

1st Cir. Nos. 08-1874

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ERIC VOSS; LAURA THIBAUT; FREDERICK CARTER; CHRISTOPHER PALEO; ANGEL AGOSTA;
KIMBERLY LAWRENCE; ROBERT BUCKMAN; NICOLE KEATING; MUSA NURISLAM; CHERYL COURTNEY;
LENNIE LEBLANC; LAURA PUTTERMAN; PEDRO CAVALLARO; DAVID BRAGA; AMANDA WATTS; ERIN
POULIN; SHERI BELVILLE; ALISSA CORMIER; BELEN GARCIA-SIMMONS; JESSE STEWART; MARK
CHAPMAN; UCHENNA OBI; STEFANIE PETRIE; LINDA KLAIBER; JEANNETTE MCGINNIS; LAURA
PROUTY; JILLIAN HUME; ANDRE AMATO; SHARIA PITTS; PETER LIDDY; JOSHUA GREANEY; HOMER
SWAIN; ANDREW PATTERSON; PATRICK SHEEHAN; ANDREW CHAN; DYLAN KEENE; ABRAHAM CARRO;
POLO DEJESUS; EMILY SAM; ZACHARY FOSTER; WENDELL ROQUE,

Plaintiffs – Appellants.

v.

LORETTA ROLLAND; MARGARET PINETTE; TERRY NEWTON, by her parents and legal guardians, Janes and
Forrest E. Newton; BRUCE AMES, by his legal guardian, Linda Bock; FREDERICK COOPER, by his mother and legal
guardian, Minnie Humphries; LESLIE FRANCIS, by his next friend, Rob Fields; TIMOTHY RAYMOND, by his mother
and legal guardian, Mariann Herk. On behalf of themselves and all others similarly situated; ARC MASSACHUSETTS;
STAVROS CENTER FOR INDEPENDENT LIVING,

Plaintiffs – Appellees.

v.

DEVAL PATRICK, Governor of Massachusetts; FREDERICK A. LASKEY, Secretary of the Executive Office of
Administration and Finance; WILLIAM D. O'LEARY, Secretary of the Executive Office of Health and Human Services;
BRUCE M. BULLEN, Commissioner of the Division of Medical Assistance; GERALD MORRISSEY, Commissioner of
the Department of Mental Retardation; ELMER C. BARTELS, Commissioner of the Massachusetts Rehabilitation
Commission; HOWARD KOH, Commissioner of the department of Public Health; TERESA O'HARE, Director of
Region I for the Department of Mental Retardation, all in their official capacities,

Defendants – Appellees.

Appeal from the United States District Court for the District of Massachusetts In Civil Action No. 98-30208-
KPN

BRIEF FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Appellants are individuals, with no corporate associations.

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to FED. R. APP. P. 34(a) and Local Rule 34(a), Appellants respectfully requests oral argument. The District Court wrongly approved the settlement in a decision that has ramifications for the health and safety of profoundly disabled individuals. Oral argument will assist the Court in addressing the important issues raised in this appeal.

STATEMENT OF JURISDICTION

A. District Court

This action was authorized by 42 U.S.C. § 1983 to redress the alleged deprivation under color of state law of rights, privileges and immunities guaranteed by federal laws and the United States Constitution. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) and 1343(4). The action was also brought pursuant to Title II of the ADA, 42 U.S.C. § 12133. The defendants are all public entities subject to Title II of the ADA. The District Court had jurisdiction over this action for declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure. Injunctive relief is authorized by 28 U.S.C. § 2202, 42 U.S.C. § 1983 and Rule 65 of the Federal Rules of Civil Procedure.

B. Court of Appeals

This Court has jurisdiction over this appeal because the approval of a class action settlement is a final, appealable Order. See Devlin v. Scardelletti, 536 U.S. 1 (2002):

The District Court's approval of the settlement – which binds petitioner as a member of the class – amounted to a "final decision of [petitioner's] right or claim" sufficient to trigger his right to appeal.

536 U.S. at 9.

C. Filing Dates

On June 16, 2008, The District Court entered an order allowing the Joint Motion to Approve Settlement on Active Treatment. A Notice of Appeal was timely filed on July 14, 2008.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court Erred when it Approved the Settlement Agreement, Where the Class as Certified Included Plaintiffs Who Lacked Standing
2. Whether the Court Erred when it Approved the Settlement Agreement, Where Federal Rule of Civil Procedure 23(a)'s Requirements Were Lacking
3. Whether the Court Abused Its Discretion when It Approved the Settlement Agreement Where the Agreement Fails to Provide a Right for Any Appellant to Reject Community Placement
4. Whether the Court Abused Its Discretion when It Approved the Settlement Agreement Where the Agreement Ratified the "Rolland Community Placement List" in Contravention of the Express Terms of the Agreement
5. Whether the Court Abused Its Discretion when It Approved the Settlement Agreement Where the Agreement Requires that 640 People Be Placed in Community Placements

**STATEMENT OF THE CASE, ITS PROCEEDINGS,
AND THE DISPOSITION BELOW**

This is an appeal of the district court's order approving the class action settlement. App. 604-622.

This class action case was commenced on October 29, 1998. The suit was brought on behalf of seven individuals and two organizations, ARC Massachusetts ("ARC") and the Stavros Center for Independent Living (collectively "Plaintiffs"). In their complaint, as amended, Plaintiffs set forth a number of claims arising out of the Nursing Home Reform Amendments, 42 U.S.C. § 1396r, various Medicaid provisions of the Social Security Act, 42 U.S.C. § 1396 et seq., and the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq ("ADA"). Named as defendants were the Governor of Massachusetts, the Commissioner of DMR, the Secretaries of the Massachusetts Executive Office of Administration and Finance and Executive Office of Health and Human Services, and the Commissioners of the Departments of Public Health, the Massachusetts Rehabilitation Commission and the Division of Medical Assistance ("DMA") (collectively "Defendants").

Rolland v. Cellucci, 191 F.R.D. 3, 5 (D. Mass. 2000).

The Amended Complaint identified the named plaintiffs:

Plaintiffs Loretta Rolland, Terry Newton, Bruce Ames, Frederick Cooper, Margaret Pinette, Leslie Francis, and Timothy Raymond all have mental retardation or other developmental disabilities. Each of these individual plaintiffs was unnecessarily admitted to and is inappropriately confined in a nursing facility, in contravention of

his/her preferences and the professional judgment of the Department of Mental Retardation's (hereafter "DMR") contracted clinical review team. Despite their disabilities, many of the individual plaintiffs are able to learn, work, participate in various community activities, and become contributing members of society.

App. 0075.

The Amended Complaint described the putative class:

The plaintiff class consists of those individuals with mental retardation and other developmental disabilities who are inappropriately confined in nursing facilities and are not receiving medically necessary services in the most integrated community settings consistent with their individual needs.

* * * * *

None of the class members need to remain in these facilities. Instead, the medically necessary services to which these persons are entitled can and must be provided, under applicable federal law, in integrated community settings.

App. 75-76.

Although the Complaint sought to define a class of individuals who were *inappropriately* placed in nursing homes and who did not need to remain in those facilities, the District Court certified a much broader class. Specifically, the District Court certified the class to consist of “adults with mental retardation and other developmental disabilities in Massachusetts who resided in . . . nursing facilities on or after October 29, 1998, or who are or should be screened for admission to nursing facilities.” Order of Class Certification, App. 128.

In 2000, the case settled. The District Court described the 2000 settlement as follows:

The Settlement Agreement establishes a presumption in favor of community placement. (Settlement Agreement (Docket No. 115), P 3.) The agreement makes clear that “it is DMR’s policy that its services and supports for nursing home class members should be appropriate to their needs and abilities, and that the provision of services in a community setting is desirable whenever it is appropriate for the individual's circumstances.” (Id.) Accordingly, the Settlement Agreement commits DMR to resolve whether a community setting is appropriate for each class member and to offer such services “unless DMR, in its professional judgment, determines that the individual cannot ‘handle and benefit from’ a community residential setting.” (Id. (quoting *Olmstead v. L. C., ex rel. Zimring*, 527 U.S. 581, 119 S. Ct. 2176, 2179, 144 L. Ed. 2d 540 (1999)).) The exclusive factors which DMR can consider in rebutting this presumption include a consideration of the advantages of community living and the possible safety risks in transferring individuals to community settings. DMR’s decisions are subject to appeal by class members and, under certain conditions, subject to review by an independent expert.

The Settlement Agreement also establishes a schedule of the number of individuals to be placed in community residences in fiscal years 2000 through 2007. These numbers vary from 75 class members during fiscal year 2000, to 175 class members for each of fiscal years 2001 and 2002, and up to 150 class members in each of the ensuing five fiscal years. Only when Defendants have completed these placement requirements will they have no obligation under the Settlement Agreement to provide additional residential supports.

The Settlement Agreement also ensures that no class member will be involuntarily transferred from a nursing facility to the community. Thus, “Defendants are not required to provide residential and other supports to a person with mental retardation or other developmental disabilities if the person knowingly objects to the provision of such supports.” (Settlement Agreement, P 4(f).) The objection shall be honored, however, only after the person: “(1) has an opportunity to express his or her interests and preferences and any ties he or she might have to a particular community or locale; (2) has been informed of the residential supports in a manner that reflects the person's ability to understand and communicate information; and (3) is provided the opportunity to visit and observe similar community settings.” (Id.)

Even then, Defendants must re-offer the choice for a period of three years.

Rolland v. Cellucci, 191 F.R.D. at 7 (emphasis added).

After the 2000 settlement, there was a protracted dispute about whether the defendants were complying with the Settlement Agreement approved by the District Court. The parties conducted extensive discovery regarding compliance, the Court held a trial that lasted several days, and the parties engaged in mediation.

A series of orders were entered by the District Court, requiring defendants to provide “active treatment” to class members in accordance with the 2000 settlement. See Rolland v. Cellucci, 198 F. Supp. 2d 25 (D. Mass. 2002). That requirement was affirmed by this Court. Rolland v. Romney, 318 F.3d 42 (1st. Cir. 2003).

Defendants continued to fail to meet their obligations under the settlement and subsequent orders. On April 10, 2007, the Court concluded that defendants had failed to comply with their obligations under the earlier Settlement Agreement. App. 166. The court ordered the parties to jointly select a Court Monitor who was responsible for reviewing the services provided to each class member and ascertaining whether such services were in compliance with defendants’ obligations. App. 168. On July 10, 2007, the Court appointed Lyn Rucker as Monitor.

On March 21, 2008, the parties submitted a notice to the Court of a proposed settlement. The Court granted the parties' Motion for Preliminary Approval of Settlement Agreement and ordered that notice be provided to class members.

From May 8-14, 2008 several letters in opposition to the proposed settlement were submitted to the Court. On May 12, 2008, an opposition was filed on behalf of more than 40 individuals who currently reside at Seven Hills Pediatric Center, Groton MA. ("Seven Hills").

The Court held a "fairness hearing" on May 22, 2008. On June 16, 2008, the Court approved the settlement. This appeal followed.

A motion to decertify the class was filed by Appellants on May 20, 2008. That motion was denied on August 19, 2008.

The Appellants ("Appellants" or "Groton Plaintiffs") now request that this Court vacate the Court's Order approving the settlement.

STATEMENT OF RELEVANT FACTS

A. The Parties

i. Groton Plaintiffs

The Groton Plaintiffs are more than 40 individuals who currently reside at Seven Hills. Seven Hills provides skilled nursing care for medically complex children and adults from throughout Massachusetts. The Groton Plaintiffs are individuals with profound mental retardation and developmental disabilities and are thus presumed to be members of the Plaintiff class. They also suffer from significant, severe multiple medical conditions. The Groton Plaintiffs appear through their parents/guardians. Typical Groton Plaintiffs are described by their parents:

[L.P., age 33,] suffered profound brain injury and a large number of accompanying medical complications including a seizure disorder and cerebral palsy, at birth in 1975. Her cognitive level is that of a newborn, she is functionally blind, cannot speak or understand speech, and is incapable of performing any voluntary bodily function (locomotion, dressing, feeding herself). She requires round-the-clock nursing care, which she has lovingly received at her nursing home for 24 years. She must be moved by others in a wheelchair, is fed by tube, is bathed, dressed, etc. by nursing staff.

Letter from L.P.'s father to the Court, dated May 7, 2008. Supp. 0002.

[E.V., age 27,] was born with Cerebral Palsy, rendering him a quadriplegic, tube fed, non-verbal, mentally retarded, helpless child. The list of his medical complications could fill a whole page. His early years consumed countless days at Children's Hospital, Boston where he is well know to most of the doctors and staff. At age 17, he

suffered a near fatal massive brain injury due to poor care after a surgery from which he will never recover.

Letter from E.V.'s parents to the Court dated May 9, 2008. Supp. 0044.

D.B. has Cystic Fibrosis, Cerebral Palsy, and Diabetes. He can not walk, talk, or feed himself. He is fed through a tube with the appropriate enzymes to break down the food so he can absorb the nutrients to keep him alive. He is checked daily and more than likely at every shift for fever or infection because his lungs are not normal and pneumonia is a real threat to his life. He is checked for sugar levels several times a day and given the necessary insulin. He is unable to control any member of his body- arms, hands, head, legs, feet, etc. To move D., you need two people, or a lifting device. He can not be left alone for prolonged periods. He has to be strapped into his wheel chair and his bed has side restraints.

Letter from D.B.'s parents dated May 8, 2008. Supp. 0009.

While the Groton Plaintiffs have distinct and individual needs, they share a number of characteristics. Each was admitted to Seven Hills after an exhaustive evaluation process. Each has multiple, severe medical conditions.

ii. Named Plaintiffs

In contrast to the Groton Plaintiffs, the named plaintiffs function at a much higher level. Almost all of the class members, except those living in specialized homes like Seven Hills, were living in ordinary geriatric nursing homes when the case was commenced:

33.... There are approximately 1,600 residents over the age of twenty-two with mental retardation and other developmental disabilities in nursing facilities throughout Massachusetts, 60. ...1,473 individuals with mental retardation and other developmental disabilities ... are confined in geriatric nursing facilities.

Amended Complaint at 11 and 18, App. 0084 and 0091. From the Amended Complaint, it appears that when the case was commenced in 1998, all of the named plaintiffs resided in ordinary skilled nursing homes, as opposed to facilities like Seven Hills, specifically designed to care for profoundly disabled individuals who also suffer from multiple complex medical conditions. Amended Complaint at 32-42, App. 105-115.

The Amended Complaint describes the class representatives at pages 33-43, App. 106-16:

Loretta Rolland graduated from high school. She enjoyed living in the community for the first fifty years of her life and is eager to return there. She is able to communicate her needs and desires.

Terry Newton lived in a group home. She attended a day habilitation program five days per week for six years. Her Individual Service Plan (hereafter "ISP") recommends that she live in a group home with medical supports in the community. Her parents, who are her guardians, want her to return to the community.

Bruce Ames moved into the community, where he quickly learned how to live independently. He learned to cook, clean, and care for his own personal needs. He lived in his own apartment. He is independent in eating, mobility,

transfers, and toileting. When he lived in the community, he administered his own insulin shots and checked his blood sugar level. He had a job.

Frederick Cooper's PASARR review states that Mr. Cooper would be best served in a community setting outside of the nursing facility.

Margaret Pinette is able to verbally communicate her needs and desires. She enjoys bingo, listening to music, and visits several times a week with her husband.

Leslie Francis communicates through gestures, eye gazes, and short phrases. He is able to maneuver his wheelchair independently and assists in his own personal care.

Timothy Raymond is much more verbal than most of the other residents of the pediatric unit and functions at a higher cognitive level. He suffers from boredom due to lack of appropriate stimulation and opportunities for growth. Because of his cognitive, social and verbal skills, Mr. Raymond has great potential for learning and living a relatively independent life. He independently maneuvers his electric wheelchair.

B. Notice

Although this case has been pending since 1998, the Groton Plaintiffs were not informed about the case or that they were class members until 2008, after the District Court had preliminarily approved the proposed Settlement Agreement and

directed that notice be given to class members. As stated by several Groton

Plaintiffs:

The first notice we received about this case was in late April, when we received a copy of a notice about the proposed settlement and were informed that any objection to it must be filed with the Court on or before May 12, 2008.

After reading the proposed settlement, we were terrified that [our son] might be considered to be moved from Seven Hills.

With many other parents, we attended a “Parent and Guardian Informational Meeting” at Seven Hills on May 6, 2008. At the meeting, plaintiff’s counsel, counsel from DMR and other representatives from DMR explained the settlement proposal to drastically reduce the number of residents of nursing facilities.

At the meeting, we were informed for the first time that a list had been created of people who had been evaluated and were contemplated to be moved from nursing facilities into so-called community placements.

Affidavit of B.V. and F.V., Supp. 0019.

The lack of notice to appellants of the pendency of the class action case prior to the preliminary approval of the settlement meant that they had no opportunity to participate in negotiating the settlement. Instead, they were faced with an agreement which the district court had already approved on a preliminary basis and one which could only be approved or rejected, not amended. “The court cannot modify the terms of the proposed settlement; rather, the court must approve or disapprove of the proposed settlement as a whole.” Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 527 (E.D. Tex. 1995).

C. The Settlement Agreement

The Settlement Agreement ultimately approved by the District Court was clearly intended to substantially reduce the number of individual class members residing in nursing homes. The Agreement asserts that:

- a. The most effective method for providing appropriate habilitation and supports to class members is through integrated community services and supports.
- b. The provision of services in the community is the preferred method for meeting the needs of most class members.

Settlement Agreement on Active Treatment (“Settlement Agreement”) at 2, App. 0238. Appellants argued that they are not appropriate candidates for community placement because of their profound disabilities and medical needs.

The Settlement Agreement obligates DMR to place 640 people who are on the Rolland List (out of a total List membership of 666) into community placement. “During the next four fiscal years, FY 2009 – FY 2012, the defendants will place a total of 640 class members from the Rolland Community Placement List into the community....” Settlement Agreement at 5, App. 0241.

D. Groton Plaintiffs’ Opposition to the Settlement

Appellants do not want community placements because, as they argued to the District Court, their medical needs and profound physical and intellectual deficits make community placement unwise and potentially dangerous.

Accordingly, Appellants objected to the proposed class action settlement because it would have had a profound and potentially life-threatening effect on their futures. They objected on various grounds, including lack of adequate notice regarding the existence of the lawsuit or of the settlement; that the proposed settlement was not fair or in their best interest; that they should not be included in the class; that they were denied an opportunity to participate in settlement negotiations, even though their interests differed from those typical of the named class representatives; and that the settlement should include a provision allowing them to refuse community placement.¹

E. The District Court’s Approval of the Settlement

In its Order, the Court rejected the Groton parents’ objections. App. 0620.

Notably, the district court’s approval of the Settlement is inconsistent with its prior orders.

In its original class certification order, the District Court described the named plaintiffs: “In essence, each of the named Plaintiffs asserts that he or she was unnecessarily admitted to and is inappropriately confined in a nursing facility

¹ “Community Placement” is a euphemism for group homes. See Testimony of DMR Commissioner Howe, Transcript of Fairness Hearing at 38, App. 0453:

“Q...[L]et’s be clear, we’re talking, aren’t we, about group homes, in the vernacular, when we’re talking about community placement?”

A. Yes, we’re talking about group homes.”

in contravention of his or her preference. Memorandum and Order with Regard to Plaintiffs' Motion for Class Certification at 2, App. 0127 (emphasis added).

And in its order approving the 2000 settlement, the district court emphasized the importance of providing affected individuals with a choice between a community-based setting and an institutional setting. Rolland v. Cellucci, 191 F.R.D. 3, 7 (D. Mass. 2000) (“The Settlement Agreement also ensures that no class member will be involuntarily transferred from a nursing facility to the community.”). To emphasize the importance of that assurance, the court quoted from the original settlement agreement: “Defendants are not required to provide residential and other supports to a person with mental retardation or other developmental disabilities if the person knowingly objects to the provision of such supports.” Rolland v. Cellucci, 191 F.R.D. at 7 (citing Settlement Agreement, ¶ 4(f)).

In contrast, the most recent settlement agreement contains no provision whereby an affected individual can object to his or her transfer from a nursing facility to a community-based program. The only recourse is through an administrative appeal. And unlike in 2000, when the district court emphasized the importance of language in the settlement ensuring that no class member would be involuntarily transferred from a nursing facility to the community, the same court

in 2008 ignored the fact that such protective language was omitted from the most recent agreement.

According to the Court's Order approving the settlement, nothing "will require Defendants to force class members out of nursing facilities against their will." Memorandum and Order, at 5, App. 0608.

After the District Court approved the settlement, the Groton Appellants appealed to this Court.

SUMMARY OF THE ARGUMENT

The Appellants or “Groton Plaintiffs” stand in contrast to the named plaintiffs in this case in a simple but fundamental way that goes to the heart of the claims in this case. The named plaintiffs brought this case seeking to be transferred from their *inappropriate* placements in nursing homes to the community, and sought to certify a class of similarly situated disabled individuals. The Groton Plaintiffs, on the other hand, seek to *remain* in their current *appropriate* placements in nursing facilities. At bottom, the Court, in failing to account for this irreconcilable difference between Appellants and the named plaintiffs, erred when it approved a Settlement Agreement, the fundamental premise of which is the notion that all disabled individuals would benefit from community placement.

As an initial matter, the Settlement Agreement should not have been approved as a matter of law because the class certified by the Court included plaintiffs who by definition lack Article III standing. While the named plaintiffs have suffered injury by being inappropriately placed in nursing facilities, the Groton Plaintiffs have not suffered any injury in fact. Accordingly, the Court erred by failing to redefine or decertify the class.

Further, the core differences between the Groton Plaintiffs and the named representatives also render the class certification improper for failure to satisfy each of the requirements of the Federal Rule of Civil Procedure 23(a).

Commonality and typicality are lacking here because the interests of the named plaintiffs and the Groton Plaintiffs starkly conflict – the class representatives seek to transfer from nursing facilities to community placements while the Groton Plaintiffs seek to remain in a nursing facility. The named plaintiffs and plaintiffs’ counsel did not, nor could they, fairly and adequately represent the interest of Appellants. A conflict of interest plainly existed, requiring the court to either decertify the class as a whole, or create a subclass of Appellants and others similarly situated.

Also, the district court erred in finding the settlement agreement fair, reasonable and adequate, as it is required to do under Rule 23(e). The agreement deprives Appellants and other class members the right – guaranteed by federal law – to reject community placement and remain in a nursing facility. Under the Nursing Home Reform Act and cases interpreting it, the Groton Plaintiffs have a right to reject community placement. Because the settlement deprives the Groton Plaintiffs of this right, the district court erred in approving the agreement. In addition, the Agreement was not fair, reasonable and adequate where it ratified the “Rolland Community Placement List,” because it was created without any input

from or notice to the Groton Plaintiffs, was created prior to the district court's approval of the Agreement, in contravention of the specific terms of the settlement agreement, and was not created under the seven criteria set forth in, and required by, the agreement. Finally, the agreement was not fair, reasonable or adequate when it required that no fewer than 640 people on the list be transferred to community placements. This blanket quota fails to protect any plaintiff from being transferred from a nursing facility to a community program against their will.

Each of these reasons, standing alone, is sufficient to render approval of the settlement erroneous.

ARGUMENT

I. THE STANDARD OF REVIEW FOR APPROVAL OF CLASS ACTION SETTLEMENTS

In a class action, the district court is required to approve a settlement. Fed. R. Civ. P. 23(e). Before a district court approves a proposed settlement, the court must determine whether the requirements of Federal Rule of Civil Procedure 23 – numerosity, adequacy, commonality, and typicality – have been met with regard to class certification and adequate notice to class members. Amchem Prods. v. Windsor, 521 U.S. 591,613 (1997). See also In re IKON Office Solutions, Inc. Sec. Litig., 209 F.R.D. 94, 100 (E.D. Pa. 2002).

Even where all the requirements for class certification have been met, Federal Rule of Civil Procedure 23(e) provides that a district court may only

approve a settlement where the “proposed settlement is fundamentally fair, adequate, and reasonable.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998).

While the decision to grant or deny approval of a settlement lies within the discretion of the trial court, courts have recognized that a court should not give “rubber stamp approval” to a proposed settlement. Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974). Indeed, it is well-settled that district judges presiding over proposed class settlements are “expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole” because “class actions are rife with potential conflicts of interest between class counsel and class members.” Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) (collecting and citing cases). District judges must therefore “exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions” to consider whether the settlement is “fair, adequate, and reasonable, and not a product of collusion.” Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279 (7th Cir. 2002).

Indeed, the district court judge essentially functions as “a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.” Id. at 280. See also In re Cendant Corp. Litigation, 264 F.3d 201, 231 (3d Cir. 2001); Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987);

Stewart v. General Motors Corp., 756 F.2d 1285, 1293 (7th Cir. 1985). As a general principle, a district court should evaluate, among other things, the probability of plaintiff prevailing on its various claims, the expected costs of future litigation, and hints of collusion. See, e.g., Mars Steel Corp. v. Cont'l Illinois Nat'l Bank & Trust Co., 834 F.2d 677, 681-82 (7th Cir. 1987); Reynolds, 288 F.3d at 283-85.

Moreover, although decisions granting or denying class certification are generally reviewed under the “abuse of discretion” standard, In re PolyMedica Corp. Sec. Litig., 432 F.3d 1, 4 (1st Cir. 2005), since Rule 23 contains express legal standards for class certification, an appeal of a class certification “can pose pure issues of law” which are reviewed de novo. Tardiff v. Knox County, 365 F.3d 1, 4 (1st Cir. 2004). “An error of law is, of course, always an abuse of discretion.” Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 158 (1st Cir. 2004). And mixed questions of law and fact fall along a degree-of-deference continuum, ranging from non-deferential plenary review for law-dominated questions, to deferential clear-error review for fact-dominated questions. Johnson v. Watts Regulator Co., 63 F.3d 1129, 1132 (1st Cir. 1995).

This Court reviews de novo the issue of whether a party has standing. Nyer v. Winterthur Intern, 290 F.3d 456, 459 (1st Cir. 2002) (“[w]e review issues of standing de novo”). This Court is required to consider standing, whether or not it

was raised below, as it speaks to this Court's jurisdiction over this matter. Id. (“[b]efore assessing the propriety of the magistrate judge's ruling, we must first inquire as to whether [plaintiff] had standing”).

II. THE DISTRICT COURT ERRED WHEN IT APPROVED THE SETTLEMENT AGREEMENT

A. The Court Erred by Certifying a Class that Includes By Definition Plaintiffs who Lack Standing

The District Court erred when it certified a class that includes the Groton Plaintiffs and others like them, who by definition lack Article III standing.

To meet the Article III standing requirement, a plaintiff must have suffered an "injury in fact" that is "distinct and palpable"; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990) (internal quotation marks omitted).

It is well-established that a court may not certify a class that contains members that lack Article III standing. The class must therefore be defined in such a way that anyone within it would have standing. See Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980) (affirming the denial of a plaintiff class because the definition of the class was "so amorphous and diverse" that it was not "reasonably

clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief"). See also Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (noting petitioners' argument that "exposure-only" class members lack an injury-in-fact and acknowledging need for Article III standing but turning to class certification issues first); id. at 884 (Breyer, J., dissenting) (referring to the "standing-related requirement that each class member have a good-faith basis under state law for claiming damages for some form of injury-in-fact"); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 334 (S.D.N.Y. 2003) (noting that "each member of the class must have standing with respect to injuries suffered as a result of defendants' actions").

In Adashunas v. Negley, 626 F.2d 600 (7th Circuit 1980), the court rejected on several grounds, including standing, plaintiff's attempt to certify a class strikingly similar to the class here. In Adashunas, the parents of a learning disabled minor brought a class action lawsuit against various state and local educational agency members. The plaintiff class consists of children entitled to a public education who have learning disabilities and "who are not properly identified and/or who are not receiving" special education. 626 F.2d at 603. The Court found that the class as defined could not be certified for lack of standing:

[S]ince the proposed class is so amorphous and diverse, it cannot be reasonably clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief. If the conceived injury is abstract, conjectural or hypothetical as here, instead of real, immediate or direct, the complaint fails to cite an actual case or controversy under Article III of the Constitution.

Id. at 604.

Like the class in Adashunas, the class here by definition includes plaintiffs without standing. Very simply, the Groton Plaintiffs have not suffered, and are not likely to suffer, an injury in fact. They have not been inappropriately placed in a nursing home. Rather, they are appropriately placed and have not yet suffered the injury of being transferred from a nursing home to a community-based facility. As explained above, the named plaintiffs in this case were inappropriately confined in a nursing home and sought to certify a class of plaintiffs who, like themselves, had been inappropriately placed and who were being deprived of the benefits of community placement. However, the court certified a much broader class, one that encompasses individuals who have not been deprived of anything by the state. To the contrary, they are at risk of being deprived of their appropriate placements as a result of this very lawsuit.

Because the elements of Article III standing are lacking for a number of class members as a matter of law, the court erred by approving the settlement agreement.

B. Federal Rule of Civil Procedure 23’s Requirements for Class Certification were Not Met.

Even if this Court finds that Article III’s standing requirement was met, the Court erred by failing to designate the Groton plaintiffs as a sub-class of plaintiffs in order to protect their interests in this litigation. The interests of the Groton Plaintiffs differ so significantly and so fundamentally from those of the named plaintiffs that it was error as a matter of law for the court to fail to either decertify the class, or create a sub-class.

1. Requirements for Class Certification

In order to qualify for class certification, plaintiffs in the proposed class must demonstrate that they satisfy four requirements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. See Fed. R. Civ. P. 23(a).

The numerosity requirement in Rule 23(a)(1) does not mandate that joinder of all parties be impossible – only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate. The commonality requirement is met if plaintiffs’ grievances share a common question of law or of fact. Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997) (per curiam).

Typicality “requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove

the defendant's liability.” Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001). Adequacy of representation means that the class representatives “will fairly and adequately protect the interests of the class.” Denney v. Deutsche Bank A.G., 443 F.3d 253, 267 (2d Cir. 2006) (internal quotation marks omitted).

2. The Court Was Required to Ensure that Rule 23’s Four Requirements were Met Prior to Approving the Settlement

As discussed above, it is well-settled that before a district court approves a proposed settlement in a class action, the court must determine if the requirements of Federal Rule of Civil Procedure 23 have been met with regard to class certification and adequate notice to class members. E.g., In re IKON Office Solutions, Inc. Sec. Litig., 209 F.R.D. at 100. In Duhaime v. John Hancock Mutual Life Ins. Co., 177 F.R.D. 54, 62, (D. Mass. 1997), overruled on other grounds, Ortega v. Star-Kist Foods, Inc., 370 F.3d 124 (1st Cir. 2004), the Court recognized that class certification should be revisited “[b]efore addressing the substantive fairness, adequacy and reasonableness of the settlement. . .” As recognized by the Supreme Court in Amchem Prods. v. Windsor, 521 U.S. 591, (1997), the class certification requirements of Rule 23 “demand undiluted, even heightened, attention in settlement context,” because they are “designed to protect absentees by blocking unwarranted or overbroad class definitions.” 521 U.S. at 620.

Class certification orders are inherently tentative in nature because they may be revisited at any time prior to final judgment. See, e.g., In re Breast Implant Litigation, 1992 U.S. App. LEXIS 16257 (6th Cir. 1992). Indeed, “courts are required to reassess their class rulings as the case develops.” Boucher v. Syracuse University, 164 F.3d 113, 118-19 (2d Cir. 1999) (citing F.R.C.P. 23(c)(1)); Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir.1983) (“Under Rule 23 ... [t]he district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts.”).

3. Because Rule 23’s Requirements Were Lacking, the Court Erred when it Approved the Settlement

Here, in view of the material differences between the interests of the Groton plaintiffs and the other class members, and because a federal court has the continuing responsibility to ensure that Rule 23’s requirements are met, the district court erred when it approved the Settlement where the requirements were plainly not met.

i. Plaintiffs and Plaintiffs’ Counsel Did Not Fairly and Adequately Represent the Interests of the Appellants

Fed. R. Civ. P. 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” See Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999). Adequacy must be determined independently of the general fairness review of the settlement; the fact that the

settlement may have overall benefits for all class members is not the "focus" in "the determination whether proposed classes are sufficiently cohesive to warrant adjudication[.]" Ortiz v. Fibreboard Corp., 527 U.S. 815, 858, 119 S.Ct. 2295, 2320, 144 L.Ed.2d 715 (1999) (internal quotation marks omitted).

The inquiry focuses on both the adequacy of the named plaintiffs and the adequacy of class counsel." Duhaime v. John Hancock Mutual Life Ins. Co., 177 F.R.D. 54, 63 (D. Mass. 1997). With regard to the named plaintiffs, the adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." Id. (citations omitted). This Court has defined adequacy of representation as twofold: (1) the proposed class representative must have an interest in vigorously pursuing the claims of the class, and (2) must have no interests antagonistic to the interests of other class members:

The adequacy requirement . . . entails a two-part showing: The moving party must show first that the interests of the representative party will not conflict with the interests of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation.

Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985). Selection of a class representative "whose substantial interests are not necessarily, or even probably, the same as those [whom] they deemed to represent" violates due process. Hansberry v. Lee, 311 U.S. 32, 45 (1940).

In General Telephone Electric Company of the Northwest, Inc. v. EEOC,

446 U.S. 318, 331 (1980), the Supreme Court noted:

"[T]he adequate representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class." The Supreme Court plainly concluded there that, when represented groups compete: "[t]he same plaintiff could not represent these classes."

Id.

Here, a fundamental conflict of interest exists that, as a matter of law, cannot be reconciled with Rule 23(a)(4). Specifically, there is an irreconcilable conflict between (on the one hand) the class representatives, all of whom desire community placement, and (on the other) the Groton plaintiffs, who do not want community placement, and for whom community placement may place them at a very significant risk. See Amchem Prods. v. Windsor, 521 U.S. 591, 625-26 (1997). As set forth above in the statement of facts, the Groton plaintiffs do not compare in any meaningful way with the named plaintiffs. The Groton plaintiffs are not capable of making choices about where they might want to live, with whom they might want to live, or under what conditions. They lack the cognitive ability to have any self-esteem or to worry about how they are perceived by others. They are totally dependent on caregivers for 100% of their needs. Unlike Loretta Rolland, et al., they will never speak, feed themselves or be able to move themselves from one place to another. They are not remotely like the named plaintiffs.

Accordingly, the named plaintiffs have interests directly antagonistic to the interests of other class members like Appellants, and similarly have no interest in vigorously pursuing the interests of such class members. Andrews, 780 F.2d at 130 (discussing two-fold adequacy requirement).

By refusing to recognize these irreconcilable differences between the Groton Plaintiffs and the other class members, the District Court failed to protect them from a settlement that is totally inappropriate for their unique status.

Very closely on point is Amchem, an asbestos litigation case, where a well-intentioned group achieved a national settlement conditioned upon class certification. The Supreme Court, however, found that adequacy was lacking in a case where, as here, the interests of the named plaintiffs were in stark contrast to the interests of other class members. In Amchem, the Supreme Court held that the named representatives – who had manifested injuries from asbestos exposure – could not adequately represent a class that included members who had been exposed to asbestos but had not yet shown signs of injury. Amchem, 521 U.S. at The Supreme Court reasoned that the named representatives were interested in immediate payment, whereas the exposure-only members would want an inflation-protected fund for the future. See Amchem, 521 U.S. at 626-27; see also Ortiz, 527 U.S. at 856 (“It is obvious after Amchem that a class divided between holders of present and future claims (some of the latter involving no physical injury and to

claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B)[.]”); Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001) (allowing collateral attack on class action settlement more than a decade after the settlement had been approved where absent class members had not been adequately represented and no provision had been made for the future claimants).

Construing challenges regarding typicality and adequacy, the Supreme Court in Amchem rejected the class certification, emphasizing the importance of Rule 23’s requirements in the settlement context:

“FRCP 23(a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.”

521 U.S. at 621. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985) (“Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.”).

The Supreme Court recognized the difficulties inherent in a global settlement that determined the rights of divergent groups of plaintiffs:

Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the

entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

Amchem, 521 U.S. at 627 (citations omitted) (quoting In re Joint Eastern and Southern Dist. Asbestos Litigation, 982 F.2d 721, 742-743 (2d Cir. 1992)).

The binding nature of a class action settlement on all class members means that a court must make certain that such individuals' interests are protected. See Int'l Union, United Auto., Aerospace, and Agr. Implement Workers of America v. General Motors Corp., 497 F.3d 615, 625 (6th Cir. 2007) ("Because Rule 23 is "designed to protect absentees by blocking unwarranted or overbroad class definitions," a district court must give "undiluted, even heightened, attention" to its protections before certifying a settlement-only class – one formed just for the purpose of settlement, not for litigation.") (citing Amchem).

As a result of the settlement, the class members, including but not limited to the Groton Plaintiffs, will be bound to the terms of the Settlement Agreement under principles of *res judicata*. Messier v. Southbury Training School, 183 F.R.D. 350, 353 (D. Conn. 1998) ("All members of a class will be bound by the judgment rendered in a class action, except those parties allowed to opt out."). If the Settlement is allowed to stand, they will have no right to sue the Commonwealth in the event they are not provided with placement or treatment which the Commonwealth would otherwise be required to provide. Most

importantly, they will lose their right to decline a transfer from their existing nursing home placement. See infra pp. 44-52.

As is the case here, the interests of the named plaintiffs in Amchem differed in significant respects from those of other class members.

"[N]amed parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned."

521 U.S. at 626.

Here, in its Order certifying the class, the District Court did not consider the unavoidable conflict between the Groton Plaintiffs and the other class members. The Groton Plaintiffs will not benefit from community placement and such placement carries unavoidable, unacceptable risks. The named plaintiffs claim that denial of community placement violates their fundamental rights. Given the sharp contrast between the interests of named plaintiffs and the Groton Plaintiffs, no one could properly represent the entire certified class.

The court also did not consider the possibility of a conflict of interest between Plaintiffs' counsel (and the institutional plaintiffs) and the interests of those to whom community placement is a threat, not a benefit. The court stated:

Rule 23(a)(4) requires that the representative plaintiffs fairly and adequately represent the interest of the entire class. In order to meet this requirement, Plaintiffs must satisfy two criteria: (1) the attorneys representing the class must be qualified and competent; and (2) the class representative must not have

antagonistic or conflicting interest with the unnamed members of the class. Defendants do not appear to seriously dispute that both of these elements have been met.

Memorandum and Order with Regard to Plaintiffs' Motion for Class Certification at 16, App. 0141 (emphasis added). While defendants may not have seriously disputed whether the criteria were met, the Groton Plaintiffs dispute that they received adequate representation and have a very clear dispute with the class representatives concerning community placement.

Within the certified class of hundreds of individuals, there existed diverse medical conditions, disabilities, and behavioral complexities. Defendants concede that the appellants are much more seriously impaired than the rest of the class:

The Seven Hills parents and guardians also make the important point that many of their family members are so medically compromised that they could not benefit from community placement. They are right. Patients admitted to pediatric nursing facilities like the Seven Hills Pediatric Center are among the most cognitively impaired and physically challenged children in the Commonwealth.

Defendants' Memorandum in Support of Final Approval of Settlement Agreement on Active Treatment, at 14-15, App. 0369-70. As the Supreme Court observed in Amchem:

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.

521 US at 627; 138 L. Ed. 2d at 715; 117 S. Ct. at 2251.

In this case, class counsel and the institutional plaintiffs see community placement for all as a desired end result. Amended Complaint at 3, App. 0076 (“None of the class members need to remain in these facilities. Instead, the medically necessary services to which these persons are entitled can and must be provided, under applicable federal law, in integrated community settings.”). The result has been that the concerns and unique needs of the Groton plaintiffs have been ignored. Unlike the named plaintiffs, the Groton plaintiffs are incapable of expressing their own concerns. However, their interests could have been articulated by their parents/guardians, had plaintiffs’ counsel ever spoken to them or informed them of the proposed settlement before it was negotiated.² Instead, plaintiffs counsel negotiated an agreement whereby more than half of the Groton plaintiffs were included on the Rolland Community Placement list months before they were even informed such a list existed. As to the remainder, their exclusion from the List was similarly determined without any input or knowledge from those who know them best.

² In Plaintiffs/Appellees’ Response to the Court’s September 8, 2008 Order to Show Cause at 2-3, Plaintiffs implied that the Groton plaintiffs knew about the ongoing case: “None of the Groton Plaintiffs who were then class members ... objected to the Initial Agreement.... Moreover, the Groton Plaintiffs did not challenge any aspect of the Initial Agreement during the next eight years of implementation, including its focus on community placement.” Any suggestion that the Groton plaintiffs ever had any notice about the case during the decade preceding the 2008 settlement is unsupported in the record and specifically denied by the Groton Plaintiffs.

The failure to include the Groton Plaintiffs in settlement negotiations was not inadvertent. Steven Schwartz, plaintiffs' lead counsel, has been counsel in similar cases and has similarly rejected the concerns of those to whom community placement is not an acceptable option. For example, in Brown v. Bush, 194 Fed. Appx. 879 (11th Cir. 2006), Schwartz represented class members seeking community placement in Florida. He objected to the proposed intervention of a group of individuals who were opposed to community placement. The proposed intervenors were not class members. The class consisted of "all present and future residents of DSIs [i.e. institutions] who requested community-based placements." Id. at 880.

Ironically, the Settlement Agreement in that case expressly provided that in order for an individual to be transferred to community-based services, the individual or his guardian or other authorized legal representative must sign a "choice form," indicating that the choice was voluntary. In other words, the aim of the litigation was to provide a choice of community placement to those who wished it. Brown was initiated by Schwartz in 1998, the same year the instant case was initiated. The option to decline community placement was preserved in the Brown settlement. Another of plaintiffs' counsel, Frank Laski, represented the plaintiff class in Messier v. Southbury Training School, 183 F.R.D. 350, 351 (D. Conn. 1998). In that case, plaintiffs were mentally retarded residents of a

Connecticut state institution. The relief sought included “require[ing] defendants to evaluate all residents for possible community placement regardless of the severity or nature of their disabilities.” Six hundred eleven residents sought to opt out. They wanted to opt out because they did not want to be forced into community placement.

ii. The Requirements of Commonality and Typicality Were not Met.

In addition to the clear conflict of interest precluding adequacy from being met here, Rule 23’s requirements of commonality and typicality are also lacking, for reasons similar to those discussed above. In General Telephone Electric Company of the Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982), the Supreme Court articulated the interrelationship between adequacy, commonality and typicality:

"The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining ... whether the named plaintiffs' claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements also tend to merge with the adequacy-of-representation requirement, although the latter ... also raises concerns about ... conflict of interest..."

The District Court has consistently, and wrongly, determined that these requirements of class certification were met here. When it originally certified the class, the Court stated:

Here, as discussed, while all members of the proposed class may not have the same treatment recommendations or needs, they have all allegedly suffered the same injury as a result of Defendants' policies and practices. In addition, they all seek the same remedy, specialized services and integrated community living opportunities. As described above, there are no meaningful differences among the class members on these fundamental issues.

Memorandum and Order with Regard to Plaintiff's Motion for Class Certification, dated February 2, 1999 at 18, App. 143 (emphasis added). The Court had no basis for concluding that all class members seek integrated community living opportunities. Plaintiff class counsel should have informed the court that a significant number of class members do not seek community placement and view such placement as dangerous, pointless and cruel.

Here, none of the named plaintiffs had been appropriately placed in a nursing home facility. Rather, each of the named plaintiffs "was unnecessarily admitted to and is inappropriately confined in a nursing facility, in contravention of his/her preferences...." Amended Compl. at 2, App. 0075. Despite their disabilities, many of the named plaintiffs "are able to learn, work, participate in various community activities, and become contributing members of society." *Id.* As set forth in the complaint, the "[putative] plaintiff class consists of those individuals with mental retardation and other developmental disabilities who are inappropriately confined in nursing facilities and are not receiving medically necessary services in the most integrated community settings consistent with their

individual needs.” Id. at 2-3, App. 0075-76. The named plaintiffs brought the class action “on behalf of all adults with mental retardation and other developmental disabilities in Massachusetts who are, have been, or will be inappropriately confined in nursing facilities. . .” Id. at 11, App. 0084. And, “the plaintiffs and members of the plaintiff class could live and function in an alternative community setting if they were provided with specialized support services appropriate to their needs. . .” Id. at 17, App. 0090.

In sharp contrast, the Groton plaintiffs are severely disabled, have been appropriately placed at Seven Hills, and cannot live and function in a community setting.

In its Order approving the settlement, the District Court noted the contrast between specialized pediatric nursing facilities like Seven Hills and typical geriatric nursing homes that lack the ability to provide for class members. Memorandum and Order Approving Settlement at 7, App. 0610. “Unfortunately, the relatively small number of class members who, on average, reside in skilled nursing facilities scattered throughout the state typically make it impractical to provide staff there with the necessary training regarding class members’ needs and, in turn, the full range of services which they require.” Id. Although the Court acknowledged that there are “certain pediatric nursing facilities that specialize in caring for residents with the kinds of medical, physical and cognitive challenges

faced by class members...”, *id.*, the Court erred in not recognizing that Seven Hills is one of the exceptions to the general rule, and in not giving effect to the difference between the appropriately placed Groton Plaintiffs and the inappropriately placed named plaintiffs.

Rule 23 (a) (2) requires that there be “questions of law or fact common to the class.” In fact, there are no disputes of law at issue. All parties agree that all class members are entitled to active treatment in whatever placement is appropriate to their individual circumstances. As to facts, everyone agrees that each person has unique attributes. There are no significant common facts. As set forth supra at 10-14, the Groton Plaintiffs share no significant attributes with the class representatives. As plaintiffs’ counsel stated at the Fairness Hearing, “of course people with disabilities differ, of course that may affect what treatment they need, where they might live, what their preferences are....” Transcript of Fairness Hearing at 12, App. 0427.

C. The Court Erred in Finding the Settlement Fair, Reasonable and Adequate Because the Agreement Fails to Provide a Right for Any Appellant to Reject Community Placement.

The District Court should not have approved the Settlement because the Agreement failed to provide appellants with an opportunity to reject community placement in favor of remaining in a nursing facility. Under federal law, appellants have the right to reject habitation in a community-based setting in favor

of habitation in an institutional setting. Olmstead v. L.C., ex rel. Zimring, 527 U.S. 581, 587, 601-02 (1999). See also 42 U.S.C. § 1396r(e)(7)(C) (requiring that States offer mentally retarded residents of nursing facilities who have lived in the facility for at least thirty months “the choice of remaining in the facility”). Indeed, the first settlement agreement provided appellants with a right to reject community placement, and it is inconsistent that the first settlement included such language while the most recent settlement does not.

1. The Settlement Fails to Provide Appellants with the Right to Reject Community Placement as Guaranteed by Olmstead and Federal Law

Federal law requires that a resident be given the opportunity to decline community placement. Olmstead 527 U.S. at 602; 119 S. Ct. 2176, 2188; 144 L. Ed. 2d 540, 559 (1999). See also Martin v. Taft, 2005 U.S. Dist. LEXIS 19872 at 16 (S.D. Ohio 2005) (“the court in Olmstead had held that disabled individuals have the right to decline community-based treatment.”); In re Easley, 46 Pa. D. & C.4th 374, 389, 413 (Pa. Com. Pl. 2000) (holding, under Olmstead, that the legal guardian of a mentally disabled individual had the right to block the individual’s transfer from a nursing facility to a community-based facility). Because the Settlement does not provide appellants with the right to reject community placement, the Agreement deprives appellants of rights granted by Olmstead.

Therefore, the Settlement is not fair, reasonable and adequate and should be vacated.

In Olmstead, the Court held that placement of disabled persons in community settings rather than institutional settings was required by the anti-discrimination portion (Title II) of the ADA when a State's treatment professionals have determined that community placement is appropriate, the affected individuals do not oppose the transfer, and the placement can be reasonably accommodated, taking into account the State's resources and the needs of others with mental disabilities. Id. at 587 (emphasis added). The Court emphasized that disabled individuals who do not have a desire to be treated in community-based programs have a right to reject it:

Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. See 28 CFR § 35.130(e)(1) (1998) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept."); 28 CFR pt. 35, App. A, p. 450 (1998) ("Persons with disabilities must be provided the option of declining to accept a particular accommodation.")

Id. at 602.

Furthermore, the Court recognized that for some individuals "no placement outside the institution may ever be appropriate." Olmstead, 527 U.S. at 605 (quoting Brief for American Psychiatric Association et al. as *Amici Curiae* 22-23

(“Some individuals whether mentally retarded or mentally ill, are not prepared at particular times – perhaps in the short run, perhaps in the long run – for the risks and exposure of the less protective environment of community settings”; for these persons, “institutional settings are needed and must remain available.”). Id.

Justice Kennedy’s concurring opinion in Olmstead recognized that community placement for all is neither wise nor reasonable and he recognized that extreme deference should be paid to medical professionals:

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. The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference.

* * * * *

It is careful, and quite correct, to say that it is not "the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter"

527 U.S. at 610, 119 S. Ct. at 2191-92; 144 L. Ed. 2d at 564. Driving appellants into group homes would be a similarly “tragic event”.

The settlement approved by the District Court contradicts the holding in Olmstead. While Olmstead held that disabled persons must approve a proposed move from an institutional setting to a community-based setting, the decision in this case is made by DMR personnel without requiring approval by the affected individual. Memorandum and Order re: Settlement, p. 8, App. 0611 (“community

placement will not be proposed for any individual class member unless DMR determines that all of the class member’s needs ... can be met”) (emphasis added). Therefore, under the settlement agreement, the DMR could approve transfer from an institutional setting to a community-based program over the objection of a disabled individual, which is what Olmstead sought to prevent.

2. The Nursing Home Reform Amendments Give the Groton Plaintiffs a Right to Reject Community Placement and to Remain at Seven Hills

The Nursing Home Reform Amendments (“NHRA”), 42 U.S.C. § 1396r, provide the Groton plaintiffs with the right to decline a community placement, a right the district court specifically and erroneously rejected. § 1396r(e)(7)(C)(i) (the State “must” offer mentally retarded individuals who have resided in a nursing facility for at least 30 months the “choice of remaining in the facility”); Rolland v. Romney, 318 F.3d 42, 44, 46 (1st Cir. 2003) (“we hold that the residents are endowed with a private right of action”). But see Memorandum and Order re: Settlement, p. 17, App. 620 (the right to refuse a community placement “is a right which never existed”).

The NHRA is clear – the PASARR provisions of the NHRA confer individual rights upon plaintiffs, including those plaintiffs seeking to remain in nursing facilities instead of being placed into the community. Rolland, 318 F.3d at 46; Joseph S. v. Hogan, 561 F.Supp.2d 280, 300-01 (stating that the NHRA clearly

creates rights for individual nursing facility residents, and that the provisions’
“plain purpose is to protect the rights of individuals.” The statute clearly states:

In the case of a resident who is determined, under subparagraph (B), not to require the level of services provided by a nursing facility, but to require specialized services for mental illness or mental retardation, and who has continuously resided in a nursing facility for at least 30 months before the date of the determination, the State must, in consultation with the resident's family or legal representative and care-givers.... offer the resident the choice of remaining in the facility or of receiving covered services in an alternative appropriate institutional or noninstitutional setting....

§ 1396r(e)(7)(C)(i)(II).

The Groton Plaintiffs satisfy the requirements of § 1396r(e)(7)(i)(II) – they require specialized services for mental retardation and they will have continuously resided in a nursing facility for at least 30 months prior to any determination by the State that they do not require the level of services provided by a nursing facility.

See, e.g., Voss Aff. at 1, Supp. App. 0019 (son resided at Seven Hills “since November 2001”); Tseng Letter, Supp. App. 0002 (Daughter a resident for 24 years); letter of Martha Sloane-Chan and John K. Chan Supp. App. 0025 (in May 2008, son had resided at Seven Hills “for more than 10 ½ years.”); letter from Fran Joncas, Supp. App. 0039 (daughter a resident since 1978). The Groton Plaintiffs are concerned that the State will determine that their children, while requiring specialized services, do not require the level of service provided by a nursing facility. They simply sought to have in the Settlement Agreement

language tracking federal law allowing them to choose to remain in a nursing facility even if the State determined that they should move to a community placement.³

This court, in an earlier opinion in this case, recognized the applicability of the NHRA to the class members in this case, and recognized that the NHRA provided the Groton Plaintiffs the right to decline a transfer to a community placement:

For mentally retarded individuals who were already living in nursing homes at the time of the NHRA's enactment, the statute required states to institute the same two-faceted PASARR screening process. *Id.* § 1396r(e)(7)(B)(ii). When then-current residents were found not to require nursing facility levels of care, the statute required states to place them elsewhere, with the exception that those residents who had lived in a nursing care facility for at least thirty months had the option to remain in residence. *Id.* § 1396r(e)(7)(C). For all residents found *not* to require nursing facility care, states were explicitly required to provide all needed specialized services, regardless of whether the residents remained housed in nursing facilities. *Id.*

Rolland v. Romney, 318 F.3d 42, 44, 46 (1st Cir. 2003) (emphasis added).

Accordingly, while there may be no right for an individual to choose to reside in a particular facility, once in a nursing facility, an individual who requires special services for mental retardation must not be forced against

³ In fact, the previous version of the Settlement Agreement did have language providing this choice, but for reasons unknown to the Groton plaintiffs, the most recent version of the Settlement Agreement does not contain that earlier language.

his will to leave it. Section 1396r(e)(7)(C)(i)(II). The district court missed this critical distinction and mischaracterized the right the Groton plaintiffs seek to assert. In approving the Settlement Agreement, the district court concluded that “an absolute right to refuse a community placement... is a right which never existed and, therefore, is not being taken away. In short, neither federal nor state law gives class members the right to reside in a particular facility.” Memorandum and Order, at 17, App. 620. This is an incorrect statement of both the law and what the Groton plaintiffs sought in the Settlement Agreement. The Groton plaintiffs sought what federal law already provided – the choice to remaining in the nursing facility in which they have resided, in most cases for many years. They do not seek to reside in a particular facility; they simply seek the ability to choose to remain where they are.

Consequently, the District Court erred when it stated that there is no right for class members to refuse community placement. Memorandum and Order re: Settlement, at 17, App. 0620.

The plaintiffs originally recognized the rights of the Groton Plaintiffs to choose to remain in their homes. The Amended Complaint, recognizing the applicability of the NHRA, stated:

“Long-term residents who have continuously resided in a nursing facility for at least thirty months must be given the choice of receiving

these specialized services while remaining in the facility or receiving the services in an alternative community setting. 42 U.S.C. ' 1396r(e)(7)(C)(i)(II); 42 C.F.R. ' 483.118(c)(1)(i)." Amended Complaint, at 19, App. 0092.

Count V alleges that defendants deprived class members of "freedom of choice:"

1. Under federal Medicaid law and the assurances made by the defendants in the Massachusetts HCBW, individuals with mental retardation and other developmental disabilities have the freedom to choose whether to receive Medicaid services in a nursing facility, HCBW program, PCA program or an ICF/MR.

Id., App. 0119.

In permitting the named plaintiffs to omit from the settlement the right to object to a transfer from a nursing facility to a community-based program, the district court abrogated its "special responsibility" in class actions to ensure that the representative party does not enter into a settlement that unfairly prejudices members of the class he seeks to represent. Shelton v. Pargo, Inc., 582 F.2d 1298, 1306 (4th Cir. 1978) (stating that the district court has "supervisory power over and ... special responsibility in actions brought as class actions"). See also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab Litig., 55 F.3d 768, 804-19 (3d Cir. 1995) (stating that courts should "withhold approval from any settlement that creates conflicts among the class").

Here, the named plaintiffs apparently had no interest in retaining in the Settlement the right to object to a transfer from a nursing facility to a community-based program. The lack of such a right prejudices the appellants, for they seek the

ability to choose whether to stay in a nursing facility or be placed in a community-based program. Therefore, the district court failed to exercise its special responsibility to the non-named plaintiffs by not requiring that the Settlement provide appellants with the ability to choose between a nursing facility and a community-based program.

D. The Court Erred in Finding the Settlement Fair, Reasonable and Adequate when the Agreement Ratified the “Rolland Community Placement List” which had been Created Prior to Submission of the Settlement Agreement to the Court without any input from or notice to Appellants and in Contravention of the Specific Terms of the Settlement Agreement.

The District Court erred in finding the settlement fair, reasonable and adequate where the agreement provided that defendants would create the “Rolland Community Placement List,” based on specific criteria, when in fact that list had already been created.

The Settlement Agreement provides that:

The defendants immediately will create a Rolland Community Placement List. Class members in nursing facilities will be included on this List if, in DMR’s professional judgment and subject to review by the Court Monitor, DMR determines that the individual can benefit from community living.

Settlement Agreement, at 3, App. 0239 (emphasis added).

But in fact, the Rolland Community Placement List had already been created by The Department of Mental Retardation (“DMR”): “With respect to individuals living in nursing facilities as of November 1, 2007, DMR has identified 666 class

members who are recommended for community placement. These individuals will immediately be placed upon the Rolland Community Placement List.” Settlement Agreement at 5, App 0241. The Settlement approved by the Court thus ratified a list that had been previously created, in direct contravention of the terms of the Settlement Agreement.

The creation of the List was not made by using the seven criteria set forth in the Settlement Agreement at 3. App. 0239. There is no evidence that supports any inference that any of the criteria were used. No one spoke to parents/guardians or clinicians. Instead, as Commissioner Howe testified, DMR officers responsible for coordination of services reviewed clinical records. Transcript of Fairness Hearing at 27-28, App. 0442-43. The list had been created without any input from or notice to Appellants. When Appellants filed their opposition to the Settlement, thirty-one class members residing at Seven Hills were already on the Rolland list. Affidavit of B.V. and F.V., Supp. 0020.

The District Court was wrong when it interpreted the Settlement Agreement to mean that placement on the List is tentative. In its Order Approving the settlement, it said:

In any event, as the parties took great pains to explain at the fairness hearing, Defendants’ preliminary decision that certain class members may be appropriate for community placement is by no means final. That decision is merely a tentative determination that a transition services evaluation is warranted in an individual case. Moreover, as the parties have articulated, nothing in the proposed Agreement

anticipates that class members could be forced out of nursing facilities against their will.

App. 0618. The Court no doubt relied in part on testimony by DMR

Commissioner Howe, who said much the same thing. Transcript of Fairness

Hearing at 27, App. 0442. However, the Settlement Agreement is clear, in that

once a person is placed on the Rolland Community Placement List, he or she will

be transferred to community placement and cannot be removed from the List

unless there is a change in circumstances and approval by the Court Monitor.:

If, because of changed circumstances, DMR determines, based upon the criteria set forth in ¶ 4 above, that a class member would no longer benefit from community living, DMR may remove the individual from the List. DMR will notify the Court Monitor within thirty days of such removal, so that the Monitor can promptly review the class member and indicate if she concurs in this decision.

Settlement Agreement at 5, App. 0241.

Statements by the DMR Commissioner or anyone else cannot change the terms of the Agreement, entered as an order of the court. Moreover, there is no doubt that the placement of individuals on the List is largely dispositive of ultimate placement, because the basis for the quota of 640 was the number of people on the List:

Q. Where did the number 640 come from? Was that a negotiated number as part of the process that led to the settlement?

A. No, it really was a number that derived from assessment of the class as we knew it at the time.

Q. So the list, if you will, came up with approximately that number of names, and that's why it's 640 as opposed to 240 or 740 or some other number?

A. Correct.

Q. And that list was based on people's review of records and their personal knowledge of the people involved?

A. Correct.

Q. As opposed to any sort of input from parents or guardians?

A. Right.

Howe Testimony, Transcript of Fairness Hearing at 41-42, App. 0456-57.

Even more disturbing is the fact that the seven criteria need never be considered. After describing the seven criteria to be used for placement on the List, the Agreement states: "This standard only applies in determining which individuals will be identified for inclusion on the "Rolland Community Placement List." Settlement Agreement, at 3, App. 0239. Thus, the list of seven criteria is a complete sham. It appears to provide for a careful deliberative process leading to appropriate placement. In fact, it means nothing and the decisions as to placement have already been made.

E. The Court Erred In Finding the Settlement Fair, Reasonable and Adequate when the Agreement Requires that 640 People be Placed in Community Placements.

The District Court erred when it approved a Settlement Agreement that requires 640 individuals to be placed in community-based programs without providing for the possibility that there may be fewer than 640 people who would be appropriately placed into community placements. Indeed, the court approved an

Agreement that creates a numerical quota, provides insufficient security for the Groton plaintiffs, and creates an incentive that encourages the defendants to neglect the interests of the Groton Plaintiffs.

The Settlement Agreement provides insufficient security for the Groton Plaintiffs because it creates a quota requiring defendants to place 640 people into community-based programs and neglects the possibility that there are not 640 people who would be appropriately placed in community placements.

During the next four fiscal years, FY 2009 – FY 2012, the defendants will place a total of 640 class members from the Rolland Community Placement List into the community with appropriate residential and supports, through a combination of new, base resources or enhanced base resources.

Settlement Agreement at 5, App. 0241. The Settlement, however, contains no provision to protect against the possibility that there may be fewer than 640 people for whom community-based programs are appropriate. See id. at 5-7, App. 0241-43. Instead, the Settlement provides a blanket quota mandating community-based placement without protecting the Groton plaintiffs (or anyone else) from being transferred from their nursing facility to a community-based program against their will. Cf. United States v. Arkansas, 2007 WL 2609583, at *1 & n.2 (E.D. Ark. 2007) (indicating disfavor for quotas by noting that the court struck a provision for a numerical quota before approving the settlement agreement in an employment discrimination suit).

Moreover, the Settlement Agreement provides an incentive for the defendants to transition all 640 individuals on the Rolland Community Placement List to community-based programs. The agreement states that when the defendants have completed community placements, they will have no further obligations under the agreement.

When the defendants have completed the community expansion and transition requirements described above, including the placement of at least 640 individuals from the Rolland Community Placement List, they shall have no further obligation under this Agreement to provide additional residential supports.

Settlement Agreement, at 6, App. 0242. This incentive favors the named class members, who seek to facilitate a rapid and complete transition to community placements, over the Groton Plaintiffs, who seek to remain in their institutional placements. The agreement's quota and accompanying incentive structure sacrifices the Groton Plaintiffs' interests in favor of the named plaintiffs' interests. Moreover, it potentially harms class members who are otherwise entitled to community placement and who want it, but who are not among the first 640 chosen for placement.

Therefore, as discussed above, the district court failed to fulfill its "special responsibility" to ensure that the named class members do not seek a settlement agreement that unfairly prejudices the non-named plaintiffs. See Supra II.C.2. Indeed, if left to stand, the Settlement Agreement would fail to provide a

meaningful opportunity for Appellants to establish the inappropriateness of community placement. Instead, it would establish community placement as a *fait accompli* for almost all of those on the Rolland List (*i.e.* 640 of 666). It provides no mechanism for resolving a situation where fewer than 640 individuals either want to receive community placement or are determined to need it.

Instead of requiring the defendants to simply obey the existing law, and comply with previous orders of the district court, the settlement creates two classes of individuals who will be treated differently. The first group is 640 people who will receive community placement. The second is comprised of the remaining class members who will not receive community placement, whether or not any of them are entitled to such placement under existing law. Potentially, some Groton plaintiffs will receive community placement against their will, while other class members who need and want community placement will not receive it because they aren't among the 640.

CONCLUSION

For the foregoing reasons, the Groton Plaintiffs respectfully request that this Court vacate the District Court's Order approving the class settlement and remand with instructions to permit the Groton plaintiffs to be separately represented and to participate in any additional proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,862 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 1997 in size 14 Times New Roman.

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