

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

Bryan C. and Henry B. through their next friend Michael P. Dixon; Trent W. and Grayson M. through their next friend Taylor S. Kilgore; and Neville H. through his next friend Sandra Romano-Shain, for themselves and those similarly situated,

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) Civil No. 1:21-cv-00005-NT

Plaintiffs,

v.

Jeanne M. Lambrew in her official capacity as Commissioner of the Maine Department of Health and Human Services; and Todd A. Landry in his official capacity as Director of the Maine Office of Child and Family Services,

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Defendants.

JOINT SUPPLEMENTAL BRIEF TO JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF FORM AND MANNER OF CLASS NOTICE WITH INCORPORATED MEMORANDUM OF LAW IN SUPPORT (ECF No. 118)

After finalizing all settlement terms, the Parties continued to mediate with the Honorable John C. Nivison on the specific amount Defendants would reimburse Plaintiffs' Counsel for their reasonable attorneys' fees, costs, and expenses for the work they conducted in order to reach the comprehensive Settlement Agreement (ECF No. 118-1) pending before this Court for final approval. The Parties agreed through mediation that this amount shall be \$675,000, subject to the Court's approval under Federal Rule of Civil Procedure 23(h).

The Parties submit herewith their stipulated agreement on fees (Exhibit 1), a Revised Proposed Notice to potential Class Members listing the newly agreed-upon amount of fees (Exhibit 2) to replace the prior proposed Notice (ECF No. 118-2), and a Supplemental Declaration of Marissa C. Nardi of Children’s Rights to supplement her prior declaration (ECF 118-3).

FACTS

The Parties successfully completed mediation and negotiations as to all substantive and structural elements of the Settlement Agreement on January 18, 2024. *See* Decl. of M. Nardi in Supp. of Joint Mot. for Prelim. Approval (“Initial Nardi Decl.”), ECF No. 118-3 ¶ 8. After finalizing all such terms, the Parties next negotiated the amount of costs, expenses, and attorneys’ fees that Defendants would pay Plaintiffs. *See* Suppl. Decl. of M. Nardi submitted herewith (“Suppl. Nardi Decl.”) ¶ 3. Under the Settlement Agreement, “the Parties agreed that Plaintiffs are entitled to reimbursement by Defendants of a reasonable amount of Plaintiffs’ attorneys’ fees, costs, and expenses to date.”¹ But, at the time they executed the Settlement Agreement, the Parties had not agreed to a specific amount to resolve Plaintiffs’ claim for reimbursement. *See* Suppl. Nardi Decl. ¶¶ 2-3. The Parties continued mediation with the Honorable Judge Nivison to attempt to arrive at an agreed-upon amount. *See id.* ¶ 3; *see also* Ex. 1, Joint Agreement on Mediated Fees submitted herewith (“Fee Agreement”).

On March 22, 2024, following extensive direct negotiation between the Parties, and as a result of the arm’s length mediation with Judge Nivison, the Parties agreed that Defendants would pay Plaintiffs’ Counsel \$675,000 to resolve Plaintiffs’ claim for attorneys’ fees, costs, and expenses from the action’s inception through the date of final approval of the Settlement Agreement by the Court. *See* Ex. 1, Fee Agreement; Suppl. Nardi Decl. ¶ 3. On April 3, 2024, the Parties memorialized their understanding and executed the Fee Agreement (Ex. 1). *See* Suppl. Nardi Decl. ¶ 3.

¹ *See* Settlement Agreement, ECF No. 118-1 § IV.4.D.

STANDARD OF REVIEW

The Parties' Settlement Agreement includes an agreement that Plaintiffs are entitled to recover "a reasonable amount of Plaintiffs' attorneys' fees, costs, and expenses to date." Settlement Agreement, ECF No. 118-1 § IV.4.D. With respect to reasonableness, caselaw applying 42 U.S.C. Section 1988 is a useful benchmark. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("[A] prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.") (internal quotation marks and citations omitted); *see also Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010) (explaining that a "reasonable" fee is one "that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case.").

ARGUMENT

The mediated amount of \$675,000 is a reasonable amount to reimburse Plaintiffs' Counsel for the work they performed from the case's initiation through settlement approval. The Parties are in agreement both as to Plaintiffs' entitlement to attorneys' fees, costs, and expenses, and to the amount of this reimbursement for attorneys' fees for the work Plaintiffs' counsel performed through settlement approval and necessary costs and expenses to date. *See* Settlement Agreement, ECF No. 118-1, § IV.4.D; Fee Agreement.

The agreed-upon amount of \$675,000 is fair and reasonable given the 22-month investigation, the 18 months of contentious litigation, the complexity of the issues, the careful sequencing of the fee negotiations after all negotiations on settlement reforms,² the arm's-length mediation with Judge Nivison, Plaintiffs' counsel expertise, and the outstanding settlement result. *See supra* at 2; Initial Nardi Decl. ¶¶ 3-8 (explaining, for instance, Children's Rights and these Plaintiffs' attorneys' deep experience litigating systemic class actions on behalf of children; the extensive work

² *See supra* at 2.

performed by Children’s Rights attorneys to lead this action on behalf of Plaintiffs and ultimately reach a settlement, including a thorough investigation of Maine’s child welfare policies and practices with interviews of dozens of individuals with knowledge, successfully defending against a motion to dismiss, propounding and reviewing voluminous written discovery, defending depositions, working with experts, and engaging in the lengthy settlement negotiation and mediation process that ultimately led to the Settlement Agreement); J. Woodcock Decl. in Supp. of Joint Mot. for Prelim. Approval, ECF No. 118-4 ¶¶ 2-5 (explaining Bernstein Shur’s and Atty. Woodcock’s complex litigation experience and involvement at every stage of the case); Joint Mot. for Prelim. Approval, ECF No. 118 at 16-18 (explaining, for instance, the reforms in the settlement and how they will significantly benefit the putative Class, the complexity and novelty of the Constitutional issues, and Plaintiffs’ Counsel’s sustained commitment to representing the putative Class); Suppl. Nardi Decl. ¶¶ 2-4 (explaining the mediation process, the Parties’ careful sequencing of fee negotiations last, and the reasonableness of the amount itself compared to the lodestar and similar cases).³

There are also no circumstances here that could render this award unjust. Indeed, Plaintiffs’ Counsel have achieved substantial relief in the Settlement Agreement on behalf of the Class, thoroughly addressing “all critical issues in the Complaint through carefully crafted reforms” and with a structure providing clear benchmarks and oversight for the implementation, such as monitoring by an Implementation Reviewer. *See* Joint Mot. for Prelim. Approval, ECF No. 118 at 3-5, 8-9. Plaintiffs represented a class of hundreds of children in foster care who could not have otherwise brought this systemic civil rights case on their own behalf. *See id.* at 11.

³ Much of these factors are discussed and explained in detail in the prior declarations (ECF No. 118-3, 118-4) and brief (ECF No. 118) filed with the Joint Motion for Preliminary Approval, so the Parties refrain from repeating it here. The Supplemental Declaration by Ms. Nardi submitted herewith focuses on the process of negotiating and mediating the fee specifically.

Further, the specific negotiated amount is reasonable. The Parties' careful sequencing made it impossible for specific dollar amounts to impact the reform negotiations: the Parties finalized the Settlement Agreement prior to any negotiation of dollar amounts. *See* Suppl. Nardi Decl. ¶ 3. The specific negotiated amount is also reasonable because it represents a significant reduction of what the Plaintiffs could have sought under a "lodestar" analysis in a contested fee application.⁴ *See id.* ¶ 4. Although the Parties have different views about what exactly Plaintiffs would be entitled to under an application of the "lodestar" as applied in the District, the Parties agreed through mediation that \$675,000 is a fair and reasonable compromise. Further, the mediated amount is particularly reasonable given much higher fee awards found to be reasonable in other similar Section 1988 federal impact litigations on behalf of children in state systems. *See, e.g., M.B. v. Tidball*, No. 2:17-cv-4102-NKL, 2020 WL 1666159, at *2, 20 (W.D. Mo. Apr. 3, 2020), *aff'd sub nom. M.B. by Eggemeyer v. Tidball*, 18 F.4th 565 (8th Cir. 2021) (awarding plaintiffs \$3,253,651.25 in fees and \$132,907.56 in expenses where case settled two years after complaint filed in similar class action alleging violations of substantive due process and procedural due process due to lack of oversight in administration of psychotropic medications to children in foster care); *M.B. v. Howard*, 555 F. Supp. 3d 1047, 1056-57, 1074, 1092 (D. Kan. 2021) (awarding plaintiffs \$2,225,306.64 in fees and \$72,305.15 in expenses where case settled 18 months after the complaint's filing in foster care reform class action alleging violations of substantive due process concerning mental health oversight, among other issues, where no class certification briefing occurred, and only one half-day deposition was taken).⁵

⁴ "The lodestar method yields a fee that is presumptively sufficient to achieve [the] objective" of "induc[ing] a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue*, 559 U.S. at 552.

⁵ Several members of the Children's Rights team representing Plaintiffs here represented the plaintiffs in the *M.B. v. Tidball* litigation and the *M.B. v. Howard* litigation. *See* Suppl. Nardi Decl. ¶ 4.

CONCLUSION

For the reasons set forth above, the Parties respectfully request the following, in addition to the relief sought in the original brief (ECF No. 118): (a) award Plaintiffs' Counsel attorneys' fees, costs, and expenses in the mediated and agreed-upon amount of \$675,000 for the period from the case's inception until the date this Court grants final approval of the Settlement Agreement, if applicable; and (b) approve and direct issuance of Plaintiffs' Revised Proposed Notice (Exhibit 2).

Dated: April 3, 2024

Respectfully submitted,

BERNSTEIN, SHUR, SAWYER & NELSON, P.A.

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