

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

KENNY A., by his next friend, Linda :
Winn, et al., :

Plaintiffs, :

v. :

CIVIL ACTION FILE NO.
1:02-CV-1686-MHS

SONNY PERDUE, in his official :
capacity as Governor of the State of :
Georgia, et al., :

Defendants. :

-----:

**MEMORANDUM OF CLASS COUNSEL
IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF
SETTLEMENT AGREEMENT AND CONSENT DECREE**

PRELIMINARY STATEMENT

Plaintiffs and the State Defendants have jointly moved for final approval of the proposed settlement agreement attached as Exhibit A. It is the proposed Consent Decree preliminarily approved by the Court on July 5, 2005 (R-439). Plaintiffs submit this memorandum in support of the Joint Motion.

Plaintiffs' systemic challenge to Georgia's child welfare system contends that the treatment of children who come into public custody in Fulton and DeKalb

Counties as a result of abuse or neglect in their homes is so deficient that it violates their rights under both federal and state constitutions as well as under various statutes. The proposed Settlement Agreement contains a comprehensive set of binding commitments from the State of Georgia to implement wholesale reforms in its long-struggling child welfare system operated by the Division of Family and Children Services (“DFCS”) in Fulton and DeKalb Counties. This Agreement binds the State of Georgia to achieve measurably better outcomes for the plaintiff class of children. Further, the Agreement specifies a series of detailed reforms -- ranging from reduced caseloads for caseworkers and increased reimbursement rates for foster parents and other care providers to enhanced healthcare services gauged to the specific needs of children in foster care and the implementation of a single statewide automated child welfare information system -- designed to ensure that the State’s promises of improved outcomes for children in state custody survive vicissitudes in governmental leadership or policy direction and become reality for the plaintiff class.

The terms of the proposed settlement, taken as a whole, are fair, reasonable and adequate from the perspective of the plaintiff class. Therefore, Plaintiffs request that the Court grant final approval to the Settlement Agreement in its entirety and enter it as a consent decree.

STATEMENT OF FACTS

A. Summary of the Litigation

In 2001, Childrens Rights, Inc. (“CRI”) initiated a comprehensive factual investigation and evaluation of Georgia’s child welfare system. The pre-suit investigation suggested that Georgia’s child welfare system, as operated in Fulton and DeKalb Counties, was failing in its mission to provide abused and neglected children with legally required protection, treatment and services while in state custody. Instead, Georgia’s foster children were all too frequently subjected to further maltreatment and dangerous conditions while in state custody, denied basic medical, dental and mental health care, moved multiple times from one inappropriate foster home or facility to another, and left to languish in state care for years without reasonable opportunity to be returned home safely to their parents or relatives or placed with a permanent adoptive family. Many of Georgia’s own public record reports and audits of its child welfare system corroborated these findings. On June 6, 2002, CRI commenced this action in the Superior Court of Fulton County, Georgia.

All Defendants joined in removing the case to federal court. (R-1.) Years of vigorous litigation ensued. After an initial phase focused on closing Fulton and

DeKalb Counties' notorious "emergency" shelters, the parties conducted comprehensive discovery, motion practice and trial preparation. Plaintiffs overcame motions to dismiss and, over opposition from the State Defendants, successfully moved for class certification. (R-193). Despite obstacles in the form of unsuccessful defense motions for protective orders restricting discovery (*e.g.*, R-145, -391, -406), class counsel discovered more than 477,000 pages of governmental records. Sixty-three witnesses were deposed. Plaintiffs retained four highly qualified experts -- Dr. Peg Hess, Jessie K. Rasmussen, John Goad and Cathy R. Smith -- who produced a series of reports identifying and detailing the specific deficiencies Georgia's malfunctioning, under-resourced child welfare system and the harms it was working on individual children, including the named plaintiffs. The Court sustained the admissibility of these expert reports over State Defendants' *Daubert* objections and, on the basis of these expert reports and voluminous information extracted from State Defendants' records, denied State Defendants' motions for summary judgment. (R-410).

On October 25, 2004, the Court appointed Hon. Dorothy T. Beasley to explore the possibility of a mediated resolution. (R-390). Over the next eight months, Judge Beasley conducted intensive negotiations between Plaintiffs and the State Defendants. On January 14, 2005, with the case proceeding on dual tracks of

litigation and mediation and a trial setting on the horizon for February 2005, Judge Beasley persuaded the parties to consent to a thirty-day extension of the due date for the pre-trial order in order to focus on the mediation track. (R-425) The proposed settlement announced and preliminarily approved for distribution to the class on July 5, 2004 is the product of more than three years of hard-fought litigation and eight months of protracted settlement negotiations.

2. Overview of Proposed Settlement Terms

The proposed terms of settlement are set forth in Exhibit A to the Joint Motion for Final Approval of Settlement. The centerpiece of the injunctive relief provided for the benefit of the class is a series of thirty-one outcome measures the State Defendants have agreed to meet and sustain for no less than three consecutive six-month reporting periods.¹ In addition, State Defendants must provide significant resource and infrastructure improvements into the system, including additional caseworkers to meet strict caseload limits that comply with national standards,² new and additional foster homes and services to fill any shortages identified in a “needs assessment” of the system to be performed by a neutral expert,³ and a fully implemented single statewide automated child welfare

¹ Exhibit A, §§ 15, 19(A).

² *Id.*, § 8.

³ *Id.* § 5(A)

information system.⁴ In addition, the proposed Consent Decree guarantees a panoply of protections for all class members, including more prompt, frequent and comprehensive medical, dental and mental health examinations and treatment;⁵ a detailed process for goal setting, case planning and periodic reviews of children's status while in foster care;⁶ limits on the placement of children in emergency shelters, group and institutional placements, and protections against overcrowding in foster homes;⁷ and the establishment of reimbursement rates adequate to compensate providers for the actual cost of caring for foster children.⁸ The settlement contemplates that a team of child welfare specialists will serve as the Court's independent accountability agents charged with the responsibility of measuring and reporting publicly on the State Defendants compliance with these undertakings.⁹

The settlement class is identical to the class previously certified by the Court on August 18, 2003: every child "who have been, are, or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the State Defendants; and (2) have or will have an open case in the Fulton County DFCS or

⁴ *Id.*, § 7.

⁵ *Id.*, § 6.

⁶ *Id.*, § 4.

⁷ *Id.*, § 5.

⁸ *Id.*, § 5(B).

⁹ *Id.*, § 16.

DeKalb County DFCS.” The Court granted preliminary approval on July 5, 2005, set the matter down for a full-scale hearing on fairness for September 21, directed that State Defendants give notice to the class and interested parties, approved the form of the notice, and detailed the schedule for the filing of objections and requests to be heard.

The settlement specifically preserves the rights of individual class members to bring individualized claims for damages or injunctive relief.¹⁰ The class’ pending claims against Fulton and DeKalb Counties seeking declaratory and injunctive relief protecting the rights of class members to adequate and effective legal representation of abused and neglected children at all stages of their experience in the child welfare system and the juvenile court are not affected by this settlement; these claims remain pending.

ARGUMENT AND CITATION OF AUTHORITY

1. Applicable Legal Standards Governing Settlement Evaluation and Procedural Requirements

The issue for the Court to decide is whether the proposed settlement, taken as a whole, is “fair, reasonable and adequate” from the perspective of absent class members whose rights and interests are to be bound by its terms. Fed.R.Civ.P.

¹⁰ *Id.*, §19(C)(D) & (E).

23(e)(1)(C). *See generally*, Manual for Complex Litigation (Fourth) § 21.634-.635. While the Court is to be guided by the overriding public policy in favor of settlements,¹¹ the Court’s responsibility in Rule 23 fairness determinations is to “scrutinize the settlement for the existence of any fraud or collusion.” *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 305 (N.D.Ga. 1993), *citing Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The proponents of a settlement bear the burden of establishing fairness. *In Re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 312, *citing In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 (7th Cir. 1979); Manual for Complex Litigation (Fourth) § 21.634.

Rule 23 specifies procedural requirements for determining whether this burden has been met. First, the Court is required to direct notice of the proposed settlement terms to class members in accordance with Fed.R.Civ.P. 23(e)(1)(B). Second, the Court is required to conduct a hearing pursuant to Fed.R.Civ.P. 23(e)(1)(C) at which objectors to the settlement are given reasonable opportunity to raise their concerns with the Court. While the Court is not empowered to rewrite the settlement to accommodate the wishes of objectors,¹² “[o]bjectors can

¹¹ *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to September 30, 1981.

¹² *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 305.

provide important information regarding the fairness, adequacy, and reasonableness of settlements” and “can also play a beneficial role in opening a proposed settlement to scrutiny and identifying areas that need improvement.” Manual for Complex Litigation (Fourth) § 21.643. Finally, even where there are few objections, the Court is well-advised to make a “sufficient record as to the basis and justification for the settlement” and “specific findings as to how the settlement meets or fails to meet” the requirements of Rule 23. *Id.*, § 21.635.

If a proposed Rule 23 settlement passes scrutiny for fraud and collusion, courts in the Eleventh Circuit generally conduct fairness evaluation by looking to a series of six factors that include: (1) the stage of the proceedings at which settlement was achieved; (2) the likelihood of success at trial; (3) the range of possible relief; (4) the point on the range at which settlement is fair, adequate and reasonable; (5) the complexity, expense and duration of litigation; and (6) the substance and amount of opposition to settlement. *See Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 305 (N.D.Ga. 1993); *In re Motorsports Merchandise Antitrust Litig.*, 112 F.Supp.2d 1329, 1333 (N.D.Ga. 2000). The Court’s may also rely upon the judgment of experienced counsel in conducting its independent evaluation of fairness. *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 688-’89 (N.D.Ga. 2001).

2. This Settlement is Neither Fraudulent Nor Collusive

After more than three years of litigation, this Court is familiar with this case and counsel for both sides. The Court is well aware that this case has been hard-fought and vigorously litigated. Counsel for both sides are also well-known to the Court, both through this case, prior case experience before the Court, and by reputation. Class counsel has zealously pursued the best interests of the class and defense counsel has been equally diligent in defending the action. Based on the Court's observation of and familiarity with the case and counsel, the Court is well-positioned to draw its own conclusions about the likelihood or reality of fraud or collusion.

The risk that class counsel might collude with defendants and exploit the Rule 23 mechanism to extract a fee in exchange for a fraudulent settlement that disserves the interests of absent class members is remote in this case for at least five reasons. First, in contrast to Rule 23(b)(3) class cases where issues of monetary relief predominate, the motivation for fraud and collusion is diminished in a Rule 23(b)(2) case such as this one, where the nature of the relief sought and obtained for the class is purely declaratory and injunctive. Second, where, as here, the defendants are governmental actors whose public acts are subject to both press and political scrutiny, the risks of fraud and collusion are diminished. Third,

because the rights of absent class members to bring individual claims for monetary relief are unaffected by the settlement, there is no apparent motive for defendants to engage in collusion. Fourth, because the parties have chosen to present the Court with a proposed settlement on the merits and deferred all issues of Plaintiffs' fee and expense recovery to further proceedings in which the Court will retain jurisdiction to scrutinize both the fairness of the fee and the method of payment, the risk of a collusive and fraudulent *quid pro quo* settlement appears minimal. Fifth, the Court is well aware that this settlement was arrived at only after years of contested litigation and eight months of intensive settlement negotiations conducted by the Court's appointed mediator.

Moreover, while the Court has received approximately thirty comments or objections on behalf of class members or other interested parties in response to the class notice, not a single commentator/objector has even suggested that this settlement is the product of fraud or collusion.

Finally, Dorothy T. Beasley, the Court's appointed mediator, supervised the eight months of negotiation that resulted in the proposed settlement. The fact that this settlement emerged from this process confirms the absence of fraud or collusion in this settlement.

3. This Settlement is Fair, Reasonable and Adequate

Measured against the factors utilized by the courts of this district and circuit to evaluate the fairness of Rule 23 settlements, this proposed settlement is eminently fair, reasonable and adequate.

A. The Case Has Progressed to a Stage Where the Court, Counsel, and All Affected Parties Have Ample Basis to Evaluate Settlement

The record in this case and the progress of the action give the Court ample basis to evaluate the fairness of the proposed settlement. Over the past three years, the Court has carefully managed the progress of the case, decided dispositive motions to dismiss and for summary judgment, heard evidence in connection with the Plaintiffs' initial motion for injunctive relief dealing with closing of the Fulton and DeKalb shelters, decided motions to strike the reports of Plaintiffs' experts, and ruled on various discovery disputes. From this extensive involvement in the case, the Court has a firm grasp on the facts, the applicable law, and the relative strengths and weaknesses in each side's positions.

The parties have completed discovery. In adjudicating State Defendants' motions for summary judgment, the Court had ample occasion to analyze the extensive and voluminous summary judgment record, including the deposition

testimony of droves of witnesses, and the legal arguments of the parties. In discharging its responsibility to rule on these motions and the State Defendants' *Daubert* motions to strike the reports of Plaintiffs' experts, the Court became familiar with the expert reports of Dr. Peg Hess, Jessie K. Rasmussen, John Goad, and Cathy R. Smith identifying and detailing the systemic deficiencies in Georgia's child welfare system and how those deficiencies inflict harm on individual children in the State's custody.

All of this information and the Court's rulings on each motion and case management issue are matters of public record. The class notice provided class members, their representatives, and all affected persons with the means to access this information. Not a single commentator/objector has raised any complaint with respect to the adequacy of development in the case record.

The case has progressed to the stage where the Court, the parties, and all persons submitting comments or objections to settlement are well-positioned to evaluate the fairness of the settlement. This factor weighs heavily in favor of fairness to absent class members.

B. Likelihood of Success on the Merits

In evaluating likelihood of success in a proposed Rule 23 settlement, the Court "has neither the duty nor the right to reach any ultimate conclusions on the

issues of fact or law which underlie the merits of the dispute.” *In Re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D at 315. “The very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty.” *In Re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981).

Again, the Court’s previous work on the State Defendants’ motions to dismiss and motions for summary judgment make the Court well-positioned to evaluate the strengths and weaknesses of the parties’ respective positions. Plaintiffs believe their case is factually strong and well-prepared, but recognize that neither trial nor appellate outcomes are perfectly predictable. At bottom, comparing the litigation risks facing the class to the scope, substance, immediacy and certainty of relief promised in the proposed Consent Decree, Class Counsel submit that this factor weighs in favor of the proposed settlement.

C. Range of Possible Relief and The Point on the Range At Which Settlement Is Fair, Adequate and Reasonable

If the Class prevailed at a trial on liability issues, the parties and the Court would then be facing a second phase of litigation to determine the proper scope of

injunctive relief. The Court would be vested with broad equitable discretion to fashion a remedy within the “inherent limitation upon federal judicial authority” that requires tailoring any remedy imposed against a governmental unit to the nature and scope of the constitutional violation.¹³ However, the task of tailoring a remedy to the specific violation in contested proceedings would impose significant burdens on the Court and the litigants and may well divert governmental resources and energy that could be better applied to the immediate delivery of care and services to class members.

The relief obtained in the proposed settlement is extraordinarily comprehensive, detailed, and favorable to class members. It is highly unlikely that the Court would or could have imposed an injunction as intricately detailed and comprehensive in the context of contested remedy-phase litigation. *See Ingram v. The Coca-Cola Co.*, 200 F.R.D. at 689. Therefore, “[t]he benefit of obtaining guaranteed relief, in the face of serious obstacles to successful litigation, enhances the value of the settlement to the class and strongly demonstrates its fairness.” *Id.*, 200 F.R.D. at 690.

¹³ *Milliken v. Bradley*, 433 U.S. 267, 282 (1976).

D. The Complexity, Expense and Duration of the Litigation

“[C]lass action suits have a well deserved reputation as being most complex.” *Cotton v. Hinton*, 559 F.2d at 1331. This case is certainly no exception. The sweep of the factual terrain, involving the lives of approximately 3,000 children in public custody, their birth and foster and adoptive families, their case managers, their caregivers, a State agency with a budget approaching \$2.8 billion, and County governmental units responsible for delivering appropriate services to them, is immense. Some claims present novel legal issues; others present complicated legal issues in areas of law that are developing rapidly.

This three-year old case has also been expensive to litigate. The State Defendants, according to responses Georgia’s Department of Law has provided to open records requests, spent in excess of \$3.7 million dollars on outside counsel, expert witnesses, and other case expenses through June 2005. Members of the Law Department have worked in excess of 5200 hours defending the State Defendants. Attributing even a modest hourly rate to the work performed by Law Department professionals and completely ignoring the value of the work of DHR’s chief legal officers, the Governor’s counsel, and other State officials and employees who have devoted time and service to the defense effort, the State has invested at least \$5 million defending this case, including almost \$1.2 million to

the Child Welfare League of America for expert witness work. On the Plaintiffs' side, Class Counsel has advanced approximately \$1.8 million in case expenses to prosecute the claims of the class.

An overview of discovery and motion practice yields insight into this expense. Class counsel has reviewed more than 477,000 documents produced by the defendants. Sixty-three witnesses have been deposed. Both sides have submitted comprehensive expert witness reports based upon voluminous case record reviews. Unsuccessful motions to dismiss and motions for summary judgment and a successful motion for class certification have been extensively briefed. The Court's familiarity with all of the foregoing would support a finding that the necessary updating of all discovery, the finalization of a pre-trial order, and the trial itself would be extremely time-consuming and expensive.

Plaintiffs estimate that the trial of the liability phase of this case against State Defendants would consume two to four weeks. If successful, the remedy phase of the litigation would probably consume another one to three months of briefing and evidence. Based on the State Defendants' applications to pursue interlocutory appeals from the Court's denials of summary judgment (R-411, 431), Plaintiffs assume that appeals of results at trial favorable to the class would be inevitable. Weighing the litigation risks and an anticipated 15-18 month delay in

commencement of the relief against the certain and immediate terms of the proposed consent decree signed by Georgia's Governor, the proposed settlement is in the best interests of the class.

E. The Substance and Amount of Opposition to Settlement

Considering the size of the class and the sweeping changes contemplated in the proposed settlement, the substance and amount of opposition to this settlement are modest. The class notice has elicited more than 30 written comments on the proposed settlement. Most support approval. Several express strong support for the settlement, including the National Council of Juvenile and Family Court. Even those who raise some objection to a particular feature of the settlement are generally supportive of the overall settlement taken as a whole.

While the Court is required to review and address each legitimate objection, there is no requirement to "open to question and debate every provision of the proposed compromise." *Cotton v. Hinton*, 559 F.2d at 1331. "The central question at issue is not whether any particular provision could have been negotiated in a slightly different or marginally more favorable way. Rather, the Court must determine the fundamental fairness, adequacy and reasonableness of the settlement, taken as a whole. While the Court may interpret provisions subject to

dispute, it may not unilaterally rewrite the terms of the bargain struck between the parties.” *Ingram v. The Coca-Cola Co.*, 200 F.R.D. at 691-92.

i) Restrictions on Emergency Shelter Placements

Members of the Georgia Emergency Shelter Network, a self-described association of “private, not for profit, community based stabilization and assessment emergency” facilities, *none of which are located Fulton or DeKalb Counties*, object to the provision of the proposed Consent Decree, § 5(C)(4)(c)(p. 16), which restricts placement of class members in an emergency facility for more than 30 days or on multiple occasions within one episode of foster care. They urge the Court to rewrite this provision of the settlement to permit such placements for 90 days at a stretch and on multiple occasions within the same episode of foster care.

From the testimony and other evidence received by the Court in 2002 regarding the operation of “emergency” shelters in Fulton and DeKalb, the Court can readily appreciate Plaintiffs’ concern that it would not serve the best interests of class members to permit their extended placement in temporary facilities in these two counties. Other provisions of the settlement (*e.g.*, § 5(A)’s needs assessment (pp. 12-13), §4(A)’s expedited assessment and planning process (pp. 5-7), and the expanded casework capacity flowing from §8’s caseload caps (pp. 22-

23)) are designed to make it feasible to reduce the time class members spend in any initial emergency placement in Fulton and DeKalb and to accelerate their arrival at a stable and optimal placement. To the extent that any class member is removed from a Fulton or DeKalb household and sent to any of the distant objecting facilities, the restrictions of § 5(C)(4)(c), in conjunction with these other provisions, operate to protect class members. Therefore, nothing in the restrictions on extended and repetitive emergency placements casts doubt on the fairness of the settlement to class members.

ii) Restrictions on Placements in Distant Group Homes and Institutions

Persons and organizations who own, operate, or are otherwise affiliated with group homes or institutions have submitted a series of related objections to a series of settlement features that restrict the placement of young children in group homes and institutions. Section 3 of the proposed Consent Decree (pp. 3-4) establishes a series of basic principles governing the State Defendants' treatment of class members, including "Children in foster care placement should be in the least restrictive, most family-like setting possible, and the state should make reasonable efforts to avoid the use of non-family settings for children, particularly young children." Section 5(C)(4)(f) (pp. 16-17) places certain restrictions on the placement of class members of tender years in group homes and institutions.

Outcome Measure 19 (p. 35) restricts placing children in state custody more than 50 miles of the home from which they have been removed to further the child's interests in maintaining non-destructive ties to family and community.

These interrelated series of protections for class members may well reduce the flow of Fulton and DeKalb children to group homes and institutions more than 50 miles from these counties, but nothing in these provisions requires disruption of a satisfactory existing placement or precludes future placement of any child in a facility that best fits the child's particular needs and constitutes the most appropriate placement for that particular child. None of these restrictions are absolute. These provisions are not intended as attacks or criticisms on persons or organizations who establish or operate these facilities. Rather, they are intended to advance class members' best interests in being placed in the least restrictive, most family-like setting possible, and generally in locations where non-destructive ties to family and community can be maintained.

iii) Uniform Standards for Foster Care Providers

Focusing on the provisions of Section 9 (pp. 23-24), which apply to DHR/DFCS supervision of private contractors, some objectors perceive a double standard exposing the private agencies to more stringent licensing standards than those applicable to foster parents recruited by DFCS. These objections overlook

Section 11 of the proposed Decree (pp. 26-28), which requires **uniform** standards for foster parent screening, licensing and training.

iv) Objections to Specialized Case Managers

Section 4(F) of the Decree (pp. 11-12) is designed to address the special needs of foster children who linger in public custody for more than 18 months by providing a Specialized Case Manager whose caseload is small to focus on, and hopefully resolve, the problems that have prevented the long-staying child from achieving his or her permanency objective. Some objectors point to the possibilities that a child may have a good relationship with an existing case manager, that a delay in achieving permanency may not be the fault of the individual case manager, and that a complete disruption of the existing relationship with the case manager may be harmful to the child. This confluence of possibilities could occur. However, nothing in §4(F) compels disruption of a valuable existing relationship or forbids the Specialized Case Manager to adopt a teamwork approach with the predecessor to preserve whatever benefits may flow from the existing relationship. Section 4(F) is an appropriate commitment of resources designed to help children avoid unnecessarily prolonged stays in foster care. These objections do not warrant rejection of the settlement.

v) Reimbursement Rate Task Force

Section 5(B)(2)-(7)(pp. 14-15) requires DHR/DFCS to establish an independent Reimbursement Rate Task Force with responsibility for creating a reimbursement rate structure based on the reasonable cost of achieving measurable outcomes for children. Certain objectors propose to rewrite various aspects of these provisions to mandate appointment of a person selected by the Georgia Association of Homes and Services for Children to the Task Force and to formalize the role of private providers and their provider associations in the deliberations of the Task Force. Plaintiffs contemplate that the Task Force would solicit and consider appropriate information from any interested party and would gather whatever information it needs to ascertain the facts and present its findings. However, it is beyond the purview of the Court to rewrite the terms of settlement and nothing in these objections warrants rejection of the settlement.

vi) Objections to Outcome Measures 4, 8 & 9

Section 15 of the proposed Consent Decree (pp. 31-38) sets out 31 separate outcome measures for children in foster care that the State must simultaneously achieve and sustain for three consecutive six-month reporting periods under the scrutiny of the independent Accountability Agents before the State may move to

terminate the Court's jurisdiction over the proposed decree. *See* §§ 19(A) & 16.

While each individual outcome measure has some significance in isolation, it is the confluence of achieving all 31 outcome measures simultaneously and sustaining that compliance (and compliance with all other terms of the settlement) over an eighteen-month period that advances the interests of the class in attaining meaningful and comprehensive reform of Georgia's child welfare system.

Barton Clinic objects that outcome measures 4, 8(a) and 9 "set benchmarks below current and historic performance" and argues that "[a] settlement with outcome measures that allow the system's performance to decline is unfair, unreasonable, and inadequately protects the class." This objection is factually suspect and legally unsound. Even if each of these three isolated outcome measures represented a retreat from historic performance levels (which, as discussed below, is a questionable proposition), it does not follow that this settlement, taken as a whole, permits any decline in *systemic* performance. In fact, the State's commitment to achieve all 31 outcome measures simultaneously and to sustain that level of overall performance for eighteen months cannot help but advance the class' interest in improved systemic performance.

Plaintiffs do not contest Barton Clinic's assertion that Fulton and DeKalb Counties have historically reported a re-entry into care rate slightly less than the 8.6% rate specified in outcome measure 4. However, 8.6% is a reasonable ceiling on this measure to protect the class and, in addition, is the current national standard established by the Department of Health and Human Services. Re-entry is one of the few areas in which Georgia has historically achieved the federally-established benchmark. This favorable track record on the re-entry measure is almost certainly related to the fact that Georgia's foster children have historically languished in public custody for unconscionably long periods of time. By definition, children must be released from custody in order to be eligible for re-entry. Because Georgia has done such a poor job of moving children out of custody on a timely basis, its historic scores on re-entry are relatively good. If the settlement achieves the anticipated accelerated permanency outcomes, more children will be eligible for re-entry and there will be upward pressure on this outcome measure. For these reasons, Plaintiffs believe that holding Georgia to the federal standard on re-entry while simultaneously requiring sustained compliance with the remaining 30 outcome measures and all other settlement terms is an acceptable term in an otherwise fair, reasonable, and adequate settlement.

Barton Clinic asserts, based on DeKalb's discharge rates of 55-57% and Fulton's discharge rates of 34-47% in two earlier twelve-month periods, that the 40% outcome measure in §8(a) permits unacceptable backsliding. This criticism of an isolated outcome measure ignores various other conjunctive permanency acceleration requirements and protections of the settlement, including: (1) the 74% discharge requirement specified in outcome measure 8(b); (2) the accelerated search for relatives requirement in outcome measure 7; (3) the accelerated requirements for finalizing adoptions and legal guardianships in outcome measures 11, 12 and 13; (4) the accelerated permanency efforts specified in outcome measure 15; (5) the accelerated case plan reviews required by outcome measure 27; and (6) the accelerated permanency hearings required by outcome measure 28. Again, in the context of a comprehensive settlement package that affords class members fair, reasonable and adequate across-the-board relief and a variety of specific protections advancing their interest in achieving the right permanency outcome as promptly as possible, outcome measure 8(a) is an acceptable settlement term.

Finally, Barton Clinic maintains, based on asserted historic discharge rates of 39 – 45% for *all* Fulton and DeKalb children in two particular prior periods, that the 35% discharge rate at the second reporting period for children in the 24-month

backlog pool (a portion of outcome measure 9) is set too low and should be rewritten to 45%. This criticism ignores the fact that, in contrast to the asserted historic discharge rates used for purposes of comparison, the 24-month backlog pool consists only of children who have been in public custody for more than two years and, therefore, generally present a more difficult permanency challenge. It also seems to ignore the additional permanency requirements in outcome measure 9 at the third and fourth reporting periods, the requirements of outcome measure 10, the Specialized Case Manager provisions of § 4(F), and the various other interrelated protections for class members who have already experienced extended stays in public custody. This criticism of an isolated outcome measure, viewed in the context of the settlement as a whole, does not warrant rejection of the settlement.

vii) Criticism of Protection for Children Who Come to the Attention of DFCS, But Are Not Taken Into Custody

The proposed settlement does not extinguish class claims arising over DHR/DFCS' failure to provide services or to otherwise cause harm to children by failing to take them into public custody. The Consent Decree provision acknowledging resolution of class claims, §19(C) (pp. 42-43) contains a specific carve out for "claims on behalf of any children in Fulton or DeKalb Counties

concerning any programs or services for children prior to a child's placement into State custody, including, but not limited to, any diversion, differential response, or other programs or services providing an alternative to the investigation and/or substantiation of a report of abuse or neglect and/or the removal of a child from their home and placement into State custody, and any programs or services for investigations of reported abuse or neglect for children not in State custody." The settlement also preserves individual claims.¹⁴ Further, the proposed Consent Decree requires DHR to track and to provide to the court-appointed Accountability Agents for verification information on the incidence of substantiated maltreatment experienced by children who were kept out of public custody by operation of DHR's diversion program.¹⁵

The comments of Barton Clinic and Linda Stacy, DeKalb CASA, voice concerns that these protections against the risk of harm to children who are wrongfully kept out of public custody despite uninvestigated or substantiated abuse or neglect should be stronger. Perhaps that is so as a matter of public policy, but because class members are not being asked to extinguish any claim or forbear from seeking any appropriate remedy in the event that DHR/DFCS commits actionable

¹⁴ *Id.*, §19(E).

¹⁵ *Id.*, §20(G).

misconduct in its treatment of these children in the future, this criticism of this particular term of settlement does not warrant wholesale rejection of an otherwise extraordinary result for the Plaintiff Class.

F. Judgment of Experienced Counsel

“In a case where experienced counsel represent the class, the Court, ‘absent fraud, collusion, or the like, should hesitate to substitute its own judgment for that of counsel.’” *Ingram v. The Coca-Cola Co.*, 200 F.R.D. at 691. In this case, the class is represented by Marcia Robinson Lowry, who has more than 30 years of experience litigating this type of constitutional challenge to systemic deficiencies in state or local operation of child welfare systems, and Jeffrey O. Bramlett, whose experience and professional judgment on behalf of the class was at issue and relied upon by the Court in *Ingram*. In class counsel’s collective professional judgment, this settlement serves the best interests of class members. *See* Exhibit C to Joint Motion for Final Approval (Declaration of Marcia Robinson Lowry). The Court is entitled to weigh that factor in reaching a conclusion that the settlement is fair, reasonable and adequate.

CONCLUSION

The proposed terms of settlement are fair, reasonable and adequate from the perspective of the class. Accordingly, the Court should grant the Joint Motion for Final Approval and enter the proposed Consent Decree embodying the terms of settlement.

This 19th day of September, 2005.

/s/Jeffrey O. Bramlett
Jeffrey O. Bramlett
Georgia Bar No. 075780
(bramlett@bmelaw.com)
Corey F. Hirokawa
Georgia Bar No. 357087
(hirokawa@bmelaw.com)
BONDURANT, MIXSON
& ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
(404) 881-4100

Marcia Robinson Lowry (*pro hac vice*)
Ira P. Lustbader (*pro hac vice*)
Douglas C. Gray (*pro hac vice*)
Children's Rights
404 Park Avenue South, 11th Floor
New York, New York 10016
(212) 683-2210

COUNSEL FOR PLAINTIFF CLASS

/s/Mark H. Cohen

Mark H. Cohen
Georgia Bar No. 174567
Mark.cohen@troutmansanders.com
TROUTMAN SANDERS LLP
5200 Bank of America Plaza
600 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404)885-3597

Eddie Snelling, Jr., Esq.
Georgia Bar No. 665725
Senior Assistant Attorney General
Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 651-5304

Jefferson James Davis, Esq.
Special Assistant Attorney General
Georgia Bar No. 210650
DAVIS & DAVIS
921 Wachovia Bank Building
315 West Ponce de Leon Avenue
Decatur, Georgia 30030
(404) 373-3620

COUNSEL FOR STATE DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2005, I electronically filed MEMORANDUM OF CLASS COUNSEL IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT AND CONSENT DECREE with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

Stephen Whitted swhitted@co.dekalb.ga.us	Mark H. Cohen mark.cohen@troutmansanders.com
Willie J. Lovett willie.lovett@co.fulton.ga.us	Jefferson James Davis davisanddavis@bellsouth.net
Eddie Snelling eddie.snelling@law.state.ga.us	

/s/Jeffrey O. Bramlett
 Jeffrey O. Bramlett
 Georgia Bar No. 075780
 (bramlett@bmelaw.com)