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

PHYLLIS BALL, *et al.*,	:	**Case No.: 2:16-cv-282**
Plaintiffs,	:	**Chief Judge Sargus, Jr.**
v.	:	**Magistrate Judge Deavers**
MIKE DEWINE, *et al.*,	:	
Defendants.	:	
and	:	
GUARDIANS OF HENRY LAHRMANN, *et al.*; OHIO ASSOCIATION OF COUNTY BOARDS,	: :	
Defendant-Intervenors.	:	

PLAINTIFFS' POST-HEARING BRIEF IN SUPPORT OF FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT, AS MODIFIED BY THE MOVING PARTIES

The Individual Plaintiffs and the Ability Center of Greater Toledo (hereinafter "the Plaintiffs") submit this brief supporting final approval of the proposed class action settlement agreement (hereinafter "the Agreement") of the Plaintiffs, the State Defendants, and the Ohio Association of County Boards of Developmental Disabilities (hereinafter "the Moving Parties"). The Moving Parties have modified the Agreement in response to the Court's concerns. The Agreement is a fair, reasonable, and adequate resolution of the class claims while also respecting the ICF choice for non-class members. Final approval of the Agreement should now be granted.

Respectfully submitted,

s/Kerstin Sjoberg
Kerstin Sjoberg (0076405)
ksjoberg@disabilityrightsohio.org
Trial Attorney

Kevin J. Truitt (0078092)
ktruitt@disabilityrightsohio.org
Alison McKay (0088153)
amckay@disabilityrightsohio.org
DISABILITY RIGHTS OHIO
200 Civic Center Drive, Suite 300
Columbus, Ohio 43215
Telephone: 614-466-7264
Facsimile: 614-644-1888

Counsel for Plaintiffs

Neil R. Ellis
nellis@sidley.com
Kristen A. Knapp
kknapp@sidley.com
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005
Telephone: 202-736-8075
Facsimile: 202-736-8711

Jonathan W. Muenz
jmuenz@sidley.com
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
Telephone: 212-839-5300
Facsimile: 212-839-5599

Cathy E. Costanzo
ccostanzo@cpr-ma.org
Kathryn L. Rucker
krucker@cpr-ma.org
Anna M. Krieger
akrieger@cpr-ma.org
CENTER FOR PUBLIC REPRESENTATION
22 Green Street
Northampton, Massachusetts 01060
Telephone: 413-586-6024
Facsimile: 413-586-5711

Samuel R. Bagenstos
sbagen@gmail.com
625 South State Street
Ann Arbor, Michigan 48109

Telephone: 734-647-7584

Pro hac vice Counsel for Plaintiffs

I. INTRODUCTION

Following the fairness hearing held on December 17, 2019 and the Court's subsequent order declining to approve the Agreement without further modifications (Doc. 461),[1] the Moving Parties engaged in further negotiations, including considering input from the Guardian-Intervenors,[2] to address the Court's concerns. The State Defendants' brief describes in detail the modifications to which the Moving Parties have mutually agreed and the rationale for incorporating them in the Agreement.

As discussed in detail below, Plaintiffs believe: (1) that the modified Agreement addresses concerns about choice and ICF financing raised by non-class members at the fairness hearing; (2) that existing evidence makes clear that the Agreement is in the public interest and does not harm non-class members; and (3) that the relevant factors for final approval have been satisfied, making the Agreement a fair, adequate, and reasonable resolution of class member claims.

The analysis for final approval of a class action settlement must necessarily focus on the interests of class members. The Court's fiduciary role is to determine whether the settlement fairly, reasonably, and adequately resolves the class members' claims and upholds their rights to community services under the Americans with Disabilities Act and the *Olmstead v. L.C.* decision. Here, the Agreement provides significant, direct benefits to current and future class members who choose community services as alternatives to ICF care, while also avoiding the inherent risks and

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[1] At the conclusion of the hearing, the Court stated modifications to the Agreement are needed before final approval could be granted. Tr. 186: 3-5 ("I'm not wedded to this, but this is the substance of what I would require before I would approve this, language to this effect . . . .").

[2] In a subsequent letter and through email communications, the Guardian-Intervenors also provided the Moving Parties with written feedback regarding modifications they believed would address the concerns of non-class member objectors.

costs of further litigation. Therefore, Plaintiffs renew their request for final approval of the Agreement.[3]

II. THE MOVING PARTIES' PROPOSED MODIFICATIONS ARE RESPONSIVE TO THIS COURT'S CONCERNS, NON-CLASS MEMBER OBJECTORS' FEARS, AND THE GUARDIAN-INTERVENORS' REQUESTED REVISIONS.

Through the modifications discussed below, the Moving Parties have affirmatively responded to concerns raised by the Court and by non-class member objectors, adding additional reassurances regarding the maintenance of ICF daily rates in the budget cycles affected by this Agreement. These modifications to the Agreement address the Court's concerns without raising the practical and legal issues that would arise from granting unrepresented non-parties enforcement powers.

A. Additional language on options counseling makes explicit that no individual will be required to accept an exit or diversion waiver as an alternative to ICF placement.

In response to this Court's Order, and feedback from the Guardian-Intervenors, the Moving Parties have added language that makes explicit the purpose and intent of the Agreement as it relates to informed choice. In the section containing provisions on options counseling and pre-admission counseling, the modified Agreement now states that "[n]othing in this Section requires any individual to accept an Exit or Diversion Waiver as an alternative to ICF services."

Additionally, the State Defendants will remove from their options counseling lists any person whose individual guardian filed a written objection to the Agreement during the designated comment period. This new language is consistent with existing provisions in the Agreement allowing the Ohio Department of Developmental Disabilities (hereinafter "DoDD") to exclude from options counseling individuals who, on their own or through their guardian, have: a) intervened in

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[3] Plaintiffs incorporate by reference the arguments made in the Moving Parties' briefs seeking preliminary approval and final approval of the Agreement. *See* Docs. 408, 454.

this case, or b) affirmatively asked DoDD or its designee to take them off the list for options counseling. Doc. 454-1 at 5.

These modifications should remove any doubt that participants will not be required to select waiver services as an alternative to entering or remaining in an ICF. Thus, the Agreement is in line with the Court's understanding that it "only covers people who opt to do the independent living community-based services." Tr. 13: 2-3. And that "[i]f someone wants to stay in a facility, this [A]greement does not directly [a]ffect them." Tr. 14: 24-25. To clarify the Moving Parties' intent, the Agreement was modified to add a new "whereas" clause: "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." Finally, as discussed in Section III below, there is no evidence that the Agreement's remaining options counseling provisions harm the public interest, or seek to limit individuals' choice of long-term services and supports. In fact, the ability to exercise informed choice is a principle all parties support, and which will allow for the effective distribution of relief to class members who choose integrated community living.

B. Additional language on ICF rates provides assurances regarding budgetary requests made by the State Defendants under the Agreement.

In response to funding concerns raised by non-class members, the State Defendants offer the following assurances regarding ICF rates during the budget cycles affected by the Agreement:

> 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).
>
> 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.

This new language adopts specific revisions proposed by the Guardian-Intervenors, and addresses non-class member concerns regarding maintenance of ICF service rates while class-wide

relief is being implemented. Both provisions mirror existing requirements in the Agreement that DoDD request, and "exercise best efforts and reasonable diligence to obtain," the funding necessary for implementation of its terms, while also recognizing that "[t]his Agreement does not guarantee that the General Assembly will grant sufficient funding." Doc 454-1 at 11.[4] These modifications also reflect the division of powers acknowledged by the Court at its fairness hearing: "I'm a judge, not a policy[-]maker. It is the legislature that makes decisions about [the] budget . . . ." Tr. 180: 25 to 181:1.

These new provisions make explicit the balance struck between ICF and community-based services. *See* Tr. 92: 14-17; Tr. 182: 23 to 183: 4. DoDD commits to "prepare a budget request seeking sufficient funding to meet both unmet and future need for waivers" in fiscal years 2022 and 2023 (Doc. 454-1 at 8-9), while also providing ample reassurance that requested expenditures in years three and four of the Agreement will not be less than the FY 2020 daily rate for ICFs. Further, it is appropriate for the Court to defer to the State's discretion in the administration of its disability system and overall budget allocations (Tr. 181: 4-6; Tr. 21: 20-21), especially because the State Defendants represent that the Agreement will not result in the underfunding of ICFs. Tr. 22: 16-17.

C. The proposed modifications address the Court's concerns without raising the practical and legal questions that would follow from permitting unrepresented non-parties to enforce the Agreement.

The Moving Parties' changes to the Agreement, made in response to the Court's concerns, confirm that no one will be required to accept an exit or diversion waiver as a result of options counseling, and require the State Defendants to request and use best efforts to at least maintain the same ICF rates in the budgets covered by the Agreement. As a result, any perceived risk of harm to non-class members stemming from final approval is fully addressed.

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[4] As the Court recognized, state agencies can only make budget recommendations; the Ohio General Assembly ultimately sets the state budget on a biennial basis. Tr. 24: 2-5, 22-24; Tr. 172: 12-18; Tr. 174: 10-13.

Accordingly, further modification of the Agreement's enforcement provisions is unnecessary, particularly given the host of practical, factual and legal uncertainties created by opening up the Agreement's dispute resolution process to unrepresented individuals who are neither class members, nor parties with standing to enforce the terms of the Agreement. For instance, unrepresented non-parties are unlikely to have a complete and accurate understanding of the terms of the Agreement, or its subsequent implementation if approved. Statements by several guardians and ICF providers at the fairness hearing underscore this concern. As just two examples, several individuals talked about State-operated Developmental Centers and required downsizing plans for private ICFs. Tr. 164: 14-17; Tr. 62: 23 to 63: 6. The Agreement's options counseling provisions do not apply to State-operated Developmental Centers, although some objectors made this assumption. Similarly, the Agreement has no requirements about, in fact does not even mention, downsizing plans, which predate this lawsuit. These types of assumptions and misunderstandings of the terms of the Agreement could lead to unnecessary initiations of the dispute resolution procedures, which will make it more challenging for the Moving Parties and the Court to focus on effective implementation of the Agreement's terms and could harm class members by causing delay in implementation.

Finally, the Guardian-Intervenors have separate legal claims against the State Defendants, and the validity of these claims is a question already before the Court and therefore does not need to be addressed in the context of the Moving Parties' Agreement. *See, e.g.*, Docs. 326, 353, 355.

III. THE AGREEMENT'S TERMS, THE EVIDENCE BEFORE THE COURT, AND THE MODIFICATIONS PROPOSED ABOVE, ALL MAKE CLEAR THAT FINAL APPROVAL WILL NOT HARM NON-CLASS MEMBERS WHO CHOOSE TO ENTER OR REMAIN IN ICFS.

As the Court noted, the parties entered into this litigation in good faith, with the same general principles in mind – although different approaches to reaching that goal. Tr. 187: 6-9.

Plaintiffs want to ensure those who are qualified for, and choose home and community-based services, have the opportunity to avoid unnecessary segregation and receive integrated services in the community, consistent with their rights under the Americans with Disabilities Act and the *Olmstead v. L.C.* decision. Doc. 454-1 at 3. The Agreement focuses its relief on this narrowly defined class of individuals, and seeks to accomplish that relief in the span of two budget cycles. *Id.* at 8-10. It does not bind the Guardian-Intervenors or any of the individual non-class member objectors who spoke to the Court on December 17, 2019. Moreover, as the Court recognized, no actual harm has been shown, and there is no evidence directly connecting implementation of the Agreement to the objectors' long-term concern about the financing of ICFs.[5] Rather, the evidence shows ICF funding has increased in recent years, including in the very same budget that contains the initial proposed relief, and the State Defendants' obligations under the modified provisions assure best efforts will be made to at least maintain ICF daily rates in the budget cycles covered by the Agreement.

A. Evidence already before the Court shows ICF funding is not endangered by the terms of the Agreement.

There is no evidence that final approval of the modified Agreement will jeopardize the ICF rate already established in the current budget, or the State's commitment to maintaining the ICF option in the future. Rather, State Defendants' declarants, and the Guardian-Intervenors' own filings, reflect that ICF funding has gone up over the last three budget cycles, including recent rate increases already approved by the Ohio General Assembly in the current biennium budget.

There is room within the developmental disabilities system for integrated community services and the ICF capacity non-class member objectors wish to protect. The State Defendants

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[5] *See, e.g.,* Tr. 43: 15-18 (" unless you can show to me actual injury to someone, and that's not what I'm hearing. I'm hearing more of a general . . . they're pointing money in the wrong direction").

have demonstrated this by undertaking comprehensive reforms of the ICF reimbursement rate in June 2018, and by increasing the ICF rate in the current biennium budget while at the same time budgeting for the relief proposed here. Doc. 454-2 at 2-3. State Defendants' declarant Clay Weidner, Manager of Budget and Data Analysis for DoDD, describes these statutory changes as a "significant increase" for ICFs in FY 2019, with additional increases projected in FY 2020. *Id.* at 2. Mr. Weidner goes on to attest that "[t]he proposed settlement with the [P]laintiffs has no impact on the reimbursement system which is governed by statute." *Id*. at 3.

Guardian-Intervenors' briefings provide no evidence to the contrary. In fact, they acknowledge that the State has added $50 million in ICF funding over the last three budget cycles. Doc. 458 at 4. Their suggestion that State investments in the ICF system must be comparable to expenditures on home and community-based waivers ignores the reality of utilization in these systems. While there are approximately 5,000 individuals in state and privately-operated ICFs, there are over 40,000 individuals who have chosen to receive integrated waiver services in their homes and communities. Doc. 454-2 at 3. Even so, Mr. Weidner's declaration makes clear that in FY 2019, $518,356,132 (just under one fifth of the total amount spent on developmental disability services) was directed to privately-operated ICFs. *Id*.

Guardian-Intervenors also misstate the financial investments required by the Agreement. They specifically over-estimated the annualized cost of additional state-funded Individual Options waivers, and failed to account for federal Medicaid matching money, which make the State's annual contribution to these 700 waivers approximately $26 million dollars. Doc. 454-2 at 3. The $100 million figure claimed in Disability Advocacy Alliance (DAA)'s email to potential objectors is therefore inaccurate. Doc. 454-5 at 2. Importantly, this pace of waiver expansion (roughly 350 new waiver slots per year) is consistent with recent state budgets that, as noted above, have not resulted

in a decrease in ICF funding. Doc. 454-2 at 3. The Agreement resolves long-standing, adversarial litigation precisely because it sets realistic benchmarks that do not endanger other service options. Tr. 19: 23 to 20: 1; Tr. 26: 1-3.

B. Long-term, prospective concerns about legislative funding for ICFs are outside the scope of this Agreement, the final approval process, and the control of the federal court.

As the Court stated in its pre-hearing Scheduling Orders, "[t]he overarching concern in all objections is that the settlement will have an impact on the Objector's family members' ability to remain in their current intermediate care facility." Doc. 457; Doc. 453.[6] In their presentations to the Court, objectors did not cite to specific terms of the Agreement as the source of their concern. Rather, they expressed a prospective fear – fed by DAA – that approval of the Agreement would somehow lead to the elimination of ICFs. Doc. 454-5 at 2-3 (warning people might "lose their homes" and that "[i]f you care about maintaining ICF services in Ohio, you should act.").[7] Guardian-Intervenors acknowledge that the Agreement does not defund ICFs and that their fears are related to long-term spending. *See* Tr. 50: 12-18; Tr. 57: 2-5; Tr. 58: 2-12; Tr. 71: 18-25; Tr. 81: 1-9.

As the Court noted at the conclusion of the proceedings, there is no evidence of immediate harm to non-class members. Tr. 184: 2-3 ("So if this were an initial case, I would probably have to find as a legal matter there's no showing of immediate harm."). In fact, the State's position has never been that it intends to drive ICFs out of business. Tr. 7: 5-15. As the Moving Parties' briefings make clear, the facts and evidence before the Court shows that the scope of relief proposed

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[6] For this reason, the Court's Scheduling Orders limited non-class member objections to five speakers up to five minutes each. Docs. 453; 457. The Moving Parties relied on these Orders in preparing for the Fairness Hearing, and would have requested a full evidentiary proceeding with their own affirmative witnesses had they known all non-class member objectors would be heard.

[7] Those who did address the terms of the Agreement in oral and written comments, relied in substantial part on misinformation about the purpose and intent of the Agreement, circulated by DAA. *See* Doc. 454 at 28-30. At the hearing, the Court noted that the case is now subject to a lot of misinformation. Tr. 34: 22-24.

in the Agreement is reasonable given the narrowly defined class, and that the horizon for implementing this relief is short, extending for only one additional two-year budget cycle. Doc. 454-1 at 8-10. Therefore, final approval is unlikely to impact the kind of long-term, prospective concerns expressed by non-class member objectors.

There are over 4,880 certified ICF beds in Ohio, and more than 300 vacancies. Doc. 454-3 at 3. And the number of waivers to be added under the Agreement is much less than the number of ICF certified beds, as this Court noted. Tr. 111: 23 to 112: 2 ("[I]f you look at the number of people who are in ICFs and compare that to the waivers in this [A]greement, the number in ICFs are much, much greater than the number of waivers. So it's not designed to get everybody out of an ICF."). ICFs have powerful provider associations,[8] workgroups within DoDD,[9] and vocal guardian advocates. For all these reasons, no agreement of this size, scope and duration could place the continued existence of ICF services at risk.

Additionally, and as the Court repeatedly noted, the judiciary cannot bind the Ohio General Assembly, or supplant its authority for that of the duly elected legislature. Tr. 27: 7-8; Tr. 151: 14-17; Tr. 180: 25 to 181:1. Those future funding and policy decisions are for the voters, and advocacy groups like DAA, to influence through the public budget process. Courts must base their decisions to approve class action settlement agreements on the law and the evidence. Non-class members cannot turn the fair hearing process into a referendum on past State policies, [10] or a backdoor to

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[8] *See* OPRA's motion to intervene, Doc. 295; *see also* OPRA's website, available at https://www.opra.org/, last visited January 9, 2020

[9] *See* Doc. 291 at 13, 22 (discussion of DoDD workgroups).

[10] In oral argument, the Guardian-Intervenors pointed to a 20-year shift in service delivery since the Supreme Court held in *Olmstead v. L.C.* that unnecessary segregation is discrimination under the ADA. That trend obviously pre-dates this case, but it is reflective of the number of people who wish to receive home and community-based services, and the system's increasing ability to serve individuals with more significant needs in integrated settings, including through direct nursing services available under the Individual Options waiver.

reviving their own forfeited settlement.[11] Nor should final approval be derailed by a fear of future State actions unrelated to the terms of the Agreement, particularly where there is no evidence that those fears will actually come to pass. Tr. 182: 14-15 ("But, as a judge, I'm to decide disputes as they occur, not in the future."). Rather, the Moving Parties' settlement must be evaluated based on its specific terms, the way in which those terms benefit the class, and the facts and evidence currently before the Court in support of final approval under Fed. R. Civ. P. 23(e).

C. Both the terms of the modified Agreement, and the evidence presented in support of final approval, demonstrate that individuals' choice to enter or remain in an ICF will be respected.

The Moving Parties respect the views presented by non-class member objectors, and would never seek to override their personal treatment decisions or harm their family members. Options counseling remains a voluntary process, and participation in it does not require any particular outcome. Options counseling materials provide information on both ICF and waiver services. Doc. 454-11. Guardian-Intervenors commented on these materials. Doc. 454 at 33. The State legislature also recently took steps to ensure that anyone who contacts their local County Board for information about residential services options will receive information on both ICF and waiver services.[12] Guardian-Intervenors commented on this guidance as well. *Id.*

Offering individuals a meaningful opportunity to explore community alternatives, and to speak with other families and individuals who have experienced those transitions, is not an "attack" on the ICF customer base, as Guardian-Intervenors allege. Tr. 92: 12-13. It is precisely the kind of respect for individual decision-making that all parties believe to be important. To deprive

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[11] During the hearing, the Court pointed out that only weeks earlier the Guardian-Intervenors had been willing to accept final approval of the Agreement as part of a separate settlement agreement with the State Defendants, which they subsequently breached. *See* Tr. 33:1 to 36:16.

[12] *See* Ohio Rev. Code § 5126.047, available at https://dodd.ohio.gov/wps/portal/gov/dodd/about-us/communication/memos/memo-county-board-residential-services, last visited January 8, 2020.

individuals of the opportunity to explore their service options, and make an informed decision between ICF and waiver services, would be an inherently unfair result. Facilitating informed choice advances the public interest, is consistent with professionally recognized best practices, and provides a fair and effective method by which to identify and distribute relief to class members, all of which counsel towards final approval. Doc. 454 at 28-29, 31.

IV. THE MOVING PARTIES HAVE DEMONSTRATED THAT THE AGREEMENT IS A FAIR, REASONABLE, AND ADEQUATE RESOLUTION OF CLASS MEMBERS' CLAIMS AND MEETS THE APPLICABLE LEGAL STANDARDS UNDER RULE 23 FOR FINAL APPROVAL.

The Court's final approval analysis must focus on the class members' needs and interests. Here, current and future class members receive significant, direct benefits under the Agreement, resolving their claims against the State Defendants and preserving their right to community services under the Americans with Disabilities Act and the *Olmstead v. L.C.* decision. During the course of this litigation, many have already profoundly benefitted from access to community services. The vast body of professional studies demonstrate the substantial, intrinsic value of community integration for people with disabilities. Indeed, class members and class member guardians unanimously supported the Agreement, which also received support from numerous community and advocacy organizations across Ohio. The views of non-class members should not supersede class members' interest in resolution of their claims and their federal rights to community integration.

A. The Court's final approval analysis must be primarily focused on class members' needs and interests.

As the Court recognized during the fairness hearing, courts act as a fiduciary to the class in analyzing whether to grant final approval to a proposed class action settlement agreement. Tr. 46: 24-25 to 47: 4; *see also Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 280 (7th Cir. 2002) (citations omitted) (stating that some courts "have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class" and to impose "the high duty of care

that the law requires of fiduciaries"). Even Guardian-Intervenors recognize this. Tr. 36: 19-22 ("[T]he Sixth Circuit and other circuits are equally clear that the, quote, district court's role has been characterized as a fiduciary."); *see also* Tr. 46: 24-25. This analysis necessarily turns on the interests of the class members. *See* Doc. 408 at 11-18, Doc. 454 at 14-15; *see also In re Dry Max Pampers Litig.*, 724 F.3d 713, 720-21 (6th Cir. 2013) (holding that the fairness of a class action settlement must be evaluated primarily based on the relief to class members); *In re Deepwater Horizon*, 739 F.3d 790, 820 (5th Cir. 2014) (the purpose of Rule 23(e) is to protect class members).

The certified class includes only those who are qualified for and, after options counseling, affirmatively choose community services as alternatives to ICF care. These class members, current and future, receive significant, direct benefits from the Agreement, including preservation of their federal rights to community integration, while avoiding the inherent risks and costs of further litigation. The Agreement received unanimous support from class members, including class members' guardians, and from community and advocacy organizations throughout Ohio. *See* Doc. 454 at 20-24. State-funded exit waivers have already benefitted class members in transformative ways, enabling them to gain independence and autonomy and empowering them to be integrated in their communities. *See Id.* at 16-20. Testimonials filed with the Court from people with developmental disabilities who have transitioned from ICFs to community settings, and their guardians, are powerful, compelling affirmations of the benefits of the Agreement. *See*, *e.g.* Doc. 434 at 1 (APSI's executive director describing the transition of their ICF clients to community settings as "life-changing for many . . . who have desired for years to live in more integrated settings in their communities.").

The only responses from class members were positive. As just one example, class member Chuck Junior attended the fairness hearing; his letter, read into the record at the hearing by

Plaintiffs' counsel, describes the enrichments to his quality of life now that he has transitioned from an ICF to his own home in the community. Doc. 283-13. Notably, no class member objected to the Agreement, even though State Defendants sent to all 211 current class members direct notice about the Agreement. The views of those who are not class members must not supersede the primacy of class members' rights and interests in the Court's final approval analysis.

Application of the Rule 23 factors demonstrate that final approval of the Agreement is appropriate. Consistent with the class definition, the Agreement effectively identifies class members through options counseling, and it distributes the Agreement's benefits to them equitably and reasonably. There is no evidence of fraud or collusion, the Moving Parties have engaged in arms-length negotiations, and the class representatives and class counsel have adequately represented the class. The increase in funding for community services and the expansion and enhancement of options counseling supports informed choice for those considering both ICF and waiver services, and is in the public interest.

B. The Voluntary Resolution of Class Claims serves the public interest, is consistent with public policy, and is needed to protect class members' legal rights.

If the Agreement is not given final approval, the Moving Parties no longer avoid the inherent risks and costs associated with continuation of the litigation. Additional State monies will be diverted, and valuable court resources will be consumed in the adjudication of class claims. Class members will be harmed, and the public policy favoring voluntary resolution of complex class action litigation will not be realized. *See Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981).

With the Agreement's prospective relief, many more class members can have access to integrated, community services, consistent with their federal rights. Numerous community and advocacy organizations supporting the Agreement have attested to the need for increased funding

for community services and for expanded, enhanced options counseling so people not only have information about their service options but also have a meaningful opportunity to exercise their right to live in the community with appropriate supports. Doc. 454 at 20-24.

Indeed, that is what this case is about: the rights of class members. The unnecessary segregation of people in ICFs who want community services violates class members' rights under the Americans with Disabilities Act ("ADA"). Under the *Olmstead v. L.C.* decision, the ADA prohibits the unjustified institutionalization of individuals with disabilities. 527 U.S. 581 (1999). Segregation of people with disabilities "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, [and] economic independence." *Id.* at 600-01. States must provide community services for people with disabilities when such services are determined appropriate, are not opposed by the individual, and can be reasonably accommodated. *Id.* at 607.

Before this case, and before state-funded exit waivers became available, class representatives and class members languished in ICFs, prompting the current litigation. Future class members have rights under federal law to experience community integration and independent living and to avoid unnecessary institutional isolation, claims which are resolved through the Agreement negotiated by the Moving Parties.

The Court heard many personal stories at the fairness hearing about individuals who need substantial supports, including 24/7 care. What is also true is that individuals can and do receive that level of support in the community. *See* Doc. 411 (members of the Coalition for Community Living, which supports the Agreement, include parents of people with developmental disabilities who also have complex medical needs and who live in the community with waiver supports); Doc.

464 (letter from parent Kim Kelly, whose son has complex medical needs and who lives in her home with her and with services funded through his waiver). Indeed, to receive a Medicaid funded exit or diversion waiver, an individual must meet the clinical criteria for ICF admission. Ohio Admin. Code 5123:2-9-01(D)(2); Ohio Admin. Code 5123-8-01(A). But that same "level of care" can and is provided in the community. *See* Doc. 454-11.

Not only does federal law enshrine the right to community integration, but community services have substantial, intrinsic value. The amicus brief filed by the Arc of the United States, the Arc of Ohio, and the Bazelon Center for Mental Health Law (Doc. 287-1), illustrate the quality-of-life benefits to class members who would have access to community services under the Agreement. As *Amici* explained, there is a vast body of professional literature that powerfully demonstrates the overwhelming benefits people with intellectual and developmental disabilities receive when they transition from institutional care to community settings. *Id.*

As the Amici brief explained, individuals with the most significant needs often benefited the most from a transition to community based supports. Doc. 287-1; *see also* Doc. 454-6, Doc. 454-7, Doc. 454-8. These benefits include improvements in adaptive skills, skills that foster independence and self-care, and vocational skills; decreases in problematic behaviors; and increases in choice, self-determination, autonomy, and larger social networks and opportunities to interact with non-disabled peers. *Id.* Community services also result in greater participation in community life and access to mainstream community activities and events, and overall a higher material standard of living, satisfaction with their own lives, and fuller life experiences, often taken for granted by those who do not have intellectual and developmental disabilities. *Id.* This is true in Ohio also. Recent studies and reports in Ohio have found similar outcomes for people who move from ICFs to community-based settings: high rates of satisfaction, greater independence and happiness and

development of skills, more control over daily activities, increased social contacts, and improved quality of life. *See* Doc. 283 at 16-17; Doc. 283-4 ("Ohio Community Transition Study" February 29, 2016 report).

C. The Moving Parties have effectively rebutted Guardian-Intervenor's arguments in opposition to final approval.

The Moving Parties effectively rebutted the Guardian-Intervenors' arguments opposing final approval of the Agreement. Prospective, injunctive relief in the Agreement is primarily directed to current and future class members—those who, through options counseling, choose community services as alternatives to ICF care.[13] The Court rejected Guardian-Intervenors' arguments that the class is "non-existent." Tr. 28: 14-17; Tr. 32: 9-10. Their argument that the Agreement benefits only non-class members is also inaccurate and misplaced. Doc. 454 at 37-38. Not only did the State Defendants identify hundreds of current class members, but the Guardian-Intervenors misapprehend how prospective, injunctive relief is typically delivered in a fluid class action settlement. The class has always been fluid (those who meet the class criteria "on or after March 31, 2016"). Doc. 303 at 22. There are current class members at any specific time. New class members are identified as options counseling continues over the period of the Agreement, and they will then have access to relief provided under the Agreement. *Id.* at 35.

Furthermore, as the Court acknowledged at the fairness hearing, court-enforceable settlement agreements may contain remedies and benefits that go beyond what might otherwise be secured through a litigated final judgment. Tr. 17: 5-11 ("If there's one part of this you can be sure I'm confident of, it's this part."); *see also Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v.*

[13] For example, the roughly 200 current class members benefit from the Agreement's commitments regarding transition services, housing assistance, integrated day and employment services, and follow-along services during the months after a person transitions into the community. Future class members will benefit from these services and the increase in state-funded waivers over the life of the Agreement.

City of Cleveland, 478 U.S. 501 (1986). Also, as the Court acknowledged, the fact that the State Defendants have taken steps to implement parts of the Agreement (including time-sensitive budgetary actions) is common, particularly in lawsuits against the State. Tr. 39: 15-19. Furthermore, much of the proposed relief is prospective in nature, and many of the Agreement commitments require future implementation, including requests for additional funding in the next biennium. Doc. 454 at 40.

V. CONCLUSION

The Court should grant final approval of the proposed Settlement Agreement, with the modifications suggested by the Moving Parties, because it is a fair, reasonable, and adequate resolution of class members' claims, is in the public interest, and does not harm or otherwise undermine the rights of Guardian-Intervenors or other non-class members.

Respectfully submitted,

s/Kerstin Sjoberg

Kerstin Sjoberg (0076405)
ksjoberg@disabilityrightsohio.org
Trial Attorney
Kevin J. Truitt (0078092)
ktruitt@disabilityrightsohio.org
Alison McKay (0088153)
amckay@disabilityrightsohio.org
DISABILITY RIGHTS OHIO
200 Civic Center Drive, Suite 300
Columbus, Ohio 43215
Telephone: 614-466-7264
Facsimile: 614-644-1888

Counsel for Plaintiffs

Neil R. Ellis
nellis@sidley.com
Kristen A. Knapp
kknapp@sidley.com
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005

Telephone: 202-736-8075
Facsimile: 202-736-8711

Jonathan W. Muenz
jmuenz@sidley.com
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
Telephone: 212-839-5300
Facsimile: 212-839-5599

Cathy E. Costanzo
ccostanzo@cpr-ma.org
Kathryn L. Rucker
krucker@cpr-ma.org
Anna M. Krieger
akrieger@cpr-ma.org
CENTER FOR PUBLIC REPRESENTATION
22 Green Street
Northampton, Massachusetts 01060
Telephone: 413-586-6024
Facsimile: 413-586-5711

Samuel R. Bagenstos
sbagen@gmail.com
625 South State Street
Ann Arbor, Michigan 48109
Telephone: 734-647-7584

Pro hac vice Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs' Post-Hearing Brief in Support of Final Approval of Proposed Class Action Settlement, as Modified by the Moving Parties was filed electronically on January 10, 2020. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

s/Kerstin Sjoberg
Kerstin Sjoberg (0076405)