
LISA SOMMERFELD, et al.,

Plaintiffs,

v.

Case No. 03-CV-1827

JAMES DOYLE, et al.,

Defendants.

CLASS ACTION SETTLEMENT AGREEMENT

The parties desire to resolve this litigation challenging the February 2003 decision to downsize the Long-Term Care Program at the Northern Wisconsin Center ("NWC") expeditiously and economically. They do so in light of the evidence of record and their respective assessments of the likelihood that defendants or plaintiffs would prevail if this case were litigated to completion. Each side believes that the terms of this settlement, if approved by the Court, represent a reasonable and appropriate resolution of the claims in dispute.

WHEREFORE, the parties agree to the following terms and conditions:

1. The purpose of the Long-Term Care Program at NWC is to "provide services needed by developmentally disabled citizens of this state that are otherwise unavailable to them, and to return those persons to the community when their needs can be met at the local level." Wis. Stat. § 51.06(1).

2. The NWC is certified as an Intermediate Care Facility for the Mentally Retarded ("ICF/MR") in accordance with the Social Security Act, 42 U.S.C. § 1396, *et seq.* The NWC residents who participate in the Long-Term Care Program are certified Medicaid recipients and

are eligible for ICF/MR care. The class represented by the named plaintiffs in this case consists of all developmentally disabled persons receiving long-term care treatment from the NWC in the Long-Term Care Program on September 12, 2003, who have not opted out (hereinafter referred to as "Class Members"). Each Class Member has been protectively placed pursuant to court order and has a guardian appointed pursuant to state law.

3. The State of Wisconsin participates in a federally approved waiver program known as the "Community Integration Program" ("CIP"), which permits developmentally disabled Medicaid recipients like the Class Members to transfer from ICF/MR care to community settings. Each Class Member from a non-Family Care county¹ is eligible to participate in the CIP-1A Program. As a condition of its CIP home and community-based waivers, the Department of Health and Family Services ("DHFS"; together with Governor Doyle and Secretary Nelson, the "State Defendants") provides each qualifying Medicaid recipient "the choice of either institutional or home and community-based services." 42 C.F.R. § 441.302(d)(2). If the Medicaid recipient is legally incompetent to make the choice, the recipient's guardian will make the choice for him or her subject to the ultimate authority of the Chapter 55 court. Participation in CIP is voluntary, subject to the ultimate authority of the Chapter 55 court.

4. DHFS and the counties responsible for Class Members, or for Class Members from Family Care counties, their CMOs, have an affirmative obligation under federal and state law to explore for each Class Member whether there exists a less restrictive placement with services appropriate to meet the Class Member's needs.

¹Class members from Family Care counties who enroll in Family Care upon discharge from NWC receive Family Care program dollars flowing through their Care Management Organizations ("CMOs").

5. The relocation process presently underway for Class Members offers an opportunity for DHFS, NWC, the counties, the CMOs for Family Care members and the guardians to investigate and determine whether each Class Member can be adequately served in a lesser restrictive setting.

6. DHFS will proceed with relocation planning and processing for Class Members consistent with the law and as has occurred throughout the current downsizing of the NWC Long-Term Care Program. Plaintiffs acknowledge that DHFS is proceeding towards the closure of the Long-Term Care Program at NWC. The Long-Term Care Program at NWC will close as expeditiously as possible, consistent with the health and safety of its residents. For planning and other purposes DHFS has identified December 31, 2004, as the target date for relocating all Class Members. To ensure safety and encourage new placements, the State of Wisconsin significantly increased funding for the CIP-1A program, which enhances opportunities for placing Class Members in the community. Class Members will be relocated to placements in the community or another ICF/MR in accordance with their guardian's wishes, subject to the authority of their respective Chapter 55 courts.

7. DHFS has concluded that it will not be feasible to relocate all residents in the Long-Term Care Program by December 31, 2004.

8. The Legislature has authorized funding for up to 20 long-term care beds at NWC through June 30, 2005, for residents of the Long-Term Care Program, which includes the Class Members, and for whom, by reason of the complexities of their disabilities and the availability of alternate and appropriate placements and services to meet their needs, additional planning time and efforts are necessary.

9. If necessary to complete relocation of Class Members safely, appropriately and

according to law, defendants will continue funding and care for them at NWC through June 30, 2005, and, if necessary, will seek continued funding in the 2005-07 biennial budget cycle to care for them in a manner that provides for them safely, appropriately and according to law. This paragraph shall not be construed as an open-ended commitment to maintaining long-term care services at NWC in the 2005-07 biennium.

10. The guardians of the Class Members agree to work with NWC and DHFS staff as well as the staff of the respective county human services organizations, CMOs and prospective providers, including, but not limited to, the following:

a. Guardians agree not to unreasonably withhold consent to the sharing of confidential information that would enable county staff, CMO staff and prospective providers, as they have been doing thus far, to conduct comprehensive assessments and evaluations of the needs of each Class Member and to develop appropriate placement plans that provide for those services and placements that are consistent with the needs of each Class Member and with the legal requirement that each Class Member be placed in the least restrictive setting consistent with his or her needs.

b. It is not unreasonable for guardians to refuse to sign consent forms that do not specify the person whose confidential information is to be provided and the entity to which the confidential information is to be provided.

c. Guardians who have not previously consented to release of confidential information about a Class Member for assessment and relocation planning purposes, or who have withdrawn previous consents to release of confidential information about a Class Member for assessment and relocation planning purposes, will be provided completed consent forms for release of confidential information. The guardians will be

asked to sign and return those consent forms for release of confidential information about the Class Member for assessment and relocation planning purposes within thirty days of court approval of this settlement agreement, unless consent is reasonably withheld pursuant to Paragraph 10.b. All guardians will be asked to sign any additional requested consent forms for release of confidential information about a Class Member for assessment and relocation planning purposes within ten days of receipt of any such additional forms, unless consent is reasonably withheld pursuant to Paragraphs 10.a. and 10.b. Plaintiffs' counsel will use their best efforts to persuade the guardians to sign all requested consent forms for release of confidential information about a Class Member for assessment and relocation planning purposes.

d. Guardians will work cooperatively with staff from NWC and DHFS, the respective counties and prospective providers to resolve any issues that arise throughout the planning process, including the specific provisions of a proposed plan.

e. Guardians agree not to unreasonably withhold consent to suitable relocation plans for Class Members, but do not waive their state, federal and constitutional rights.

11. DHFS and NWC staff agree to continue to work with the guardians of the Class Members as they have been doing thus far, including, but not limited to, the following:

a. DHFS agrees that NWC staff will exercise professional judgment throughout the planning process for each Class Member, consistent with the provisions of applicable law and as has occurred throughout the current downsizing of the NWC Long-Term Care Program.

b. DHFS and NWC staff will continue to work cooperatively with guardians and with staff from each respective county or CMO and prospective providers to ensure that

the health, safety and welfare of each Class Member is protected, consistent with the provisions of applicable law and as has occurred throughout the current downsizing of the NWC Long-Term Care Program.

c. DHFS and NWC staff will work with the Counties in considering alternate ICF/MR placements for Class Members when desired by their guardians, consistent with the provisions of applicable law and as has occurred throughout the current downsizing of the NWC Long-Term Care Program.

12. If, despite the efforts made under Paragraphs 10 and 11, agreement cannot be reached on the terms of a suitable plan for the placement of the Class Member, then the parties, counties and CMOs may proceed in accordance with the provisions of Wis. Stat. ch. 55. Guardians may also present any claimed violations of Paragraph 11 in accordance with the provisions of Wis. Stat. ch. 55 or other applicable law.

13. This agreement is a full, final and complete compromise and settlement of claims, doubtful and disputed as to the questions of liability, damage and remedy, and is not to be construed as an admission of liability by any of the State Defendants, their agents or their employees. The parties acknowledge that the Court conducted a three day hearing in this case. The parties further acknowledge that a trial will not take place because of this settlement. The plaintiffs acknowledge that no State Defendant, or employee, including Governor Doyle and Secretary Nelson, has violated the rights of any Class Member. The plaintiffs also acknowledge that no class member has been transferred to non-ICF/MR care absent guardian consent. Defendants acknowledge that the Court ordered that no Class Member be placed in a community setting absent guardian consent or court order.

14. Defendants agree as follows:

a. Within ten days after approval of this Settlement Agreement, the State Defendants will provide plaintiffs counsel with the Individual Service Plan, CIP Plan or Family Care Individual Service Plan and 30 Day Review for all Class Members transferred to date for whom this information has not been previously provided.

b. With respect to all future transfers of Class Members, the State Defendants will provide plaintiffs' counsel or agent with the Individual Service Plan and CIP Plan upon receipt by the Community Integration Specialists for each Class Member prior to the Class Member's transfer from NWC. Plaintiffs' counsel or agent will be afforded the opportunity to submit written comments on the terms of the relocation plans, provided that no transfer will be delayed or postponed in order for plaintiffs' counsel or agent to submit written comments. The Class Members and their guardians retain their existing rights under Chapter 55 for court review of placement plans, and no new rights of review or procedure are created by this provision. The State Defendants will provide plaintiffs' counsel or agent with the 30 Day Review completed after the placement.

c. The applicability of sub. b. is subject to the decision of each guardian for a Class Member whether to continue to consent to plaintiffs' attorneys receiving the documents identified in sub. b. A jointly prepared letter and form advising Class Members' guardians of this opportunity to withdraw consent will be provided to the guardians by the State Defendants. The State Defendants will not be required to comply with sub. b. for any Class Member whose guardian notifies the State Defendants in writing by August 1, 2004, or sixty (60) days following the hearing on this Agreement, whichever is later, of that guardian's withdrawn consent to plaintiffs' attorneys receiving the documents identified in sub. b.

15. Plaintiffs' counsel will cause this case to be dismissed with prejudice, subject to court approval. The Court will retain jurisdiction for 30 days after the final relocation of Class Members solely for purposes of enforcing Paragraphs 14.a. and 14.b. and the guardian consent requirements of Paragraphs 10.a., 10.b. and 10.c., of this Agreement.

16. This Settlement Agreement resulted from the drafting and participation of all parties, and no presumption in favor of or against any party is to be accorded in any subsequent application or interpretation.

FOR PLAINTIFFS:

Dated: 5/12/04

Kurt Kobelt
KURT C. KOBELT

FOR STATE DEFENDANTS:

Dated: May 12, 2004

Paul L. Barnett
PAUL L. BARNETT

Dated: 5/12/04

Mary E. Burke
MARY E. BURKE

FOR INTERVENORS:

Dated: 5/12/04

Mitchell Hagopian
MITCHELL HAGOPIAN

APPROVED:

Dated: August 2, 2004

Maryann Sumi
HONORABLE MARYANN SUMI