

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**DWIGHT DURAN, et al.,**

**Plaintiffs,**

v.

**MICHELLE LUJAN-GRISHAM,  
Governor, et al.,**

**Defendants.**

**1:77-cv-00721-KK-SCY**

**JOINT MOTION FOR FINAL APPROVAL  
OF THE SECOND REVISED SETTLEMENT AGREEMENT**

The parties jointly move for this Court to approve the Second Revised Settlement Agreement (“SRSA”), attached hereto as Exhibit A.

The SRSA is identical to the Revised Settlement Agreement (“RSA”) that was filed on August 21, 2019 (ECF No. 3067-1), and which was preliminarily approved by the Court on September 5, 2019 (ECF No. 3072), except it contains three substantive modifications that the parties agreed to after the Court’s preliminary approval order. A redline showing the changes between the RSA and the SRSA is attached as Exhibit B.

The parties have already explained why the RSA should be approved by the Court in their Joint Motion for Final Approval of Revised Settlement Agreement (ECF Docs. 3174, 3184), and at the February 3, 2020 hearing on final approval. This Joint Motion explains why the modifications in the SRSA should also be approved. This Joint Motion also explains why these modifications benefit the Plaintiff class and thus do not require the class to be provided with another round of notice and another opportunity to object.

**1. The Modifications in the SRSA**

The SRSA contains three substantive modifications to the RSA, as shown in Exhibit B. (The SRSA also modifies the introductory paragraph to fully explain the procedural history of the agreement, but those modifications do not affect the substantive rights or obligations of the parties.)

First, the SRSA corrects a typographical error in Paragraph 1(d)(ii)(3) of the RSA that was identified by a class member. This paragraph is modified to add the following underlined words:

No more than five prisoners per dayroom shall be assigned to dayrooms in any facility and the dayroom housing must provide a minimum of 50 square feet of combined living and sleeping space per inmate (excluding the cell left open for hygiene, as set forth below).

Counsel for Plaintiffs and Defendants agreed to this modification on the record at the hearing on final approval held on February 3, 2020. This modification should be approved because it clarifies the meaning of this Paragraph as intended by the parties and ensures that there will be no confusion during implementation of the SRSA.

Second, the SRSA modifies Paragraph 12 of the RSA in the manner described in the Joint Motion and Memorandum of Law for Approval of a Modification to Paragraph 12 of the Revised Settlement Agreement (the “Joint Motion to Modify Paragraph 12”), filed January 31, 2020 (ECF No. 3186). As described in that joint motion, this modification requires the New Mexico Corrections Department (“NMCD”) to submit Parole Board Docket Forms and Parole Plans to the Adult Parole Board (the “Parole Board”) “90 days prior to a class member’s projected release date for class members serving parole in New Mexico and no later than 120 days prior to the class member’s projected release date if the class member will serve parole out of state.” Under the prior RSA, Paragraph 12 required these documents to be submitted to the Parole Board “no later than

30 days prior to a class member's hearing date," but after the RSA was signed the parties determined that this timing requirement did not make sense because they learned that the parole hearing date was not scheduled until the Parole Board received the Parole Board Docket Form and Parole Plan. The modification to Paragraph 12 in the SRSA thus corrects this error in the timing for submission of these documents and effectuates the parties' intent when the RSA was signed to ensure that the process of parole planning for class members begins well in advance of their projected release dates. This modification should be approved for all the reasons stated in the Joint Motion to Modify Paragraph 12 (ECF No. 3186).

Third, the SRSA modifies Paragraph 17 of the RSA to add an additional group of class members from Otero County Prison Facility ("OCPF"), who will be eligible to receive the remedial relief good time awards described in that paragraph. The category of class members who will be added are inmates who were "housed for at least 60 in dormitories days at OCPF from October 1, 2016 until the date the Court finds Defendants are in substantial compliance with subparagraph (1)(b)(iv) of the [SRSA]." The parties agreed to this modification on the record at the hearing for final approval on February 3, 2020.

Under Paragraphs 1(b)(i)–(iv) of the RSA, Defendants are required to reduce the number of class members housed in the dormitories at four facilities: Northwestern New Mexico Correctional Facility ("NWNMCF"), Springer Correctional Center ("SCC"), Western New Mexico Correctional Facility ("WNMCF"), and OCPF. Under Paragraph 17 of the RSA, the class members who had been housed at these facilities prior to the Defendants' substantial compliance with the transfers were to receive an award of good time as "remedial relief," except this relief was not given to the class members who had been housed at OCPF. The exclusion of class members at OCPF was a contentious issue during the negotiations of the RSA. Although counsel for the

Plaintiff class worked hard to obtain this remedial relief for these class members, they were ultimately forced to compromise on this issue in order to obtain a final agreement on the RSA. Many of the class members who filed objections to the RSA specifically objected to the exclusion of class members housed at OCPF from the remedial relief provided under Paragraph 17. Approximately 38 of the 92 objections specifically raised this issue as a ground for objecting to the RSA. The modification to Paragraph 17 that was agreed to at the February 3, 2020 hearing satisfies those objections.

This modification should be approved because it benefits members of the Plaintiff class and also treats all class members who were housed in dormitories equitably. This equitable treatment supports approval of the SRSA because one of the factors the Court must consider when approving a class action settlement is whether “the proposal treats class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D). As a general matter, good time awards are also an appropriate form of remedial relief for overcrowding and were awarded in the Court-approved 2016 Settlement Agreement for violations of the 1991 Settlement Agreement at Western New Mexico Correctional Facility (“WNMCF”) (ECF No. 2769).

In the Court’s Order granting preliminary approval to the RSA, the Court determined that the RSA treated class members equitably relative to each other under Rule 23(e)(2)(D), and on the question of good time awards as remedial relief, the Court stated that “[c]ounsel have adequately explained why some categories of inmates in the Plaintiff class will receive greater remedial relief than others, and these differences in treatment are equitable and objectively reasonable in that they avoid adverse impacts on public safety in accordance with the PLRA. 18 U.S.C. § 3626(a)(1), (c)(1).” (ECF No. 3072 at 6.) Defendants had previously explained that the inmates at OCPF were excluded due to the nature of their crimes because that facility houses primarily sex offenders.

(OCPF also houses two dormitory units for prisoners who were formerly in law enforcement.) The modification to Paragraph 17 provides even more equitable treatment to class members, and thus further supports the Court's finding that approval is appropriate under Rule 23(e)(2)(D).

This modification does not adversely impact public safety under the Prison Litigation Reform Act ("PLRA"). 18 U.S.C. § 3626(a)(1). Paragraph 17 expressly requires the good time awards to be consistent with NMSA 1978 § 33-2-34(A) (2015). That state statute provides that prisoners confined for nonviolent offenses can receive meritorious deductions up to a maximum of thirty days per month of time served, but prisoners confined for serious violent offenses can receive meritorious deductions up to a maximum of four days per month of time served. *See* NMSA 1978 § 33-2-34(A) (2015). This statute reflects the State's balancing of interests in permitting good time awards for prisoners but also preserving public safety. The majority of class members at OCPF who will receive a remedial relief good time award under the modification to Paragraph 17 are imprisoned for serious violent offenses and thus will be entitled under this state statute to receive no more than four days' good time under that modification. The SRSA thus does not conflict with the Court's previous finding regarding public safety because it incorporates the State's balancing of public safety interests under state law.

Additionally, while the Court had previously found in its order granting preliminary approval that exclusion of some prisoners from the remedial relief provision was justified due to public safety considerations, Defendants informed the Court at the February 3, 2020 hearing that there are sex offenders in dormitories in New Mexico prisons other than the OCPF. Such prisoners would have been eligible to receive the remedial relief under Paragraph 17 of the RSA. That fact further confirms that the modification to Paragraph 17 is appropriate because there is no public

safety justification for treating the inmates in dormitories at OCPF differently from the inmates in dormitories in other New Mexico prisons who have committed similar offenses.

**2. Additional Notice and Opportunity to Object is Not Required**

As explained in the parties' Joint Motion to Modify Paragraph 12, courts have generally held that when a class action settlement is modified, Rule 23(e) does not require a second notice if the modifications are not detrimental to the class. (ECF No. 3186 at 5–7.) Each of the above modifications benefits the Plaintiff class and none of these modifications harms any member of the Plaintiff class. Thus, the parties believe that an additional round of notice and objection is not required under Rule 23(e). Indeed, an additional round of notice and objections would potentially delay approval and implementation of these modifications, which would not benefit of class members.

**3. Conclusion**

For all of the foregoing reasons, the Parties respectfully request that the Court approve the SRSA and decline to require an additional round of notice and objections.

Respectfully Submitted,

HECTOR BALDERAS  
NEW MEXICO ATTORNEY GENERAL  
/s/ Jennifer Saavedra  
Jennifer Saavedra  
Olga Serafimova  
Assistant Attorneys General  
Post Office Drawer 1508  
Santa Fe, NM 87504-1508  
(505) 490-4053

*Attorneys for Defendants*

LAW OFFICE OF ALEXANDRA  
FREEDMAN SMITH  
/s/ Alexandra Freedman Smith  
925 Luna Circle, NW  
Albuquerque, NM 87102  
(505) 413-8884  
asmith@smith-law.nm.com

ROTHSTEIN DONATELLI LLP  
Mark H. Donatelli  
Reed C. Bienvenu  
Post Office Box 8180  
1215 Paseo de Peralta  
Santa Fe, New Mexico 87501  
(505) 988-8004

mhd@rothsteinlaw.com  
rbienvendu@rothsteinlaw.com

LAW OFFICES OF PETER CUBRA  
Peter Cubra  
3500 Comanche N.E., Suite H  
Albuquerque, NM 87107  
(505) 256-7690  
pcubra@qwestoffice.net

DAVIS LAW NEW MEXICO  
Philip B. Davis  
Nicholas T. Davis  
1000 Lomas Blvd. NW  
Albuquerque, NM 87102  
(505) 242-1904  
phil@davislawnm.com  
nick@davislawnm.com

THE LAW OFFICE OF RYAN J. VILLA  
Katherine Loewe  
2501 Rio Grande Blvd NW Suite A  
Albuquerque, NM 87104  
505-639-5709 or 505-256-7690  
505-433-5812  
kate@rjvlawfirm.com

*Attorneys for the Plaintiff Class*

**Certificate of Service**

I HEREBY CERTIFY that on February 10, 2020, I caused the foregoing to be filed using CM/ECF which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

*/s/ Alexandra Freedman Smith*  
Alexandra Freedman Smith