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PATRICK E. DUFFY, CLERK
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Debra M. Weiss

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

TRAVIS D., et al. Plaintiffs, -vs- **MONTANA DEVELOPMENTAL CENTER**, et al. Defendants.	CV 96-63-H-CSO **ORDER AMENDING JUDGMENT**

Pursuant to the stipulation and joint motion of the parties, **IT IS ORDERED** that the Rule 60(a) motion to adopt and incorporate the terms of the class action settlement [Dkt. No. 423] is **granted.**

In approving the settlement proposed by the parties, it was the Court's intention to incorporate the terms of the settlement into that ruling. [See Dkt. No. 403 Exh. 1 and Dkt No. 421.] Further, to maintain jurisdiction for the purpose of enforcing

the settlement agreement, the Court must generally manifest intent to do so. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 381 (1994).

Based on the foregoing, **IT IS FURTHER ORDERED** that the Clerk of Court shall amend judgment in this case to add the following terms:

1) The Court adopts and incorporates the terms of the settlement agreement into its May 27, 2004 Order approving settlement;

2) The Court retains jurisdiction over this case for the limited purpose of enforcing the terms of the settlement agreement.

The Clerk of Court is directed to notify the parties of the making of his Order.

Dated this 21st day of June, 2004.

Carolyn S. Ostby
United States Magistrate Judge

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Clerk, U. S. District Court
District of Montana
HELENA

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PATRICK E. DUFFY, CLERK
BY GAYLE A. REUTERDAHL
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

TRAVIS D., by his mother and next friend, Leslie Barry, ALLEN K., by his parents and guardians Michael and Earlene K., VIRGINIA L., by her sister and next friend Barbara Mercer, ISIDOR S., by his next friend Nancy Staigmiller, KIMBERLY B., by her next friend Dawn DeVor, CORIE B., by his sister and next friend Lilly Westby, TIFFANY M., by her next friend Johnelle Howanach, LYLE H., by his parents and guardians Martha and Ervin H., JUDY M., by her next friend Nancy Staigmiller, ALVIN W., by his next friend Gay Moddrell, BRENDA S., by her mother and guardian Mary Ann Parrent, FREEMAN B., by his father and next friend Bob B., ANDREA I., by her mother and next friend Lori I., TRAVIS C., by his mother and guardian Ann C., MICHAEL H., by his step mother and next friend Helen H., JAMES K., by his next friend Nancy Staigmiller, PATRICK D., by his parents and guardians Dayle and	CV 96-63-H-CSO **MEMORANDUM and ORDER**

Monte D., LYNN D., by her next friend Nancy Maxson, PEOPLE FIRST OF MONTANA, on behalf of its members,

Plaintiffs,

-vs-

EASTMONT HUMAN SERVICES CENTER, MONTANA DEVELOPMENTAL CENTER, GAIL GRAY, Director, Montana Department of Public Health & Human Services, JOE MATTHEWS, Director, Disability Services Division, Department of Public Health and Human Services, DAN ANDERSON, Administrator, Mental and Addictive Disorders Division, Department of Public Health and Human Services, JEFF STURM, Superintendent, Montana Developmental Center, SYLVIA HAMMER, Superintendent, Eastmont Human Service Center, ED AMBERG, Chief Executive Officer, Montana State Hospital, RON BALAS, Superintendent, Montana Mental Health Nursing Care Center, STATE OF MONTANA,

Defendants.

INTRODUCTION

On May 13, 2004, the Court conducted a hearing on whether the proposed class action settlement is fair, reasonable, and adequate. After considering the parties' briefs, argument at the hearing, and objections to the proposed settlement, both written and oral, the Court determined that the proposed settlement is fair, reasonable, and adequate. This Memorandum and Order is intended to document and to further explain the bases for the

ruling made in open court.

DISCUSSION

Prior to approving a class action settlement, a court must direct notice in a reasonable manner to all class members who would be bound by the settlement. Fed. R. Civ. P. 23(e)(1)(B). By the Order dated February 5, 2004 (Dkt. # 406), and the Notice of Class Action Settlement and Fairness Hearing dated February 6, 2004 (Dkt. # 407), the Court ordered the parties to provide reasonable notice of this proposed settlement to the class members. At the hearing on this matter, counsel for both parties agreed that reasonable notice to the class members had been provided.

The Court may approve this class action settlement only after having determined that the settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(1)(C). The Court's duty lies with the members of the class, and while the Court may reject the settlement as proposed, it may not rewrite the settlement in order to impose on the parties a settlement it deems more appropriate. Evans v. Jeff D., 475 U.S. 717, 726 (1986). In approving or rejecting a proposed class action settlement, courts within the Ninth Circuit must consider a nonexclusive list of eight factors. Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1375 (9th Cir. 1993). Those factors are:

1) strength of Plaintiffs' case;
2) risk, expense, complexity, and likely duration of further litigation;
3) risk of maintaining class action status throughout trial;
4) amount offered in settlement;
5) extent of discovery completed and stage of proceedings;
6) experience and views of counsel;
7) presence of governmental participant; and
8) reaction of class members to settlement.

Id.; Linney v. Cellular Alaska Partnership, 151 F.3d 1234, 1242 (9th Cir. 1998).

1. Strength of Plaintiffs' case

This case was stayed for approximately one year, awaiting the United States Supreme Court decision in Olmstead v. L.C., 527 U.S. 581 (1999). Olmstead sets forth a test to determine when a mentally disabled person who is committed in a state institution must be provided with community-based services. Community-based services are required when three elements are met:

1) the state's treatment professionals reasonably determine that such placement is appropriate;
2) the affected persons do not oppose such treatment; and
3) the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others who are receiving state-supported disability services.

Olmstead, 527 U.S. at 607. A defense to the Olmstead requirements is the fundamental alteration defense. A public entity must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid

discrimination on the basis of disability, unless making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7). When interpreting this regulation, the Supreme Court wrote:

> Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

Olmstead, 527 U.S. at 604. The Court also wrote:

> If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.

Id. at 605-06.

Bolstered by the Olmstead decision, Plaintiffs have a strong case that certain persons who were or are housed in one of the Montana facilities must be placed in community-based services. However, Olmstead does not require that all Plaintiffs be immediately placed in community-based services. The state is required only to make reasonable accommodations, and any accommodation that constitutes a fundamental alteration of the

state's services is not required. Therefore, Plaintiffs' case turns on whether the accommodations they seek are reasonable.[1]

Prior to Olmstead, the state maintained two institutional facilities for the developmentally disabled, one in Glendive, Montana, and one in Boulder, Montana. Since the time Olmstead was decided, the state closed the Glendive facility, transferred certain residents to Boulder, and implemented a plan to move more residents into community-based services. This plan is set forth in the proposed settlement. *See also Pls.' Mem. in Support of Final Approval of Class Settlement at 4.*

The Court concludes that the relative strengths and weaknesses of the parties' legal and factual arguments herein are well-reflected in the settlement. Counsel for both parties agree that the accommodations set forth in the settlement are reasonable. The Court concurs. This factor weighs in favor of approving the settlement.

2. *Risk, expense, complexity, and likely duration of further litigation*

This case has been pending since 1996. The parties agree that further litigation will not benefit either side. *Defs.' Mem. in Support of Final Approval of Class Action Settlement at*

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[1] Throughout this litigation, the state has also raised defenses such as immunity under the Tenth Amendment, immunity under the Eleventh Amendment, and whether a private cause of action may be brought under the Medicaid Act. These have been addressed in prior court orders.

4; Pls.' Mem. in Support of Final Approval of Class Settlement at 3-4. Legal arguments relevant to this case will require 1) waiting for appellate decisions of other courts in other cases, and 2) bringing appeals of decisions made in this case.

Though this Court has already ruled on the issue, Defendants point to a split in the lower federal courts about whether a private right of action exists under Title XIX of the Medicaid Act. *Defs.' Mem. in Support of Final Approval of Class Action Settlement at 3.* On another issue the Court has previously decided, Plaintiffs acknowledge that the Supreme Court is currently considering whether states have sovereign immunity against enforcement of Title II of the ADA. *Pls.' Mem. in Support of Final Approval of Class Settlement at 4.* Nevertheless, the requirements the Supreme Court set forth in Olmstead are clear. If the parties pursue appellate decisions on these and other remaining legal issues, the relief the parties have agreed on might be delayed for years.

Further, the parties have moved for summary judgment on several issues. The Court has ruled that material issues of fact preclude summary judgment on these issues. Absent settlement, a trial will be necessary, and that trial will impose both expense and risk on the parties. The trial, as well as the possible subsequent appeals, will extend the duration of this litigation.

Olmstead likely will remain good law, so any appeals on the Medicaid Act will not change the duties currently placed on the state. The risk, expense, complexity, and likely duration of further litigation are all great. This factor weighs in favor of approving the proposed settlement.

3. *Risk of maintaining class action status throughout trial*

This Court has previously ruled that a class action suit may be maintained by Plaintiffs. This case is not one for individual relief, but instead is one for requiring the state to comply with federal law. The class action settlement does not require Montana to provide services to any individual Plaintiff. It requires the state to provide reasonable accommodations in community-based services.

Any class member who wishes to be placed in community-based services, and who has not received such services, will not be eliminated from the class and be forced to file individual suit. That member must instead proceed to enforce the class action settlement, and must prove that his or her treatment does not comply with the settlement. Any such claim may be made under the terms of the settlement and in this Court.

In addition, if this case were to proceed, there is a possibility that the class might be decertified. Accordingly, as to this factor, there does exist a risk of going forward with the

litigation. This factor thus also weighs in favor of approving the settlement.

4. Amount offered in settlement

Because this case is one for injunctive relief, the "amount" offered in settlement is not a factor. However, the list of factors the Ninth Circuit has set forth is not exclusive. Torrisi, 8 F.3d at 1376. For the purposes of this case, therefore, the Court will consider the adequacy of the injunctive relief.

As a part of the proposed settlement, the state has committed to creating 45 additional community-based living spaces by December 31, 2007. *Defs.' Mem. in Support of Final Approval of Class Action Settlement at 4-5.* This settlement will provide resources that can be used to provide additional community placements which will benefit the class members. *Id. at 5-6.* The state has represented that such community placements will unencumber additional funds that will benefit the class, and those funds will be used in a manner contemplated in the settlement.

This factor does not weigh in favor of Plaintiffs or Defendants. Rather, it weighs in favor of approving the settlement. The agreement between the parties was reached after extensive negotiations. The agreement was reached after at least

two mediations and a conference with the Court. The agreement was reached by arms-length negotiations. The injunctive relief agreed upon by the parties supports approval of the settlement.

5. Extent of discovery completed and stage of proceedings

Plaintiffs filed this case in 1996. Over the past eight years, the parties have had an unusually long period of time to perform discovery and to raise legal issues. The parties have had sufficient time to litigate this matter.

6. Experience and views of counsel

Andrée Larose, an attorney who represents the Montana Advocacy Program, has extensive experience representing the developmentally disabled. Associated with Ms. Larose is experienced class counsel including attorneys from the Public Interest Law Center of Philadelphia and the Bazelon Center for Mental Health Law. Both Kimberly Kradolfer and Paul Johnson are experienced attorneys who have ably represented the State of Montana. Upon representations made in their briefs and at argument at the hearing, both Andrée Larose and Paul Johnson concur that the proposed settlement is fair, reasonable, and adequate.[2] The Court has previously expressed to all counsel its recognition of their intensive and well-focused negotiation

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[2] Class counsel is qualified to represent the class. The Court appoints class counsel. Fed R. Civ. P. 23 (g)(1)(A).

efforts, without which this settlement would not have been possible.

7. *Presence of governmental participant*

In his brief and at the hearing, attorney Paul Johnson argued that the proposed settlement is fair, reasonable, and adequate. For the reasons stated at the hearing, and for the reasons stated in this Memorandum and Order, the interests of the State of Montana were adequately represented, and its concurrence in this settlement is an additional testament to its reasonableness.

8. *Reaction of class members to settlement*

This factor weighs heavily because the Court has a duty to the class members. Of 187 class members who received reasonable notice, only four chose to be heard.[3] Two objected to what they determined was interference by the Montana Advocacy Program. Alta J. LeDoux, who is Ronnie Stands' mother, wrote that she is "totally confident of the care that Ronnie receives at Boulder." Alta J. LeDoux attached a letter written by Doris Whithorn. Doris Whithorn wrote:

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[3]None of the four who chose to voice their opinions was represented by counsel. Several did not strictly comply with the notice provisions imposed by this Court. Though the state objected to the Court's consideration of these opinions, the Court overruled the state's objections. The Court has a duty to protect the interests of the members of the class. Regardless of procedural defaults, the Court, in its duty to protect the interests of the class members, chose to hear any opinions that were raised.

> I have a grandson who has been cared for at Boulder for many years. He has been so very well cared for at that location that I should certainly hate to see that facility shut down. He would not be able to function or be cared for in any comparable way in a group home.
>
> Please do not consider closing down Boulder. It cares for many who would not get any decent care in group homes. . . .

The letters of Alta J. LeDoux and Doris Whithorn make clear that Ronnie Stands' family believes that he should remain in the facility at Boulder. The proposed settlement does not contravene the wishes of Ronnie Stands' family. The settlement must comply with Olmstead, and the second element of Olmstead requires that a person must want to live in a community-based setting before he or she is placed there. 527 U.S. at 602, 607. In addition, the settlement does not call for the closing of the Boulder facility.

Sherry L. Paton objects to the settlement on behalf of her brother, William Lee Durocher. She objects because the settlement provides no money for increasing salaries or providing benefits for employees who work in group homes. The Court first notes that this issue was not raised in the pleadings in this action. Further, Sherry L. Paton's concerns are the subject of ongoing litigation in state court, which litigation is specifically excluded from the scope of this settlement. At the hearing, Defendants introduced as evidence a copy of the

complaint in Sandy L., et al. v. Judy Martz, et al., BDV-2002-558, First Judicial District Court of Montana, Lewis and Clark County. The case is referenced in Paragraph 2.7(7) of the Settlement Agreement. The Settlement Agreement does not cover the claims made in Sandy L., and the relief sought in that case is not precluded by this settlement.

Patricia C. Lynes both filed a written statement and testified at the hearing. Her objection is based on the personal treatment her son, Allen Lynes, has received. Apparently, Allen Lynes set some type of fire, and his treatment was altered after this behavior. Patricia C. Lynes stated at the hearing that she does not object to the settlement. She stated that the settlement is "very good" and was "a long time coming."

Patricia C. Lynes' objection raises her concerns regarding the individual treatment of her son, but it does not bear on whether the proposed class settlement is fair, reasonable, and adequate. By her own testimony, Patricia C. Lynes approves of the settlement. Her concerns, while important, do not bar approval of this settlement. Thus, none of the objectors raised issues that questioned the fairness, reasonableness, or adequacy of this settlement.

CONCLUSION AND ORDER

Having considered the nonexclusive factors the Ninth Circuit

Court of Appeals has adopted, having considered counsels' briefs and argument, and having considered the objections of interested parties, the Court finds that the settlement proposed by the parties is fair, reasonable, and adequate.

Accordingly, **IT IS ORDERED:**

1) The Court approves the settlement proposed by the parties.

2) Any pending motions are denied as moot.

3) Pursuant to the agreement of the parties, the Clerk of Court shall enter judgment of dismissal with prejudice. *[See Class Action Settlement Agreement at 7]*.

The Clerk of Court is directed to notify the parties of the making of this Memorandum and Order.

Dated this 27th day of May, 2004.

CAROLYN S. OSTBY
UNITED STATES MAGISTRATE JUDGE

FILED, ENTERED AND NOTED
IN CIVIL DOCKET

MAY 28 2004
PATRICK E. DUFFY, CLERK
By GAYLE A. REUTERDAHL
Deputy Clerk

UNITED STATES DISTRICT COURT

HELENA DIVISION DISTRICT OF MONTANA

TRAVIS D., by his mother and next friend, Leslie Barry, et al
Plaintiffs
V.
EASTMONT HUMAN SERVICES CENTER, et al
Defendants

JUDGMENT IN A CIVIL CASE

Case Number: CV 96-69-H-CSO

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
Pursuant to the agreement of the parties, the action is dismissed with prejudice.

May 28, 2004
Date

Patrick E. Duffy
Clerk

Gayle Reuterdahl
(By) Deputy Clerk