

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

DUBOIS, et al.,

Plaintiffs,

v.

Case No. 4:03-CV-107-SPM

CALAMAS, et al.,

Defendants.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTION FOR
APPROVAL OF SETTLEMENT AGREEMENT**

**I. STANDARD FOR APPROVAL OF SETTLEMENT IN CLASS ACTION
LITIGATION**

There is "strong judicial policy favoring settlement as well as the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). Nowhere is this policy more appropriate than in class actions where "there is an overriding public interest in favor of settlement." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)¹. "Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce

¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit prior to October 1, 1981.

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judicial resources.” *Armstrong v. Board of School Directors*, 616 F.2d 305, 313 (7th Cir. 1980).

Under the Federal Rules of Civil Procedure, a class action settlement cannot be dismissed without the approval of the court. Fed. R. Civ. P. 23(e). In assessing a proposed settlement, “[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff’s likelihood of success on the merits against the amounts and form of the relief offered in the settlement.” *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981). The Eleventh Circuit has enumerated a number of factors which a district court may consider in evaluating the fairness of a class settlement, including:

- (1) the likelihood of success at trial;
- (2) the range of possible recovery;
- (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable;
- (4) the complexity, expense and duration of litigation;
- (5) the substance and amount of opposition to the settlement; and
- (6) the stage of proceedings at which the settlement was achieved.

Bennett, 737 F.2d at 986. Most important among these factors are the range of possible recovery, the likelihood of success on the merits and whether the settlement is “reasonable in light of these determinations.” *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 217 (5th Cir. 1981). When considering these factors, the court should keep in mind the “strong presumption” in favor of

finding a settlement fair. *Cotton*, 559 F.2d at 1331. In addition, to determine the fairness of a proposed settlement, “the view of experienced counsel” as to the merits of the settlement is entitled to significant weight. See *Ressler v. Jacobson*, 822 F.Supp. 1551, 1552 (M.D. Fla. 1992).

II. EVALUATION OF THE SETTLEMENT

An analysis of the Settlement Agreement in this case, in light of the Eleventh Circuit’s criteria, as explained below, establishes that it is fair, adequate, reasonable and in the best interests of the class.

A. Likelihood of Success on the Merits and the Range of Possible Recovery

Courts judge the fairness of a proposed compromise by weighing the plaintiffs’ likelihood of success on the merits against the amount and form of the relief achieved in the settlement. See *Cotton*, 559 F.2d at 1130-31. However, courts are not to decide the merits of the case or resolve unsettled legal questions. *Id.* at 1130. “As settlements are construed upon compromise the merits of the parties’ claims and defenses are deliberately left undecided.” *Ressler*, 822 F.Supp. at 1552-53. “Judicial evaluation of a proposed settlement of a class action thus involves a limited inquiry into whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement.” *Id.* at 1553. Indeed, a trial court, in approving class action settlements has neither the

“right nor the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.” *Cotton*, 559 F.2d at 1130. In evaluating the likelihood of success on the merits if this matter had been tried, it is helpful to examine the allegations and claims for relief made by Plaintiffs in their Complaint. *Id.*

Plaintiffs filed their class action Complaint on April 11, 2003 (Dkt. #1), on behalf of all individuals with traumatic brain or spinal cord injuries who have been, or will be, determined to be eligible for the state’s Traumatic Brain and Spinal Cord Injury Medicaid Waiver Program (TBI/SCI Waiver Program) which provides home and community based services to prevent unnecessary institutionalization or risk of institutionalization to obtain long term care. The Complaint alleged that Defendants’ administration of the TBI/SCI Waiver Program violated the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* and implementing regulations, and, Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a) and implementing regulations, due to the failure to establish “a comprehensive, effectively working plan” for placing qualified persons with disabilities in the most integrated (i.e., least restrictive) settings appropriate to their needs, to have a “waiting list that moved at a reasonable pace,” and forcing Plaintiffs to be institutionalized, or at risk of institutionalization, to receive long-term care. See

Olmstead v. L.C., 527 U.S. 581 (1999). Plaintiffs also alleged that Defendants violated Title XIX of the Social Security Act (the Medicaid Act), 42 U.S.C. § 1396a *et seq.* and implementing regulations and the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to make written determinations within 90 days of an application for services, not providing services with “reasonable promptness,” failing to provide due process and failing to provide class members with the freedom of choice between institutional care and home and community based services. Defendants denied these allegations.

In the Complaint, Plaintiffs sought declaratory and injunctive relief and requested that the Court enjoin Defendants to adopt new policies and procedures to ensure that class members could obtain services with reasonable promptness; have the opportunity to receive written notice and a fair hearing which comply with state and federal laws and the Constitution concerning any adverse actions/decisions concerning their requests for services; be provided with the freedom to choose between institutional care and home and community based services; be placed on a waiting list for services (if necessary) that moves at a reasonable pace and not be forced to be institutionalized, or placed at the risk of institutionalization, to obtain long-term care. As described in more detail below in Section (B), the Settlement Agreement provides this relief. It provides for the

adoption and implementation of a Handbook and Internal Operating Procedures which has resulted in numerous positive policy changes addressing these issues. In addition, Defendants have committed to seek significant increases in funding over the next several state fiscal years to ensure that the agreed upon changes and protections are fully and reasonably implemented. Additionally, as part of the Settlement Agreement, the majority of these changes, such as the provision of due process and an increase in funding and the expansion of the TBI/SCI Waiver Program through the enrollment of 50 more individuals for fiscal year 2006-07 have already occurred. Defendants are also conducting new assessments of all individuals currently on the waiting list for services using the assessment and prioritization tool developed by the parties as part of the Handbook and Internal Operating Procedures. All of these improvements were sought by Plaintiffs in their Complaint.

While Plaintiffs' counsel believe that their claims have strong legal support, the range of possible relief through further litigation was virtually the same as that offered through the terms of the Settlement Agreement. There are direct benefits to class members through the relief attained by the Settlement Agreement provisions. Accordingly, an evaluation of this factor warrants approval of the settlement.

B. Fairness, Adequacy, and Reasonableness of the Settlement

The determination of a “reasonable” settlement is not susceptible to a mathematical equation yielding a particularized sum. *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). “[I]n any case there is a range of reasonableness with respect to a settlement - a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion...” *Id.* at 693.

The Settlement Agreement terms provide extensive tangible benefits to the Plaintiffs. In consultation with Plaintiffs’ counsel, Defendants have developed a Handbook which includes, *inter alia*, policies and procedures concerning individuals’ due process rights, applications for services, freedom of choice, assessments for services, and the waiting list for services.² The Handbook is available to the public through the state fiscal agent’s website.

Defendants have agreed that all persons who apply for services will receive a written determination within 90 days of their application which informs them whether they will be enrolled in the TBI/SCI Waiver program, placed on the waiting list for services, whether additional information is needed to complete their

² The Handbook encompasses many issues and matters that are beyond the scope of this litigation and Agreement, therefore, only certain selected provisions and pages of the Handbook, which are specifically referred to in the Settlement Agreement, are considered to be part of the settlement.

application, and/or whether they are determined not to be eligible for services. See Handbook at Appendix pages G-2 and G-3 ("Notice of Decision and Fair Hearing" form). (Dkt. #190 at Ex. A, App. G-2 & G-3).

In addition to the Handbook, Defendants have developed Internal Operating Procedures (IOPs) for the TBI/SCI Waiver Program. The IOPs provide guidance to case workers concerning the application, assessment, due process, enrollment and waiting list procedures for the program and shall be provided, upon request, by the Department of Health to persons on the waiting list and participants in the program. The IOPs are also accessible to the public on the Department of Health Brain and Spinal Cord Injury Program's website.

As part of the settlement terms, the Department of Health shall make it a priority to seek funding that will be sufficient to expand the TBI/SCI Waiver Program by a minimum of 50 slots for fiscal year 2006-07; 75 slots for fiscal year 2007-08; and 75 slots for fiscal year 2008-09. The Department of Health also agrees to use its best efforts to have its legislative budget request, with each of these stated waiver slot increases for each fiscal year, included as part of the Governor's recommended budget and to obtain the necessary legislative support and funding for this expansion of waiver slots. DOH also agrees to support this request and use its best efforts to obtain legislative approval of the expansion in each of these fiscal

years.³

With regard to assessments for TBI/SCI Waiver Program services, the Department of Health also agrees to perform assessments utilizing the Handbook's Home and Community Medicaid Waiver Prioritization and Screening Instrument and to conduct assessments of all persons on the waiting list for the TBI/SCI Waiver Program within 180 days of execution of the Settlement Agreement by using this new assessment tool. This tool will be used to re-screen applicants, determine their service need and develop a priority score utilizing this information in order to determine where to place them on the waiting list for services, if such placement is necessary. This is a significant development and benefit for the class members because, previously, class members on the waiting list received no written confirmation of their placement on the waiting list, much less any information concerning their position on the waiting list in relation to other applicants.

Under the terms of the Settlement Agreement, class members will not only receive written notice of information concerning their assessment and priority score for services, but will also receive written information about their due process rights and right to a hearing to challenge any decisions that they disagree with. Prior to

³ To the extent that expansion of the TBI/SCI Waiver Program depends upon federal funding or is subject to approval by the federal Centers for Medicare and Medicaid Services, the Agency for Health Care Administration agrees to use its best efforts to obtain such funding or approvals.

the Settlement Agreement, there was no written notice provided concerning the denial or delay of services. Defendants have agreed that all class members will now receive a written due process notice which contains the information required by federal Medicaid regulations.

As part of the settlement terms to ensure the rights of class members, Defendants also developed two brochures to provide information to applicants and enrollees concerning the application, assessment, due process, enrollment and waiting list procedures for the TBI/SCI Waiver Program. These brochures shall be offered by the Department of Health to all applicants for the TBI/SCI Waiver Program and shall be distributed to all Brain and Spinal Cord Injury Program offices in the state, the Florida Brain Injury Association, the Florida Spinal Cord Injury Resource Center, Centers for Independent Living, the Advocacy Center for Persons with Disabilities and the local offices of the Department of Children and Families. These publications are also made available on the BSCIP website.

While the Defendants have made concessions, including the development and implementation of a lengthy Handbook and Internal Operating Procedures concerning the administration of the TBI/SCI Waiver Program which implements many formal procedures that were not in place prior to the Settlement Agreement. Plaintiffs have also made compromises in order to settle this case. For example,

not all individuals on the waiting list for services will be enrolled, right away, into the program, nor did Defendants agree to formally adopt an *Olmstead* type plan for the state. However, Plaintiffs believe that this compromise should not result in injury to any class members since under *Olmstead*, the state can have a waiting list, it is just required to move at a "reasonable pace." Moreover, class members' rights will be protected through the procedural due process necessary to challenge a denial or delay in services. Plaintiffs also believe that the agreement made by Defendants to commit to secure additional funding for, at least, an additional 200 individuals⁴ to be enrolled in the program over the next three state fiscal years will serve the needs of the class members in obtaining timely services as required under the ADA and Section 504. Plaintiffs counsel believe that the settlement of this case at this juncture will be far more beneficial to the Plaintiffs than continued litigation of their claims.

C. Complexity, Expense, and Duration of Litigation

There were numerous complex factual and legal issues involved in this litigation. The complexity of the Medicaid program is well documented.⁵ Plaintiffs

⁴ In addition, the maximum number of slots for the TBI/SCI Waiver Program, as stated in Section (C)(1) of the Settlement Agreement, can be exceeded if additional funding can be secured.

⁵ Indeed, the Medicaid Handbook which was created and adopted as part of the settlement is over 100 pages long and merely governs one aspect of the state's

engaged an expert to assist in understanding the administration of the TBI/SCI Waiver Program as compared to similar Medicaid programs around the country which provide home and community based services to persons with traumatic brain or spinal cord injuries. At the time that this litigation was filed, there were 226 known individuals in the class, each with varying factual circumstances concerning his or her application for services, and the parties vigorously litigated issues related to class certification. See Dkt. ##12, 13, 19, 20, 102, & 111.

The legal issues to be tried regarding the Medicaid Act, the ADA and Section 504 are complex and would have required the presentation of expert testimony and detailed and complex factual issues concerning analysis of the state budgets for several agencies and an analysis of whether or not the Defendants' available affirmative defense under the ADA and Section 504 was established. See *Olmstead*, 527 U.S. at 604. Plaintiffs anticipate that between 25-30 witnesses, in addition to experts, would have been required at trial related to the intensive factual inquiry and proof required for the ADA and Section 504 claims and defenses. The trial in this matter would have also taken at least 7-10 days.

To complete trial preparations, Plaintiffs would have sought additional formal

Medicaid Program, the TBI/SCI Waiver Program. See Fla. Admin. Code. R. 59G-13.130.

discovery and the expense of continuing to litigate would have included the depositions of approximately 15 additional administrators, state regional managers and case workers with the TBI/SCI Waiver Program who are located in offices from Miami to Pensacola. This discovery would have been necessary to supplement the information already obtained and have it in a form useful for trial.

Plaintiffs prefer to devote limited and finite resources to productively meeting the needs of the class and believe that Defendants also share this sentiment. In the absence of the Settlement Agreement, depending on the duration of continued litigation, class members might not receive any TBI/SCI Waiver Program services for years or would have to wait to benefit from any positive policy changes, even assuming an eventual favorable decision.

D. Substance and Amount of Opposition to Settlement

In approving a settlement, courts have noted the possible hardships that may be imposed and objections from class members must be considered. *Piambino v. Bailey*, 757 F.2d 1112, 1142 (11th Cir. 1985). The agreed upon and approved notice of proposed settlement to class members informed the public that written objections could be filed and set December 22, 2007,⁶ as the deadline for the filing

⁶ The parties assumed that the Court intended that December 22, 2006, to be the actual deadline.

of such objections. To Plaintiffs' knowledge, Defendants complied with the Court's Order concerning the notice and distributed the approved notice to all class members via First Class Mail on or before November 17, 2006, posted the notice on the home page of the official website of the Department of Health's Brain and Spinal Cord Injury Program and the home page of the official website for the Agency for Health Care Administration, and displayed the Notice in their appropriate offices around the state in conspicuous places accessible to the public. As of January 2, 2007, the parties were unaware of any written objections to the Settlement Agreement from class members.

E. Stage of Proceedings at Which the Settlement was Achieved

The purpose of considering the stage of the proceedings is to ensure that Plaintiffs had access to sufficient information to evaluate the case and to assess the adequacy of a settlement proposal with an informed judgment of the strengths and weaknesses of their position. In this case, there has been extensive discovery, including numerous depositions of agency personnel with detailed knowledge about the administration of the program and the exchange of hundreds of pages of documents. Defendants filed a motion to dismiss which was denied by the court. (Dkt. #75). Both parties anticipated filing motions for summary judgment as to certain claims, however, as indicated above, trial of certain issues would have been

necessary. The intensive settlement negotiations conducted through mediation, and informal discussion, facilitated the Plaintiffs' ability to judge whether to accept and recommend the proposed terms contained in the Settlement Agreement. Plaintiffs and their attorneys fully understood the relative strengths and weaknesses of their legal position and negotiated the Settlement Agreement in light of that assessment.

F. Views of Plaintiffs' Counsel

To assist the court in determining the fairness of a proposed settlement, "the view of experienced counsel" as to the merits of the settlement is entitled to significant weight. *Ressler*, 822 F.Supp. at 1552. Plaintiffs were represented by an experienced team of attorneys from Southern Legal Counsel, Inc., and the National Health Law Program. Southern Legal Counsel has served as class counsel in class actions on a number of cases, including litigation to vindicate the rights of persons with disabilities. The National Health Law Program have served as class counsel on numerous Medicaid class actions throughout the country, including litigation to protect the rights of low-income persons with disabilities. After full review of the evidence obtained through discovery and analysis of the applicable legal issues, Plaintiffs' attorneys are satisfied that this settlement confers significant, concrete benefits upon the Plaintiffs, is fair, reasonable, and adequate to the class

and is the best that could be achieved under the circumstances. It not only provides benefits to class members now, but also implements systemic policy changes and commitments to increases in service capacity that will benefit class members for years to come.

This was not a hurried agreement reached in the initial stages of a lawsuit. Rather, because of the stage of the proceedings and the large amount of discovery, the parties were well aware of the relative strengths and weaknesses of each others' positions. Moreover, the settlement terms were also reached through extensive negotiations during several formal mediation sessions and informal discussions that happened from June 2004 through August 2006. During that time, the terms of the agreement were developed, finalized, and the Handbook and Internal Operating Procedures were developed with extensive comments by both parties. The settlement process was prolonged due to the complicated issues involved in developing these policies and the role of two state agencies and numerous state administrative personnel. Over this time period, Plaintiffs' counsel also contributed extensive comments and raised multiple issues concerning these policies in order to ensure the fairness of the terms of the settlement to all members of the class. Plaintiffs' counsel can state that, in their experienced opinion, beyond any doubt, that the Settlement Agreement is fair, reasonable, and adequate to the

class.

CONCLUSION

The parties respectfully request that the Court enter an order approving the Settlement Agreement for all of the foregoing reasons. As referenced in the Settlement Agreement, the Agreement itself does not trigger the ultimate dismissal of this case. Instead, as set forth at Section (E)(1), the parties have contemporaneously filed a proposed Final Order of Dismissal with Prejudice and respectfully request that the Court enter that Order and close the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by electronic mail and U.S. First Class Mail on this 3rd day of January 2007, to the following:

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