IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PHYLLIS BALL, by her General Guardian, PHYLLIS BURBA, et al.,

Plaintiffs,

v.

JOHN KASICH, Governor of Ohio, in his official capacity, et al.,

Defendants,

and

GUARDIANS OF HENRY LAHRMANN, et al., and OHIO ASSOCIATION OF COUNTY BOARDS,

Intervenors.

Case No. 2:16-cv-282

JUDGE EDMUND A. SARGUS, JR.

Magistrate Judge Elizabeth P. Deavers

ICF FAMILY GUARDIANS' REPORT ON CLASS SETTLEMENT NEGOTIATIONS

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I. INTRODUCTION

At the Fairness Hearing on December 17, the Court was clear: "I am going to tell the parties if they want me to approve this, this is going to have to be expanded to include the right of any party who is a guardian of anyone in an ICF." *Transcript* at 6 (Exhibit 1).[1] After detailing its concerns, the Court concluded by stating, "I'm going to reserve whether or not to accept the settlement. I've told you exactly my thoughts on what needs to be included." *Id*. at 7.

But the parties have not only failed to incorporate the Court's concerns, they now tell the Court it is wrong – that the Court's clear directions are both unnecessary and unacceptable. But the Court was not wrong. The Court – after patiently hearing a day's worth of poignant testimony – directed the parties because the Court listened and had some deep concerns. The parties now try to justify their rejection of the Court's directions, but upon closer examination, their explanations are self-contradictory and lack merit. Regardless, because the parties failed to heed the Court's directive, the Court should deny the proposed settlement until they do so.

II. FACTS

1. Immediately after the Fairness Hearing ended, on December 19, the Guardians sent the parties their proposed revisions to the settlement that would not only satisfy the Court's concerns, but in the spirit of compromise, would also resolve all of Guardians' objections and their separate claims. A copy of the Guardians' proposed revisions is attached as Exhibit 2.

2. The parties did not respond to Guardians for three weeks.

3. Late on January 7, the Defendants wrote the Guardians stating: (a) they will not incorporate all the Court's suggested changes, (b) they reject the Guardians' proposed changes, and (c) they would consider incorporating a limited enforcement mechanism for only the

[1] Likewise, in its Order the next day, the Court wrote: "Before the Court will approve this settlement, guardians of persons residing within an ICF *must* also have the right to activate the dispute resolution provision in Section V(E)." *Order* at 1 (ECF 461) (emphasis added).

Guardians – meaning for 12 ICF families instead of 5,000 ICF families – but only if Guardians "agree to dismiss their claims." In so doing, the parties never explained how or why the Guardians' edits are unacceptable or not consistent with the Court's comments.[2]

4. Even so, in the spirit of compromise and closure, Guardians informed Defendants that Guardians were amenable to settlement – and would dismiss their separate claims – so long as the parties' language was consistent with existing state statute. Guardians suggested they and Defendants work quickly to bridge the remaining gaps. But contrary to their statement that "Defendants have exhausted their ability to negotiate this case," Defendants refused to engage with the Guardians. *Defendant's Response* at 2 (ECF 466).

III. DISCUSSION

A. The Parties' Fail to Follow the Court's Directions

At the conclusion of the day-long Fairness Hearing, the Court was clear that it wanted the parties to do three things before it would approve the settlement. The Guardians' proposed language addresses the Court's three concerns and even incorporates the exact language the Court suggested, while the parties' edits either reject the Court's concerns, or only partially address and incorporate the Court's suggested language. A simple chart best summarizes the differences.

[2] Defendants also suggested a conference call – which invitation Guardians accepted – but instead of having a conference call, Defendants informed Guardians they would not discuss matters further.

1. Must Include ICF Families

What the court said	*Parties' Response*	*Guardians' Response*
"I am going to tell the parties if they want me to approve this, this is going to have to be expanded to include the right of any party who is a guardian of anyone in an ICF." *Transcript* at 6.	Omits any mention and tells the Court it is wrong.	Add language stating: "Guardians shall have the right to enforce this Agreement as provided by, and subject to, this § 5."

2. Nobody Forced to Leave ICF or Engage in Options Counseling

What the Court Said	*Parties' Response*	*Guardians' Response*
"I would approve this, language to this effect: 'That nothing in this agreement is intended or will operate to encourage or direct a person in an ICF through a guardian who does not want to obtain a waiver to be forced or encouraged to leave an ICF.'" *Transcript* at 6. "[A]nyone who is in an ICF and wishes to continue should have an absolute right to maintain that status and that, I think, needs to be added to the agreement to make that clear." *Id*. at 7.	Insert: "Nothing in this Section requires any individual to accept an Exit or Diversion Waiver as an alternative to ICF services."	Insert: "Nothing in this Agreement is intended or will operate to encourage or direct a current (or admitted) ICF resident or his/her Guardian to exit (or be diverted from) his/her ICF, or to accept an Exit (or Diversion) Waiver as part of Options Counseling, which Options Counseling is a voluntary process. ICF residents and their Guardians maintain their rights to receive ICF services. Options counselors will inform individuals and guardians of the voluntary nature of counseling when they contact residents and guardians."

3. Funding for ICFs

What the Court Said	*Parties' Response*[3]	*Guardians' Response*
"[F]unding in this budget is not diminished to ICFs. So just hold that as a thought, that that has to be an issue that this court has to confront." Id. at 3. "The issue is the future of ICF care." *Id*. at 4.	Insert: "For the current biennium (FY 20-21), DoDD will not seek a change in ICF reimbursement methodology as set forth in the current biennial budget (House Bill 166). For FY 22-23, DoDD will request and exercise best efforts	Insert: "Nothing in this Agreement is intended or shall affect the availability or funding of ICF services provided or offered by Defendants and/or a County Board, which services Defendants intend to continue to provide. The provision and funding of ICF services provided or offered by Defendants and/or a County Board are not affected by this Agreement. Funding necessary to implement this Agreement shall not come at the expense of, or be derived from, Defendants and/or a County Board's funding of ICF

[3] Guardians informed Defendants that their suggested language contradicts the existing state statutory scheme by referring to a variable not used to determine ICF reimbursement. Defendants did not disagree, but nonetheless refused to even discuss the matter.

	and reasonable diligence in support of a Statewide Average Daily Rate (per bed) for ICF reimbursement that is no less than the Statewide Average Daily Rate for FY 20."	services. For the current biennium (FY 20-21), DoDD will not seek a change in the ICF reimbursement methodology as set forth in the current biennial budget (House Bill 166), and for FY 22-23, and during the term of this Agreement, DoDD will request, and exercise best efforts and reasonable diligence to ensure that the current ICF reimbursement system will be maintained and implemented as written in existing statute without the implementation of any roll-back or other change that would reduce current reimbursement as provided in existing statute. . The funding for ICF services is subject to the same "Funding" restrictions set for *infra* at § V(C)."

In sum, the parties failed to heed the Court's directive. Little additional commentary is necessary except to note that the Guardians' suggested language not only addresses the Court's concerns – and incorporates the Court's language – but also would result in Guardians' dismissing their claims.[4]

B. <u>The Parties' Explanation for Rejecting the Court's Comments Lacks Merit</u>

Because the parties are rejecting the Court's directions, they try to justify their positions. But their explanations lack merit and are contradictory. The parties make two arguments.

First they argue that the Court's direction to include ICF Guardians is improper because they "are neither class members nor parties to the Agreement." *Defendant's Response* at 1. But for the parties to now suggest that relief should only go to class members forgets that many (likely the majority) of the 700 waivers in the settlement will be provided to individuals who, quoting Defendants, "are neither class members nor parties to the Agreement." Thus, if it is permissible for the settlement itself to provide millions of dollars of relief to *non-class members*,

[4] The Guardians asserted three claims against Defendants and the County Boards. ECF No. 326. The gist of Guardians' claims is that Defendants and County Boards fail to communicate, offer, and adequately fund the ICF entitlement for eligible Ohioans. Guardians' proposed language not only addresses the Court's concerns, but also sufficiently addresses Guardians' claims such that Guardians would dismiss their claims and resolve all issues in this case.

then the parties' should have no principled objection to incorporating the Court's comments to also provide ICF families some basic protections. Arguing otherwise is self-contradictory.

Second, the parties argue the settlement "will not harm" ICF families "who choose to enter or remain in ICFs." *Plaintiff's Brief* at 5 (ECF 467). Defendants likewise argue there is no evidence "that the Agreement will cause [ICF families] any concrete harm – because it won't." *Defendants' Brief* at 4. But, the parties contradict themselves with their arguments and defy their own record.

Plaintiffs' complaint states there are "6,437 people with I/DD in Ohio's vast ICF system." *Complaint* at ¶ 136. Yet today Defendants state in their pleading there are only about 4,500 ICF residents. *Defendants' Brief* at 8. So just during the pendency of this case the ICF population has decreased about 30%.[5] To suggest ICFs are not affected by the proposed settlement – let alone potentially threatened – defies reality.[6]

Against this backdrop, ICF families are not "misinformed" and their fears are not "unfounded," as the parties state. The Court allowed Guardians' intervention in the first place because it recognized this case does affect ICF families. It is also why the Court directed the parties as it did at the Fairness Hearing.

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[5] Comparing apples to apples, Guardians believe there were about 5,600 private ICF residents when the case commenced, making the decline about 20%. Either way it is significant.

[6] The parties' statements that ICF funding has increased in the current budget are also misleading. When accounting for inflation, ICF funding has *decreased* over the past three budget cycles while waiver funding has increased about $1.5 billion over the same period. The parties are quick to explain that the settlement's $100 million cost will "only" cost the state about half that because of the federal match. But when they discuss the relatively miniscule ICF funding increases, they do not similarly note they cost the state only about half the reported amounts because of the same federal match. Similarly other settlement provisions – such as maintaining downsizing incentives for ICF providers to convert their beds to waivers – also affect ICF families.

Plus, if nothing in the Agreement will harm ICF families as the parties suggest, then they should embrace the Court's changes and Guardians' language. If the Court's concerns are unnecessary as the parties argue, then they should have little hesitation in incorporating the Court's (and Guardians') comments. Since Defendants state the settlement "will not endanger ICFs" – which they alone control – they should embrace an enforcement mechanism for ICF families. *Defendants' Brief* at 9. If indeed "no agreement of this size, scope and duration could place the continued existence of ICF services at risk," the parties should embrace the Court's directions. *Plaintiffs' Brief* at 9. They should welcome plainly stating in the settlement that options counselors will make clear that counseling is voluntary. They should welcome stating they will exert "best efforts" to maintain the existing statutory funding mechanism for ICFs. But as they won't, their resistance is telling and of great concern to Guardians.

Finally, one practical factor is worth noting: none of the Court's comments – and none of Guardians' proposed edits – would affect the relief provided to class members. It is *not* as if the language changes work to reduce the 700 waivers provided under the settlement or any other settlement relief. As such, Plaintiffs should have no objection.

IV. CONCLUSION

The Court warned the parties: "I can accept it but only if it's modified, and that will be up to the lawyers and the parties to decide whether to do this. They don't have to, but for approval this is what I see." *Id*. at 5. After providing its clear direction, the Court stated: "I've told you exactly my thoughts on what needs to be included." *Id*. at 7. Having now failed to include what the Court stated was necessary for approval, the Court should deny the parties' motion to approve the Settlement Agreement.[7]

[7] Though the Court needs no additional reason to deny the parties' motion, in their Objection Guardians detailed four reasons why the proposed settlement should be denied: (1) because the

What has transpired here is exactly what Justice Kennedy foreshadowed and cautioned against 20 years ago, when he penned his concurrence in *Olmstead*:

> It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision. . . . In light of these concerns, if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition.

Olmstead, 527 U.S. 610.

In its comments at the Fairness Hearing, the Court invited the parties to address its concerns. As the parties have failed to completely do so, the Court should deny their motion until they do so.[8]

Respectfully submitted,

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class is small, if non-existent, (2) because most of the settlement relief is provided to non-class individuals, (3) because much of the proposed relief has already been implemented, and (4) because it contradicts the Court's earlier rulings. ECF No. 437.

[8] Guardians remain committed to resolving all disputes and given that the gap in positions is bridgeable with funding language that reflects existing statute that was recently implemented, they are equal parts surprised and disappointed the parties did not engage in any discussions with them since the Fairness Hearing. Guardians believe all issues and disputes are ripe for final settlement in this one agreement.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *ICF Family Guardians' Report on Class Settlement Negotiations* was filed via the Court's authorized CM/ECF system on January 13, 2020, which will send notification of such filing to all other parties to this action.

/s/ Roger P. Sugarman
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