IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION, COLUMBUS

PHYLLIS BALL, et al.	:	
	:	
Plaintiffs,	:	**Case No. 2:16cv00282**
	:	
v.	:	**Judge Edmund A. Sargus, Jr.**
	:	
JOHN KASICH, et al.	:	**Magistrate Judge Elizabeth Preston Deavers**
	:	
Defendants.	:	

DEFENDANTS' RESPONSE TO THE COURT'S DECEMBER 18, 2019 ORDER (DOC. 461)

On December 17, 2019, the Court held a fairness hearing concerning the proposed class settlement agreement ("the Agreement") between Plaintiffs and Defendants. The State and County Defendants (together, simply "Defendants") write in response to the Court's December 18, 2019 Order (Doc. 461).

During closing remarks at the hearing, and through its Order the next day, the Court indicated it would approve the Agreement with modifications. Or. 1-2, Doc. 461. It initially proposed adding an enforcement mechanism that can be used by any guardian of persons residing in Intermediate Care Facilities ("ICFs"). *Id.* at 1. This mechanism would allow these guardians, who are neither class members nor parties to the Agreement, to allege that the Agreement is harming ICF interests. Fairness Hearing Tr. 185, Doc. 465 (hereafter "Tr."). Additionally, the Court proposed that the Agreement include the following language: "nothing in the agreement is intended or will operate to encourage or direct a person in an ICF through a guardian who does not want to obtain a waiver to be forced or encouraged to leave an ICF." Or.

2, Doc. 461. The Court did, however, state that it was "not wedded to" its proposed language and left the door open for alternative suggestions. *See* Tr. 186-87.

This response does four things. First, it explains why Defendants are unable to accept the above modifications. Second, it proposes alternative modifications that Defendants (and Plaintiffs) would be able to accept. A redline version of these modifications is attached. Third, it explains why these adjustments, combined with what the Court has already concluded, should remove any doubt that the Agreement satisfies Rule 23's standards. Fourth, it alternatively requests, if the Court does not find the proposed adjustments to the Agreement acceptable, that the Court set a litigation schedule to resolve everyone's claims—as Defendants have exhausted their ability to negotiate this case.

A. The Court's proposed modifications would inject too much uncertainty into the Agreement.

Defendants appreciate that, in the best-case scenario, all of the parties involved in this case would have been able to reach a global solution acceptable to everyone. Unfortunately, despite Defendants' extensive negotiations with all sides, that has not happened. Defendants must, therefore, make decisions based on the current reality: they are being sued by two groups with opposite policy preferences—and they have an agreement with *only one side*. Independent of the class settlement, Guardian Intervenors still have active claims. If Defendants and the Intervenors had been able to finalize a settlement for *those* claims, then *that* settlement would have undoubtedly included ICF commitments coupled with some enforcement option.

The current proceedings are about Defendants' proposed settlement with Plaintiffs' class, a class of people who prefer waivers. To Defendants, a key benefit of the Agreement is that it will provide a final and predictable solution for the class claims. Relatedly, it will save the

settling parties the considerable costs of continued litigation; such as costs associated with depositions, expert discovery, summary-judgment proceedings, trial, and appeal.

The Court's proposed modifications, however, would undo, or at least greatly lessen, the certainty the Agreement provides Defendants. The modifications would create a federal shortcut for those who prefer ICFs—by which they "wouldn't have to file a new lawsuit" they "can simply file a motion in this case"—to bring a challenge whenever, in their view, there is "real harm" to ICF preferences. *See* Tr. 185-86. Since Guardian Intervenors, and others who share their perspective, already oppose the Agreement, Defendants can only assume that this approach would inevitably mean various sub-rounds of negotiations and enforcement litigation.

Adding to this uncertainty, the Court's proposed language leaves room for differing interpretations. Take, for example, how the proposed language would interact with the Agreement's provisions about options counseling for people in ICFs. The State has sought to make this counseling process neutral and it has accepted suggestions from all sides. And, as the Court is aware, the State resisted attempts during this case to make expansive changes to its counseling process. Critically, the Agreement allows Defendants to remove ICF residents from options counseling if they make a request. So, in Defendants' view, such counseling is not meant to pressure anyone to leave an ICF. Still, Guardian Intervenors have continually suggested that they distrust the counseling process and view it as coercive. Thus, whether such counseling will "operate to" or "encourage" people to leave ICFs may ultimately depend on the eye of the beholder. Such uncertainty is why Defendants are unwilling to make abstract promises about how the Agreement will operate, or what it will encourage people to do, particularly with the backdrop of federal enforcement and potential liability.

Based on the fairness hearing, Defendants also fear that adding an enforcement option for non-parties to the Agreement would quickly lead to people raising generalized issues unrelated to the Agreement. To be sure, the speakers at the hearing gave passionate accounts of their experiences and why they prefer ICFs for their loved ones. No one disputes that. But, as the Court itself signaled, the speakers were unable to show that the Agreement will cause them any concrete harm—because it won't. *See* Tr. 184. Many speakers instead voiced broader criticisms of Ohio's ICF policies over the past twenty years since *Olmstead v. L.C.*, 527 U.S. 581, 604 (1999). Whether those criticisms are valid or not, a federal court is not the proper forum for the debate unless someone has standing and can state a viable federal claim.

B. Defendants can add provisions to the Agreement memorializing their continued commitment to the ICF option.

While Defendants cannot accept the Court's proposed modifications, they do offer an alternative. Because this Agreement is with a class that prefers waiver services, the Agreement's commitments focus on that option. But, as Defendants have repeatedly said, they would *not* have reached this Agreement if it implicitly placed the ICF option at risk. As discussed more below, undisputed facts already show as much. To further reinforce Ohio's ICF commitment, Defendants are able to alter the Agreement in three areas. (Plaintiffs have informed Defendants that they are willing to accept these changes.)

First, Defendants can add a statement about ICFs at the beginning of the Agreement. The Agreement begins with a series of "whereas" recitals. Doc. 454-1. Though not enforceable, these recitals provide context for the reader. For example, one recital discusses the settling parties' shared objective to provide people with informed choices and access to waiver services. To expressly include ICFs within these recitals, Defendants can add the following language:

> Whereas, nothing in this Agreement is intended to force a person to forego or relinquish ICF services. Nor is anything in this Agreement intended to remove the ICF option in the future.

Second, Defendants also suggest adding language within the Agreement's terms about options counseling (Section III). To begin, Defendants can add a category to the Agreement's exclusion provision (Section III.A.1). Defendants propose to exclude the following individuals from options counseling:

> Individuals who, either on their own or through their guardian, submitted written objections to this Agreement in Case No. 2:16-cv-282. This exclusion is limited to individuals DoDD can readily, and confidently, identify from the content within the written objections.

Defendants additionally suggest including the following provision at the end of Section III:

> Nothing in this Section (III) requires any individual to accept an Exit or Diversion Waiver as an alternative to ICF services.

This language—particular in combination with ICF residents already-existing ability to decline options counseling (Section III.A.1)—will reinforce that options counseling is a voluntary process intended to give people choices, not force them to leave their preferred setting.

Third, Defendants can include language about ICF reimbursement rates over the life of the Agreement (within Section IV of the Agreement). The Agreement covers the current budget cycle and the next budget cycle. As the Court is aware, Defendants were able to obtain an *increase* in ICF rates for the current cycle, even while meeting funding commitments under the Agreement. Defendants can agree to add the following language, which seeks to preserve this status quo:

> For the current biennium (FY 20-21), DoDD will not seek a change in the ICF reimbursement methodology as set forth in the current biennial budget (House Bill 166).

Then, for the next budget cycle, Defendants can commit to seek at least the same reimbursement rate from the General Assembly:

> For FY 22-23, DoDD will request and exercise best efforts and reasonable diligence in support of a Statewide Average Daily Rate (per bed) for ICF reimbursement that is no less than the Statewide Average Daily Rate for FY 20.

To ensure clarity, these provisions will also require a definition of "Statewide Average Daily Rate," which is included in the attached redline proposal (Exhibit A).

Importantly, for the same reasons laid out above, Defendants cannot agree to add an enforcement mechanism for non-class members to the Agreement. Again, Guardian Intervenors have their own active lawsuit, which Defendants have already unsuccessfully attempted to settle.[1] If Guardian Intervenors are entitled to any federal relief, they will receive it through their own claims. Still, as the Court no doubt appreciates, Defendants take commitments in the Agreement and their representations to the Court very seriously, and they will act in good faith to meet these commitments.

C. With the proposed additions, the Court should approve the Agreement.

Combining Defendants' proposals with what the Court already concluded at the fairness hearing, the Court should now approve the Agreement.

Under Rule 23, a court reviews a class settlement agreement "is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court correctly recognized at last month's hearing that whether an agreement is "fair" is not a freestanding policy inquiry. *See* Tr. 27, 180. Review instead involves specific factors, which mainly address whether the settlement is fair *to class members*. Fed. R. Civ. P. 23(e)(2); *see also Int'l Union, United Auto., Aerospace, & Agr.*

[1] Shortly before this filing, Defendants communicated with Guardian Intervenors about the changes they are able to make to the Agreement. Defendants informed Guardian Intervenors that, if they agree to dismiss their claims with prejudice and relinquish their fee requests, then Defendants would agree to an enforcement option for the ICF-reimbursement-rate commitments described above.

Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007). For example, these factors ask whether class counsel has "adequately represented the class," Fed. R. Civ. P. 23(e)(2)(A); whether "the relief provided *for the class* is adequate," Fed. R. Civ. P. 23(e)(2)(C) (emphasis added); and how "absent class members" have reacted to the proposed settlement, *Gen. Motors Corp.*, 497 F.3d at 631. Conversely, a non-party to the class settlement, even one who has intervened in the case, "does not have the power to block" other parties from settling "merely by withholding [] consent." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986).

The case law outlines further limits on review of class settlements. A court examines "the settlement 'in its entirety and not as isolated components.'" *Robinson v. Ford Motor Co.*, No. 1:04-CV-00844, 2005 U.S. Dist. LEXIS 11673, at *11 (S.D. Ohio June 15, 2005) (quoting *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 245-46 (S.D. Ohio 1991)). "[B]ecause settlement of a class action, like settlement of any litigation, is basically a bargained for exchange between the litigants, … Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Robinson v. Shelby Cty. Bd. of Educ.*, 566 F.3d 642, 649 (6th Cir. 2009) (emphasis and quotations omitted). A court should be especially deferential when a settlement involves government officials, who have already weighed the public interests involved. *See, e.g.*, *Thompson v. Midwest Found. Indep. Physicians Ass'n*, 124 F.R.D. 154, 160 (S.D. Ohio 1988); Doc. 454 at 18-19 (collecting authority). And, while a court is free to suggest modifications, the settling parties make the ultimate call on whether to accept them. *Staton v. Boeing Co.*, 327 F.3d 938, 961 n.16 (9th Cir. 2003). Thus, in the end, the choice is binary: it is either the terms the settling parties are willing to accept or no settlement at all.

Here, with Defendants' proposed modifications, the Court should now approve the Agreement. The Court's statements at the hearing already go a long way in explaining why. In its final comments, the Court stated that the Agreement was "good to some extent" and had "positive" aspects. Tr. 184, 186. Based on the context, these qualified compliments were presumably noting that the Agreement does good things for class members. After all, at no point during the hearing did the Court suggest the Agreement was insufficient for the class. The Court instead qualified its statements because it felt items were "missing" for non-class members; those who prefer ICFs. *Id.* at 184. Even then, the Court remarked that this group had not shown any cognizable harm from the Agreement: "if this were an initial case, I would probably have to find as a legal matter there's no showing of immediate harm." *Id.* Combining these suggestions—that the Agreement does good for class members with no showing of imminent harm to others—no legal basis exists for withholding approval.

To the extent further assurance is needed, Defendants' proposed additions should push the Agreement over the approval edge. These ICF commitments match the evidence. Recall that, with what was said at the hearing, the following facts remain undisputed:

- Private ICFs in Ohio serve over 4,500 people, McKinney Decl. ¶9, Doc. 454-3;
- Over 300 certified ICF beds remain available, *id.*;
- This summer, Ohio amended its Revised Code to ensure that people are being informed of the ICF option, Ohio Rev. Code §5126.047;
- Last fiscal year, Ohio's private ICFs received over a half-billion dollars in state and federal funding, Weidner Decl. ¶9, Doc. 454-2;
- During the last budget, Ohio was able to obtain an increase in ICF reimbursement rates, while still meeting its funding commitments under the Agreement, *id.*; and

- ICF residents receive per-person funding that is roughly the same as per-person funding for exit waivers. *See* Weidner Aff. ¶¶ 7-8, Doc. 273-4.

Like every other State, Ohio has had to make difficult choices over the last twenty years about how to reform its service system in light of *Olmstead*. As is true in other States, reform in Ohio has reduced the number of people in facilities. But unlike some other States—such as Michigan, which does not offer ICFs, *see* Tr. 81—Ohio has maintained a strong ICF program that serves many people. That should not get lost in all this: despite extensive litigation, Ohio has consciously *kept* an ICF option capable of serving thousands of people. Indeed, Ohio's ICF "footprint," which is large in comparison to other States, has made Ohio the target for lawsuits like this one. *See* Compl. ¶8, Doc. 1.

Putting this differently, Defendants completely agree with speakers at the fairness hearing that ICFs should remain an important part of Ohio's system. Ohio has, therefore, sought measured reforms that maintain the ICF option for those with the greatest needs. Defendants do disagree, however, with some suggestions at the hearing, which crossed the line into unsupported speculation. In particular, the notion that Defendants have a hidden agenda to eliminate the ICF option is baseless. That notion cannot be squared with Defendants' litigation history in this case. The State actively defended this case for multiple years, vigorously disputing Plaintiffs' claims and successfully narrowing the proposed class. Throughout those costly proceedings, Defendants stressed the importance of having balance and choices within its system. Why would Defendants have undergone all that just to roll over later? The better explanation, and the accurate one, is that Defendants accepted this Agreement because it sets realistic waiver commitments that will not endanger ICFs.

Finally, to the extent speakers' criticisms strayed outside the Agreement (most did), this proceeding is not a referendum on the ICF policy choices Ohio has made since *Olmstead*. Whether the State has struck the "optimal" balance between ICFs and waivers goes well beyond the question at hand. *See Shelby Cty. Bd. of Educ.*, 566 F.3d at 649. Even if open to criticism from some who prefer ICFs, the Agreement Defendants reached with class members—a group that prefer waivers—is fair, adequate, and reasonable. The Court should approve it subject to Defendants' proposed modifications.

D. Alternatively, Defendants seek a case schedule.

Defendants will briefly address the alternative to approval, which is litigation on all sides. In March, this case will turn four years old. For much of the past two years, Defendants have worked hard to try and reach agreements with both sides. For a fleeting moment, Defendants had settled the case with both Plaintiffs and Guardian Intervenors. Yet, as things presently sit, Defendants are admittedly frustrated with the results of their—and also the Court's—considerable negotiation efforts. However they label it, Guardian Intervenors went against their agreement by using biased communications to recruit objectors to the class settlement. *See* Doc.417. Now, with the Court's recent Order, Defendants' class settlement with Plaintiffs stands in jeopardy, too.

At day's end, the proposed class settlement is a fair and reasonable solution for class members that will not harm others. So, under Rule 23 standards, the Court should approve it. If the Court disagrees, Defendants see no alternative but to resume litigation. Thus, absent approval, Defendants request a status conference for the purpose of setting a revised case schedule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2020, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Respectfully submitted,

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