unnecessary and obsolete, are never appropriate for the placement of mentally retarded persons and should be closed.”

31. Although opposing intervenors overstate the position of these organizational plaintiffs, it is true that they

advocate the community placement and support, where it is appropriate, of persons residing in Western Center and similar institutions. Their position, however, is not antagonistic to the interests of the class members, notwithstanding the disagreement of the opposing intervenors. The placement of appropriate Western Center residents in community facilities with adequate support programs is consistent with the interests of the entire class.

32. After consideration of all of the evidence, and the submissions of the parties, the court finds that all of the requirements of Fed.R.Civ.P. 23(b)(2) have been met and the certification of the class previously entered is confirmed.

IV

Findings of Fact: Settlement Agreement

33. Representatives of plaintiffs and defendant began settlement discussions in late 1991, approximately two years after this litigation was initiated. All parties who testified about the settlement discussions described them as difficult and heated. After almost one year, in September, 1992 plaintiffs reached an agreement with DPW. After further negotiations based on the agreement, Allegheny County signed the agreement in February, 1993.

34. Pursuant to Fed.R.Civ.P. 23(e), the court approved a notice to be sent to all class members. The notice invited class members to submit their objections to, or approval of, the settlement agreement, or to participate in the hearing, if they so chose, by sending a written request to the court prior to February 17, 1993. As of February 18, 1993, 155 responses were received, with 19 individuals or couples requesting to testify at the hearing.

*6 35. On February 24, 1992, those who requested to testify were given the opportunity to do so.⁴

Community Placement

36. In the past 20 years, the number of persons in Pennsylvania residing in institutions such as Western Center has decreased from 12,000 to approximately 3,700 as a result of DPW’s policy of providing services in the community, rather than in larger institutions, whenever appropriate.

37. Under the terms of the settlement agreement (Defendant's Exhibit 2), DPW professionals will evaluate all residents of Western Center to determine whether a program of community supports and services is recommended. Of the total number of residents identified for community placement, the agreement contemplates that 80 persons will begin to receive such community services in fiscal year 1992-93. Fifty percent of the remaining class members who have been recommended for community services will receive them in fiscal year 1993-94, and 50 percent will receive such services in fiscal year 1994-95.⁵

38. A person-centered planning process is conducted for each class member who has been recommended for community placement. The process is directed by the class member and any involved family member, guardian, friend or advocate; it is coordinated by the service manager of the county of the class members' origin or placement responsibility. It includes an interdisciplinary team of professionals. Unless the class member objects, the family member, guardian, friend or advocate will have a significant role, along with members of the interdisciplinary team, in decisions relating to the provision of community services. As a condition of receipt of funding, the county will provide an independent client advocate for any individual class member needing assistance in the planning process or placement decision.

Funding

39. Services developed under the agreement will be funded by the Home and Community Based Waiver (HCBW). (See Defendant's Exhibit 2, Appendix B). The HCBW is a federal funding source allowing states that provide services to persons living in, or at risk of living in, institutions, to provide such services to those individuals in the community. The HCBW requires both state and federal funding and has become the primary funding source for mental retardation services in Pennsylvania.

40. The Pennsylvania General Assembly has appropriated sufficient state funding to use the HCBW to provide the services projected in the settlement agreement for fiscal year 1992-93. The governor has requested appropriation of sufficient funds to continue providing services as outlined in the agreement for fiscal year 1993-94.

Monitoring

41. The settlement agreement contains provisions for

extensive monitoring by DPW and each county of the services provided pursuant to the settlement agreement. As a prerequisite for receiving HCBW funding, Pennsylvania's approved HCBW application contains comprehensive standards relating to the health and welfare of persons with mental retardation to be implemented by community providers. (Plaintiffs' Exhibit 2, Appendix B). Additionally, plaintiff organizations will monitor the services at Western Center at least twice monthly for the five year duration of the settlement agreement. Also, DPW will fund an independent client advocate through PP & A whose primary duties are to monitor services for Western Center residents, review general conditions at Western Center and at newly developed community services and otherwise assist residents and/or their families.

Dispute Resolution

*7 42. The agreement sets forth procedures for dispute resolution which require a meeting between the parties within 14 days of notice of the dispute. If a resolution is not reached by the parties, DPW is required to secure a mental retardation professional, subject to approval of plaintiffs' counsel, to review and resolve the matter. DPW will direct the implementation of the professional's decision.

Western Center

43. DPW will take reasonable steps to guarantee that Western Center retains its ICF/MR certification. DPW will also take reasonable steps to assure that no person requiring mental retardation services who can be served in a community based program will be admitted to Western Center.

V

Conclusions of Law: Settlement Agreement

44. Fed.R.Civ.P. 23(e) provides that a class action shall not be dismissed or compromised without the approval of the court, and only after notice has been given to all members of the class as directed by the court. Before approving any settlement of a class action, the court must determine "whether the settlement is fair, adequate and reasonable." *Stoetznor v. U.S. Steel Corp.*, 897 F.2d 115,

118 (3d Cir.1990).

45. In considering the proposed settlement, the court's role is a limited one. It may either approve or disapprove the settlement; it may not rewrite it. *Phillips v. Allegheny County*, 869 F.2d 234, 238 (3d Cir.1989); *Harris v. Pernsley*, 654 F.Supp. 1042, 1050 (3d Cir.1987).

46. In determining whether the settlement is reasonable, the court must consider any objections filed by members of the class. *See Harris*, 654 F.Supp. at 1050.

47. The Court of Appeals for the Third Circuit has set forth six factors to be considered in evaluating the fairness, adequacy and reasonableness of a settlement agreement such as the present agreement.⁶ These factors are: 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 and the amount of discovery completed; 4) the risks of establishing liability; 5) the risks of establishing damages; and, 6) the risks of maintaining the class action through the trial. *Stoetznner*, 897 at 119 (3d Cir.1990); *citing Girsh v. Jepson*, 521 F.2d 153 (3d Cir.1975).

Complexity, Expense and Direction

48. As to the first factor, it is beyond dispute that litigating this matter would be quite complex, extremely expensive for all parties and of lengthy duration. At the time of the hearing on settlement and decertification, this case was already more than three years old. At the limited hearing, which was not a full-blown trial on the merits, the court heard the testimony of 34 witnesses, including six experts, over a period of eight days. Similar litigation conducted elsewhere has consumed extensive judicial resources including trial expense and court time. *See Halderman v. Pennhurst State School & Hospital*, 610 F.Supp. 1221 (E.D.Pa.1985); *Jackson v. Fort Stanton Hospital*, 757 F.Supp. 1243 (D.N.M.1990), *rev'd in part and remanded*, 964 F.2d 980 (10th Cir.1992).

Reaction of the Class

*8 49. Turning to the second factor, the reaction of the class to the settlement is mixed. Although the court must consider any objections filed by members of the class, they cannot serve as an automatic bar to a settlement; however, it is significant if there is opposition by a majority of class members. *TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456, 462 (2d Cir.1982).

50. Of the 756 notices sent pursuant to Rule 23(e), 92 persons expressed opposition to, and 43 persons or organizations, including nine class members, expressed support for, the agreement. (*See Affidavit of Plaintiffs' Counsel to Demonstrate Compliance with Court Orders Regarding Notice*). Ten family members testified in opposition to the settlement pursuant to the Rule 23(e) notice, and four parents of class members testified as witnesses for the opposing intervenors.

51. Many of those who testified in opposition to the settlement agreement expressed fears and concerns common to family members of persons with mental retardation who are facing potential changes in location and treatment. *See Lelsz v. Kavanaugh*, 783 F.Supp 286, 291 (N.D.Tex.1991), *aff'd*, No. 92-1087 (5th Cir. January 11, 1993); (Plaintiffs' Exhibits 18-21, 25). All of the family members who testified indicated that they opposed the agreement because they did not want to see Western Center closed. Several of those who testified revealed that they had not read the agreement in its entirety, or that they did not remember its contents.

52. In short, most of the testimony by family members of class members addressed concerns other than the terms of the settlement agreement, and sought relief beyond the authority of the court to remedy and unrelated purpose of the hearing. The settlement agreement does not provide for the closure of Western Center. Moreover, the court has no authority to direct DPW to deliver its services to any particular facility. The state has the power to relocate its residents for its own administrative needs or unilaterally to close any of its institutions for economic or other reasons. *See Id.*, at 298.

53. The court's authority in proceedings such as the present one, is restricted to ensuring that the state provide its services in keeping with statutory and constitutional standards. The opposition of some class members and others to a proposed settlement agreement does not preclude the court from finding that the agreement is fair, adequate and reasonable.

Stage of Proceedings and Discovery

54. The third factor involves consideration of the stage of the proceedings and the amount of discovery completed. This litigation was more than three years old before the settlement agreement was reached. To date, 142 pleadings have been filed and extensive discovery has been undertaken. Had an agreement not been reached, this matter would have been ready and set for trial. There is no question that the settlement agreement, if approved, will obviate the need for a lengthy trial. At the present stage of the proceedings, all parties are able to understand and

evaluate the potential impact of the agreement on their respective legal positions.

Risk of Establishing Liability

*9 55. The fourth factor addresses the risks of establishing liability. The court need only evaluate the probable outcome of the litigation and is not bound to weigh and decide each contention. *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 96 F.R.D. 632, 642 (D.C.N.J.1983). For plaintiffs to prevail in this lawsuit, they must establish that defendants violated the constitutional standards as set forth in *Youngberg v. Romeo*, 457 U.S. 307 (1982), as well as the statutory standards as set forth in Title XIX of the Social Security Act, 42 U.S.C. §§ 1396, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Plaintiffs presented sufficient evidence at the hearing to put these matters at issue. However, these matters require expert opinions and clearly are issues over which expert opinions widely differ. Accordingly, the decision by each party thereto to enter into the settlement agreement is reasonable and prudent in light of the genuine risk of a judicial determination as to liability adverse, or less favorable, to that party than the terms of the agreement.

Risk of Establishing Damages

56. The fifth *Girsh* factor examines the range of reasonableness of the settlement in light of the best possible recovery. The court must compare the relief provided by the settlement agreement to that which plaintiffs sought when they filed their action. Plaintiffs, in their amended complaint, requested the following relief:

- (i) that defendants operate Western Center in accordance with standards set forth by the Title XIX ICF/MR regulations, 42 C.F.R. 442.4 *et seq.*;
- (ii) that defendants provide adequate treatment to Western Center residents, including the development and implementation of individualized habilitation programs and the provision of adequate physical therapy, medical, psychological, nursing, and dental services;
- (iii) that defendants ensure that Western Center residents are protected from harm;
- (iv) that defendant stop using excessive and undue restraints;
- (v) that defendants provide community services for those class members who, in the judgment of

professionals, are not in need of institutionalization;

(vi) that defendants discontinue their segregation of and discrimination against Western Center residents on the basis of handicap;

(Amended Complaint, p. 35).

In light of the evidence presented at the hearing, it does not appear as though there was any relief initially sought by plaintiffs that has not been obtained through the provisions of the settlement agreement. Indeed, it is arguable that the agreement provides more comprehensive benefits than that which could have been obtained through litigation.

Risk of Maintaining Action Through Trial

57. There is little risk that a class action would not be maintainable throughout the length of a trial, the sixth *Girsh* factor. The evidence at the hearing indicated that the population at Western Center was very stable, and many of those who have been admitted there have been residents for many years. At present, there are 377 class members, of whom 360 reside at Western Center.

Objections to Settlement Agreement

*10 58. Prior to the hearing, opposing intervenors submitted eight objections to the settlement agreement. Most of their objections have already been addressed in the body of this adjudication; however, the court will summarize them and respond briefly to the concerns they raise.

59. The first objection asserts that the settlement agreement is a sham because it merely reflects the existing policy of DPW. Although, some of what is contained in the settlement agreement represents existing policies or goals of the DPW, without the agreement, the state cannot be held accountable for implementing those policies and goals, The settlement agreement approved by a court order requires DPW to execute those policies and goals.

60. The second objection charges that dispute resolution under the agreement lacks due process and is inherently biased. The dispute resolution procedure, as set forth in paragraph 15 of the settlement agreement and summarized above in paragraph 42, affords due process and adequate protections against bias. It requires a meeting within 14 days of notice of a dispute and the appointment of a retardation professional, approved by

plaintiffs' counsel, to review and resolve any dispute which the parties are unable to resolve.

61. The third objection, that the settlement agreement's unstated purpose is the closure of Western Center, has been addressed in paragraphs 52 and 53 above.

62. The fourth objection asserts that the agreement fails to provide a monitoring program for community based facilities and services to class members that will guarantee a level of care and safety equal to, or greater than, the care and safety provided for residents of Western Center. The court finds that the monitoring systems provided by the agreement, and described in summary in paragraph 41 above, are sufficient to ensure the care and safety of individuals receiving services in the community.

63. The fifth objection charges that the agreement fails to provide for the participation of the Western Center Board of Trustees or the Parents Group. However, the failure of the agreement to provide for such participation by the Board of Trustees or the Parents Group as separate entities does not render the agreement unfair, inadequate or unreasonable. Moreover, individual members of the Board of Trustees or the Parents Group may participate, if appropriate, as involved family members, guardians, friends or advocates in the person-centered planning process as described above in paragraph 38.

64. The sixth objection, expresses the concern that, because the agreement fails to provide for regularly updated habilitation programs for class members placed in community living arrangements, they may, therefore, be deprived in the future of adequate multi-disciplinary professional services. The agreement assures, at minimum, an annual update of each individual's habilitation program, as stated in DPW's approved application for the HCBW. (Plaintiffs' Exhibit 2, Appendix B). Moreover, the agreement provides that each individual have a service manager who is responsible to conduct a regular review of that individual's person-centered plan to ensure that the services are properly implemented. These systems, along with the dispute resolution procedure, provide adequate assurances that individuals in the community will receive appropriately updated habilitation plans.

*11 65. The seventh objection is that correspondence from parents and siblings of residents of Western Center has been overwhelmingly opposed to the settlement agreement. The court has addressed this issue in paragraphs 49-53 above.

66. The eighth objection states that ARC and ARC affiliates should not perform monitoring at Western Center in light of the Developmental Disabilities Act's prohibition against service providers performing monitoring, and that ARC should not be a training agent for Western Center. The settlement agreement expressly provides in paragraph 16, that the monitoring of Western Center will be performed in accordance with the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6042. Moreover, no evidence was offered that ARC provides, or has provided, services at Western Center, or that it acts, or has acted, as a training agent for residents of Western Center.

67. In summary, opposing intervenors objections to the settlement agreement referred to above fail to persuade the court that the agreement inadequately serves the interests of the class members. On the contrary, the evidence presented at the hearing showed that, in light of all of the factors the court is bound to consider, the settlement agreement is fair, adequate and reasonable, and will provide substantial benefits and protections to the class members without subjecting them to the risk and expense of litigating these highly complex issues. Accordingly, the settlement agreement will be approved.

An order follows.

ORDER

AND NOW, this 22nd day of June, 1993, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. This court's order dated February 21, 1992 certifying the above-captioned action as a class action under Fed.R.Civ.P. 23(b)(2) is confirmed.
2. The settlement agreement entered into by plaintiffs, the Pennsylvania Department of Public Welfare and Allegheny County, and signed by counsel for those parties, is fair, adequate and reasonable. The agreement is, accordingly, approved.

Parallel Citations

6 A.D.D. 676, 5 NDLR P 433

Footnotes

¹ Mark Lunz, John C. Lunz, III and Wayne Lunz, who were persons at risk of being placed at Western Center, are not class members.

Richard C., by Kathy B. v. Snider, Not Reported in F.Supp. (1993)

- 2 Pennsylvania Protection & Advocacy (PP & A) is designated by the Commonwealth of Pennsylvania to monitor programs pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6041 *et seq.*. PP & A subcontracts to the Association for Retarded Citizens to perform monitoring. PP & A provides no direct services.
- 3 David G. was transferred to Ebensburg Center in May, 1990, however, he remains a member of the class.
- 4 On February 24, 1993, the court called the name of every person or couple requesting to testify. Not all of the individuals or couples were present, however, the court heard the testimony of the following people: Charles Cihil, Martin Dempsey, Walter Kohut, Richard Welsh, Charles Miller, James Mooney, Laura Mooney and Aldo Giannini. Although Mr. Giannini had not complied with the procedures set forth in the notice of settlement, he had previously written to the court requesting to testify, and with the agreement of all counsel, he was permitted to do so. On March 4, 1993, Mary Chiappino and Betty Lou McDevitt, who had originally requested to testify, but who could not be present on February 24, 1993, were also permitted to testify.
- 5 The agreement contains a “one-for-one” provision by which a county will receive funding to provide services for one person on that county’s waiting list for each Western Center resident who is placed in the community and receives services in that county. This provision does not affect the fairness or reasonableness of the agreement as it applies to class members, but it does extend the benefits of the agreement to persons who are not class members. The provision is consistent with purpose of the Social Security Act provisions authorizing Home and Community Based Waivers, 42 U.S.C. § 1396(n). Without this provision, it is unlikely that the county, and perhaps the state, would have agreed upon a settlement. Under this provision of the settlement agreement, a benefit is achieved which would not have been obtainable through litigation.
- 6 The *Girsh* opinion set forth three additional factors: (a) the ability of the defendants to withstand a greater judgment; (b) the range of reasonableness of the settlement in light of the best possible recovery and (c) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. These additional factors are directed toward class settlements involving monetary damages and are inapplicable to the instant action for equitable relief.