UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LORETTA ROLLAND, et al., Plaintiffs	)	
v.	)	Civil Action No. 98-30208-KPN
DEVAL PATRICK, et al., Defendants	)	

OPPOSITION OF GROTON PLAINTIFFS TO
PROPOSED SETTLEMENT AGREEMENT

INTRODUCTION

The "Groton Plaintiffs" are 43 individuals[1] who currently reside at Seven Hills Pediatric Center, Groton MA. ("Seven Hills.") Seven Hills provides skilled nursing care for medically complex children and adults from throughout Massachusetts. The Groton Plaintiffs are individuals with mental retardation and developmental disabilities and are thus presumed to be members of the Plaintiff class.[2] The Groton Plaintiffs appear through their parents/guardians.

While the Groton Plaintiffs have distinct and individual needs, they share a number of characteristics. Each has been admitted to Seven Hills after an exhaustive

[1] Eric Voss, Laura Thibault, Frederick Carter, Christopher Paleo, Angel Agosto, Kimberley Lawrence, Kelley Schnair, Robert Buckman, Nicole Keating, Musa Nurislam, Cheryl Courtney, Lennie LeBlanc, Laura Putterman, Pedro Cavallaro, David Braga, Amanda Watts, Erin Poulin, Sheri Belville, Alissa Cormier, Belen Garcia-Simmons, Jesse Stewart, Mark Chapman, Uchenna Obi, Stefanie Petrie, Linda Klaiber, Jeanette McGinnis, Laura Prouty, Jillian Hume, Andrew Amato, Sharia Pitts, Peter Liddy, Joshua Greaney, Homer Swain, Andrew Patterson, Patrick Sheehan, Andrew Chan, Dylan Keene, Abraham Carro, William Campbell, Polo DeJesus, Emily Sam, Zachary Foster and Wendell Roque.

[2] The certified class consists of "adults with mental retardation and other developmental disabilities in Massachusetts who resided in . . . nursing facilities on or after October 29, 1998, or who are or should be screened for admission to nursing facilities." (Order of Class Certification (Docket No. 49).

evaluation process. Each has multiple, severe medical conditions. Here are descriptions of a few of the Groton Plaintiffs, as described by their parents:

> [Laura Putterman], age 33, suffered profound brain injury and a large number of accompanying medical complications including a seizure disorder and cerebral palsy, at birth in 1975. Her cognitive level is that of a newborn, she is functionally blind, cannot speak or understand speech, and is incapable of performing any voluntary bodily function (locomotion, dressing, feeding herself). She requires round-the-clock nursing care, which she has lovingly received at her nursing home for 24 years. She must be moved by others in a wheelchair, is fed by tube, is bathed, dressed, etc. by nursing staff.

Letter from Louis Putterman to the Court, dated May 7, 2008.

> Eric Voss, age 27, was born with Cerebral Palsy, rendering him a quadriplegic, tube fed, non-verbal, mentally retarded, helpless child. The list of his medical complications could fill a whole page. His early years consumed countless days at Children's Hospital, Boston where he is well know to most of the doctors and staff. At age 17, he suffered a near fatal massive brain injury due to poor care after a surgery from which he will never recover.

Letter from Barbara and Francis Voss to the Court dated May 9, 2008.

> David has Cystic Fibrosis, Cerebral Palsy, and Diabetes. He can not walk, talk, or feed himself. He is fed through a tube with the appropriate enzymes to break down the food so he can absorb the nutrients to keep him alive. He is checked daily and more than likely at every shift for fever or infection because his lungs are not normal and pneumonia is a real threat to his life. He is checked for sugar levels several times a day and given the necessary insulin. He is unable to control any member of his body- arms, hands, head, legs, feet, etc. To move David, you need two people, or a lifting device. He can not be left along for prolonged periods. He has to be strapped into his wheel chair and his bed has side restraints.

Letter from Ed and Margaret Braga, dated May 8, 2008.[3]

Although members of the Plaintiff Class, the Groton Plaintiffs have not been informed about, or engaged in, this litigation until recently. In late April 2008, the Groton Plaintiffs received notice of the proposed settlement and learned, for the first

[3] Copies of letters from parents/guardians are attached hereto as Exhibit B.

time, that they were plaintiffs in this case and, more importantly, that the proposed settlement could have a potentially significant and deleterious impact on their lives.

THE PROPOSED SETTLEMENT

The current stage of litigation is concerned with the Diversion Plan incorporated in the original settlement, because this Court retained jurisdiction over that component of the case. The plan states:

> Diversion occurs before an admission when the circumstances regarding an individual change sufficiently to prompt consideration of admission to a nursing facility and interventions, if available and appropriate, could be designed to prevent admission. Diversion also occurs after an individual has been admitted to a nursing facility and interventions, if available and appropriate, could be designed to prevent the continued stay of the individual beyond 90 days.

Memorandum and Order dated 1/16/07 at 11-12 (emphasis added). Clearly, the intent of the diversion plan, approved in 2001, was to reduce, prevent or otherwise limit nursing home placements.

The Proposed settlement Agreement on Active Treatment ("PSA") makes several assumptions, without any supporting data. It asserts that

> a. The most effective method for providing appropriate habilitation and supports to class members is through integrated community services and supports.
> b. The provision of services in the community is the preferred method for meeting the needs of most class members.

PSA ¶ 3. Such blanket statements fail to recognize that people with significant medical, physical and cognitive needs may be best served by receiving care in a single location, an option not available in the typical community based facility.

The PSA anticipates that

> The defendants immediately will create a Rolland Community Placement List. Class members in nursing facilities will be included on this List if, in DMR's professional judgment and subject to review by the Court Monitor, DMR determines that the individual can benefit from community living. The factors to be considered in making this determination include: (1) opportunities to interact with family and friends; (2) accessibility to appropriate work or day supports; (3) opportunity for meaningful participation in aspects of community life; (4) the presence or absence of an advanced medical condition that would have a significant adverse effect on the individual's safety; (5) the presence or absence of fragile health condition such that the main supports are nursing services for medical and basic needs; (6) the presence or absence of a substantial risk of substantial transfer trauma which cannot be mitigated by individual clinical intervention; and (7) adequate levels of support in the community system to ensure safety. This standard only applies in determining which individuals will be identified for inclusion on the "Rolland Community Placement List."

PSA ¶ 4. In fact, the DMR has already created the list: "With respect to individuals living in nursing facilities as of November 1, 2007, DMR has identified 666 class members who are recommended for community placement. These individuals will immediately be placed upon the Rolland Community Placement List." PSA ¶ 5. The list includes 31 current residents of Seven Hills, including some Groton Plaintiffs. Affidavit of Barbara and Francis Voss, attached hereto as Exhibit A, ¶ 9.

The fundamental goal of the PSA is to reduce the number of nursing home residents. "During the next four fiscal years, FY 2009 – FY 2012, the defendants will place a total of 640 class members from the Rolland Community Placement List into the community." PSA ¶ 13. "When the defendants have completed the community expansion and transition requirements described above, including the placement of at least 640 individuals from the Rolland Community Placement List, they shall have no further obligation under this Agreement to provide additional residential supports." PSA ¶ 19.

> By greatly increasing the number of community placements available to class members, the Agreement would over time permit the vast majority of class members to be served using appropriate community supports, rather than from within a nursing facility. Defendants are confident that they can successfully provide full active treatment to the fewer than 100 class members who are expected not to be moved to a community setting over the next four fiscal years.

Defendants' Memorandum in Support of Joint Motion for Preliminary Approval of Settlement Agreement on Active Treatment at 2. ("Def. Memo.")

It is presumed that all class members on the List will be transferred. See PSA ¶ 28, which outlines the "transition plan" for all class members on the List.

THE PROPOSED SETTLEMENT IS NOT IN THE BEST INTERESTS OF ANY OF THE GROTON PLAINTIFFS

The goal of this litigation, and of the settlement agreement, is numbers based: to reduce the number of people in nursing homes. Success will be measured by whether the numerical goals, i.e. "Community Placement" of 640 people, are reached. It appears that until now, no one has argued against the basic premise. This Court appears to have favorably considered the idea of reducing the number of people receiving care in facilities like Seven Hills as well:

> At most, the court was echoing Plaintiffs' wish that the parties' settlement would accomplish the goals to which they and, indeed, the court aspired *i.e.*, a significant reduction in the nursing home population.

Memorandum and order dated 1/16/07 at 10.

> Although Plaintiffs recognize this declining census, they nonetheless assert that the decline ought to have been significantly greater. Wish that were true;

Id. at 13.

The reduction in the number of people in nursing homes is thus seen by Plaintiffs' counsel, DMR, and perhaps the Court, as an unmitigated good. It assumes that there is no subclass of plaintiffs who are better off in such facilities than in any other.

There is a fundamental and, based on the sorry history of the Commonwealth's treatment of its most vulnerable citizens, justifiable bias against "institutionalization" of people with mental retardation or developmental disabilities. But modern facilities like Seven Hills are not Dickensian warehouses, but rather well staffed, well run, communities who provide the best possible options for residents. The goal of the Diversion Plan may be desirable for some members of the plaintiff class, but the Plan does not recognize that the Groton Plaintiffs will not benefit from diversion.

The original settlement in this case was approved by the Court in 2000. Rolland v. Cellucci, 191 F.R.D. 3 (D. Mass. 2000). The Court noted that the settlement provided that a class member could not be forced to leave a nursing facility:

> The Settlement Agreement also ensures that no class member will be involuntarily transferred from a nursing facility to the community. "Defendants are not required to provide residential and other supports to a person with mental retardation or other developmental disabilities if the person knowingly objects to the provision of such supports." (Settlement Agreement, P 4(f).) The objection shall be honored, however, only after the person: "(1) has an opportunity to express his or her interests and preferences and any ties he or she might have to a particular community or locale; (2) has been informed of the residential supports in a manner that reflects the person's ability to understand and communicate information; and (3) is provided the opportunity to visit and observe similar community settings." (Id.) Even then, Defendants must re-offer the choice for a period of three years.

Id. at 7. In its fairness determination, the Court noted:

> Of the handful of inquiries received by Plaintiffs' counsel, only three or four expressed any concern about its terms, concerns invariably centered on the misperceived possibility of forced removal of class members from nursing homes. As described, such concerns quickly were allayed.

Id. at 11.

If the PSA contained a similar provision against involuntary transfers, this Objection would not be necessary and the parents/guardians of the Groton Plaintiffs would not be in fear.

The DMR has consistently taken the position that it may transfer people into community facilities when it deems such a transfer to be appropriate. United States District Judge Tauro has been presiding over the Ricci case for more than 35 years. In 2006, he enjoined further transfers of residents from the Fernald Developmental Center and he "appointed U.S. Attorney Michael Sullivan as Court Monitor to investigate whether the DMR's past and prospective transfer of residents out of Fernald was in compliance with this court's 1993 Final Order, and applicable law." Ricci v. Okin, 499 F. Supp. 2d 89 (D. Mass. 2007).

In Ricci, the Court held:

> [T]his court concludes that the Commonwealth's stated global policy judgment that Fernald should be closed has damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis.
>
> Although the transfers that have taken place so far may have been in the best interests of residents who were able to obtain "equal or better services" elsewhere, the Court Monitor's report reaches a conclusion that should be apparent to anyone who has visited Fernald. For some Fernald residents, a transfer "could have devastating effects that unravel years of positive, non-abusive behavior." Of note, the Court Monitor emphasized the importance of simplicity, continuity, and consistency in the surroundings, activities, and caretakers that help residents live each day.
>
> An essential function of the ISP process is to give residents and guardians a voice in important decisions. It is intended to provide an individual and personalized analysis of each resident. Administering this process under the global declaration that Fernald will be closed, however, eviscerates this opportunity for fully informed individualized oversight.

Id. at 91. The court emphasized that individual choice was paramount and could not be circumvented by DMR. "This court is simply ensuring that the DMR use the ISP process to adequately assess whether the setting is appropriate *and* whether it "is not opposed by the affected individual." Id. at 92, n. 16, quoting Olmstead v. Zimring, 527 U.S. 581, 587 (1999). (Court's emphasis.) The court's order was designed to make sure alternative placement decisions properly start with the needs and wishes of the individual resident, rather than an inflexible global closure policy." Id. n. 17.

The PSA will, if approved, enter as an enforceable Order of this Court. It compels DMR to transfer 640 class members, whether or not there are 640 members who wish to be transferred or for whom transfers would be beneficial. "During the next four fiscal years, FY 2009 – FY 2012, the defendants will place a total of 640 class members from the Rolland Community Placement List into the community." PSA ¶ 13. When the defendants have completed the community expansion and transition requirements described above, including the placement of at least 640 individuals from the Rolland Community Placement List, they shall have no further obligation under this Agreement to provide additional residential supports." Id. at ¶ 19. Given that the entire class is only about 800 people[4], the PSA will result in the transfer of at least 80% of the class out of nursing facilities and into "the community."

The PSA limits the scope of appeals by class members.

> Any class member who is adversely affected by the Commonwealth's determination of his or her need for specialized services may seek administrative review of that determination pursuant to 130 CMR § 610.000 *et seq.* Any class member who is adversely affected by DMR's

[4] See Plaintiffs' Memorandum in Support of Joint Motion for Preliminary Approval of Settlement Agreement on Active Treatment 2: "almost eight hundred individuals."

> determination to exclude the individual from the Rolland Community Placement List may seek administrative review of that determination pursuant to 115 CMR § 6.30 *et seq.*

PSA ¶¶ 15 and16. Thus, the PSA limits appeal options for a parent or guardian. He or she may appeal a denial of financial assistance through the Mass Health fair hearing process, 130 CMR § 610.000 *et seq.,* but appeals through the DMR process, 115 CMR § 6.30 *et seq.* are limited to appeals of a decision to exclude an individual from the List. There is no option to appeal decisions to include an individual on the List or, presumably, to effectuate a transfer.[5]

In a section that can only be described as patronizing, the PSA describes how reluctant parents and guardians will be educated about the benefits of accepting community placements:

> a: "Class Counsel or their agents will engage in various activities to encourage individuals on the Rolland Community Placement List or their guardians to accept community placement such as…"
>
> b: "DMR service coordinators and UMass case managers will undertake additional efforts to assist each class member and guardian to understand the advantages of community living."
>
> c: "DMR will take all reasonable actions to enlist the social workers' support for promoting transition to the community and facilitating the prompt and full implementation of this agreement."
>
> e. The defendants will educate and inform class members' corporate guardians about community living and DMR's commitment to provide residential services and other supports to class members in the community.

[5] A recent Bill sponsored by Congressman Barney Frank would provide the following:

"Notwithstanding any other provision of law, no entity that receives funds from the Federal government may use such funds to file a class action law- suit against an intermediate care facility for the mentally retarded on behalf of any resident of such facility unless the resident (or, if there is a legal representative of the resident, such legal representative), after receiving notice of the proposed class action lawsuit, has the opportunity to elect not to have the action apply to the resident."

> f: "This initiative will include an educational strategy focused on the guardians who have expressed resistance to transition to the community."

PSA ¶ 20. Here is the reaction of a guardian:

> This all sounds like the Plaintiffs are expecting resistance. Why would we resist if this were as wonderful, appropriate, safe, well thought out, and funded? Because many of us have dealt with these systems for years and years, have seen what is out there, have seen what becomes of these "community placements" and the people placed in them, and in order to have our children be as well cared for as possible, placed them at Seven Hills. Most of us who have had children placed prior to their 22 birthday have chosen to do so because of the lack of services available "in the community" and because we feel that the advantages of the care at Seven Hills far outshines that of the community in safety, convenience, education, skills of staff and other areas.

Letter of Eileen Frerichs. A mother and father had a similar reaction:

> We reviewed the Proposed Settlement Agreement. The language in it is insulting to all of us who have struggled to provide the best possible care for our children under terribly difficult circumstances. The notion seems to be that we need to be "educated" about the benefits of community placements ….

Affidavit of Barbara and Francis Voss, Exhibit A.

The wishes of the individual residents, expressed through their parents or guardians, are unmistakable. They want to remain at Seven Hills and they do not want to remain, or be placed on, the "Community Placement List." Exhibit B is a series of letters prepared after the March 6 meeting by parents/guardians. The letters are heartbreaking and heartfelt. Their loved-ones have found a safe and enriching home at Seven Hills. They are justifiably frightened at the prospect of a different placement. All the verbal reassurances in the world that they shouldn't worry and that their wishes will be carefully considered cannot substitute for a clear statement from this Court that the Groton Plaintiffs will not be transferred from their current homes.

CONCLUSION

The Groton Plaintiffs respectfully urge the Court to reject the Proposed Settlement Agreement, or to modify the Agreement to ensure that none of the Groton Plaintiffs remain on or are placed on the "Community Placement List," and to enter such additional relief, including injunctive relief, as may be necessary to prevent any change in placement not specifically requested by the parent or guardian.

Respectfully Submitted:

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By their attorney:

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