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

BRIEF OF ICF FAMILY GUARDIANS IN OPPOSITION TO THE PROPOSED CLASS SETTLEMENT

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The ICF Family Guardians – mothers, fathers, siblings, and other loved ones – are the guardians of 13 developmentally disabled ("DD") Ohioans. Ten of the 13 live in intermediate care facilities for the developmentally disabled ("ICFs"), along with 5,000 other Ohioans. The ICFs are their "homes," not "institutions." Because the proposed settlement threatens not just their existence and choice to live in an ICF – but also the rights of all Ohioans to receive information about, and live in, an ICF – Guardians respectfully object to the settlement.

I. INTRODUCTION

The Court should deny the proposed settlement for three threshold reasons:

1. It is unclear whether the class has any members, and if it does, it is likely very small. The parties have not identified how big it is or who is in it – basic components of *any* class case. Tellingly, even the named class representatives are no longer class members. **Because the class is small or non-existent, the Court should reject the proposed settlement.**

2. Whatever the actual class size, the proposed relief goes mostly (if not entirely) to ***non***-class individuals. This is not surprising because when a class is small or non-existent and the relief is massive – as is the case here – the relief logically must flow to non-class individuals. But if approved, the settlement would mainly benefit a large but wholly different "class," a class Plaintiffs *sought* to certify, not the narrow class the Court did certify, which is impermissible. **Because most of the proposed settlement relief is provided to non-class individuals, the Court should reject it.**

3. Much of the settlement has already been implemented. Specifically, more than $100 million in waiver and housing funding was appropriated and passed into law in 2018 and 2019. Likewise, the required counseling services are already being provided. As such, there is little for the Court to still "approve." The settlement reflects legislating and lobbying activities masquerading as a federal lawsuit. **Because courts are supposed to consider live cases – not**

issue advisory opinions that effectively rubber stamp actions already taken – the Court should reject the proposed settlement.

Besides these basic reasons, there is another fundamental reason the Court should reject the settlement: it undermines the Court's prior rulings. Specifically, it contradicts the Court's express rulings in certifying the class. Viewed in this light, the parties' motion is not just a motion to approve their settlement, but it is effectively also a *Motion to Vacate the Court's Prior Rulings on Intervention and Class Certification.*

For any of these reasons, the Court should deny the proposed settlement.

II. BACKGROUND

A. The Class: from 27,800 to Few, if Any Members

Plaintiffs filed this case in 2016 seeking to certify a class of tens of thousands. As they wrote in their complaint: "The six Individual Plaintiffs are part of a class of approximately 27,800 similarly-situated adults with intellectual and developmental disabilities throughout Ohio who are needlessly institutionalized in publicly – and privately – operated large ICFs or are at serious risk of institutionalization because of systematic limitations on access to integrated, home and community-based services." Complaint at ¶ 2 (ECF 1). The proposed class would have included the Guardians, all 5,000 ICF families, and 22,000 others.[1]

[1] About 5,000 Ohioans (not 27,800) live in Ohio's ICFs. The other 22,000 individuals Plaintiffs identified – and originally sought to include in the class – are those they claimed were "at risk of institutionalization." *Id.* at ¶¶ 102, 103. Plaintiffs asserted these 22,000 disabled individuals (purportedly) want community-based services (i.e., waivers) because they were listed on county board "wait lists." But tellingly, even many of the Guardians –whose loved ones live happily in ICFs and have no desire to leave their ICFs – were included on the so-called "wait-lists." In short, as the Court later recognized when narrowing the class, the "wait lists" did not reflect actual needs or preferences of disabled Ohioans. This is why in 2017 – *during the pendency of this case* – the Ohio legislature amended its relevant laws to abandon and reconstitute the historically inaccurate waitlists. The campaign – led by Defendants (DODD) and county boards – was called "Fix the List." O.R.C. § 5126.042; O.A.C. § 5123-9-04.

In March 2018, after digesting thousands of pages of briefs, the Court held that "certifying a broad class is inappropriate." *Ball v. Kasich*, 307 F. Supp. 3d 701, 718 (S.D. Ohio 2018) (ECF 303 at *22) (the "Class Order"). In its detailed opinion, the Court rejected Plaintiffs' attempt to certify a broad class. Instead, the Court certified a narrow class defined as: "All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are qualified for home and community-based services, and, after receiving options counseling, express that they are interested in community-based services." *Id*.

Because the Court's definition greatly narrowed Plaintiffs' preferred class, Plaintiffs asked the Court – three times – to clarify or reconsider its decision. The Court, however, said "no" three times, each time explaining itself and the precise contours of the class:

- First, on May 2, 2018, the Court issued an order making clear that "to be class members, the individuals: (a) Must be Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are qualified for home and community-based services; and (b) Must have received options counseling; and (c) Must have affirmatively stated that they want community-based services, and have not had them provided." *Order* (ECF 309).

- Second, on September 25, 2018, the Court issued another order stating: "The class consists of individuals who already received the options counseling as it is provided by the defendants.." *Order* (ECF 332). The Court also made clear that Plaintiffs' "Free Choice" claim was not a class claim. *Id*.

- Third, on November 18, 2018, after Plaintiffs sought formal "reconsideration" of the Court's prior class rulings, the Court denied Plaintiffs' motion, holding "Plaintiffs' arguments are not well taken." *Order* at 7 (ECF 371).

As a result, the class as certified was greatly narrowed. However, as discussed below, the parties have never identified its members. This is not surprising, as it is unclear if the class has *any* members. Of course, even assuming it has *some* members, class relief may only be provided to class members – a glaring defect of the proposed settlement.

B. What the Proposed Settlement Provides and *Who* gets the Relief?

The proposed settlement provides significant monetary relief – approximately $100 million annually in perpetuity – as well as non-monetary relief. But most of the relief goes to non-class members, and much of it has already been appropriated and implemented. The proposed relief is:

- 700 Additional Waiver Slots: Though the Settlement Agreement states "DoDD will request operating funding to allocate 350 new IO waiver slots for FY 20 and 350 new IO Waiver slots for FY 21," Ohio has already appropriated the funds.[2] More troubling, it is a near certainty these additional waivers will *not* go to class members (if there are any class members). The *existing* waivers for ICF residents – called "exit waivers" – are *under*subscribed. Less than half have been used. Hundreds remain unused. If any class members have yet to leave their ICF, they do not need any of the new 700 waivers to do so, they can use any (of the many) existing unused ones. As such – by definition – the additional 700 waivers will almost certainly go to ***non***-class individuals.[3] While the approved notice sent to class members (if any class members exist) says that the "Department will seek funding to provide a total of 700 waiver slots over the first two years of the agreement," the Department has already sought and obtained the funding, which was appropriated and passed into law.

- $24 Million in Housing Assistance: These funds have already been appropriated.[4]

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[2] In 2019, the Main Operating Budget Bill (HB 166) made funding available to increase community-based services and waiver capacity. Funding for the increased capacity is supported from budgetary line items 653654, 653407, and 653606. These line items total approximately $70 million (about $100,000 per waiver).

[3] The Court should not approve the settlement, but if it does, it should require the parties to report quarterly who receives the waivers: class members or non-class individuals. If some of the waivers have already been provided, the parties should report who received them, and if any went to class members, the Court should ask, "what happened with all the unused exit waivers?"

[4] In 2018, the Capital Appropriations and Reapprorpriations Bill (HB 529) allocated $24 million of community capital housing assistance primarily for people receiving Exit, Diversion, or

- Additional Training for ICF Workers: Defendants have also already implemented the settlement's requirement to provide ICF personnel additional training on discharging ICF residents. Settlement § III(A)(6). https://dodd.ohio.gov/wps/portal/gov/dodd/about-us/communication/memos/memo-qidp-training (last visited December 1, 2019).

- Expand Options and Pre-Admission Counseling: For counseling, the settlement provides two things. First it provides a second round of "Options Counseling" to existing ICF residents and families, like the Guardians. But this too has already been implemented, meaning for thousands of ICF families that were subjected to counseling before, they now must go through another round, where they are again asked, "are you sure you want to keep your loved one in an institution?"[5] The second type of counseling – called "Pre-Admission Counseling" – is provided to people who have selected an ICF, but have not yet moved to their ICF. It is basically a last chance for county boards to say: "if you don't move into your 'institution,' we can instead move you to the 'community' with a diversion waiver."[6] Relevant to the Court's analysis is that putative

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Conversion Waivers during FY 19 and FY 20. This funding was supported by budgetary line item CF9004. It is unclear whether these funds have been distributed yet, and if so, who received the funds: class members or non-class individuals. The parties should provide the Court this detail.

[5] Though the Guardians – being well informed – can quickly reject the efforts, many families do not understand the process or the consequences (i.e., unlike with an ICF – which offers housing, nursing, food, and *all* services – with waivers recipients are left to obtain their services in *a la carte* fashion). The Guardians' separate claims against defendants and county boards detail their active efforts to erode the ICF service. ECF 326.

[6] Diversion waivers are meant for those who have chosen an ICF placement. To date, relatively few diversion waivers have been used. The proposed settlement actually lessens the existing requirement that recipients of diversion waivers must first be *accepted* into an ICF. *See* O.R.C. § 5124.68(A)(1)(a) (requiring ICF providers to notify county board of potential admission so that pre-admissions counseling can then ensue.) Under the proposed settlement, this safeguard is abandoned, and people would only need to *apply* to an ICF. Settlement § III(B). As such, if the settlement is approved, the system can be manipulated. After years of few diversion waivers being utilized, thousands may become necessary, costing the state hundreds of millions and affecting ICF funding. It is unclear whether this is an oversight by Defendants or conscious change.

class members cannot use or benefit from either of these additional types of counseling because they have already chosen to leave their ICF. As such, this relief – like all the proposed relief – is directed at ***non***-class individuals. Finally, the counseling is asymmetrical in that Defendants do not provide similar counseling to remind and educate the more than 30,000 Ohioans who receive waiver services that they can instead move to an ICF setting.[7]

C. Who are the Guardians, Why do they Matter, and Why do they Care so Much?

The Guardians are moms, dads, siblings, and other loved ones of 13 developmentally disabled human beings who live happily – and by their choice – in some of the many (approximately 200) ICFs scattered throughout Ohio.[8] The Court recognized early that ICF residents and families are necessarily impacted by this case. It is why the Court granted Guardians' motion to intervene. *Ball v. Kasich*, 2017 WL 3172778 (S.D. Ohio, July 25, 2017) (ECF 261). The Court succinctly framed Guardians' interests: "Plaintiffs do not, and of course could not, dispute the fact that if more of the designated funding is devoted to community based resources, ICF funding will be reduced and contribute to closing or downsizing ICFs." *Id*. at 12. The Court held that "Plaintiffs and Guardians seek to protect the same personal interest in receiving appropriate care in the state and federal programs set up for that purpose." *Id*. at 17. In ordering

[7] When Defendants were fighting class certification, they claimed they let the "market" decide services: "As long as Ohio offers private ICFs as an option, as it intends to do, reduction in private ICFs will largely be the product of individual choices and voluntary reductions." ECF 291 at 7. But the unstated reality is if two residents leave a 16 bed ICF, the provider then – at DODD's urging – often "voluntarily" closes or converts the ICF because it cannot operate with two vacancies. Effectively, by honoring the "choice" of two residents, the choice of 14 other residents is dishonored.

[8] Two of the Guardian families do not have loved ones in ICFs. They joined Guardians because they want to preserve the ICF option for their families and to demonstrate that it is not only existing ICF families that share Guardians' concerns, but many developmentally disabled Ohioans.

the Guardians' intervention, the Court understood the *systemic* nature of the case and the threat of robbing Peter (ICFs) to pay Paul (more waivers).

Eight months later the Guardians were also at the forefront of the Court's analysis when the Court rejected Plaintiffs' proposed class definition and significantly narrowed the class. In its order certifying the (narrowed) class, the Court noted "the systematic policies and practices about which Plaintiffs complain are Ohio's licensing, funding, and maintenance of an excessive number of ICFs," which runs counter to Guardians' interest in preserving the ICF option. *Class Order* at 14. The Court also explained:

- "The class members who decide that they prefer to stay in a Large ICF may actually be harmed by Plaintiffs' proposed modification of Ohio's funding policies, which would divert funding away from these class members' preferred service option (Large ICFs) to community-based service." *Id.* at 19.

- "[C]lass members who may want community-based services do not have homogenous interests with those class members who do want community based services. Likewise, some class members who are on the wait list want community based services and some want services provided in Large ICFs. In a situation where there is limited funding, this not only reflects lack of homogenous interests, it indicates competing interest, which could actually harm certain members of a broad Rule 23(b) class because of the lack of notice and opportunity for class members to opt out. Therefore, because the proposed class does not suffer a uniform harm that can be remedied with the same relief, certifying a broad class is inappropriate." *Id.* at 21-22 (emphasis in original).

Guardians care greatly about the proposed settlement for the exact reasons the Court identified: because any settlement will greatly impact Guardians, as well as the 5,000 other ICF families, *and* the tens of thousands of disabled Ohioans who might flourish in an ICF, if only it was properly offered to them.[9] In sum, just as the Court has held throughout this case, Guardians

[9] This is why Guardians filed their 86 page complaint against Defendants and county boards: because they are not properly communicating or funding the ICF option. The purpose of this Objection is *not* to detail the parties' efforts to close ICFs. Instead, Guardians' complaint addresses those separate claims. ECF 326.

have a stake in this case, and the proposed settlement in particular. **It is, frankly, their most important life interest**. The Court recognized this early on, but the proposed settlement disregards it.

III. DISCUSSION

Normally at this stage, courts consider whether a proposed settlement is "fair, reasonable, and adequate," as Rule 23(e)(2) requires. In doing so, courts normally consider a slew of factors. *Int'l Union, UAW, et al.. v. Gen. Motors Corp*., 497 F.3d 615, 631 (6th Cir. 2007) (reversing district court's approval of class action settlement); *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 245 (6th Cir. 2011) ("The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits."). And when courts do so, "[t]he burden of proving the fairness of the settlement is on the proponents." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 719 (6th Cir. 2013), *quoting* 4 Newberg on Class Actions § 11:42 (4th ed.).

But here, the Court does not even make it to this "normal" analysis because there is nothing normal about the proposed settlement. Instead here, *before* the Court engages in the traditional analysis, it must first address three, threshold deficiencies.[10]

A. <u>Because there are few, if any, Class Members, Court should Reject the Settlement</u>

Axiomatic, there cannot be a class settlement without a class. Fed. R. Civ. P. 23. But here it is unclear whether there are any class members. Again, the class is limited to (1) ICF residents who, (2) after having received options counseling, (3) requested community-based services (i.e., a waiver), but (4) did not receive one. Given that the existing exit (and diversion) waivers allotted in 2015 and 2017 have not been fully utilized, the class may (and frankly should) consist of zero

[10] If the Court proceeded to engage in the "normal" analysis, it would be hard pressed to satisfy the most important factor, likelihood of success on the merits. This is so because the class – if there is a class – has ready access to *existing* exit waivers, which are *under*subscribed.

members.[11] In fact, in opposing class certification, Defendants filed affidavits making clear that "DODD has approved every exit waiver request." Supplemental Affidavit of Lori Horvath (Deputy Director Ohio DODD) (ECF 291-1 at ¶ 9). As such, the class may have zero members (and if it has members, the parties should explain why they were not previously provided an exit waiver).[12]

Moreover, it appears none of the class representatives are still class members. A class requires a named representative who is a class member. *See* Fed. R. Civ. P. 23(a) (stating that "one or more" members of a class may commence a class action). Plaintiffs need to establish that the named representatives are indeed class members, meaning they live in an ICF, went through options counseling, requested a waiver, yet are still in their ICF waiting for community services. Guardians could not find a single case of a court approving a proposed class settlement where the class representatives were not class members. If Plaintiffs cannot show that the named representatives belong to the class, the Court should deny the settlement.

In the parties' motion for preliminary approval, they wrote the "Moving Parties suggest that the Department of Developmental Disabilities send direct notice of the proposed Agreement to current class members identified as of the date of approval." ECF 407 at 5. This begs the question: who did Defendants send the class notice to, and how did Defendants identify current

[11] Using the materials Defendants have filed in this case, Guardians have determined that more than half the exit waivers remain unused. *See* Exhibit 1. As they have not engaged in discovery, Guardians are dependent on extrapolating Defendants' data.

[12] The only logical reason for there being *any* class members – meaning ICF residents who want to leave their ICF, but have not yet done so – is *not* because they lack a waiver, but instead because they have not found a waiver provider to accept them. But if that is the explanation, it is an entirely different concern and problem, which is not addressed by the proposed settlement. As Horvath explained in her affidavit: "This process typically takes several months and requires coordination among all parties involved." *Id*. at ¶ 12. She also stated: "A decision to accept a waiver frequently is reversed with a decision to stay in an ICF." *Id.* at ¶ 14.

class members? Specifically, to establish that there are class members, Defendants should provide a list of each member it sent the notice that includes: (a) class member's name; (b) name of ICF where class members lives; (c) date person moved into the ICF; (d) date person received options counseling; (e) date person requested a waiver to leave the ICF; (f) whether the person received an exit waiver (and if so date exit waiver received); and (g) explanation why the class member has not yet left her ICF.

The onus is on the parties to prove and establish that a class still actually exists. Unless and until the parties clearly demonstrate there is a class, no "class" settlement can be approved.[13] The Court took great labor in crafting the class definition to protect a finite group of people who share a common harm: namely, those who remain in an ICF after having requested a waiver to leave. If none or few such individuals exist, then there is no class, and no settlement to consider.

B. <u>The Proposed "Class" Relief goes mainly to Non-Class Individuals</u>

Even if the parties can establish a class, it is undeniable that Defendants will provide most of the class relief to non-class individuals. Specifically, the proposed class relief will be provided mostly, if not entirely, as follows:

- <u>Options Counseling</u>: Because options counseling is meant to inform ICF residents about community options, it will not (and need not) be provided to class members. If any class members exist, they have *already been provided* options counseling and chose to leave their ICF. The Court has stated this clearly: "by definition class members do not need more counseling." *Reconsideration Order* at 11 (ECF 371).

- <u>Pre-Admission Counseling</u>: This too will only be provided to non-class members because pre-admission counseling is provided to individuals "who apply for admission to an ICF," not to existing ICF residents. Settlement § III(B).[14]

[13] Similarly, if the "class" is miniscule or only exists because waiver recipients are awaiting waiver providers to accept them, the Court should reject the proposed settlement.

[14] As discussed earlier, the revised pre-admission counseling process is ripe for abuse. Moreover, just as with options counseling, diversion waivers are *under*subscribed for anyone who after receiving pre-admission counseling changes her mind and instead seeks a waiver placement.

- 700 Additional Waivers: This funding was appropriated in June 2019. How much has already been provided is unknown, but what is known is that whenever it is provided, the majority of it – if not entirety – will be provided to non-class individuals. If there are any class members, they could use any (of the hundreds) of unclaimed waivers created in 2015 and 2017. Though the settlement provides the additional 700 waivers will "give first priority to Exit Waivers and Diversion Waivers," that means they are designed to *then* be allocated to non-class members. If these waivers are indeed to benefit class members – meaning ICF residents who want to leave their ICFs – then they would be reserved for class members, not recirculated to expand the general waiver population.

The fact that Defendants will provide most (if not all) of the relief to non-class members is not surprising because the class has few, if any, actual members. As such, the relief can only (or mostly) go to non-class individuals. But this is impermissible. Class relief must go to class members. As the Sixth Circuit has held, "'The fairness of the settlement must be evaluated primarily based on how it *compensates class members*'—not on whether it provides relief to other people." *Dry Max Pampers Litig.*, 724 F.3d at 720 (emphasis in original), *quoting Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); *Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) ("Without quarreling with the district court's findings, we nevertheless conclude that this settlement is not fair, reasonable, and adequate under Rule 23(e) because there has been no demonstration on the record below that the settlement will benefit the class"). Where, as here, much – if not all – of the class relief goes to non-class individuals, the Court must reject the settlement.[15] As for how this could happen here – meaning Defendants will

[15] It is almost as if the parties designed a *cy pres* settlement, meaning a settlement that – by design – provides almost all of the relief to non-class individuals. Though class *cy pres* provisions have come under intense judicial scrutiny – and the Supreme Court recently considered their legitimacy – when they are allowed, they are meant as a substitute form of relief for the class, not a way to provide relief to non-class individuals, as is the case here. *Frank v. Gaos*, 586 U.S. ___ (2019) (*per curiam*). In *Gaos*, the Supreme Court accepted *certiorari* to determine whether *cy pres* class provisions are ever permissible, but after hearing and briefing, it instead vacated and remanded the case on standing grounds, avoiding the issue. Justice Thomas, however, dissented, stating he would reverse without regard to the standing issue because "*cy pres* payments are not a form of relief to the absent class members and should not be treated as such." *Id.*

provide most of the relief to non-class individuals – the parties effectively negotiated a settlement for the 27,800 member class Plaintiffs *sought* to certify, not the class the Court actually certified.

C. Much of the Proposed Settlement has already been Implemented

Even if the parties can prove the existence of any class of meaningful size *and* show that the proposed relief actually goes to those class members, there remains a fundamental flaw: much of the relief is not *proposed*. Instead, most of it has already been appropriated, provided, or implemented.

As detailed above, the funding was long ago appropriated and the additional counseling services are already being provided. For the funding bills – which blossomed into *law* – it is important to note that they are not conditioned upon this case or settlement. The *laws* as passed do not reference this case or mention Plaintiffs' claims. Whether or not the Court approves this settlement, the relief will be – and in some cases already has been – provided. As relates to the counseling services, many of the Guardians already endured their second round of options counseling.

Courts are not in the business of issuing advisory opinions, but that is essentially what the parties are seeking here. *Hegy v. Demers & Adams*, 882 F.3d 616, 620 (6th Cir. 2018) ("Article III of the U.S. Constitution does not authorize federal courts to decide theoretical questions."). As the Supreme Court has held: "When the federal judiciary power is invoked to pass upon the validity of actions [already taken] by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." *Flast v. Cohen*, 392 U.S. 83, 96 (1968). *Chapman, et al. v. Tristar Prods., Inc.*, Nos. 18-3847/3866 (6th Cir. Oct. 10, 2019 at *4)

("The prohibition on advisory opinions, in turn, is an important element in the separation of lawful powers between the governmental branches of our republic.").

Applied here, for much of the settlement there is nothing to actually approve. Specifically, whether the Court grants or denies the settlement, the additional counseling has already commenced, and the additional funding was long ago appropriated.[16] Because much of the relief has already been provided – and is not tied to or conditioned upon resolving this lawsuit – there is effectively nothing for the Court to now approve. Article III proscribes proceeding.

D. Court should also Reject the Settlement because it Harms Guardians in the Exact Ways the Court said Improper and Undermines Court's Class Rulings

Even if there was a class, *and* the relief actually went to class members, *and* the settlement was not already largely implemented, the Court should still reject it because it harms not just the Guardians and the 5,000 ICF families, but anyone else who may need an ICF in the future. In short, the settlement harms ICF families in the exact ways the Court already held improper.

As relates to funding the DD system, the Court recognized when it narrowly defined the class that "where there is limited funding, this not only reflects lack of homogenous interests, it indicates competing interest, which could actually harm certain members of a broad Rule 23(b) class." *Class Order* at 22. The Court said the same when it allowed Guardians' intervention: "Plaintiffs do not, and of course could not, dispute the fact that if more of the designated funding is devoted to community based resources, ICF funding will be reduced and contribute to closing or downsizing ICFs." ECF 261 at 12. Even the Defendants said just that when they were opposing class certification, writing: "Indeed, because Plaintiffs in the end ask—whether explicitly or

[16] If Defendants advise that the money, though already appropriated to DODD, will not have to be spent on the 700 waivers if the Court rejects the settlement, then it can perhaps be used to address *all* needs in the system, including ICF residents' needs. This is discussed in detail *infra*.

implicitly—to shift money away from ICFs, their vision of 'relief' would likely harm many people who prefer ICF settings." ECF 273 at 3.

But that is exactly what is now going on here: the settlement requires Defendants to fund approximately $100 million in perpetuity (for 700 waivers) *and* seek funding for an unspecified number of additional waivers. But it provides no additional funding, protections, or counseling *for* ICFs. It neglects ICFs, just as the Court, and even the Defendants, said was impermissible.

The Court's class rulings explain just how wrong and inappropriate the proposed settlement is. The Court purposefully *only* certified a very narrow class – not one with 27,800 members – because had it certified a broad class, then ICF residents (and thousands of other Ohioans who may want an ICF) would be harmed. Because the settlement effectively provides relief to the broad class Plaintiffs *sought*, the settlement – if approved – will damage ICF families in the exact ways the Court was trying to prevent when it narrowly defined the class. As such, the settlement runs afoul not just of the formal class concerns discussed above – i.e., (1) no or small class, (2) relief provided to non-class members, and (3) it is already implemented – but it runs afoul of the essence, spirit, and reasoning of the Court's class rulings. Approving it is the functional equivalent of the Court vacating its detailed class rulings.

Worth remembering, this case was brought in the name of *Olmstead v. L.C.*, 527 U.S. 581 (1999). But in *Olmstead*, Justice Ginsburg "emphasize[d] that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id*. at 601-02. She explained: "Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it." *Id*. at 602. Likewise, "the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk." *Id*. at 604. And she ended: "we conclude that, under Title II of the ADA, States are required to provide community based treatment for persons with

mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, ***and*** the placement can be reasonably accommodated, ***taking into account the resources available to the State and the needs of others with mental disabilities***." *Id*. at 607 (emphasis added). This is exactly why the Court ordered Guardians' intervention: because the state must take into account everyone's needs. But the settlement here takes into account only one constituencies' needs. If there is to be a settlement, there should be one global settlement that accounts for everyone's needs, as *Olmstead* mandates.

E. Attorneys' Fees Improper

There can, of course, be no attorneys' fees if the Court rejects the settlement. The analysis should end there, meaning there are ample reasons why the Court should reject the proposed settlement. As such, attorneys' fees require scant mention other than to note:

- Counsel claims that dozens of lawyers and staff have spent more than 20,000 hours on this case – totaling almost $9 million in fees before reduction – yet they do not provide any actual billing records. Without doing so it is impossible for the Court to determine the reasonableness of time actually spent.
- To give some perspective, Guardians' counsel – all 2.5 of them – have billed less than 1/20th (5%) of what class counsel has billed. Unlike DRO, Guardians do not receive millions in taxpayer dollars to defend their rights in this litigation.
- DRO, the lead class lawyer, annually receives millions in taxpayer funding as Ohio's designated protection and advocacy agency. Its personnel do not normally charge attorney fees. DRO did not hire lawyers for this case; they were already on its (taxpayer-supported) payroll. The same applies for CPR, the other public interest organization representing the class.
- DRO has a conflict. It has a fiduciary duty to represent the interests of all disabled people in Ohio, which includes Guardians (and all 5,000 ICF families). 42 U.S.C. § 15043; 45 C.F.R. § 1386.21(c); O.R.C. § 5123.60 But in opposing Guardians – *their constituents* – they violate their base duty. DRO should be disqualified, not compensated.
- Counsel does not state how the proposed $1.2 million will be split if awarded.
- Even the Defendants noted when they opposed class certification that "Plaintiffs and Disability Rights Ohio continue to use this lawsuit as a thinly-veiled means to compel their policy preferences across Ohio." ECF 291 at 2.

F. What the Court Should Now Consider

First, the Court should deny the parties' motion to approve the settlement, as it is deficient in many respects. Second, and simultaneously, it should consider exercising its discretion to decertify the class. Fed. R. Civ. P. 23(c)(1)(C) (court can decertify case at any time); *Randleman v. Fidelity. Nat. Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) (affirming district court's decertification decision). Doing so should end the case because the named class representatives were provided relief long ago. Finally, the Court should consider ordering all the parties – Plaintiffs, Defendants, and Intervenors – to one settlement table to resolve all issues.

A decade ago an Illinois federal court was faced with nearly the same dilemma. *Ligas v. Maram*, No. 05-4331 (N.D. Ill.). There – same as here – the state's protection and advocacy agency sued the state claiming that "Defendants administer an antiquated system for serving people with developmental disabilities that relies heavily on large public and private institutions, including ICF-DDs." *Id.* ECF 1 at ¶ 3. The complaint here is stylistically and substantively identical to the *Ligas* complaint, with the plaintiffs asserting the same claims in both cases. Both cases are premised on *Olmstead*. And in both cases the court certified a class, but in *Ligas*, the court certified a broad class numbering thousands. The *Ligas* class definition was nearly identical to the broad class definition Plaintiffs *sought* here, which this Court rejected.

After four years, *Ligas* culminated in a proposed class action settlement. The court had preliminarily approved the settlement and was poised to give it final approval In fact, the night before the fairness hearing, the court issued a one page document titled "Court's Preliminary Comments on Written Objections Filed Prior to the Fairness Hearing," in which it stated that "[t]he Consent Decree supports each Class Member's choice of living arrangements." *See* Exhibit 2.

But then – after listening to the objections at the fairness hearing – the court rejected the settlement. *See* Exhibit 3. And its logic for doing is equally applicable here: "the settlement

negotiated by the plaintiffs and the defendants is considerably broader than was necessary to address the needs of the class." *Id*. Here, the proposed settlement is so much broader than necessary to address the needs of the class, most of its relief will only benefit *non*-class members.

Besides rejecting the settlement, the *Ligas* court then did something seemingly more remarkable: it also decertified the case (*sua sponte*) holding that "[b]ecause commonality and typicality do not exist among class members, class certification is vacated and approval of the proposed consent decree is denied." *Id*. Though the Court did *not* certify a broad class, the need to decertify is arguably just as strong because: (1) the class is small or nonexistent, and (2) if it has any members, they can remedy their claim by accessing any of the many unused existing waivers. Said differently, because the Court here determined early that a broad class is improper, Plaintiffs were left to try to stuff their $100 million dollar settlement into a ten pound settlement bag. It results in most of the benefits spilling out to non-class members, which is impermissible.

There is an additional global lesson *Ligas* teaches that is applicable here. If the Court is to approve a class action settlement, it should consider requiring all the parties – Plaintiffs, Defendants, and Intervenors – to sit down and together negotiate one, global settlement resolving all claims. Doing so is consistent with the Court's prior rulings: "Plaintiffs and Guardians seek to protect the same personal interest in receiving appropriate care in the state and federal programs set up for that purpose." ECF 261 at 17. After it rejected the settlement and decertified the class, the *Ligas* court ordered all parties to the same table. After a few months together at one table, the parties presented a comprehensive class settlement that protected (and balanced) all interests, just as *Olmstead* mandates. Putting everyone at the same table eliminated the pressure of robbing Peter to pay Paul, since both Peter and Paul were at the same table.

IV. CONCLUSION

The Court should reject the proposed settlement because: (1) there are no class members or the class is miniscule, (2) non-class members receive the majority of the relief; and (3) the settlement has largely been implemented. Any of these reasons standing alone require denial, but the presence of all of them – combined with the settlement undermining the Court's prior rulings – mandates it.

What has transpired here – and what the Court can now fix by rejecting the settlement – 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he directed the foregoing *ICF Family Guardians' Objection to Proposed Settlement* to be filed via the Court's authorized CM/ECF system on December 2, 2019, which will send notification of such filing to all other parties to this action.

/s/ John P. Brody
John P. Brody