UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

A.J., a minor child by and through his mother, Donnell Creppel; G.M., a minor child by and through his mother, Jessica Michot; B.W., a minor child by and through his mother, Kodi Wilson; B.C., a minor child by and through his mother, Sarah Washington,	)	CIVIL ACTION NO. 19-324-BAJ-RLB
Plaintiffs	)	JUDGE JACKSON
v.	)	MAGISTRATE JUDGE BOURGEOIS
REBEKAH GEE, in her official capacity as Secretary of Louisiana Department of Health, and the LOUISIANA DEPARTMENT OF HEALTH	)	CLASS ACTION
Defendants.	)	

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT AND NOTICE PLAN

Plaintiffs, on behalf of themselves and all others similarly situated ("Plaintiffs"), and Defendants Rebekah Gee, in her official capacity, and the Louisiana Department of Health ("Defendants") (collectively, "the Parties"), submit this memorandum in support of their Joint Motion for Preliminary Approval of Class Settlement and to Set Fairness Hearing ("Motion"). For the reasons explained below, the Parties' proposed Settlement Agreement is fair, reasonable, and adequate and provides substantial benefits to the entire class while removing the delay, risk, and expense inherent in the trial of a complex case such as the present action. The Parties respectfully request that this Court grant preliminary approval of the proposed Settlement Agreement, as attached to the Motion

with proposed order; adopt the notice plan as described in the Settlement Agreement and in the notices attached as Exhibits 2 and 3; and schedule a Fairness Hearing to address the fairness and adequacy of the proposed Settlement Agreement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

A. Background

Four children, who were found eligible for the in-home nursing services, called Extended Home Health (EHH) and Intermittent Nursing (IN) (collectively "in-home nursing services") under Louisiana's Medicaid programs, through their parents ("Plaintiffs"), filed this class action lawsuit on May 22, 2019 against the Secretary of the Louisiana Department of Health and the Louisiana Department of Health ("LDH"). The Complaint alleged that Plaintiffs were unable to obtain adequate nursing services due to the Defendants' failure to "arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment [nursing services]," as mandated by the federal Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions of the Medicaid Act. 42 U.S.C. Secs. 1396a(a)(10)(A), 1396a(a)(43)(C), 1396d(a)(4)(B), 1396d(r), and the Medicaid Act reasonable promptness provision, 42 U.S.C. Sec. 1396a(a)(8). Plaintiffs further alleged that the Defendants' policies, practices, and procedures had the effects of placing Class Members at a serious risk of institutionalization or hospitalization and constituted unlawful discrimination under the Americans with Disabilities Act (ADA) and violated the integration mandate of the implementing regulations. 42 U.S.C. Secs. 12131-32; 28 C.F.R. Sec. 35.130(d).

On August 26, 2019, the Court certified a class under the Federal Rules of Civil Procedure 23(b)(2) defined as "[a]ll current and future Medicaid recipients under the age

of twenty-one (21) in Louisiana who are certified in the Children's Choice Waiver, the New Opportunities Waiver, the Supports Waiver, or the Residential Options Waiver who are also prior authorized to receive extended home health services or intermittent nursing services which do not require prior authorization but are not receiving some or all of the hours of extended home health services or intermittent nursing services as authorized by the Defendants." ECF No. 21.

After five months of arms-length negotiation, the Parties have now reached an agreement to settle the case. Accordingly, the Parties now jointly move that the Court grant preliminary approval of the proposed Settlement Agreement, approve the notice plan, and schedule a hearing to address the fairness and adequacy of the proposed Settlement Agreement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

B. Procedure

As set out in the Manual for Complex Litigation, Fourth, §§ 13.14, 21.61, 21.612,[1] the procedure in approving a class action settlement is for the court to review the proposed settlement to see if publication is warranted and review the adequacy of the proposed notice, and then set a date for a fairness hearing, ordering how Class Members may submit comments on the proposed settlement.

The Court cannot modify the settlement. It can either approve or reject it. "Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed Settlement Agreement and order its acceptance over either party's objection." *Evans v. Jeff D.,* 475 U.S. 717, 727 (1986).

[1] https://www.uscourts.gov/sites/default/files/mcl4.pdf

This proposed class action proceeds under Federal Rule of Civil Procedure 23(b)(2).[2] This means only declaratory and injunctive relief are at issue, because "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Rule 23(b)(2). That the action does not seek damages reduces conflict concerns and management issues. There is no provision for Class Members to opt out and no distribution of damages that could present inequities among Class Members.

C. The Principal Terms of the Settlement Agreement Provide Fair and Reasonable Relief.

The Settlement Agreement fairly, reasonably, and adequately affords relief to Class Members. The essence of the relief sought by Plaintiffs is for Defendants to revise its processes for coverage of in-home nursing in a manner that allows for Class Members to receive staffing for the amount, duration and scope of in-home nursing services that Defendants have prior authorized. The relief afforded under the Settlement Agreement addresses and substantially achieves that goal through a graduated process tailored towards identifying the reasons that a child is missing in-home nursing hours and then remedying the deficiencies identified. Specifically, the Settlement Agreement requires that:

1. Defendants shall establish a Crisis Response Team whose primary responsibility shall be arranging for in-home nursing services for Class Members when such services are unavailable through existing Medicaid

[2] Complaint, ¶19, ECF No.1

home health agencies within their administrative regions. The Crisis Response Team shall have the responsibility to make all reasonable efforts to ensure in-home nursing services are able to be provided to the Class Member within 10 business days of a referral for any Class Member, who after two weeks of effort to attain services, are unable to receive 90% of prior authorized in-home nursing services. Class Members at risk of institutionalization may be referred to the Crisis Response Team without having to seek in-home nursing services for two weeks first.

2. Defendants shall publish and implement enhanced reimbursement rates for the following situations: two Class Members being cared for simultaneously; children in EHH with high medical needs; overnight shifts for EHH; weekend shifts for EHH; holiday shifts for EHH; and for EHH services in rural areas. Defendants shall also study an enhanced rate for overtime hours and seek budgetary authority to implement an overtime rate, should that rate be determined necessary.

3. Defendants shall enact changes to existing policies and procedures to promote more effective coordination between Class Members, case management providers, home health providers, and Defendants.

4. Defendants shall initiate a study to determine the correlation between the current reimbursement rates for in-home nursing services and the unavailability of these services for Class Members. Defendants shall to seek authority to implement any rate increases recommended by the study.

5. Defendants will complete a study of the impact of the licensure of additional home health agencies on the availability of in-home nursing services if, after the rate study completes and any rate increase are implemented, there remains a concern with the ability of Class Members to receive at least 85% of their in-home nursing services on an ongoing basis. If Defendants' study demonstrates that additional home health agencies will increase the availability of in-home nursing services based on modifications to licensure, Defendants shall take necessary steps to remove barriers to the licensure of new in-home nursing provider agencies.
6. Defendants shall develop and implement a plan to grow the total number of qualified individuals in the job pool for the provision of Medicaid-covered in-home nursing services in Louisiana.
7. Defendants shall engage in on-going monitoring of the availability of in-home nursing services. This monitoring will be provided to Plaintiffs' counsel for review.
8. Plaintiffs' counsel shall be entitled to a total of $94,500 in fees for the hours and costs entered into this case. Plaintiffs shall be entitled to further fees in the event that enforcement of the Settlement Agreement becomes necessary.

D. Jurisdiction and Termination of the Settlement Agreement

The Settlement Agreement stipulates that the Court shall retain jurisdiction to enforce the terms of the Agreement until it terminates. Unless otherwise ordered, this Settlement Agreement shall terminate five years after the Approval Date. The Parties, jointly or severally, may file a motion requesting modification or termination of this

Settlement Agreement at any time after the Approval Date and before the Settlement Agreement is terminated.

E. The Proposed Settlement Agreement Merits Preliminary Approval

Generally, a district court may preliminarily approve a proposed class action settlement if it is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). Preliminary approval of a proposed settlement based on an evaluation of fairness is the first in a two-step process required before a class action may be settled. See David F. Herr, Manual for Complex Litigation § 30.4 (4th ed. 2005) ("Manual Fourth"). "A proposed settlement of a class action should therefore be preliminarily approved where it 'appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible [judicial] approval." *In re Shell Oil Refinery*, 155 F.R.D. 552, 555 (E.D. La. 1993).

Pursuant to Rule (23)(e)(1)(B), this Court should order notice upon a showing that the criteria of Rule 23(e)(2) are met. Rule 23(e)(2) requires a showing that:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and;
> (D) the proposal treats Class Members equitably relative to each other.

In the Fifth Circuit common-law principles preceded the standards used under Rule 23(e)(2) to determine the fairness of a class-action settlement. *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). The *Reed* factors are:

> (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the litigation and available discovery; (4) the probability of plaintiffs' prevailing on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives, and absent Class Members.

Since these two standards largely overlap, Courts in the Fifth Circuit will often combine them in making determinations of the fairness of a class-action settlement. *See*, *e.g.*, *Hays v. Eaton Grp. Attorneys, LLC,* No. CV 17-88-JWD-RLB, 2019 WL 427331 (M.D. La. Feb. 4, 2019); *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching, Grades 7-12 Litig.,* 447 F. Supp. 2d 612, 619 (E.D. La. 2006).

1. The Settlement is Procedurally Fair.

"In determining the fairness, adequacy and reasonableness of the proposed compromise, the inquiry should focus upon the terms of the settlement." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). "The settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case." *Id.* "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting Manual for Complex Litigation § 30.42 (3rd ed.1995)). "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Cotton*, 559 F.2d at 1330.

The settlement in this instant case is procedurally fair, its terms having been negotiated by counsel with significant subject-matter expertise in the Medicaid Act, the Americans with Disabilities Act, and other such complex litigation. The negotiations were conducted at arms-length and required five months of meticulous back-and-forth proposal between the parties. Attaining settlement terms required movement by all Parties from their initial litigation positions.

2. The Settlement is Substantively Fair

Courts within the Circuit typically examine the following factors in determining whether to approve a settlement agreement as substantively fair: "(1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles [to] prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representative, and the absent Class Members." *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982). Pursuant to Rule 23(e)(1)(B)(i), the parties must make a showing that the settlement can be justified prior to the Court permitting the issuance of notice.

a. The settlement was not a product of fraud or collusion.

As explained above, the settlement negotiations were conducted at arms-length and required concessions from all parties. While there was negotiation and agreement concerning attorneys' fees to Plaintiffs' counsel, these negotiations were not initiated until after the other terms of the settlement were agreed upon.

b. The complexity, expense, and likely duration of the litigation

The settlement of this case at this early phase avoids undue expenses to all Parties involved. If litigated through trial, the case would require numerous expert witnesses, significant amounts of attorney hours due to the large amount of discovery, motion practice, and a lengthy trial. Further, the case itself would have a long duration, with the losing party likely to appeal an adverse decision. An appeal would all but guarantee that this litigation would continue for several more years without resolution. This could significantly delay obtaining relief for any Class Members. One of the primary benefits of the Settlement Agreement is that it provides reasonably prompt relief to the class within the timeframes outlined in the Settlement Agreement, without the major expenditures of time and money for further litigation. Though the class has already been certified, the case presents some unique complexities related to the applicability and interpretation of Medicaid laws and the application of the ADA's integration mandate. Because the case will be complex, expensive and lengthy, this factor weighs in favor of settlement.

c. The stage of the proceedings and the amount of discovery completed.

Though the parties have not conduced formal discovery, Plaintiffs have an understanding of the information that would be provided during the discovery phase. "[W]hen the settlement proponents have taken affirmative steps to gather data on the claims at issue, and the terms of the settlement or settlement negotiations are not patently unfair, the Court may rely on counsel's judgment that the information gathered was enough to support a settlement." *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching, Grades 7-12 Litig.*, 447 F. Supp. 2d at 620-21. Prior to filing suit, Plaintiffs requested and Defendants produced significant amounts of data describing the extent to

which Class Members were not accessing in-home nursing services. The information provided was responsive to Plaintiffs' request under the Public Records Act. LA. R.S. 44:1, *et. seq.* Much of this information was submitted as a supplement to this Court in Plaintiffs' Motion to Certify Class. ECF No. 2-3, 2-4, 2-5, 2-6, 2-7. Because Plaintiffs' have obtained information sufficient to understand the scope of their alleged violations and the agreement will continue to provide Plaintiffs information while this agreement is in effect, this factor weighs in favor of settlement.

d. The factual and legal obstacles to prevailing on the merits.

The terms of the Settlement Agreement are fair, adequate, and reasonable when balanced against the strength of the Plaintiffs' case on the merits. "A district court faced with a proposed settlement must compare its terms with the likely rewards the class would have received following a successful trial of the case." *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983).

If this case does not settle, Plaintiffs believe that they will be able to develop the necessary proof to support their claims during fact and expert discovery. Despite the strengths of Plaintiffs' case, Plaintiffs are mindful of the hurdles to establish Defendant's liability. Plaintiffs recognize the significant risks that would accompany a trial in this matter, which includes the likelihood of delay to resolve motions to dismiss filed by Defendants and that a successful outcome for Plaintiffs would result in much of the same relief to that which Defendant have agreed to offer. The Settlement Agreements grants much of the relief sought in Plaintiffs' Complaint. Given the uncertainty of the injunctive relief that may be offered by this Court and the strength of Plaintiffs' case, this factor weighs in favor of settlement.

e. The possible range of recovery and the certainty of damages.

Plaintiffs do not seek any damages. There is no provision for Class Members to opt out and no distribution of damages that could present inequities among Class Members.

f. The respective opinions of the participants, including class counsel, class representatives, and the absent Class Members.

Parties, including class counsel and the class representatives, believe that the settlement is beneficial to all Parties. Parties also believe that this criterion will be more adequately addressed after notice is issued to absent Class Members and they are given the opportunity to object.

F. Adequacy of Proposed Notice to the Class

For Rule 23(b)(2) injunctive class actions, Rule 23(c)(2) requires only "appropriate notice to the class," as opposed to notice to all identifiable Class Members as is required for 23(b)(3) class actions for damages. Further, "[a] settlement notice need only satisfy the broad reasonableness standards imposed by due process." *In re Katrina Canal Breaches Litig.*, 628 F.3d at 197.

The parties have proposed to give notice to Class Members through the media outlets LDH typically uses to publish legal notices. These are the following: Lafayette Daily Advertiser, Shreveport Times, Alexandria Daily Town Talk, Lake Charles American Press, Baton Rouge Advocate, Monroe News Star, Houma Courier, and the New Orleans Times-Picayune. A short form notice (Exhibit 3) is attached for these outlets, giving access to the longer summary (Exhibit 4), to the complete settlement document, and to Advocacy Center contact information, to ask questions, and submit comments and objections.

The longer summary of the proposed settlement would be posted on the "News" section of Louisiana Medicaid's website, and on the Advocacy Center's website, both linking to a complete copy of the Stipulation.

Further, the Parties have proposed to give notice through letters sent to the home addresses of all individuals receiving a developmental disabilities waiver through Medicaid in Louisiana who are currently prior authorized for extended home health nursing services, giving a brief explanation of the settlement and directions for how to find additional information of the settlement on the Defendants' website.

All notices shall give contact information for the Advocacy Center, to ask questions or submit objections. All notices will include any instructions from the Court as to how to submit objections directly to the Court for its fairness hearing. The parties believe that though the notice proposal outlined in the section, absent Class Member shall have fair notice to voice their objections.

Conclusion

For these reasons, the Parties respectfully request that the Court enter an Order (1) granting preliminary approval of the proposed Settlement Agreement; (2) requiring notice in the form and method of the Parties' proposed plan; and (3) setting a date for a Fairness Hearing on the Settlement Agreement.

Respectfully submitted,

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