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17
18 IN THE UNITED STATES DISTRICT COURT
19 FOR THE NORTHERN DISTRICT OF CALIFORNIA

20 CHARLES DAVIS, et al.

21 Plaintiffs,

22 vs.

23 CALIFORNIA HEALTH AND HUMAN
SERVICES AGENCY (CHHS),

24 Defendants.

) Case No.: C00-2532 SBA

) CLASS ACTION

) DATE:

) TIME:

) PLACE:

26 **JOINT NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF**
27 **CLASS SETTLEMENT AGREEMENTS, DIRECTING NOTICE TO THE CLASS, FOR A**
28 **SCHEDULING ORDER AND FAIRNESS HEARING, AND FOR FINAL APPROVAL OF**
SETTLEMENT AGREEMENTS; MEMORANDUM OF POINTS AND AUTHORITIES

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5. Final approval of the Class Action Settlement Agreement following the Fairness Hearing.

Respectfully submitted,
PROTECTION AND ADVOCACY, INC.
DISABILITY RIGHTS EDUCATION AND
DEFENSE FUND
AARP FOUNDATION LITIGATION
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 This action was brought by a plaintiff class consisting of individuals with disabilities and the
4 Independent Living Resource Center of San Francisco ("Plaintiffs") against the City and County of
5 San Francisco ("Defendant San Francisco") and the California Health and Human Services Agency,
6 Grantland Johnson, California Department of Health Services, Diana Bonta; California Department
7 Of Social Services, Rita Saenz, California Department of Mental Health, Stephen Mayberg,
8 California Department of Aging and Lynda Terry ("State Defendants"), collectively "Defendants,"
9 alleging that Defendants violated the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et*
10 *seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, the Medicaid Act, 42 U.S.C. § 1396 *et*
11 *seq.*, the Nursing Home Reform Act, 42 U.S.C. § 1396r *et seq.*, and 42 U.S.C. § 1983. Plaintiffs
12 claim that Defendants have failed to properly assess for, inform of, and ensure that class members
13 are offered and provided with home and community based long-term care services in the most
14 integrated setting appropriate to their needs. Plaintiffs claim that as a result, class members are, or
15 are at risk of being, unnecessarily institutionalized at Laguna Honda Hospital and Rehabilitation
16 Center ("LHH"). All defendants have denied these allegations.

17 Plaintiffs and Defendants have engaged in substantial settlement negotiations and have
18 reached agreement among themselves regarding significant class claims. Plaintiffs and Defendants
19 have further agreed to dismiss the remaining claims without prejudice in order to enable Defendant
20 San Francisco to implement the Settlement Agreement and to enable Plaintiffs to refile the
21 remaining claims at a later date. The original executed Settlement Agreement between Plaintiffs and
22 Defendant San Francisco as approved by the parties is submitted herewith as Exhibit 1 to the
23 accompanying Declaration of Kim Swain ("Swain Declaration")¹. The original executed Settlement
24 Agreement between Plaintiffs and State Defendants as approved by the parties is submitted herewith
25 as Exhibit 2 to the accompanying Swain Declaration. By this motion, the parties seek:

26
27
28 ¹ The Swain Declaration attached here is not a pleading submitted jointly by all parties.

1 settlement agreement, Plaintiffs have agreed to dismiss the entire case without prejudice. After July
2 31, 2004, Plaintiffs will reinstitute all or part of the case, as described below in Section III.

3 Plaintiffs and State Defendants have agreed to settle that portion of the case involving Pre-
4 Admission Screening and Resident Review (PASRR) evaluations of class members. All claims
5 against the State Defendants will be dismissed without prejudice until State Defendants comply with
6 the terms of the Settlement Agreements as described in Section IV. At such time, claims related to
7 PASRR will be dismissed with prejudice. Please note that the following is a summary and the
8 attached Settlement Agreements, Exhibits 1 and 2 and their accompanying Exhibits and Attachments
9 contain the specific provisions of the Agreements and are incorporated herein by reference.

10 **III. SETTLEMENT AGREEMENT BETWEEN PLAINTIFFS AND SAN FRANCISCO**

11 **A. Terms of the Procedural Agreement (“Settlement Agreement”)**

12 1. Defendant San Francisco will establish a Targeted Case Management (“TCM”)
13 Program by February 1, 2004, and conduct other activities as described in Exhibit A to the
14 Settlement Agreement between Plaintiffs and Defendant San Francisco² or notify Plaintiffs in
15 writing within 10 days after a decision has been made, but no later than February 1, 2004, that
16 Defendant San Francisco has decided not to establish the TCM unit in accordance with Section 3.0-
17 3.4 of Exhibit A.

18 2. Plaintiffs will request that the Court dismiss without prejudice all claims against San
19 Francisco (Claims 1, 2, 4, 5 and 12) in the Third Amended Complaint.³ The Agreement establishes
20 terms and procedures for a dismissal with prejudice of claims relating to assessment procedures
21 (Claims 1, 4 and 12 of the Third Amended Complaint); and provides for postponing the re-filing of
22 the community integration claims (Claims 2, 5 and 11) until the implementation of the TCM
23 Program so that they can be refiled based on pertinent facts at the time, after July 31, 2004 or sooner
24

25
26 ² Unless otherwise indicated, all further references to “Exhibit A” refer to Exhibit A to the
27 Settlement Agreement between Plaintiffs and Defendant San Francisco, attached hereto as Exhibit
28 1 to the Swain Declaration.

³ Unless otherwise indicated, claim numbers refer to claims brought under the Third Amended
Complaint, filed herewith as Exhibit 4 to Swain Declaration.

1 if San Francisco informs Plaintiffs that it will not establish the TCM Program.

2 3. The Court will retain jurisdiction to (1) preside over San Francisco's motion for
3 compliance with the Settlement Agreement on or before July 31, 2004; (2) enable the parties to hold
4 monthly progress meetings with Magistrate Judge Chen; and (3) enable Magistrate Judge Chen to
5 monitor and enforce reporting requirements (as set forth in Sections 4.4-4.5 of the Settlement
6 Agreement) prior to the motion for compliance.

7 4. Defendant San Francisco will file a motion to establish compliance with the terms
8 contained in Exhibit A ("Motion for Compliance") no later than July 31, 2004. Compliance will
9 mean compliance with each section and subsection of Exhibit A and the reporting requirements set
10 forth in sections 4.4-4.5 of the Settlement Agreement.

11 5. The parties agree that no judgment will be entered on the dismissal without prejudice
12 and that judgment will only be entered after there is a dismissal with prejudice and then only as to
13 the claims subject to this Agreement (Claims 1, 4 and 12).

14 6. If Defendant San Francisco establishes at the hearing on its Motion for Compliance
15 that each term of Exhibit A is satisfied, Plaintiffs agree to file a dismissal with prejudice as to those
16 claims encompassed by the Settlement Agreement that relate to assessment (Claims 1, 4 and 12)
17 under the Third Amended Complaint. This dismissal with prejudice shall not affect Plaintiffs' right
18 to pursue claims 2 and 5 against San Francisco.

19 7. The parties have agreed to a proposed notice to the class, which is contained in
20 Exhibit 3 to Swain Declaration. The parties agree that distribution of the notice will be as follows:
21 Defendant San Francisco will translate the notice into Spanish and Chinese writing and alternative
22 formats (*e.g.* audio cassette) within 14 days and provide the translated notice to Plaintiffs upon
23 completion. Plaintiffs will proofread and provide comments to San Francisco within 14 days.
24 Defendant San Francisco will distribute the notice to all class members at LHH. San Francisco
25 will publish a copy of the notice at LHH in the Administrative Office and on each floor of the
26 LHH Main Building and Clarendon Hall and at SFGH. San Francisco will also publish the notice
27 in the San Francisco Chronicle for 2 consecutive days. For at-risk class members, not identified at
28 the time of the initial notice, a copy of the notice, in the appropriate translation or alternative

1 format, if necessary, will be provided within three days of the individual's being identified as a
2 class member. As indicated above, this form of notice is adequate to provide notice to the class and
3 complies with the due process requirements of F.R.C.P. Rule 23.

4 **B. Substantive Settlement Agreement ("Exhibit A")**

5 1. By February 1, 2004, Defendant San Francisco agrees to implement a Targeted Case
6 Management ("TCM") Program within the San Francisco Department of Public Health (DPH) to
7 conduct screening, assessments, service/discharge planning and ongoing case management for class
8 members, as set forth in section 3.0 of Exhibit A. The TCM Program will be composed of nurses
9 and social workers who will report to the Placement Division of Community Programs at DPH.

10 2. The screening, assessments and service/discharge planning will be consistent with the
11 Division of Community Program's goal to place class members in the most integrated setting
12 appropriate for their needs. Further, a major component of the Division's work is to avoid
13 unnecessary institutionalization and assure appropriate utilization of hospital and nursing home
14 resources by promoting appropriate community-based alternatives. The nurses and social workers in
15 the TCM Program shall not be employees of San Francisco General Hospital ("SFGH") or LHH.

16 3. Staff of the TCM Program will carry an average caseload of no more than 15
17 individuals at a time during the calendar year. "Average Caseload" is the total number of clients in
18 the case manager's active caseload during the year divided by 12. Staff will conduct screening,
19 assessment, service/discharge planning, and ongoing case management services to eligible class
20 members as appropriate.

21 4. By February 1, 2004, San Francisco shall begin to screen, assess and develop
22 service/discharge plans as appropriate for all at-risk class members in accordance with the agreed-
23 upon protocols and procedures, as set forth in Section 4.3 of Exhibit A.

24 5. By February 1, 2004, San Francisco shall begin to screen and assess all current LHH
25 residents, and develop service/discharge plans as appropriate, in accordance with the agreed-upon
26 protocols and procedures as set forth in Section 4.4 of Exhibit A. At least 50 percent of all current
27 LHH residents who have not been previously screened by the TCM Program shall be screened,
28 assessed, and provided with service/discharge planning services as appropriate, by the TCM

1 Program by July 31, 2004. All current LHH residents shall be screened and assessed, and provided
2 with a service/discharge plan, as appropriate, by the TCM Program by February 5, 2005.

3 6. By December 1, 2003, Defendant San Francisco shall develop and provide to
4 Plaintiffs' counsel protocols and procedures by which class members are screened to determine
5 eligibility for TCM Program assessment, service/discharge planning, and ongoing case management
6 services as set forth in Section 4.5 of Exhibit A. Plaintiffs' counsel will have an opportunity to
7 provide written comments to Defendant San Francisco for consideration within 14 days of receipt.

8 7. Upon screening, or as soon as practicable thereafter, the TCM Program will provide,
9 and document provision of, information about home and community based (HCBS) waivers and
10 refer the class member to all appropriate HCBS waivers.

11 8. By December 1, 2003, Defendant San Francisco shall develop and provide to
12 Plaintiffs' counsel protocols and procedures by which class members are assessed as set forth in
13 Section 4.6 of Exhibit A. Plaintiffs' counsel will have an opportunity to provide written comments
14 to San Francisco for consideration within 14 days of receipt.

15 9. By December 1, 2003 Defendant San Francisco shall develop and provide to
16 Plaintiffs' counsel protocols and procedures by which class members are provided with
17 service/discharge planning as set forth in Section 4.7 of Exhibit A. Plaintiffs' counsel will have an
18 opportunity to provide written comments to San Francisco for consideration within 14 days of
19 receipt.

20 10. The service/discharge planning process shall *inter alia*:

- 21 a. Determine the most integrated setting appropriate to class members' needs;
- 22 b. Determine whether the individual meets the essential eligibility requirements
23 for community supports and services in accordance with individual needs and
24 preferences; and
- 25 c. Include consideration of all community supports and services for which the
26 individual may be eligible, including those outlined in Attachment 4 to
27 Exhibit A. Consideration of community supports and services shall not be
28 limited to currently available resources.

1 11. Prior to conducting screening, assessments, and service/discharge planning, all TCM
2 Program staff, with the exception of clerical staff, will be trained using the curriculum and materials
3 described in Section 5.0 of Exhibit A.

4 12. Staff of the TCM Program and LHH staff will collaborate on developing and
5 implementing an educational training program for LHH medical social work staff that includes the
6 components contained in Section 5.4 of Exhibit A.

7 13. Ongoing case management services will be provided primarily by TCM Program staff
8 if the TCM Program determines that: (1) the class member is reasonably likely to be discharged to
9 the community within 180 days of development of the Service/Discharge Plan; or (2) the class
10 member has progressed on the Service/Discharge Plan to be within 180 days of discharge; or (3) the
11 class member may require active discharge planning for a period that exceeds 180 days. Ongoing
12 case management by the TCM Program shall be provided in accordance with section 6.5 of
13 Exhibit A.

14 14. Class members who meet the screening criteria and have received an assessment and
15 service/discharge plan shall receive primary case management from LHH social work staff, in
16 accordance with sections 6.2, 6.3, and 6.6 of Exhibit A if they do not meet the criteria above.

17 15. Class members shall be referred to Specialty Mental Health Targeted Case
18 Management as set forth in section 6.7 of Exhibit A.

19 16. By November 1, 2003, Defendant San Francisco, in collaboration with Plaintiffs'
20 counsel, will establish a Community Advisory Committee ("CAC"), as set forth in section 8.1 of
21 Exhibit A. The first meeting will be held in November, 2003. The CAC shall meet on at least a
22 quarterly basis thereafter and more often if needed to carry out its responsibilities. Meetings shall
23 be open to the public and Plaintiffs' counsel will be informed of meetings in writing at least two
24 weeks in advance if the meetings are changed from the regularly scheduled quarterly date. The CAC
25 will review aggregate data on the screening, assessment, and service/discharge planning processes
26 and make recommendations to San Francisco as set forth in section 8.2(a) of Exhibit A. The CAC
27 will also participate in a consumer satisfaction survey and receive reports on the results of the
28 surveys, as set forth in section 8.2(b) of Exhibit A.

1 17. By January 5, 2004 Defendant San Francisco shall designate a portion of the existing
2 LHH Patient Library to serve as a Community Resource Center at LHH where residents can gain
3 access to information about community options and services, receive training, attend presentations
4 by community providers about community options, receive peer counseling regarding community
5 living, or talk to community advocates, as set forth in section 9.1 of Exhibit A.

6 18. By January 5, 2004, the TCM Program shall develop a curriculum of presentations
7 for residents of LHH to include at least the components set forth in section 9.2 of Exhibit A, and
8 consider any input from the CAC.

9 19. To the extent peer mentors are available, the TCM Program shall include the services
10 of peer mentors for any class members who request such assistance, as well as those class members
11 who, in the opinion of the staff in the TCM Unit, could benefit from such assistance. All class
12 members shall be informed of the availability of peer mentor assistance during the assessment and
13 service/discharge planning process. Peer mentors shall be individuals with disabilities who live in
14 the community and are knowledgeable about community living. The services provided by peer
15 mentors include those specified in section 9.3 of Exhibit A.

16 20. Beginning in October, 2003, on a monthly basis, Plaintiffs' Counsel shall be provided
17 with space at LHH to conduct private meetings with LHH residents. LHH staff shall assist in
18 posting notices of upcoming meetings and transporting residents to the meetings, as needed.

19 21. Plaintiffs and Defendant San Francisco have agreed to the form of notice to the class,
20 included as Exhibit 3 to Swain Declaration. Should the Court determine that notice to the class is
21 not required, Plaintiffs and Defendant San Francisco agree to provide notice to the class as set forth
22 in section 10.1 of Exhibit A. Costs of translation and distribution of the notice will be borne by
23 Defendant San Francisco, and will occur as set forth in section 10.1(c) of Exhibit A.

24 22. Class members have the right to appeal, to the extent currently available under law,
25 through the Medi-Cal hearing process set forth in 22 CCR section 51014. Defendant San Francisco
26 will provide information about advocacy resources and appeal rights to all class members as set forth
27 in sections 10.2(b) and (c) of Exhibit A and will provide written notice on a quarterly basis to each
28

1 class member at LHH of the status of referrals and waitlists for housing and community based
2 services.

3 23. By February 1, 2004, Defendant San Francisco will develop a data collection system
4 to track outcomes for all class members who are provided with screening, assessment,
5 service/discharge planning and/or case management. Information available shall include the areas
6 specified in section 11.1 of Exhibit A.

7 24. During the period *prior to* resolution of San Francisco's Motion for Compliance, San
8 Francisco shall provide to Plaintiffs' counsel by the 10th of each month, a written report on activities
9 undertaken with respect to each section of Exhibit A during the previous month, which shall include
10 detailed progress of the establishment of the TCM Program, and updated information on
11 implementation of the screening, assessment, and service/discharge planning processes, and other
12 components of Exhibit A.

13 25. Once screening, assessments, and service/discharge planning begins, San Francisco
14 will provide to counsel for Plaintiffs: (1) aggregate data as specified in section 11.1 of Exhibit A;
15 and (2) a random sample of 15 percent of the screens, assessments, (including PASRR/MI II
16 evaluations if used in lieu of the TCM assessment) and service/discharge plans, completed for each
17 month by the TCM Program, but no less than a total of 15 assessments and service/discharge plans.
18 These assessments and service/discharge plans shall include a sample from both at risk class
19 members and those residing at LHH.

20 26. If the complete data set forth in subpart 11.1 of Exhibit A is not available by the 10th
21 of the month, San Francisco will provide Plaintiffs with a copy of each and every screen, assessment
22 and individual service/discharge plan completed by the TCM Program during the preceding month.

23 27. As soon as available, but no more than 14 days after completion of each of the items
24 set forth below, San Francisco will provide to Plaintiffs' counsel the information specified as
25 follows:

- 26 a. Screening, Assessment, and Service/Discharge Planning instrument changes
27 or updates, as specified in section 4.2 of Exhibit A;
- 28 b. Protocols and procedures for screening, assessment, and service/discharge

- 1 planning for class members, as set forth in sections 4.5 – 4.7 of Exhibit A;
- 2 c. Training curriculum and materials and trainer information, as set forth in
- 3 section 5.0-5.3 of Exhibit A;
- 4 d. Information regarding efforts to inform and provide transition services to class
- 5 members, as set forth in section 6.8 of Exhibit A;
- 6 e. Membership, agendas, and minutes of the CAC, as set forth in section 8.1 of
- 7 Exhibit A;
- 8 f. Consumer survey results and names of consumer volunteers, as set forth in
- 9 section 8.2(b) of Exhibit A.

10 **IV. SETTLEMENT AGREEMENT BETWEEN PLAINTIFFS AND STATE**

11 **DEFENDANTS:**

12 1. Defendant Department of Mental Health (DMH) and its Director, Dr. Stephen

13 Mayberg (collectively “DMH”) will make the following changes in the Pre-Admission Screening

14 and Resident Review with respect to individuals with Mental Illness (PASRR/MI) process:

15 (a) DMH will revise the PASRR/MI Level II Evaluation Form and require its PASRR/MI Level II

16 evaluators to use the revised form in conducting PASRR/MI Level II Evaluations; (b) DMH will

17 revise the DMH Contractor Manual; and (c) DMH will provide training on the revised PASRR/MI

18 Level II Evaluation process to persons conducting PASRR/MI Level II Evaluations.

19 2. DMH will amend the DMH Contractor’s Manual to reflect the revisions stated in

20 Exhibit A of the Settlement Agreement between Plaintiffs and State Defendants, attached to Swain

21 Declaration as Exhibit 2. DMH will complete these revisions, and provide a copy of the revised

22 manual to Plaintiffs’ Counsel by December 1, 2003.

23 3. The parties agree that by October 1, 2004, DMH will adopt the PASRR/MI Level II

24 Evaluation Form, attached as Exhibit B to the Settlement Agreement between Plaintiffs and State

25 Defendants, Exhibit 2 to Swain Declaration, for the performance of PASRR/MI Level II

26 Evaluations, and will require persons performing PASRR/MI Level II Evaluations to begin using the

27 attached form and revised Contractor’s Manual by October 1, 2004.

28 4. DMH will provide training to PASRR/MI Level II evaluators on the revised

1 PASRR/MI Level II Evaluation process as provided in paragraph 6 of the Settlement Agreement
2 between Plaintiffs and State Defendants (Exhibit 2 to Swain Dec.). Trainings will be completed by
3 September 15, 2004.

4 5. By October 1, 2004, State Defendants will provide counsel for Plaintiffs with a
5 written report certifying that each of the following has been completed and briefly summarizing the
6 activities completed or steps taken to accomplish each:

7 (a) The Contractors' Manual described in paragraph 3 of the Settlement
8 Agreement between Plaintiffs and State Defendants has been distributed and
9 is being implemented;

10 (b) The Level II form described in paragraph 4 of the Settlement Agreement
11 between Plaintiffs and State Defendants has been implemented and is being
12 used by evaluators; and,

13 (c) The training described in paragraph 6 of the Settlement Agreement between
14 Plaintiffs and State Defendants has been conducted.

15 6. DMH will provide Plaintiffs' counsel with individualized and aggregate data as set
16 forth in paragraph 8 of Exhibit 2.

17 7. All parties agree to bear their own fees and costs, including but not limited to
18 attorneys' fees and expert witness fees and costs. Nothing in the Agreement precludes Plaintiffs
19 from seeking an award of attorneys' fees and costs for time expended and expenses incurred
20 related to any proceedings undertaken to enforce the terms of this Agreement.

21 8. The parties have entered into this Agreement to resolve with finality all pending
22 claims between them and to avoid the time and expense of litigation. After notification that State
23 Defendants have implemented paragraphs 3, 4, and 6, Plaintiffs retain the right to refile claims One,
24 Two, Four, Five, Seven, Eight and Nine of the Third Amended Complaint against State Defendants.
25 Plaintiffs retain the right to refile all claims against State Defendants upon notification that State
26 Defendants are unable to implement paragraphs 3, 4, and 6 of the Agreement.

27 9. The parties agree that this action shall be dismissed, and the parties shall seek an
28 order of the Court, as follows:

1 (a) Plaintiffs will dismiss without prejudice all claims in the Third Amended
2 Complaint, as to all State Defendants without prejudice upon court approval
3 of the Agreement. Within 10 court days of receiving the written notification
4 described in paragraph 7 from State Defendants, Plaintiffs will either dismiss
5 with prejudice claims Three, Six and Ten as to all State Defendants or will
6 notify counsel for State Defendants that Plaintiffs believe State Defendants
7 have not adequately complied with the requirements of the Settlement
8 Agreement and intend to pursue enforcement proceedings.

9 (b) Upon dismissal of the action—either within 10 days following the notice
10 provided pursuant to paragraph 18(a) of the Settlement Agreement, or within
11 10 days following resolution of the enforcement proceedings, as provided in
12 paragraph 18(a) of the Settlement Agreement—the allegations in claims
13 Three, Six and Ten of the Third Amended Complaint and the prayer for
14 declaratory and injunctive relief shall be fully compromised and settled
15 pursuant to this Settlement Agreement and final judgment as against State
16 Defendants.

17 10. If one party believes that the other party has failed to comply with any term of this
18 Agreement, that party shall notify the other party’s counsel in writing. The notice shall specify the
19 term(s) of the Settlement Agreement with which the other party allegedly has failed to comply and
20 the reason(s) for the allegation. Such notification shall propose dates for a meet and confer session.
21 Within 20 days from receipt of the notice, opposing counsel shall provide counsel for the party
22 alleging noncompliance with a written response. The response shall specify whether the party
23 agrees or disagrees with the allegation, the basis for agreement or disagreement and, when
24 appropriate, the steps the party proposes to take to remedy the alleged noncompliance or violation.
25 Within 15 days following receipt of the response, the parties shall meet and confer to discuss
26 resolution of the alleged noncompliance. The parties shall engage in good faith in this meet and
27 confer process prior to seeking judicial relief. No effort by a party to resolve a dispute informally
28 shall be construed to limit the defenses or the relief available to that party in any subsequent court

1 proceedings.

2 11. The timing of any applications to the Court, notice to the class, and fairness hearing
3 pursuant to this Settlement Agreement shall be coordinated with the corresponding proceedings
4 pursuant to the separate settlement agreement between Plaintiffs and Defendants City and County of
5 San Francisco in this action, attached to Swain Declaration as Exhibit 1.

6 12. The Court's Order approving this stipulated Settlement Agreement shall continue for
7 a period of 36 months from the date of entry of Judgment. The Court shall retain jurisdiction of this
8 action for the duration of the Order and for such time thereafter as is necessary to effectuate the
9 purposes of this Settlement Agreement. If the Court declines to accept continuing jurisdiction, the
10 terms and conditions of this Settlement Agreement shall nevertheless be fully binding upon the
11 parties as an agreement in settlement of the litigation.

12 13. State Defendants' obligation to perform this Settlement Agreement is contingent upon
13 the availability of sufficient funds to implement the PASRR/MI evaluation process provided for
14 herein. For that purpose, State Defendants will use their best efforts, including efforts made through
15 the Budget Act to obtain the funding necessary to implement this Settlement Agreement. Such
16 efforts may include representations that support the following principles: (1) the goal that people
17 with disabilities live in the most integrated setting appropriate to individual need and (2) a
18 philosophy for individualized assessment based on the concept of recovery and psycho-social
19 rehabilitation, including client-directed assessment and services planning, strengths-based clinical
20 assessment, the wellness approach to services, and functional assessment of skills. Plaintiffs accept
21 State Defendants' representations that they will use their best efforts to secure funding.
22 Notwithstanding the provisions of paragraph 18(a) of the Settlement Agreement, Plaintiffs agree that
23 should funding not be obtained, Plaintiffs may not seek enforcement of the Settlement Agreement on
24 that ground, but rather, agree that their only recourse is the re-filing of the complaint in accordance
25 with paragraphs 12 and 28 of the Settlement Agreement.

26 14. If State Defendants notify counsel for Plaintiffs in writing that they are unable to
27 perform the Agreement due to the unavailability of sufficient funds and Plaintiffs refile claims
28 within one year of such notification, State Defendants expressly agree to waive the following

1 procedural defenses based on the passage of time between the dismissal of this action without
2 prejudice and the time that those claims are refiled, which are defenses based on statutes of
3 limitations, laches, delay in prosecution, claim preclusion, or issue preclusion; and all objections to
4 certification of a class as defined in Section I.

5 **V. DEFINITION OF THE SETTLEMENT CLASS**

6 The settlement agreement class is the same class as previously stipulated by the parties and
7 subsequently certified by the Court.

8 **VI. LEGAL ARGUMENT**

9 **A. Preliminary Approval of the Settlement Agreement is Proper**

10 Class-action Settlement Agreements are generally subject to a two-step approval process:
11 "first the Court conducts a preliminary approval or pre-notification hearing to determine whether the
12 proposed Settlement Agreement is 'within the range of possible approval' or, in other words, whether
13 there is 'probable cause' to notify the class of the proposed Settlement Agreement." *Horton v.*
14 *Merrill Lynch*, 855 F.Supp.825, 827 (E.D.N.C. 1994) (citing *Armstrong v. Board of School*
15 *Directors*, 616 F.2d 305, 312 (7th Cir. 1980). Preliminary or conditional approval allows parties to
16 avoid the unnecessary expenditure of resources arising from notice to the class of a Settlement
17 Agreement that cannot possibly gain Court approval.

18 If a proposed Settlement Agreement receives preliminary approval, the parties provide notice
19 to the class in a manner determined by the Court. "A District Court has broad discretion in
20 determining the kind of notice to employ in alerting class members to a proposed Settlement
21 Agreement and Settlement Agreement hearing, subject to the 'broad reasonableness standards
22 imposed by due process.'" *Battle v. Liberty Nat. Life Ins. Co.*, 770 F.Supp. 1499, 1520 (N.D.Ala.
23 1991), *Mendoza v. Tucson School Dist. No. 1*, 623 F.2d 1338, 1350-1 (9th Cir. 1980).

24 Once the Court grants preliminary approval and notice is provided, the Court conducts a
25 "Fairness Hearing," at which all interested parties are afforded an opportunity to be heard. *Horton* at
26 827. At such a hearing, the Court conducts a substantive evaluation of the proposed Settlement
27 Agreement to determine whether it is "fundamentally fair, adequate, and reasonable." *San Francisco*

1 *NAACP v. San Francisco Unified School Dist.*, 576 F.Supp. 34, 43 (N.D.Cal. 1983), (quoting
2 *Officers for Justice v. Civil Service Commission*, 688, F.2d 615, 625 (9th Cir. 1982).

3 In this case, a preliminary review of the relevant considerations demonstrates a substantial
4 basis for granting the conditional approval requested by this motion, moving forward with the
5 requested notice, and proceeding to a Fairness Hearing. The proposed Settlement Agreements are
6 fair and adequate in that Defendants have agreed to undertake significant changes in their procedures
7 for assessment and provision of information about home and community based services, even though
8 the Defendants deny liability and no finding of liability has been made.

9 Plaintiffs' claims against both State and San Francisco Defendants regarding community
10 based long-term care options remain intact. Given the agreement of San Francisco to institute the
11 new assessment and discharge procedures which are designed to identify community-based long-
12 term services where appropriate, it is not feasible for Plaintiffs to pursue their community
13 integration claims against either State or San Francisco Defendants until the new Targeted Case
14 Management Program (TCM Program) has been established and implemented. Because the new
15 TCM Program may not be established until February 2004, the current trial schedule, including a
16 January 2004 cut-off for discovery, does not allow Plaintiffs the opportunity to base the
17 community integration claims for a May 2004 trial on relevant current information. Therefore,
18 the community integration claims have been dismissed without prejudice so that they can be refiled
19 after the establishment of the TCM Program, and according to current assessment and other
20 relevant evidence.

21 The proposed Settlement Agreement is also reasonable. In this case, the Settlement
22 Agreement was reached after substantial Settlement Agreement discussions during which the parties,
23 the class and their counsel had a full opportunity to appraise the strengths and weaknesses of the
24 case. Magistrate Judge Chen supervised the negotiations between the parties.

25 Also significant in evaluating the proposed Settlement Agreement are the risks at trial for
26 both sides, the costs of continuing the litigation, and the delay in achieving the access modifications
27 that continued litigation would entail. Moreover, the parties would have the right to appeal any
28 adverse judgment. Any appeal would be expensive and protracted. This Settlement Agreement,

1 however, provides immediate benefits to both Plaintiffs and Defendants. Based upon the evaluation
2 of the benefits to the parties offered by the Settlement Agreement, as well as the expense, delay and
3 risk of going forward to trial, the Settlement Agreement is reasonable.

4 **B. The Proposed Notice is Adequate**

5 Rule 23(e) of the Federal Rules of Civil Procedure states that "[a] class action shall not be
6 dismissed or compromised without the approval of the Court, and notice of the proposed dismissal or
7 compromise shall be given to all members of the class in such manner as the Court directs." Unlike
8 class actions certified under FRCP 23(b)(3), actions certified under FRCP 23(b)(2) contain no strict
9 notice requirements of any kind, thus leaving it to the Court's discretion to determine what notice, if
10 any, should be given. *See* FRCP 23(c)(2).

11 This class action was certified by the Court under Rule 23(b)(2), pursuant to stipulation of
12 the parties. As a Rule 23(b)(2) class, the Court effectively has complete discretion to determine the
13 extent of notice to be applied.

14 The parties propose notice as follows: Defendant San Francisco will translate the notice
15 attached hereto as Exhibit 3 to Swain Declaration into Spanish and Chinese writing and alternative
16 formats (e.g. audio cassette) and provide the translated notice to Plaintiffs upon completion.
17 Plaintiffs will proofread and provide comments to San Francisco within 14 days. Defendant San
18 Francisco will distribute the notice to all class members at LHH. San Francisco will also post a
19 copy of the notice at LHH in the Administrative Office and on each floor of the LHH Main
20 Building and Clarendon Hall and at SFGH. San Francisco will also publish the notice in the San
21 Francisco Chronicle for (2) consecutive days. For at-risk class members, not identified at the time
22 of the initial notice, a copy of the notice will be provided within three days of being identified as a
23 class member. As indicated above, this form of notice is adequate to provide notice to the class and
24 complies with the due process requirements of FRCP Rule 23.

25 **C. The Court Should Approve the Proposed Scheduling Order, Including Setting a**
26 **Date for the Fairness Hearing**

1 The parties propose the following general time schedule to provide for notice, comment, and
2 final approval of the Settlement Agreement. The parties are also submitting herewith a proposed
3 scheduling order, with blanks for the Court to set specific dates.

4 First, the parties request approximately six weeks from the time of preliminary approval to
5 mail, post and publish notice in the various forms indicated above. Second, the parties request an
6 additional four (4) weeks following the period for notifying class members in which class members
7 may file objections, and/or notices of intent to appear at the final approval hearing, with such date to
8 be determined by the postmark of the document filed. Third, the parties request two weeks further
9 for the parties to respond to any objections. Fourth, the parties request that the Fairness Hearing be
10 set approximately two weeks after the deadline for responding to objections. This entire schedule
11 totals approximately fourteen weeks from tentative approval to the final hearing.

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VII. CONCLUSION

For the reasons discussed above, Plaintiffs and Defendants request that the Court issue tentative approval of the Class-Action Settlement Agreement, approve the form of the proposed notice, and issue the proposed schedule order, including setting a date for a final approval Fairness Hearing. The parties further request final approval of the Settlement Agreement at the time of the Fairness Hearing.

Respectfully submitted,

PROTECTION AND ADVOCACY, INC.
DISABILITY RIGHTS EDUCATION AND
DEFENSE FUND
AARP FOUNDATION LITIGATION
BAZELON CENTER FOR MENTAL HEALTH LAW
NATIONAL SENIOR CITIZENS LAW CENTER
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