IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLEN WOODS, *et al.*	:	
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 2:17-cv-4443
	:	
SEAN MARLER,	:	
	:	
	:	
Defendant.	:	

JOINT MEMORANDUM REGARDING STATUS OF LITIGATION

Pursuant to the Court's amended April 10, 2018 Order (ECF No. 37), Class Counsel hereby submit this Joint Memorandum "describing each party's position as to further steps in this case." This Joint Memorandum first describes areas on which Class Counsel and Warden Marler continue to disagree and then sets forth a path for moving forward on which the parties are in agreement.

A. Plaintiffs' Positions on Disputed Issues

While Class Counsel commends Warden Marler for the new policy disclosed in his response, Class Counsel do not agree that the policy "will resolve all issues and claims raised in plaintiffs' complaint" (ECF No. 36). Class Counsel believe that several key issues remain unresolved: (1) deficiencies in the new policy, including as to visitation for inmates who have minor children by more than one non-spouse parent; (2) legal protections to ensure that the policy will remain in effect; and (3) attorneys' fees and costs.

First, the new policy continues to constrain the right to child visitation for pre-sentence inmates more than for sentenced inmates. A significant number of class members have minor children by more than one parent to whom they are not married. The new policy will allow such class members to add only **one** of those parents to their visitor list, and will allow them to re-designate their sole non-immediate-family-member visitor only once every three months.[1] The practical effect of the amended policy will be that some class members will continue to have much more difficulty visiting with at least some of their minor children than will sentenced inmates in the FDC. Other troubling changes to the policy include a decrease in visitation hours on Saturdays and holidays, when children can most readily visit.

Second, Warden Marler's new policy does not come with assurances that he or a successor will not revert to the former policy or impose some other more restrictive policy. This is of particular concern because one objective of the policy challenged in this case appears to have been to reduce overall visitation at the FDC, and the new policy will increase the number of visitors. Without some form of binding assurance (such as, for example, a consent decree or an enforceable court-approved settlement agreement providing for monitoring during a defined period), Warden Marler or his successor could easily revert to the old policy or impose other restrictions that will interfere with child visitation.[2] Class Counsel therefore do not believe

[1] The one-page notice about the policy change that Warden Marler has posted in the FDC provides only a partial summary of modifications to the full policy. The complete new policy is attached as Exhibit A.

[2] The introduction of the new policy cannot moot this case, because the FDC could rescind the policy as easily as it was introduced. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) ("[V]oluntary cessation of a challenged practice does not moot a case unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (second alteration in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000))).

settlement or voluntary dismissal would be suitable under Federal Rule of Civil Procedure 23(e) without some enforceable mechanism for ensuring that the FDC does not reinstitute an unconstitutionally restrictive visitation policy.

Finally, Class Counsel believe they will qualify for prevailing-party costs and fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, if this case settles as described above. *See, e.g., Raab v. City of Ocean City*, 833 F.3d 286, 294 (3d Cir. 2016); *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 853 (3d Cir. 2006). The parties will have to either agree on this issue or present it to the Court for resolution.

B. Defendant's Positions on Disputed Issues

Warden Sean Marler respectfully submits that plaintiffs' and the class' complaint should be dismissed voluntarily under Rule 41(a)(1)(A)(ii), without prejudice, each party to bear its own fees and costs, because the FDC's new policy, effective April 30, 2018, addresses the essential allegations of the complaint. While the Court would have to approve the dismissal under Rule 23(e), there would be no need for notice and a hearing under Rule 23(e)(1)-(2).

There is also no need for an enforcement mechanism of the kind plaintiffs suggested because the defendants do not seek binding relief on the plaintiffs or the class. In other words, the plaintiffs—or any FDC Philadelphia inmate—may sue if the visitation policy at FDC changes in an unconstitutional way. But any future, hypothetical policy change that may occur should be addressed only after such a new policy is enacted. The inmate population, the Court, and the Bureau of Prisons are better served by litigating any stricter policy changes when such changes are made, if ever. The FDC contemplates no further action related to its visitation policy, and thus, there is nothing for the Court to monitor and no reason for the Court to retain jurisdiction. This matter does not involve a settlement agreement that requires a government

entity to take steps to address a constitutional issue and necessitates the retention of jurisdiction. Here, the FDC devised a revised policy and put it in place unilaterally and without a settlement agreement.

While the class' claims may not technically be moot, judicial restraint counsels against continuing this litigation. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). This Court should not reach to decide substantive First and Fifth Amendment challenges to a federal government policy that is no longer in effect and is not being applied to deny plaintiffs' requests to visit with their children. The policy revision resolves this issue and renders any opinion of the Court purely advisory.

Woods and Campbell allege that the revised policy presents a continuing problem because "[a] significant number of class members have minor children by more than one parent to whom they are not married" and, by implication, that a continued constitutional violation exists (Part A at p. 2.) But plaintiffs assume: (1) that there is one or more inmates with multiple partners to whom the inmate is not married; (2) that such inmate or inmates have multiple children under the age of 16 with different partners; and (3) that such inmate without immediate family members to accompany those children to the prison. Plaintiffs have no evidence to support these assumptions. In any event, the revised policy addresses this alleged issue of multiple partners by allowing the inmate to change the "plus one" visitor every three months. Moreover, inmates may request special visits if the "plus one" three-month rotation fails to meet their needs.

Even if the Court were to continue litigation, the FDC Philadelphia's revised policy negates any issues Woods, Campbell, or the class could expect to raise in further litigation. The policy change confirms that plaintiffs are not entitled to injunctive relief because they cannot "demonstrate that irreparable harm is likely in the absence of an injunction," *Winter v. Nat. Res. Def. Counsel, Inc.*, 555 U.S. 7, 22 (2008). The gravamen of the complaint is that the policy "bar[s] Plaintiffs and other unmarried pre-trial inmates from visits with their children." (Opp. Motion to Dismiss, ECF Docket Entry 13, at 14.) The policy revision resolves that problem.

Finally, because this lawsuit merely acted as a catalyst for the policy revision, the plaintiffs' attorneys are not entitled to attorney's fees. In *Buckhannon Bd. & Care v. West Virginia HHR*, the Supreme Court held that a lawsuit alone does not justify an award of fees. 532 U.S. 598, 605 (2001). Class counsel argue that "they will qualify for prevailing party costs and fees under the Equal Access to Justice Act . . . if this case settles as described" in Part A above, namely that the Court retain jurisdiction and enter a consent decree. Class counsel seeks remedies beyond what the FDC Philadelphia has unilaterally done solely to recover attorney's fees. Moreover, class counsel presumes that they face no other obstacle on their road to fees if the Court retains jurisdiction. In other words, they presume that Marler could not meet his burden to show that his position in this litigation before changing the policy was "substantially justified." We respectfully disagree.

C. Points of Agreement

The parties believe that court-facilitated mediation could promote a resolution of this matter faster than would be possible through continued litigation. Accordingly, the parties jointly request, if judicial resources permit, for a mediation before Judge Heffley or another judge to be scheduled for the near future, ideally before the end of April.

In addition, the parties agree that a suspension of impending discovery and briefing deadlines until the mediation would allow them to devote their full attention to potential amicable resolution of this matter. Accordingly, the parties request a stay of the discovery and briefing deadlines set by the Court's January 24th Order (ECF No. 22), to be revisited in the event that mediation is not fruitful.

Respectfully submitted,

Mira Baylson
Pa. Bar No. 209559
Amanda Pasquini
Pa. Bar No. 324537
Jordan DiPinto
Pa. Bar No. 324337
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103
Tel.: 215-988-2677
Mira.baylson@dbr.com

/s/ Benjamin D. Geffen
Benjamin D. Geffen
Pa. Bar No. 310134
Mary M. McKenzie
Pa. Bar No. 47434
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
Tel.: 215-627-7100
bgeffen@pubintlaw.org
mmckenzie@pubintlaw.org

Jim Davy
Pa. Bar No. 321631
PENNSYLVANIA INSTITUTIONAL LAW PROJECT
718 Arch St., Suite 304S
Philadelphia, PA 19106
Tel.: 215-925-2966
jdavy@pailp.org

Counsel for Plaintiffs and Proposed Class Members

Dated: April 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2018, I caused the foregoing Joint Memorandum Regarding Status of Litigation to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of Pennsylvania.

/s/ Benjamin D. Geffen
Benjamin D. Geffen