

1 THE COURT: I appreciate your comments.

2 Is there anyone else who would like to speak?

3 All right. I think I've heard everything I need to hear
4 from the parties at this point unless there's anyone with a
5 contrary view.

6 All right. I have a number of comments to make. I
7 start by saying usually I'm in this courtroom with mostly
8 lawyers, if not exclusively, but today we have a lot of
9 welcomed guests who have done a lot of information giving which
10 I very much appreciate so I want to address a lot of my
11 comments to all of you with some basic things that the lawyers
12 probably wouldn't need to hear, but I think they help you
13 understand what I'm wrestling with in this case.

14 So I'm a judge not a policy maker. It is the
15 legislature that makes decisions about budget, but at the same
16 time there are federal laws and there's a federal constitution
17 that allows a court such as the court I serve on to listen to
18 disputes and to enforce the federal law, but also to give
19 discretion to state officers who are elected by the citizens of
20 Ohio.

21 This case has a long history even though it's three
22 years old. The case filings for those of you who read the
23 complaint know that it was brought under the Americans with
24 Disabilities Act. That's a very broad and worthy federal
25 statute that is designed to take people with disabilities and

ROUGH DRAFT * ROUGH DRAFT * ROUGH DRAFT

EXHIBIT

1

1 let them be all they can be. For a people of the group that
2 we're speaking of, they were found in 1999 in the famous
3 Olmstead case to be entitled to independent living if with some
4 support they could obtain that, but that case has limitations
5 that apply in this case as well. It has to be somebody who is
6 medically certified to be able to have independent living and
7 also choose independent living.

8 So I think we start with some basic principles here that
9 we'll talk about for a moment.

10 I've helped mediate this case to a certain point, and I
11 do want to say I think everyone starts with the same general
12 principles, that those who are able to live independently and
13 wish to ought to be able. That's what the Olmstead case says.

14 The Court's view is that skews what we're arguing about
15 here a little bit because it clearly creates a right of action
16 for someone who could do independent living. It's got some
17 language in the opinion that talks about somebody who needs to
18 be given an ICF kind of service, but that type of claim is a
19 little bit more abstract. So I think at the time the case
20 issued in 1999, most people in this room who've been part of
21 the process would say we were institutionalizing far too many
22 people. I think at one time the number in Ohio was close to
23 90,000. It's about 5,000 now. So as it was in the mental
24 health area, far too many people institutionalized. The
25 pendulum had swung far too much in that direction. The danger

1 here is it's swinging back too far in the other direction, and
2 that's a lot of what this case is about.

3 But as a judge I'm to decide disputes as they occur, not
4 in the future. That's one of the issues here that I think all
5 of you have sensitized me to, that there is this whittling away
6 at the ICF option which, I speak for myself here, I think would
7 be a devastating tragedy to happen in Ohio. But an argument
8 back is it hasn't happened yet, that the funding in this budget
9 is not diminished to ICFs. So just hold that as a thought,
10 that that has to be an issue that this court has to confront.

11 So we have this pendulum, trying to calibrate it between
12 the right number of people with independent living and the
13 right number of people who want to be, through their guardian,
14 and need to be medically speaking in an institution, and there
15 are many people in Ohio who fit that in the Court's view, and
16 many of those people have been represented very articulately
17 today by many of the speakers.

18 I will say a thing about the parties in this case, what
19 a judge does is resolve disputes so this doesn't surprise me
20 that people start with good principles, good heartedness, and
21 then they disagree on how this should all be resolved. So
22 whether we have had too many people in ICFs or too few, I think
23 people have different views on this. The people who are here
24 who live with this every day, you have a very good perspective
25 on this, and it was good for all of us, particularly me, to

1 hear this today so I thank you for all of that.

2 I want to digress for just a moment. I helped mediate
3 this settlement. I'm not locked into it, and you'll see in
4 just a moment where it's all going to go. In the course of
5 these negotiations, there was a bit of what I would call a dust
6 up. We don't need to get into that. I mentioned that briefly
7 with Mr. Chovlosky this morning. But I will tell you, whether
8 that dust up happened or not doesn't change the issues before
9 me; particularly, after what I heard here in the last several
10 hours. The issue is the future of ICF care. It's not directly
11 addressed in this agreement, but I would agree with those who
12 have spoken it is impacted by it. I don't think anybody could
13 deny that.

14 So if this were an initial case, I would probably have
15 to find as a legal matter there's no showing of immediate harm.

16 Oftentimes people bring a lawsuit where they're afraid
17 something is about to happen and it hasn't, and it would
18 essentially be premature under the law. I can't decide an
19 abstract dispute. I have to decide a real dispute. So if
20 money were to go down in real dollars or in terms that could be
21 a hard quantification of numbers, then that would be one thing.
22 But, on the other hand, this is also a matter of fairness.
23 That's what this class action is about.

24 One thing that you may wonder why do I have a fairness
25 hearing in the settlement? In most cases we would not. But a

1 class action fundamentally binds people who are not necessarily
2 here and participating. So to protect the interests of absent
3 parties, that's why a judge is required to approve something
4 like this because there are a lot of people affected by it both
5 now and in the future, and that's where the notion of fairness
6 comes in. And that's where I am of the view the agreement is
7 good to some extent. There are at least two items missing.
8 And, again, for the benefit of our audience, the lawyers all
9 know this, I have no authority to modify this agreement, but I
10 do have the power to reject it or accept it, and I've been in
11 this job long enough you learn there's an in between. I can
12 accept it but only if it's modified, and that will be up to the
13 lawyers and the parties to decide whether to do this. They
14 don't have to, but for approval this is what I see, and this
15 dovetails with the third from the last speaker who also had the
16 same idea.

17 First of all, this is an agreement that runs through
18 January of 2023. And, as with most complicated agreements, it
19 has a couple of pages on what to do about disputes if either
20 party thinks the other is isn't complying. It's a
21 straightforward agreement. It obligates the parties to notify
22 each other, a practical thing to do, and to try to mediate
23 their differences. And if they can't, then I reserve
24 jurisdiction to construe the agreement and decide if one party
25 or another has violated it.

1 I am going to tell the parties if they want me to
2 approve this, this is going to have to be expanded to include
3 the right of any party who is a guardian of anyone in an ICF.
4 If they believe anything in this agreement is not being
5 fulfilled, then they will also have the right to take advantage
6 of this dispute resolution provision. This may sound more like
7 lawyer talk, but what it really means is you wouldn't have to
8 file a new lawsuit. You can simply file a motion in this case,
9 and there would be relief forthwith usually in a matter of
10 weeks rather than the time it would take a complex lawsuit to
11 wind its way through this court.

12 And then to address the point that many of the people
13 have made, and that is the idea that there is the potential for
14 someone in an ICF having real harm during the course of this
15 agreement so I just penned some language. I'm not wedded to
16 this, but this is the substance of what I would require before
17 I would approve this, language to this effect: That nothing in
18 this agreement is intended or will operate to encourage or
19 direct a person in an ICF through a guardian who does not want
20 to obtain a waiver to be forced or encouraged to leave an ICF.

21 I still view this as fundamentally the choice of the
22 guardian and the patient himself or herself.

23 I believe there are other aspects of this agreement that
24 are positive. Again, we, I think, all understand the principle
25 that someone who is in an ICF who would like an option ought to

1 have the right to a waiver, but that anyone who is in an ICF
2 and wishes to continue should have an absolute right to
3 maintain that status and that, I think, needs to be added to
4 the agreement to make that clear.

5 I do want to spend a moment, I have had all on the
6 record, to be clear, nothing behind closed doors other than for
7 mediation purposes but, again, on the record, and I think I can
8 speak for the state they have never taken the position they
9 wish to drive ICFs out of business. In fact, to be clear, that
10 was the gravamen of the dispute when this case was filed, and
11 this is a settlement so the parties have tried to reconcile
12 their differences. It doesn't mean they see the world the same
13 way, but I'm confident the state has the view that ICFs are
14 definitely in the future of the services to be offered by both
15 county boards and the department of developmental disabilities.

16 Again, I think everybody here has acted in good faith.
17 We all have strong views in this area. They may be different,
18 but I think they are guided by people with good hearts but with
19 differing opinions.

20 So at this point I'm going to reserve whether or not to
21 accept the settlement. I've told you exactly my thoughts on
22 what needs to be included. I'll give the parties 14 days to
23 attempt to negotiate language and expect to hear a report on or
24 before 14 days from today.

25 MR. KELLER: Your Honor, a couple procedural

1 questions.

2 One, can we get an order that memorializes the language
3 you are thinking about so we can all think about it?

4 THE COURT: Yes. I'll tell you, just to be clear, I
5 hope I made this clear, that was my thought. If you have
6 something of the same substance in a different format, I'm not
7 opposed to that.

8 MR. KELLER: That's helpful, Your Honor.

9 The second is one thing that hasn't been talked a lot
10 about today is we do have active claims against us by guardians
11 that affects the state's calculus, and there's a long pending
12 motion to dismiss. Is there any possibility of an expedited
13 ruling?

14 THE COURT: Not within the 14 days.

15 MR. KELLER: So we have to make a decision without
16 knowing what's happening with those?

17 THE COURT: Yes.

18 MR. KELLER: Thank you.

19 MS. RUCKER: Your Honor, if I could also just ask, the
20 notice that was issued for the hearing allowed for the parties
21 to have rebuttal time. And in the interest of making a
22 complete record today, is it possible the parties, if the
23 choose, have that 10 minutes of time to respond?

24 THE COURT: I'd just note for the record that we've
25 now been here almost 6 hours. I respectfully decline. But

1 thank you.

2 MR. JAMES: Judge, the 14 days with the holidays,
3 that's probably going to make it very difficult.

4 THE COURT: Understood. Let's start with 14 days. If
5 you find impediments, I will be generous with a week or two
6 extension.

7 MR. KELLER: Another procedural question, Your Honor.
8 I'm just trying to understand how all this is going to work.
9 Can the proponents language just come from -- if we can't all
10 the parties reach agreement on it?

11 THE COURT: Well, the actual --

12 MR. KELLER: Can the moving parties that are actually
13 trying to settle the case propose their own language?

14 THE COURT: I would prefer to have the intervenors on
15 board, but if they can't be, the plaintiffs and defendant can
16 submit their own.

17 MR. KELLER: Okay. Thank you, Your Honor.

18 THE COURT: Mr. Chovlosky.

19 MR. CHOVLISKY: Yes, judge, most sincerely, thank you
20 for the language day.

21 In terms of the guardians, Mr. Keller is right, we have
22 84 pages of claims pending. Nothing would make us happier than
23 to resolve those claims as part of this singular agreement.

24 THE COURT: As you've just heard, he asked me to do
25 that before the 14 days and I declined. I'm staying consistent

1 with that.

2 MR. CHOVLOSKEY: So my point there is simply we would
3 love to be part of that process to resolve our claims so that
4 these misinformed people have a voice.

5 THE COURT: And you understood I've already declined
6 so thank you.

7 All right. Well, thank you all very much, and
8 particularly thank you to all the people who have offered
9 testimony today. I appreciate it very much.

10 And, with that, we'll be in recess.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25