

HON. JAMES L. ROBERT

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADAM DUNAKIN, by and through his
parent and next friend, KIMBERLEE
HOLLINGER individually, and on behalf of
similarly situated individuals,

Plaintiff,

v.

KEVIN W. QUIGLEY, in his official capacity
as Secretary of the Washington State
Department of Social and Health Services;
and DOROTHY F. TEETER, in her official
capacity as Director of the Washington State
Health Care Authority,

Defendants.

NO. 2:14-cv-00567-JLR

CLASS'S MOTION FOR FINAL
APPROVAL OF SETTLEMENT
AGREEMENT, AWARD OF
LODESTAR ATTORNEYS' FEES
AND LITIGATION COSTS

**Noted for Consideration:
January 9, 2017 at 10:00 a.m.**

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TABLE OF AUTHORITIES

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Treatises

4 A. Conte & H. Newberg, *NEWBERG ON CLASS ACTIONS*, § 11:50 (4th ed. 2002) 6

I. INTRODUCTION

1
2 This groundbreaking Settlement reforms defendants' Pre-Admission Screening
3 and Resident Referral (PASRR) system in order to protect Plaintiff and others with
4 intellectual disabilities or related conditions from languishing in nursing facilities
5 without needed services, in violation of the Nursing Home Reform Act, the Medicaid Act,
6 Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). If
7 finally approved, the Settlement Agreement will require the Department of Social and
8 Health Services to implement significant and comprehensive reforms to all aspects of its
9 PASRR system. These changes will enable hundreds of individuals who have lived in
10 institutions for many years, like Mr. Dunakin, to receive the specialized services they
11 need to gain skills for greater independence, or to live in a community-based homes close
12 to or with their families and friends.

13 Class notice was sent to every identified class member living in a Medicaid-
14 funded, state certified nursing facility. *See* Dkt. No. 78, ¶4. No objections or comments
15 to the settlement agreement were received. Hamburger Decl., ¶2. This is significant. No
16 one objected to (1) the comprehensive reforms to the PASRR system proposed; (2) the
17 protections put in place to ensure community placement when a class member is willing
18 and able to live outside of a nursing facility; (3) the attorneys' fees sought; (4) the
19 requested litigation costs; or (5) any other aspect of the settlement agreement. The lack
20 of objectors to the merits of the Settlement Agreement confirms that it is a good resolution
21 for all involved. Importantly, this resolution was reached without years of contentious
22 litigation, as has occurred in other states.

1 This is a complete victory. Through the Court's partial summary judgment
2 decision, the Class and class counsel obtained an unambiguous judicial determination
3 that defendants had not been implementing PASRR as required by law. That decision
4 opened the door to meaningful negotiations that gave rise to the comprehensive reforms
5 of the PASRR program required under the Settlement Agreement.

6 The Court should conclude that the proposed Settlement Agreement is fair,
7 reasonable and adequate. The Agreement provides all of the relief that Plaintiff sought
8 in his Complaint, without the risks, expense and delay that further litigation would bring.
9 It also allows class counsel to continue to track implementation of the PASRR changes
10 over time, and establishes clear metrics for determining when the goals of the Agreement
11 are met. Very few cases achieve such stellar results. For these and other reasons, the
12 Settlement Agreement should be approved, and the attorneys' fees and litigation costs
13 sought by class counsel awarded.

14 II. EVIDENCE RELIED UPON

15 The parties rely upon the Declaration of Eleanor Hamburger submitted with this
16 Motion as well as the records and pleadings in this case. While defendants do not oppose
17 this motion, they do not agree with the facts or legal conclusions alleged herein.

18 III. FACTS

19 Consistent with the Court's Order preliminarily approving the Settlement
20 Agreement, class notices were sent out to class members on or before November 11, 2016.
21 Dkt. No. 78, ¶4.

1 The notice informed class members about the provisions of the Settlement
2 Agreement and the opportunity to submit objections or comments for the Court's
3 consideration. *See* Dkt. No. 71-1, Appendix 2. The notice also explained how class
4 members could request to attend the hearing in person. *Id.* The deadline for submitting
5 objections, comments or requests to appear was December 12, 2016. Dkt. No. 76, pp. 3-4.
6 Neither party nor parties' counsel received any comments, objections or requests to
7 appear from class members. Hamburger Decl., ¶2.

8 IV. OVERVIEW OF THE SETTLEMENT AGREEMENT

9 This section revisits the summary of the key terms of the Settlement Agreement.

10 A. Defendants Shall Implement Comprehensive Reforms to their PASRR System

11 The Settlement Agreement requires defendants to put in place new procedures for
12 ensuring timely PASRR Level I screenings, Level II Evaluations and Post-PASRR Level II
13 Meetings and systems for monitoring the ultimate provision of specialized services and
14 community-based discharge planning. *Id.*, ¶¶ 6.2; 6.3. The new system anticipates that a
15 written plan for PASRR services, developed at a meeting with the class member and his
16 or her family members/guardians, if appropriate, is the key to ensuring that the
17 individual's rights under the Medicaid Act, the Nursing Home Reform Act and the ADA
18 are protected. *See App. 1*, ¶¶ 6.4.2, 6.4.3.

19 B. The Agreement Provides for Transition to Community Placement

20 The Agreement ensures that all class members are able to make an informed choice
21 about where they are able and would like to live. *See App. 1*, ¶6.5. The Settlement
22 Agreement incorporates the existing Roads to Community Living (RCL) federal

1 Medicaid program to assist with community placement for individuals who choose to
2 and are able to live in the community. *Id.* For those are undecided or unwilling to live
3 in a community based setting, the Agreement provides for a process to ensure that they
4 are regularly updated about their community based options. *Id.*, ¶6.6. For those who are
5 medically unable to live in the community, the Agreement ensures that they are provided
6 with specialized services to maximize independence with “reasonable promptness.” *Id.*
7 ¶6.7.

8 **C. Class Release**

9 If approved (and in return for the benefits under the Settlement Agreement), the
10 Class will release defendants from any and all claims for injunctive and declaratory relief
11 related to the claims brought in the litigation pursuant to the Nursing Home Reform Act,
12 Medicaid Act, Section 504 of the Rehabilitation Act or Americans with Disabilities Act.
13 *App. 1*, ¶1.5.

14 **D. Termination of Settlement Agreement**

15 The Settlement Agreement includes an anticipated termination date of
16 September 30, 2020, if the quarterly and biannual reports demonstrate that defendants
17 have substantially complied with the metrics described in Section 6 of the Settlement
18 Agreement. *See id.*, ¶8. If defendants achieve full compliance with each and every
19 compliance metric in advance of September 30, 2020, the parties will jointly move the
20 Court for an order asking for early termination of the Agreement and dismissal of the
21 case. *Id.*, ¶8.2.

1 **E. Attorneys' Fees and Litigation Costs**

2 The Settlement Agreement provides that Defendants will pay class counsel their
 3 actual lodestar attorneys' fees without a multiplier and its actual litigation costs
 4 ("Option 1"). *Id.*, ¶¶ 9.1.1; 9.1.2. Plaintiffs submitted an unopposed motion to for the
 5 Court to approve an award of attorneys' fees of \$590,345.00 and litigation costs of
 6 \$65,026.59, to be paid by Defendants. Dkt. 79. No class members will be responsible for
 7 payment of any attorneys' fees or costs. No class member objected to the amount of the
 8 fees or expenses. Hamburger Decl., ¶2.

9 **V. LAW AND ARGUMENT**

10 **A. Legal Standards for the Approval of a Class Action Settlement Agreement**

11 Before a settlement on behalf of a certified class may be finalized, the court must
 12 find that the proposed agreement is "fair, reasonable, and adequate." Fed.
 13 R. Civ. P. 23(e)(2). In analyzing the fairness, reasonableness, and adequacy of an
 14 agreement, courts weigh a number of factors, the weight of which will vary depending
 15 on the unique circumstances of each case. *Officers for Justice v. Civil Serv. Comm'n*, 688
 16 F.2d 615, 625 (9th Cir. 1982). These factors include:

17 the strength of the plaintiffs' case; the risk, expense, complexity, and likely
 18 duration of further litigation; the risk of maintaining class action status
 19 throughout the trial; the amount offered in settlement; the extent of
 discovery completed and the stage of the proceedings; the experience and
 views of counsel; the presence of a governmental participant; and the
 reaction of the class members to the proposed settlement.

20 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (citation omitted). This process
 21 protects absent class members who did not have a direct hand in crafting the settlement.

22 *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1444, n.5 (9th Cir. 1989).

1 Some of these factors, such as the reaction of class members, can only be gauged
2 after preliminary approval and notice is provided to class members. “[T]he absence of a
3 large number of objections to a proposed class action settlement raises a strong
4 presumption that the terms ... are favorable to class members.” *In re Omnivision Techs.*,
5 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007). “In most situations, unless the settlement is
6 clearly inadequate, its acceptance and approval are preferable to lengthy and expensive
7 litigation with uncertain results.” *Nat’l Rural Telecom. Coop., v. DIRECTV, Inc.*, 221 F.R.D.
8 523, 526 (C.D. Cal. 2004) (quoting 4 A. Conte & H. Newberg, *NEWBERG ON CLASS ACTIONS*,
9 § 11:50 at 155 (4th ed. 2002)). Here, every factor weighs strongly in favor of approval.

10 **B. All of the Factors Support Final Approval of the Settlement Agreement**

11 Under the Settlement Agreement, class members have obtained significant,
12 comprehensive reform of the PASRR system, which should result in additional services
13 while residing in nursing facilities and the development of community-based residential
14 programs for those ready and willing to leave. Class members did not compromise to
15 obtain this outcome, which may provide relief sooner for class members than had the
16 case been litigated to judgment. The Class reached this agreement after extensive written
17 discovery and depositions, motions practice, an interlocutory appeal to the Ninth Circuit,
18 and an exhaustive sampling of class members’ PASRR records by class counsel’s expert.

19 Similar litigation in other states took many years to reach the same sort of
20 agreement. Some resulted in consent decrees and the establishment of court monitors,
21 only to be followed by extensive post-judgment litigation. *See e.g., Rolland v. Patrick*, 946
22 F. Supp. 2d 226, 226 (D. Mass. 2013) (detailing the extensive post-settlement litigation

1 history of a similar PASRR case filed in 1998 in Massachusetts was finally dismissed in
2 2013); *Evans v. Williams*, 340 U.S. App. D.C. 500, 206 F.3d 1292, 1293 (2000) (consent
3 judgment in de-institutionalization consent decree resulted in post-judgment litigation
4 from 1978 to at least 2000). Class counsel sought to establish a settlement agreement and
5 monitoring process that would rapidly and efficiently bring the defendants and the
6 Washington Department of Social and Health Services into compliance with PASRR, and
7 that would avoid the pitfalls of past litigation.

8 **C. No Objections to the Reasonableness of the Settlement Agreement Were
Filed**

9 The absence of reasonable objections establishes a strong presumption in favor of
10 approval. *Nat'l Rural Telecom. Coop.*, 221 F.R.D. at 529. Where, as here, the class is “nearly
11 silent” regarding the terms of the settlement agreement, “the lack of objection of the Class
12 Members favors approval of the Settlement Agreement.” *In re Omnivision Techs.*, 559 F.
13 Supp. 2d at 1043 (3 objectors appeared out of 57,630 potential class members); *see, e.g.*,
14 *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577 (9th Cir. 2004) (45 objections out of 90,000
15 notices sent); *Rodriguez v. West Publ. Corp.*, 2007 U.S. Dist. LEXIS 74767, at *33 (C.D. Cal.
16 Sept. 10, 2007) (54 objections out of 376,000 notices).

17 Here, no objections were received. The Court should presume that the silence of
18 the class members on this issue reflects their support for the settlement.

19 **D. The Lodestar Attorneys’ Fees and Litigation Costs Sought by Class
Counsel Are Reasonable.**

20 Class counsel has filed an unopposed motion for the court to approve its lodestar
21 fees and litigation costs. Dkt. No. 79. They have also posted the Motion on the settlement
22

1 webpage, and provided notice to the Class of the amount requested. Dkt. 76, ¶ 7; Dkt.
2 79. Not a single class member objects to the payment of attorneys' fees and costs by
3 defendants. Defendants do not object to the payment. Given the extraordinary outcome
4 in the Settlement Agreement, the attorneys' fees and litigation costs are reasonable, and
5 should be awarded.

6 VI. CONCLUSION

7 For the foregoing reasons, the parties respectfully urge this Court to enter the
8 accompanying Proposed Order granting final approval of the Settlement Agreement and
9 providing for continuing jurisdiction to enforce its terms.

10 DATED: December 28, 2016.

11 **DISABILITY RIGHTS WASHINGTON**

12 /s/ Susan Kas

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- **Angela D. Coats McCarthy**
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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

- (no manual recipients)

DATED: December 28, 2016, at Seattle, Washington.

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)