UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LORETTA ROLLAND, et al.
Plaintiffs,

v.

DEVAL PATRICK, et al.,
Defendants.

Civil Action No. 98-30208-KPN

DEFENDANTS' MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT AGREEMENT ON ACTIVE TREATMENT

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Introduction.

Defendants respectfully urge the Court to give final approval to the proposed Settlement Agreement on Active Treatment (the "Agreement"), with the adjustments to several dates in ¶¶ 23-24 of the Agreement as set forth in the joint motion filed on April 7, 2008.

The Agreement will provide substantial benefits to Rolland class members. 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. The Agreement will also allow the creation of capacity available to serve potential class members who present for admission to nursing facilities in the future. 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.

The parties agree that the Agreement is highly likely to produce a much more favorable outcome for class members than the current efforts to provide full active treatment to the roughly 750 class members who have been in a nursing facility for more than 90 days. The Agreement recognizes in ¶ 3.b that "the provision of appropriate services to most class members who currently are in nursing facilities is best accomplished through their transition to the community and the expansion of community services." Such a result is not mandated by federal law, and cannot be achieved if defendants instead must invest tens of millions of new dollars in enhancing active treatment to meet the standards reflected in the Court Monitor's protocol. Though federal law does not require states to create new community placement resources, it recognizes that if a state has existing capacity to provide adequate and safe supports to persons with mental

retardation in a community setting as an alternative to nursing home admission or continued stay, then that course is favored. See 42 C.F.R. §§ 483.126 and 483.132.

As discussed in Section III below, the important concerns raised on behalf of certain residents of Seven Hills Pediatric Center are addressed by the facts that: (i) roughly half the class members residing at Seven Hills are not on the initial community placement list, typically because they have such substantial medical needs; (ii) no class member on the initial list will in fact be recommended for community placement unless such a move is determined to be in their best interest after a detailed, individualized review by clinical professionals, including full opportunity for input from family members and guardians; and (iii) class members would retain their full rights under existing law to appeal any community placement.

Summary of Proposed Settlement Agreement on Active Treatment.

The basic structure of the proposed Agreement is as follows. Defendants would commit (subject to appropriation) to: (i) create and fill 640 new community placement slots for Rolland class members over the next four fiscal years (¶¶ 4-21); (ii) continue current levels of specialized services, and also provide individualized transition services, for class members awaiting community placement (¶ 28); (iii) continue the current, successful diversion efforts, and develop a corrective action plan if the number or rate of diversions unexpectedly falls off, but that plan "shall not be enforceable by the Court" (¶¶ 29-30); and (iv) provide "active treatment," that will be measured by the Court Monitor's protocol, for all class members who remain in nursing facilities at the end of the four years, as well as for any class member who has been deemed unsuitable for community placement in the meantime (¶¶ 24, 27). Nothing in the Agreement would require the Defendants to force class members out of nursing facilities against their will.

In exchange, Plaintiffs would agree that Defendants need not meet the rigorous "active treatment" standards reflected in the Court Monitor's protocol for class members who are on the

community placement list and awaiting placement during the next four years (¶¶ 28, 61), to a narrowing of the role of the Court Monitor (¶¶ 31-35), and to a simpler system of semi-annual reports and quarterly meetings (¶¶ 36-37).

At the end of the four years, if Defendants have in fact transitioned 640 class members from nursing facilities to the community, and with respect to all remaining class members have implemented any specific recommendations by the Court Monitor for how to correct any active treatment deficiencies, the case shall be dismissed (¶¶ 33 & 49-50).

Reasons Why Final Approval Is Appropriate.

The question before the Court is whether to approve the Agreement as negotiated by the parties. The Court "cannot alter the terms of the Settlement Agreement; if anything, the court's discretion 'is restrained by the clear policy in favor of encouraging settlements.'" Rolland v. Cellucci, 191 F.R.D. 3, 12 (D.Mass. 2000) (quoting Durrett v. Housing Authority of City of Providence, 896 F.2d 600, 604 (1st Cir. 1990) (quotation marks and citation omitted)).

In reviewing a proposed settlement of class claims, the Court's "role is not to dictate the terms of settlement, but only to reject the settlement if it is not fair, reasonable and adequate." Nilsen v. York County, 382 F.Supp.2d 206, 218 (D.Me. 2005) (Hornby, J.); accord, e.g., Evans v. Jeff D., 475 U.S. 717, 726 (1986) (a court may not "require the parties to accept a settlement to which they have not agreed"); Jeff D. v. Andrus, 899 F.2d 753, 758 (9th Cir. 1989) ("The court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement."); In re Warner Communications Securities Litigation, 798 F.2d 35, 37 (2d Cir.1986) ("[I]t is not a district judge's job to dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms."); Holmes v. Continental Can Co., 706 F.2d 1144, 1160 (11th Cir. 1983)

("Courts are not permitted to modify settlement terms or in any manner to rewrite the agreement reached by the parties."); 3B Moore's Federal Practice ¶ 23.80[4] (2d ed. 1987).

Where, as here, "sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." City Partnership Co. v. Atlantic Acquisition Ltd. Partnership, 100 F.3d 1041, 1043 (1st Cir. 1996) (affirming approval of settlement in class action). More specifically, there is a presumption that the settlement satisfies the "fair, reasonable, and adequate" standard established by Fed. R. Civ. P. 23(e)(2). Id. "Approval is to be given if a settlement is untainted by collusion and is fair, adequate, and reasonable." In re Lupron Marketing and Sales Practices Litigation, 228 F.R.D. 75, 93 (D.Mass. 2005) (Stearns, J.).

I. THE PROCESS LEADING TO THE PROPOSED SETTLEMENT AGREEMENT WAS FAIR.

The proposed Agreement is the product of intensive, arms-length negotiations between the defendants and competent counsel who have represented the Rolland class since the inception of this lawsuit in 1999. Plaintiffs' counsel are particularly well informed, through their monitoring of implementation of the original Settlement Agreement, and through the litigation of a number of motions in which plaintiffs alleged non-compliance with certain aspects of that agreement or with federal law concerning the provision of "active treatment" to class members.

Each class member was given adequate notice of the proposed settlement, in a form approved by the Court, and given the opportunity to submit written comments on the proposal (as well as the opportunity to appear at the fairness hearing scheduled for May 22, 2008).

In sum, the process leading to the pending Agreement was fair, and the legal presumption in favor of the settlement applies here.

II. THE PARTIES HAVE AGREED ON A FAIR, REASONABLE, AND ADEQUATE APPROACH TO PROVIDE SUBSTANTIAL IMPROVEMENTS FOR ALL CLASS MEMBERS.

A. Community Placement Is Likely To Be Better for Most Class Members Than Full Active Treatment While Residing In a Nursing Facility.

The benefits from investing in additional community placement opportunities for Rolland class members under the proposed Agreement will likely exceed the incremental change that would occur should individuals for whom community placement is appropriate remain living in nursing facilities. In community-based programs operated or funded by the Department of Mental Retardation ("DMR"), staff receive special training in the provision of services to individuals with mental retardation or developmental disabilities, and are also trained to meet the specific needs of the individuals placed. Not only must a community placement be able to meet all the medical and nursing needs of its residents, in a community-based setting there is also an emphasis on and staffing to support the delivery of habilitative services to class members. In these respects, DMR community placements are similar to other intermediate care facilities for the mentally retarded (so-called ICF/MRs) or pediatric skilled nursing facilities that specialize in caring for residents with the kinds of medical, physical, and cognitive challenges faced by Rolland class members. In contrast, for skilled nursing facilities that do not specialize in providing services to patients with needs like those of Rolland class members, while nursing and support staff are required to receive some training in providing care to persons with mental retardation and developmental disabilities, the relatively small number of class members in each facility will typically make it impractical for most nursing facilities to provide all staff with the same intensity of training regarding how to address class members' needs.

The federal "active treatment" requirements do not apply to community placements. This is why the original Settlement Agreement provided in ¶ 14 that "Defendants may satisfy their obligations" to provide or arrange for the provision of specialized services, as defined by federal

law, "by providing class members with appropriate community residential and other supports." The proposed Agreement reflects the same understanding that providing class members with a community placement takes the place of providing specialized services or active treatment as required for nursing facility placements.

Although the federal "active treatment" standard will no longer apply to class members living in a community placement rather than a nursing facility, DMR regulations establish goals for residential supports and services that are very similar to those that are the objective of active treatment: personal dignity; the opportunity to exercise individual choice, to participate in and contribute to the community, to develop and sustain varied and meaningful relationships, and to acquire skills that increase self-reliance pursuant to an individualized service plan; and of course the assurance of personal health, safety, and economic security. 115 C.M.R. § 7.03.

B. DMR Will Only Recommend Community Placements Based on Individualized Evaluation and After Appropriate Transition Planning.

The determination of whether a class member could be better served in a community placement than in a nursing facility is a highly individualized one. The Agreement quite properly protects DMR's discretion to explore and, where appropriate, make available a community placement only for individual class members who, in DMR's professional judgment, can likely benefit from community living. See Agreement ¶ 4. Community placement will not be proposed for any individual class member unless DMR, in the exercise of its professional judgment, determines that all of the class member's needs, including medical needs, can be met in an appropriately designed and staffed community setting.

Consistent with ¶ 28(a) of the proposed Agreement, and as described in the attached "Joint Plan for Transition Services," DMR has developed a standard format for a person-centered transition plan, after discussion and input from the Court Monitor and the Plaintiffs. The parties

agree that this Transition Plan format is adequate and meets the requirements of ¶ 28(a). As reflected in the Transition Plan format, the transition planning process will be thorough and highly individualized. It will, among other things, identify the personal preferences, interests, relationships, environmental and physical support requirements, health care and dietary needs, of each individual class member who may be a candidate for community placement. That detailed information will then serve as the basis for an individualized transition plan to ensure that any community placement is both appropriate and successful. The Transition Plan will be integrated into the RISP, which will continue to be the primary service planning process for class members.

The anticipated timetable for completing initial transition plans is as follows. For class members who will be placed in the community in FY09, a Transition Plan, except for Part C (pre-placement transition services), will be completed by October 31, 2008. For class members scheduled to be placed in subsequent fiscal years, a Transition Plan, except for Part D (community placement activities), will be completed by February 28, 2009. DMR will ensure full completion of the placement section (Part D) in the individual's year of placement.

C. While Awaiting Community Placement, Many Class Members Will Be Better Off.

The Agreement ensures that class members awaiting placement will continue to receive at least the level of specialized services called for in their RISP. See ¶ 28. In addition, they will receive transition services that will ensure intensified service coordination and expand community participation opportunities. Pursuant to ¶ 28(b) of the proposed Agreement, DMR intends to increase the number of service coordinators for class members and significantly reduce their caseloads, so that service coordinators can be more actively engaged with each class member. Among other things, this will ensure that the resources needed for proper transition planning and evaluation are in place. Pursuant to ¶ 28(c), DMR will make best efforts to reduce reliance upon

day habilitation that is delivered in the nursing facility and will encourage class members to participate in specialized services which are provided in day habilitation programs that offer expanded opportunities for community integration.

The purpose of these transition services is to enrich the lives of class members on the Community Placement List, by providing them with increased and enhanced supports and services. These services are intended to provide class members with increased opportunities to participate in community life and provide greater exposure to new experiences in the community. These supports are intended to create opportunities to allow the individual to explore and develop their interests and skills as well as to gain increased comfort with being in the community. The services should be relevant to the individual's expressed interests or preferences, or designed to address obstacles to community-based services; these preferences and obstacles will be reflected in the individual's transition plan. The transition services will focus on activities that will reduce the isolation that individuals experience now by providing community based activities reflective of the preferences of the participants.

Transition services will be arranged by DMR. They may be provided through a community residential supports provider (preferably one that will serve the individual residentially in the future). Alternatively, they also may be provided by a specialized services provider, in which case the supports would be targeted at providing a community experience or supports that will encourage the individual to explore community-based services. Transition services could also be provided by a community-based provider of individual supports.

Pursuant to ¶ 34 of the proposed Agreement, the Court Monitor will review a sample of individuals who are candidates for community placement, "in order to determine whether they are receiving transition planning, transition services, intensified service coordination, and other specialized services as described in ¶ 28." In collaboration with the Court Monitor, the parties

have agreed on the criteria for evaluating such transition planning, transition services, intensified service coordination, and other specialized services. Those criteria are set forth in the attached Joint Plan, at pages 2-4. In addition, the parties have agreed upon a methodology for sampling to ensure adequacy of the sample size, fairness to the parties and overall reduction of cost associated with monitoring. That methodology is described at page 5 of the attached Joint Plan.

D. For Class Members Not Expected to Transition to the Community, Full Active Treatment Will Be More Readily Achievable.

The parties are confident that the Agreement will make it possible for defendants, over time, to ensure that all class members expected to remain in nursing facilities receive full active treatment, as measured under the Court Monitor's exhaustive protocol. Plaintiffs have correctly noted that, while this obligation will be challenging even for the much smaller number of class members who are expected to remain in nursing facilities under the Agreement, it is achievable in a reasonable time because of its limited scope and the fact that almost half of these individuals are in three pediatric nursing facilities that serve only individuals with mental retardation or developmental disabilities.

The Agreement also helps provide much greater certainty regarding what will be needed to ensure that these remaining class members receive full active treatment. Under the Agreement, the Court Monitor will continue to review the adequacy of active treatment for those class members not on the community placement list. Significantly, the Court Monitor will do more than simply provide pass/fail grades. In any case where she finds active treatment deficiencies, the Monitor will make specific findings and individualized recommendations as to what steps must be taken to achieve full compliance for that client, as measured under the Monitor's active treatment protocol. Agreement ¶ 33. This will ensure that defendants know exactly what the Monitor expects them to do to correct any observed deficiencies, and that defendants will no

longer be uncertain as to what level of service will be considered to be good enough to resolve this litigation and comply with all federal active treatment obligations. See ¶ 50.

E. The Agreement Is Much More Likely To Improve The Lives of Class Members Who Remain in Nursing Facilities, and Is a Much Better Use of Resources, Than Continuing on the Current Path.

The parties agree that trying to provide active treatment to all remaining class members residing in nursing facilities "is not clinically appropriate [or] fiscally prudent." See Plaintiffs' Memorandum in Support of Preliminary Approval (Docket No. 470) at 3. They agree that going forward their efforts and resources are much better spent on achieving community placement for the vast majority of remaining class members, rather than in continuing to struggle to meet a very high standard of full active treatment for nursing facility residents.

As the Court well knows, the Rolland class consists of individuals with mental retardation or other developmental disabilities who reside in nursing facilities and whose care is paid for by the Commonwealth under its Medicaid program. When this case was filed in 1998, there were approximately 1600 class members in nursing facilities. As of November 1, 2007, that population has been reduced to approximately 758, because of defendants' success in meeting the community placement targets specified in the original settlement agreement approved in 1999, and their success more recently in diverting potential new class members away from nursing facilities and into new or existing community placements. If the Agreement is approved and successful, the parties expect that by late 2012 there would remain a relatively small number of Rolland class members who have stayed in a nursing facility for longer than 90 days.

To achieve compliance for all class members with Court Monitor's protocol, in the manner that she has begun to apply it, would require an enormous investment of time, energy, and resources. Even with such an investment, it is quite likely that (1) attempted compliance with the protocol could lead to further, time consuming, and contentious disputes that would have to be

resolved by the Court, and (2) it could take further years to ensure that all Rolland class members, even those in nursing facilities that serve only one or two of them, receive something close to what the Court Monitor would deem to constitute full active treatment.

Shifting to a joint goal of providing the vast majority of Rolland class members with a community placement is much more productive than serving those individuals in a nursing facility (because no community placement is available), and continuing to debate what constitutes adequate active treatment for each of them. By defining concrete community placement targets, and by requiring the Court Monitor to provide specific recommendations for how to achieve active treatment compliance for class members who are expected to remain in a nursing facility, the Agreement will provide the certainty needed to assure plaintiffs that all class members will get satisfactory levels of service, and to assure defendants that this litigation will draw to a close when those known goals are achieved.

This certainty is important in part because it addresses defendants' concern that the goal of specialized services or active treatment has been something of a moving target over the life of this case. In the original Settlement Agreement, defendants agreed to provide class members with specialized services. The stay of Plaintiffs' claims regarding the provision of "specialized services" was lifted in 2001. In May 2002 the Court found that Defendants were in violation of federal law by not ensuring that each class member receives "active treatment." By further orders in August and November 2002, the Court required the creation for each class member of a single service plan (which DMR calls the "Rolland Integrated Service Plan," or RISP) that includes the individual's specialized services plan and provides for "carry over" of the specialized services goals into the nursing facility. The Court also approved the active treatment measuring device developed by the Defendants. Although RISPs were created for all class members that included

carryover goals, plaintiffs' experts found the plans and services wanting, based on their application of the more rigorous standards of the "active treatment" ICF/MR regulations.

In April 2007 the Court found that Defendants had still not met their active treatment obligations, and issued an order adopting relevant portions of the ICF/MR regulations as the active treatment standard for class members. The Court appointed a Court Monitor whom he charged with reviewing the care provided to each class member to determine whether they are receiving active treatment. The Court Monitor developed a 71-page, exhaustively detailed protocol for measuring whether each class member is receiving active treatment. In her initial reviews during a pilot test, the Court Monitor generally found that existing efforts do not come close to meeting the active treatment standard. The proposed Agreement is much more likely to lead to success all around than continuing down the path of trying to resolve through litigation what constitutes full active treatment for hundreds of class members.

The additional community placements that form the heart of the proposed Agreement could not happen without the compromises by all parties that have led to this voluntary further settlement. Quite simply, defendants cannot invest the tens of millions of dollars in community services that will be needed to carry out the proposed Agreement over the next four years if they must also spend similar sums to provide full active treatment to the remaining class members. In plaintiffs' words, "[i]t is neither realistic nor legally mandatory that the defendants simultaneously develop an active treatment program and community placements for 640 class members." Plaintiffs' Memorandum (Docket No. 479) at 14 n.10. Nor can defendants devote the management and staff resources needed to create substantial numbers of new community placements if they must spend vast amounts of time and substantial amounts of money to support the extensive monitoring previously ordered by the Court. The Court Monitor's budget, as approved by the Court, estimates that it would cost at least $6 million to conduct the extensive

reviews of every class member called for in the Court Monitor's protocol. At present, none of those funds may be used to enhance services to class members. Under the proposed Agreement, in contrast, a substantial portion of funds that would otherwise have to be spent on monitoring will instead fund the actual provision of services.

III. THE IMPORTANT CONCERNS ARTICULATED BY THE "SEVEN HILLS" PLAINTIFFS WILL BE ADDRESSED THROUGH INDIVIDUALIZED EVALUATION AND PLANNING, AND DO NOT MERIT REJECTION OF THE PROPOSED AGREEMENT.

Parents or guardians of many class members residing at Seven Hills Pediatric Center in Groton, Massachusetts, have submitted eloquent letters to the Court voicing their concerns about the proposed Agreement. In addition, a formal memorandum in opposition was submitted on behalf of 43 of the 54 Rolland class members who reside at this facility. Seven Hills is a pediatric skilled nursing facility that "provides comprehensive, compassionate care to children and young adults who are severely developmentally delayed and have complex medical needs. Children at Seven Hills enter prior to their 22nd birthday and traditionally remain throughout their lifetime." See http://www.sevenhills.org/shg.html (Seven Hills website) (last visited May 16, 2008).

These letters and this memorandum make three main points. First, the parents and guardians describe and praise the high quality of care provided by the staff of Seven Hills Pediatric Center to their loved ones, and take issue with any suggestion that the services and care provided there are inadequate. Second, they detail the substantial medical and physical needs of their children or other family members who reside at Seven Hills, and state their concerns that a community residence would not be able to meet the needs of most Seven Hills patients, and that their loved ones are too medically fragile to handle or benefit from move to a community facility. Third, they express their concern that, under the proposed Agreement, family members and guardians would not be involved in any evaluation of or planning for possible community placement, and lose any right to appeal from a community placement recommendation.

As explained below, defendants agree with the comments on the first point, agree in most cases with the second point, and respectfully disagree with the third point.

A. These Plaintiffs Make the Important Point That Their Family Members Receive Excellent Care From Seven Hills Pediatric Center.

Defendants respectfully urge the Court to take note of the compelling showing by these Seven Hills parents and guardians that they are very happy with the quality of care provided to their loved ones. These parents and guardians understand full well the significant medical, physical, and cognitive needs and limitations of the Seven Hills plaintiffs, as they have for the most part provided care and support to these individuals for their entire lives. They are also very knowledgeable about the nature and quality of care provided at Seven Hills Pediatric Center. Their letters and other comments provide an important reminder that some nursing facilities, perhaps especially but not only the pediatric facilities that specialize in serving the needs of individuals like Rolland class members, are very good at serving medically compromised individuals with severe mental retardation or other developmental disabilities.

This feedback is relevant not only for evaluating the proposed Agreement, but also in evaluating whether nursing facilities that continue to provide homes for Rolland class members are meeting the active treatment standard. For class members who are likely to remain in nursing facilities, including class members residing at Seven Hills Pediatric Center, we must make sure going forward that any evaluation of active treatment is not based on standards so high that even well run facilities that provide excellent care cannot meet them.

B. The Placement Decisions Must Always Remain Highly Individualized; It Is Quite Likely That Most Class Members Who Reside at Seven Hills Are Best Served There, and Would Not Benefit From Community Placement.

The Seven Hills parents and guardians also make the important point that many of their family members are so medically compromised that they could not benefit from community placement. They are right. Patients admitted to pediatric nursing facilities like the Seven Hills

Pediatric Center are among the most cognitively impaired and physically challenged children in the Commonwealth. That is why roughly half of the Rolland class members who reside at Seven Hills (25 out of 54) are not on the initial draft of the community placement list.

With respect to those Seven Hills residents (and other class members) who at present are on the community placement list, that in no way constitutes a decision that community placement is appropriate. Rather, it is merely a tentative determination that detailed, individualized transition evaluation and planning through the PASARR process is warranted. That process allows for extensive input from family members and guardians, and involves careful clinical review by qualified professionals. That process is governed by existing federal and state rules, which is why the proposed Agreement does not and should not attempt to define it further. The proposed Agreement does not, and should not, try to substitute arbitrary legal rules for the detailed, individualized exercise of informed professional judgment that is required in all placement decisions.

C. Class Members Would Retain Their Full Rights To Appeal a Proposed Move to a New Community Residence.

The Seven Hills plaintiffs are concerned that the proposed Agreement would "limit[] appeal options for a parent or guardian." Seven Hills Plaintiffs' Opposition at 9. In fact, the Agreement would not limit any existing appeal rights.

In any case where the defendants, through the PASARR process, deny a continued nursing facility stay because an available community-based program could meet the individual's needs or because the nursing facility can no longer meet the patient's treatment needs, that decision is (and under the proposed Agreement would remain) subject to an appeal under existing federal and state law. Under federal law, an individual who is adversely affected by any PASARR determination, including a determination during a regular review that a continued nursing facility

stay should be denied because the individual should instead be transferred to a community placement, must be given the opportunity to appeal that decision. See 42 C.F.R. § 431.220(a)(4); 42 C.F.R.§ 483.204(a)(2); see also 42 U.S.C. §1396r(e)(3) & (f)(3) (originally § 1919 of the Social Security Act). Massachusetts implements these appeal rights through the "fair hearing" process established by MassHealth. See 130 C.M.R. § 456.412(B) & (C).[1] The appeal process before the MassHealth Board of Hearings is described in and governed by 130 C.M.R. § 610.000 et seq. "Pursuant to M.G.L. c. 118E, § 48, the Board of Hearings has exclusive jurisdiction to hear appeals relating to the programs administered by the MassHealth agency." 130 C.M.R. § 610.002."

In addition, as a resident of a nursing facility, all class members would retain the right to appeal from a determination by a nursing facility that an individual must be transferred or discharged. See 42 C.F.R. § 431.220(a)(3); 130 C.M.R. § 610.032(C); see also 42 U.S.C. § 1395i-3(e)(3) & (f)(3) (originally § 1819 of the Social Security Act). Class members would similarly retain the right to appeal from a determination by MassHealth concerning, for example, the scope of assistance (including, but not limited to, level-of-care determinations) or from a condition of eligibility imposed by MassHealth that is not authorized by law. See 130 C.M.R. § 610.032(A)(5) & (7); 42 C.F.R. § 431.220(a)(2).

The proposed Agreement would add to, not limit, this set of well-established rights. It would provide that, in addition to all existing appeal rights, individuals excluded from the Community Placement List could appeal their exclusion by following the same process open to

[1] Though paragraph (C) refers to decisions by DMR "that an individual is not eligible for admission to a nursing facility," defendants — consistent with federal law — construe this provision to apply as well to a decision by DMR through the PASARR process than an individual should be transferred from a nursing facility to a community placement.

individuals who wish to appeal from a modification of an ISP involving the move of an individual to a new home, pursuant to 115 C.M.R. § 6.30 et seq.. See Proposed Agreement ¶¶ 2, 40.

Beyond the question of appeal rights, the Seven Hills plaintiffs also question why the proposed Agreement does not give Rolland class members an absolute right to refuse a community placement. The answer is that the proposed Agreement would not change, in any way, the rights of patients under existing law to advocate for a particular placement. Neither federal nor state law gives Rolland class members the right to reside in a particular facility. See Plaintiffs' Memorandum (Docket No. 479) at 18. The Seven Hills plaintiffs' reliance upon Judge Tauro's recent order in the Ricci case is misplaced for several reasons. Cf. Seven Hills Plaintiffs' Opposition at 7-8. Unlike in Ricci, in this case federal law requires the defendants to consider community placement for nursing facility applicants or residents with mental retardation or other developmental disabilities. Defendants must, as part of the annual PASARR process for each Rolland class member, determine — among other things — whether "[t]he individual's total needs are such that his or her needs can be met in an appropriate community setting," and whether "[i]f the inpatient care is appropriate and desired but the [nursing facility] is not the appropriate setting for meeting the individual's needs . . ., another setting such as an ICF/MR (including small, community-based facilities) . . . is an appropriate institutional setting for meeting those needs." 42 C.F.R. §483.132(a)(1) & (4). In any case, the recent order in Ricci, which applies only to the subset of class members who reside at the Fernald Developmental Center, is on appeal to the United States Court of Appeals for the First Circuit.

IV. IN THE ABSENCE OF THE PROPOSED SETTLEMENT AGREEMENT, PLAINTIFFS WOULD NOT BE ABLE TO OBTAIN COMMUNITY PLACEMENTS FOR MOST CLASS MEMBERS.

Finally, the reasonableness of the proposed settlement to the plaintiffs is underscored by the fact that it would provide benefits that plaintiffs could never achieve through continued

litigation. See Rolland, 191 F.R.D. at 9 ("[T]he court is required to judge the reasonableness of the proposed settlement by evaluating the probable outcome of the litigation and weighing the remedies the class could secure from the settlement against the probable cost of continued litigation."); accord Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14, 101 S.Ct. 993, 998 n.14 (1981) ("Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement.") Defendants agree with plaintiffs' observation (see Ps' Memo in Support of Joint Motion for Preliminary Approval, n.4) that, in the absence of this voluntary Agreement, plaintiffs could not obtain hundreds more community placements for class members.

First, it is undisputed that defendants have made all of the community placements required by the original Settlement Agreement. Thus, plaintiffs' claims seeking additional community placements remain stayed, and plaintiffs are barred from seeking any court-ordered relief that would mandate additional community placements.

Second, although the stay of plaintiffs' claims regarding the provision of "specialized services" was lifted in 2001, and subsequently the Court ordered defendants to provide "active treatment" under the Nursing Home Reform Amendments ("NRHA") to the federal Medicaid law, nothing in the NHRA requires defendants to create new community placements. In relevant part, the NHRA mandates screening to ensure that only individuals with appropriate medical needs are admitted to nursing facilities. Whether a class member should be admitted to a nursing facility depends both on that individual's clinical needs and on the availability of suitable community alternatives to nursing facility care. If an individual meets the clinical criteria for admission set by DMR, and his or her needs cannot be met in an available community setting, the admission is appropriate. See 42 C.F.R. §§ 483.126 and 483.132. If an individual does not meet this minimum threshold of clinical need, admission is inappropriate. 42 C.F.R. §§ 483.114(b) &

483.126. Where nursing facility admission is deemed appropriate in light of an individual's clinical needs, the individual cannot be diverted elsewhere if his or her needs cannot safely be met in an available community setting. Cf. 42 C.F.R. § 483.132(a). Both aspects of the decision, whether the individual's needs are such that he or she meets the clinical threshold for admission, and whether diversion is available and appropriate, are determined in the PASARR process. But nothing in the NHRA themselves or in the PASARR regulations imposes any legal obligation to fund and create new community placements.

Third, even if plaintiffs claims under the Americans with Disabilities Act (the "ADA") did not remain stayed (which in fact they do, as a result of defendants' undisputed fully compliance with the community placement provisions of the original Settlement Agreement), it is highly unlikely that plaintiffs could meet their heavy burden of proving an ADA violation or that the Court could force defendants to carry the kind of fundamental alteration in the delivery of services to class members that would result voluntarily under the proposed Agreement. Under the ADA, "in no event is the entity required to undertake measures that would impose an undue financial or administrative burden . . . or effect a fundamental alteration in the nature of the service." Tennessee v. Lane, 541 U.S. 509, 532, 124 S.Ct. 1978, 1994 (2004) (citing 28 C.F.R. §§ 35.150(a)(2), (a)(3); accord, e.g., Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 603-604, 119 S.Ct. 2176, 2188-2189 (1999). "A state may take into account its limited resources as well as the needs of other [individuals] with disabilities in determining what sorts of reasonable modifications are appropriate under Title II" of the ADA. Toledo v. Sanchez, 454 F.3d 24, 39 - 40 (1st Cir. 2006); accord Olmstead, 527 U.S. at 607, 119 S.Ct. at 2190. "The Supreme Court has instructed courts to be sympathetic to fundamental alteration defenses, and to give states 'leeway' in administering services for the disabled." Arc of Washington State Inc. v. Braddock, 427 F.3d 615, 618 (9th Cir. 2005) (holding that ADA's integration mandate did not require state to request

federal authorization to increase the size of the home and community-based services program) (quoting Olmstead, 527 U.S. at 605, 119 S.Ct. at 2189).

In sum, the Agreement will bring about a result that could not happen through continued litigation: the vast majority of class members will, over a reasonable period of time, be moved from nursing facilities to appropriate community placements.

Conclusion.

For the reasons stated above, defendants join with plaintiffs in urging the Court to give final approval to the proposed Settlement Agreement on Active Treatment.

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I hereby certify that this document was filed through the Electronic Case Filing (ECF) system and thus copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF); paper copies will be sent to those indicated on the NEF as non registered participants on or before May 19, 2008.

/s/ Kenneth W. Salinger