DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
ANN ROSSART, et al., Plaintiffs, v. DEVELOPMENTAL PATHWAYS, INC., et al., Defendants.	Case No. 06CV4479 COURTROOM 3
ORDER	

For the reasons articulated below, the "Stipulated Motion to Approve Settlement Amount," filed July 21, 2008, is GRANTED.

I. INTRODUCTION

This case involved Plaintiffs' claims that they were denied certain specialized Medicaid services for the developmentally disabled without sufficient notice of, and an opportunity for, state-level de novo review. In particular, in the only two claims that survived summary judgment, Plaintiffs asserted that the State Defendants'[1] failure to provide Plaintiffs with state-level de novo review violated 1) the Medicaid Act, 42 U.S.C. §§ 1396 et seq. and its regulations (First Claim for Relief) as well as 2) the due process clause of the Fourteenth Amendment to the United States

[1] The "State Defendants" are the Colorado Department of Human Resources and its executive director, Karen L. Beye, and the Colorado Department of Health Care Policy and its executive director, Joan Henneberry. Plaintiffs settled with

Constitution (Second Claim for Relief). Under both of these claims, Plaintiffs sought a declaration that they are entitled to notice of and an opportunity for state-level de novo hearings, coupled with injunctive relief ordering such hearings. Plaintiffs also sought certification of these claims as class claims under C.R.C.P. 23(b)(2).

In a bit of an unusual procedure, I granted Plaintiffs' summary request for relief on the merits—finding that applicable Medicaid regulations (but not due process) did in fact guarantee Plaintiffs a state-level de novo hearing and that the State Defendants' procedures deprived Plaintiffs of that right—before I ruled on class certification. After a certification hearing, I then certified a 23(b)(2) class. In the order of certification, I directed the parties to submit a joint proposed form of permanent injunction, as well as a proposed remedial plan to identify all class members and provide them with notice of their right to state-level de novo hearings. The parties did so, and those orders have entered.

I initially gave Plaintiffs 30 days thereafter to file any motion for attorney fees. After a series of motions for extension of time, Plaintiffs and the State Defendants filed the subject "Stipulated Motion to Approve Settlement Amount," seeking my approval of an agreed-to, but unstated, attorney fee award from the State Defendants to Plaintiffs' counsel. By my Order dated July 29, 2008, I directed the parties to file additional briefs on two points: 1) whether I may approve this fee award without notice to the class; and 2) what, exactly, the fees compromise was.

II. CLASS NOTICE

C.R.C.P. 23(e) provides that "a class action shall not be dismissed or compromised without the approval of the court, and notice . . . to all members of the class in such manner as the court

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the only other Defendant, Developmental Pathways, Inc., and their claims against that Defendant were dismissed without prejudice.

directs." The cases and commentaries are clear that a trial court has great discretion in gauging the extent of notice to the particular circumstances of a case, and indeed that in an appropriate case a dismissal or compromise might not require any notice at all. Newberg has the following to say on this point:

> [W]hile court approval is necessary, notice of dismissal [or compromise] may not be mandatory in all instances. The broad interpretation of the language that notice "shall be given to all members of the class in such manner as the court directs" permits the court to approve a dismissal [or compromise] without notice to the class where no prejudice to class members would result.

3 NEWBERG ON CLASS ACTIONS § 8.18 (2008). There are, in fact, several reported cases, though none in Colorado, in which courts have dispensed with any notice requirement under Rule 23(e) when satisfied that the nature of the dismissal or compromise makes any risk of collusion or other prejudice to the class members negligible. *See, e.g., Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337 (1st Cir. 1991); *Tyco Laboratories, Inc. v. Koppers Co.*, 82 F.R.D. 466 (E.D. Wis. 1979).

Here, because this class was certified under 23(b)(2), with Plaintiffs' seeking only injunctive relief and not damages (other than fees), and because Plaintiffs' counsel's fees were contingent (that is, Plaintiffs will not be obligated to pay the difference between the lodestar amount and the compromised amount), class members have no economic interest in this compromise, and therefore cannot suffer any conceivable prejudice. Likewise, precisely because the only two parties with an economic interest in this compromise are the State Defendants who are paying it and Plaintiffs' counsel who are accepting it, there is no risk of any collusion.

I recognize that the federal version of Rule 23(e) underwent drastic change in 2003, and that at the same time Rule 23(h) was added, which explicitly requires notice to all class members

before a court may award fees. But the fact is our state version of Rule 23(e) was not amended in this manner, and we have no counterpart to federal Rule 23(h). In my judgment, these federal changes reinforce what was, before them, the well-settled rule that unless class members might be prejudiced by a collusive compromise, no settlement notice is necessary.

My conclusion in this regard is further reinforced by the line of cases that examines what is and is not a "class action" within the meaning of Rule 23(e), and which holds that certain "side-settlements" that are peripheral to the main action are not subject to Rule 23(e). *See, e.g., Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 4 (1st Cir. 1999); *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 213 (2nd Cir. 1987). Here, precisely because individual class members will not be liable for the difference between the billed amount of fees and the compromised amount, this fee dispute is quite "peripheral" to the main action, on which Plaintiffs prevailed.

Finally, it is worth mentioning here that any notice to class members will not only likely be ineffective, it will impose a cost that will have to be borne by someone. Every class member, by definition, is claiming to be developmentally disabled. We must ask ourselves whether individual notice to these class members, of a settlement on fees which will not affect them in the slightest, will accomplish anything. The cost of such notice, on the other hand, will either be paid by taxpayers, if I assess it against the State Defendants, or Plaintiffs' lawyers, if I assess it against Plaintiff, effectively reducing the amount of their compromised fees, or both. If the flexibility of Rule 23(e) means anything, it must mean that trial judges should be able to exercise some common sense in refraining from imposing such costs in circumstances such as these.

III. THE FEE COMPROMISE

I find and conclude that the compromise on fees entered into between Plaintiffs' counsel and the State Defendants is fair and reasonable. Plaintiffs' counsel kept contemporaneous records

of the time spent, and according to those records the actual amount of billed fees through April 2008 exceeded $340,000. The parties' proposed compromise is for the amount of $265,000.

I find and conclude that Plaintiffs' counsel's hourly rates of $360 (Fox), $350 (Parcel), $300 (Higgins, Faley and Fuselier), and $200 (Krichiver) are fair and reasonable. I likewise find that the hourly paralegal and intern rates of $110 are fair and reasonable. Finally, I find and conclude under all the circumstances that the number of hours spent by Plaintiffs' counsel and their paralegals and interns were reasonable and necessary, and that the resultant lodestar of more than $340,000 would have been a reasonable amount to award in a contested context. This was a fairly complex case, involving the always numerous and often inscrutable federal Medicaid statute and regulations. Although Plaintiffs lost on a few alternative theories and claims, they achieved the central purposes of this litigation: class certification and a judicial determination that Plaintiffs had a right to notice of and an opportunity for state-level de novo review.

The fee compromise reflected not only the risk that I might shave the lodestar, but also the more profound risk that I might not award any fees to Plaintiffs' counsel. It is difficult to assess this latter risk, since the parties reached their compromise before Plaintiffs even filed their motion for fees. I therefore do not know on what basis Plaintiffs contend they are entitled to any fees. Of course, quite apart from the risks of a lower or no award, by compromising on Plaintiffs' fee request both sides also eliminated the costs of litigating the fee issue.

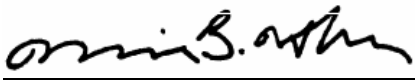
Most importantly, as discussed in Part II above, this compromise was the product of an arms' length settlement between the only two parties with an economic interest in the fee award—the party paying it (the State Defendants) and the party getting it (Plaintiffs' counsel). This is not a situation in which a trial court reviewing a fee compromise in a class and/or common fund context needs to worry that a dollar paid by a defendant in fees is a dollar that is not being paid to the

settling class. This was a 23(b)(2) class, and the class members' only interest in this litigation was in the injunctive relief counsel was successful in obtaining. Plaintiffs never sought any damages, other than the very fees that are at issue here.

For all these reasons, I am confident that the fee settlement is a fair, reasonable and appropriate resolution.

DONE THIS 29TH DAY OF SEPTEMBER, 2008.

BY THE COURT:



Morris B. Hoffman
District Court Judge

cc: All counsel