STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. KENSC-CV-22-54

ANDREW ROBBINS, et al.,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, et al.,

Defendants.

COMBINED ORDER

INTRODUCTION

As of this date, there are approximately 393 indigent defendants[1] in Maine who are entitled to representation under the United States and Maine Constitutions who remain unrepresented. Approximately 100 of these individuals are being held in custody in jails across the State. It is undisputed that Defendants in this case have not provided a sufficient number of qualified attorneys who are eligible to be appointed by the District or Superior Courts to represent indigent defendants. Any review of available data demonstrates that the numbers of unrepresented indigent defendants have been steadily increasing since the data began to be collected by Maine's Judicial Branch in late 2023. Despite this, and despite the fact that these individuals are Class Members, the parties in this class action are back before the Court asking it to approve a proposed settlement that does not in any enforceable way require the Defendants to address their fundamental obligation under Maine law: to provide qualified attorneys to represent indigent defendants consistent with federal and state constitutional and statutory obligations, and

[1] The number of pending cases involving these defendants comes to just under 500.

to "[d]evelop and maintain a system" of attorneys capable of fulfilling this function. 4 M.R.S. §§ 1801, 1804(3)(A).

This case has been pending since March of 2022 and has now been stayed longer than it has been actively litigated. The purpose of the stays was to provide time and a process for the parties to negotiate a settlement of the Sixth Amendment claims made by the Plaintiffs. Pending before the Court is a motion titled "Supplemental Joint Motion to Conduct Preliminary Review of Amended Class Action Settlement, Direct Notice to Class Members of Amended Proposed Settlement, and Make Further Orders as Part of the Settlement Approval Process." The Court, for reasons set out below, denies the Motion. In the second part of this Combined Order, the Court issues an Order regarding the course of future proceedings.

With respect to the pending Motion, the Court finds that the proffered Settlement Agreement ("SA") satisfactorily addresses a number of the obstacles that prevented the Court from approving the first proposal. However, it fails in two important, related respects to meet the legal standard it must in order for the Court to approve it, even preliminarily. The first obstacle is an issue that the parties also failed to address in the first proffered SA, and that has to do with enforceability. The second is the failure of the SA to address in any serious way the constitutional problem that was emerging at the time this lawsuit was filed, even if it had yet to be quantified. As it has now become clear that the number of unrepresented individuals increases week by week, it is beyond dispute that—as the Chief Justice recently stated in her State of the Judiciary speech—"[w]e are in a constitutional crisis." State of the Judiciary address of Chief Justice Valerie Stanfill to 2d Reg. Sess. of 131st Legis., at 7.

More specifically as to the first issue, while the new SA eliminates and/or clarifies language that prevented Class Members from obtaining some amount of emergency relief during

the four-year stay of litigation initially proposed, the new SA still provides no meaningful judicial enforcement for terms within it which may benefit Class Members, including monitoring and performance reviews of contract counsel, along with caseload limits. And instead of a four-year stay of litigation from the date of approval, with the "remedy" being to resume litigation of these constitutional claims, the parties propose that the case would be dismissed without prejudice if and when the Court approves the settlement.[2]

As to the second obstacle, the new proposal fails to even acknowledge the Defendants' legal obligation under Maine law to make available for appointment attorneys who are qualified, and capable of providing continuous representation for the growing number of unrepresented indigent Defendants. The new SA suggests that the Defendants believe establishment of Public Defender Offices will be the most effective way to address the issue of capacity, and it changes language regarding the advocacy efforts they are expected to undertake after the case is dismissed without prejudice. But now, instead of requiring that the Defendants "undertake [] good faith effort[s]" to roll out Public Defender Offices as described in a now-withdrawn SA, the SA presently before the Court requires them to "take all available steps within their powers and authority to open staffed public defenders' offices." And again, there is no remedy provided within the SA for Class Members if that does not happen, as the case would be dismissed if and when the SA is approved.[3]

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[2] While the current SA contains no mention of a stay, Section II.C specifies that Plaintiffs will not reassert or revive certain claims—i.e., claims of constructive denial of counsel based on the Defendants' failure to adequately train, supervise, and evaluate appointed counsel—against the Defendants for a period of four years after the SA's effective date.

[3] Section II.F of the SA contains a "dispute resolution" provision, wherein the parties agree to an informal resolution process, should any noncompliance occur. If an informal resolution cannot be reached, the parties retain the right to file a separate action "for breach of the Agreement under ordinary contract principles."

The Court understands that while this litigation has been pending, a number of measures have been undertaken by the Defendants and other State actors in an effort to address the lack of qualified contract counsel to assign to court-appointed cases. Unfortunately, none of them have come close to remedying the constitutional crisis at hand. Shortly after reimbursement rates went from $80 to $150 an hour, the numbers of rostered attorneys plummeted. The Governor and the Chief Justice have more than once implored members of the private bar to accept appointments. Trial judges have attempted in some areas of the State to appoint qualified—but technically unrostered—attorneys through so-called "limited rosters." Review hearings, as is noted in the SA, have been established by the Judicial Branch, requiring that unrepresented defendants be brought back before the Court at different intervals in the hopes of finding counsel. Despite all these efforts, the number of unrepresented Class Members have steadily continued to increase each week. *See* attached spreadsheets (detailing, in regular reports, the indigent defendants in need of counsel from December of 2023 to the present).

In addition, while this litigation has been pending, and despite warnings from multiple State actors and this Court, the Maine Commission on Indigent Legal Services ("MCILS") instituted, effective January 1, 2024, caseload limits based upon a "point" system that limits the number of cases an attorney can accept. To be clear, caseload limits could, if properly implemented, benefit Class Members. The timing of these new measures was what drew concern, as it was becoming clear by the end of 2023 that the number of attorneys provided to the Courts for appointment was steadily decreasing.

The parties provide a number of justifications for their inability or unwillingness to more directly address the problem of unrepresented Class Members in the new SA. As the Complaint reveals, this case is a civil rights action brought under 42 U.S.C. § 1983 asserting claims under

the Sixth Amendment; and Plaintiffs have also alleged violations of Article I, Section 6 of the Maine Constitution. Class Counsel now assert that the constitutional issues confronting Maine's indigent defense system are different from how they envisioned the case originally. Their initial focus was on the quality of the representation being provided, and what they pointed to as conditions in the system that may pose an "unconstitutional risk" of deprivation of counsel. They claimed that caseload and performance standards for appointed counsel would provide a remedy for this risk, and Defendants agreed to implement many of these reforms. This position, however, fails to appreciate the reality facing Class Members across the State. Standards and accountability mean very little when very few attorneys, or no attorneys at all, have been made available by Defendants for judges and justices to appoint. Class Counsel do admit, as they must, that the problems now facing Class Members implicate the same constitutional provisions named in their original filings: The Sixth Amendment of the United States Constitution, and Article 1, Section 6 of the Maine Constitution.

For their part, Defendants insist that the most they can be required to do to address the current crisis in any settlement of this case would be to advocate with the Legislature and members of the Executive Branch to obtain sufficient resources to open Public Defender Offices, which they now believe will address the problem, eventually. They assert that Maine's separation of powers doctrine means that they cannot be held legally accountable by this or any Court if they continue to work hard with current resources to implement reforms and step up their advocacy with the Legislature and the Governor to roll out over time new Public Defender Offices and implement other reforms.

Counsel for both parties further suggest that if the Court approves this new SA, and the case is dismissed, currently unrepresented Class Members can seek relief for non-representation

at review hearings, or by making arguments about "prejudice" at some later stage in their individual cases—perhaps after conviction—once they eventually do obtain representation.

Finally, they actually suggest that Class Members may be able to find a way to bring a new class action to address the constitutional problem of non-representation should their advocacy efforts fall short, or if rosters remain depleted or empty, or if the rollout of Public Defender Offices takes longer than they hope.

STANDARD OF REVIEW

As the parties know, at this stage of this litigation, the Court is required by law to review the new SA, along with the parties' justifications regarding the problem of non-representation of Class Members, by acting as a "fiduciary" for all Class Members. *Sparks v. Mills*, 626 F. Supp. 3d 131, 136 (D. Me. 2022); *1988 Tr. for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.,* 28 F.4th 513, 521 (4th Cir. 2022); *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 280 (7th Cir. 2002); *In re Cendant Corp. Litigation,* 264 F.3d 201, 231 (3d Cir. 2001). In this capacity, the Court "serve[s] as guardian of the rights of absent class members," *see In re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 751 (8th Cir. 2003) (quotation marks omitted); *In re Cendant*, 264 F.3d at 231, and must "conduct a searching, careful, and rigorous inquiry before preliminarily approving a settlement." *Grenier v. Granite State Credit Union*, No. 21-cv-534-LM, 2023 WL 4931857, at *2 (D.N.H. Aug. 2, 2023) (quotation marks omitted).

The Court's previous order denying preliminary settlement approval provides a detailed overview of the standards that govern the present inquiry, but briefly, the Court's analysis starts with M.R. Civ. P. 23(e), which prohibits the "dismiss[al] or compromise[]" of a class action lawsuit "without the approval of the court." At the preliminary approval stage, the Court is tasked with deciding whether "it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing." *Anderson v. Team Prior, Inc.*, Docket No. 2:19-

cv-00452-NT, 2021 WL 3852720, at *5 (D. Me. Aug. 27, 2021) (quotation marks omitted). To approve a proposed settlement, the Court must be assured that the agreement is "fair, reasonable, and adequate"—particularly where, as here, public rights are at stake. *Pike Indus., Inc. v. City of Westbrook*, 2012 ME 78, ¶¶ 20-24, 45 A.3d 707; *Robinson v. Nat'l Student Clearinghouse*, 14 F.4th 56, 59 (1st Cir. 2021); Fed. R. Civ. P. 23(e)(2). Given the "generality" of the governing standards and "the need to balance [the settlement's] benefits and costs," the Court "enjoys considerable range in approving or disapproving a class action settlement." *Robinson*, 14 F.4th at 59 (quotation marks omitted).

Moreover, the procedural and substantive factors identified in Fed. R. Civ. P. 23(e)(2) provide useful guidance as the Court assesses the fairness, reasonableness, and adequacy of a proposed settlement.[4] Among other considerations, this rule directs courts to take into account the "costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i). To appropriately weigh the risks and benefits of trial, the Court finds it necessary to conduct a brief overview of the law governing the appointment of counsel to indigent defendants, as well as the relief that may be available to Class Members if they were to prevail at trial on their claims.

Appointment of Counsel. Both the United States Constitution and the Maine Constitution guarantee that an indigent criminal defendant be afforded the assistance of appointed counsel. *State v. Lipski*, 2019 ME 148, ¶ 7, 217 A.3d 727; U.S. Const. amend. VI; Me. Const. art. I, § 6. Under the United States Constitution, the right to counsel "attaches" when the State initiates

[4] The factors identified in Fed. R. Civ. P. 23(e)(2) include "procedural checks: that 'the class representatives and class counsel have adequately represented the class' and that 'the proposal was negotiated at arm's length.'" *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 345 (1st Cir. 2022). "They also include substantive checks: that 'the relief provided for the class is adequate' and that 'the proposal treats class members equitably relative to each other.'" *Id*

"adversarial judicial proceedings" against a defendant, i.e., at a defendant's first appearance before a judicial officer when the defendant "is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191,194, 198, 211 (2008). Once the right attaches, the defendant is "entitled to the presence of appointed counsel during any 'critical stage' of the [criminal] proceedings," and "counsel must be appointed within a reasonable time . . . to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id.* at 212.

In Maine, Rule 44 of the Maine Rules of Unified Criminal Procedure "implements the constitutional right to counsel in a criminal proceeding," guaranteeing appointment of counsel at initial appearance and continuous representation once the right attaches. *State v. Smith*, 677 A.2d 1058, 1060 (Me. 1996); M.R.U. Crim. P. 5(e), 44(a)(1). Rule 44(a)(1) of the Maine Rules of Unified Criminal Procedure provides that when an individual charged with a criminal offense involving a risk of jail cannot afford an attorney, "the court shall . . . assign counsel to represent the defendant *at every stage of the proceeding* unless the defendant elects to proceed without counsel." M.R.U. Crim. P. 44(a)(1) (emphasis added). Rule 5(e) further provides that "[w]hen a person is entitled to court-appointed counsel, the court shall assign counsel to represent the defendant not later than the time of the initial appearance, unless the person elects to proceed without counsel." M.R.U. Crim. P. 5(e).

As Justice Douglas recently noted in *Peterson v. Johnson*: "The rules are unambiguous. They require the court to assign counsel to represent an indigent defendant 'not later than' the initial appearance to 'represent the defendant at every stage of the proceeding.'" No. SJC-23-2, at 13 (Jan. 12, 2024) (Douglas, J.) (quoting M.R.U. Crim. P. 5(e), 44(a)(1)). And a Maine statute similarly speaks to the issue of appointment of counsel, requiring that "competent defense

counsel [] be assigned" to represent a person accused of murder or a Class A, B, or C crime "[b]efore arraignment." 15 M.R.S. § 810(2).

While Maine Courts are tasked with appointing counsel to those deemed indigent, MCILS is the entity charged with developing and maintaining a roster of qualified attorneys who are available to represent an indigent defendant after the right to counsel attaches. 4 M.R.S. §§ 1801, 1804(3)(A). The Legislature clearly intended to delegate this authority, and responsibility, to MCILS. Indeed, MCILS's core purpose is to "provide efficient, high-quality representation to indigent criminal defendants . . . consistent with federal and state constitutional and statutory obligations." 4 M.R.S. § 1801.

Acknowledging that MCILS's rosters "are frequently inadequate to timely ensure court-appointed counsel for indigent defendants at every stage of the Proceeding," the Trial Court Chiefs issued a Standing Order on November 3, 2023 establishing a review procedure for in-custody defendants entitled to, but not yet assigned, appointed counsel. Under the Standing Order, these defendants must "be brought before the court on the next convenient date on which in-custody arraignments are held, but in no event later than seven (7) days after the initial appearance." Standing Order 1-2. If, on the date of the review hearing, appointed counsel continues to be unavailable, "a lawyer for the day may be designated for the limited purpose of representing the person at that appearance" and motions regarding bail and other matters will be entertained by the court. *Id.*[5]

Nevertheless, the weekly review hearings required by the Standing Order—as Justice Douglas aptly noted—are not a long-term solution, but rather a "limited, short-term response to an on-going crisis." *Peterson*, No. SJC-23-2, at 29. While the hearings may offer some

[5] The Standing Order also creates certain procedures for out-of-custody defendants.

temporary relief for defendants awaiting permanently assigned counsel, the hearings "do not address the fundamental need—'to get a lawyer working, whether to attempt to avoid [a] trial or to be ready with a defense when the trial date arrives.'" *Id.* at 31-32 (quoting *Rothgery*, 554 U.S. at 210). Indeed, until permanent counsel is assigned, critical defense work cannot get done, as unrepresented pre-trial defendants are unable to adequately secure witnesses, review discovery, negotiate with the prosecution in an arms-length fashion, and request the preservation of evidence, among the many other tasks necessary to prepare a defense or resolve the case through a plea agreement. *See Betschart v. Garrett*, No. 3:23-cv-01097-CL, 2023 WL 5288098, at *6 (D. Or. Aug. 17, 2023).[6]

Relief. Throughout the proceedings in this matter, questions have been raised regarding the authority of this Court to afford Class Members a meaningful remedy, should the Court conclude, after trial, that Defendants are violating Class Members' constitutional rights. To that point, the Court is well-aware of the Maine Constitution's requirements regarding separation of powers. The Law Court has repeatedly noted that "the separation of governmental powers

[6] The Court notes that trial courts elsewhere have approved settlement agreements in class action lawsuits alleging failures on the part of the State to appoint counsel. For instance, a New York court approved a settlement agreement stipulating that "[t]he State of New York [would] ensure, within 20 months of the Effective Date and continuing thereafter, that each criminal defendant within [certain counties] who is eligible for publicly funded legal representation . . . is represented by counsel in person at his or her Arraignment." *See* Settlement Agreement at 5, *Hurrell-Harring v. State of New York*, Albany Cty. Supreme Ct. Docket No. 8866-07. The agreement further contemplated that a written plan to implement these obligations would be developed, and the litigation would be conditionally discontinued pending the enactment of the state budget for that year. *Id.* at 5, 16-17. If, after enactment of the budget, the State believed it would be unable to meet its obligations due to inadequate funding by the Legislature, the Plaintiffs could revive their actual denial of counsel claims through a procedure specified in the agreement. *Id.* at 16-17. By contrast, the SA here contains no similar commitment by Defendants to ensure that indigent defendants are appointed counsel or a contingency plan as to what would occur if funding or something else prevents Defendants from fulfilling its obligation in this regard.

mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government." *Bates v. Dep't of Behavioral & Developmental Services*, 2004 ME 154, ¶ 84, 863 A.2d 890 (quotation marks omitted).

However, while there are limits on the authority of a court to enjoin agency practices, injunctive relief may be available to plaintiffs who prevail on a 42 U.S.C. § 1983 claim against an administrative agency, like the one asserted against Defendants in this case. *See Burr v. Dep't of Corr.*, 2020 ME 130, ¶¶ 23-28, 240 A.3d 371.

Indeed, the Law Court has endorsed the use of narrowly crafted injunctions to remedy constitutional violations committed by agency actors. In *Burr*, the Law Court explained that the authority to "enjoin specific conduct that the court f[inds] unconstitutional" is "a power that rests with the judiciary," and relief of this nature may be ordered without violating separation of powers principles. *Id.* ¶ 27. For instance, the Law Court cited with approval a case where a court permanently enjoined state education agencies from persisting in certain unlawful conduct and ordered them to implement compliant procedures. *Id.* These types of injunctions—designed to ensure that the unconstitutional practices do not recur—are not foreclosed as they simply "define[] what is prohibited and leave[] it to the [agency] to decide how to comply." *Id.*

With these legal principles in mind, the Court enters findings and conclusions as set forth below.

FINDINGS AND CONCLUSIONS

The Court believes it would be a mistake for the parties to believe that the holding in *Bates* prevents a Maine trial court from adjudicating and providing relief for the constitutional issues presented in this case. That is not at all what the Law Court in *Bates* held; in *Burr*, it found

an opportunity to make that clear. Referring to its decision in *Bates*, the Law Court stated in *Burr* that:

> Although we mentioned the separation of powers, we did not decide the case on that basis, instead holding that the "appointment of a receiver to operate and direct the affairs of AMHI was not a sustainable exercise of discretion." *Bates* . . . supports the conclusion that injunctive relief can be an appropriate remedy for a civil rights violation in a § 1983 claim.

Burr, 2020 ME 130, ¶ 23, 240 A.3d 371 (quoting *Bates*, 2004 ME 154, ¶ 87, 863 A.2d 890). The Law Court further stated that courts should not get involved "'unless either a constitutional violation has already occurred or the threat of such a violation is real and immediate.'" *Id.* ¶ 24 (quoting *Rogers v. Scurr*, 676 F.2d 1211 (8th Cir. 1982) (emphasis omitted)).

Obviously, no adjudication has occurred in this case. And while it is beyond dispute that insufficient numbers of qualified attorneys have been made available by Defendants for appointment by Maine jurists, if the case must be adjudicated the Court would still be required to determine if Plaintiffs can prove that the current crisis amounts to a constitutional violation, or as the Law Court put it in *Burr*, that the "threat of such a violation is both real and immediate." 2020 ME 130, ¶ 24, 240 A.3d 371 (quotation marks omitted). However, the Court rejects the parties' basic premise that the Court should accept this new SA because there are limitations on how a Maine court could fashion injunctive relief if a constitutional violation has occurred. To the extent the parties rely upon *Bates* for this proposition, they misread that case, particularly in light of how the Law Court recently clarified in *Burr* what *Bates* actually means.

It should also be remembered that under Maine's doctrine of separation of powers, no branch of government can take away authority from another branch if that authority comes directly from the Maine Constitution. *See* Me. Const. art. III, § 1; *Burr*, 2020 ME 130, ¶ 20, 240 A.3d 371. The Legislature may have delegated to MCILS the duty and authority to provide lawyers and maintain rosters sufficient to satisfy federal and state constitutional and statutory

obligations, but it preserved the Judicial Branch's role to "assign" counsel. *Compare* 4 M.R.S. § 1801, *with* 15 M.R.S. § 810. And more fundamentally, neither the Legislature, nor any Executive Branch actor, may under our constitutional system take away from the Judicial Branch the fundamental authority to adjudicate and remedy constitutional violations. *See Burr*, 2020 ME 130, ¶ 27, 240 A.3d 371 (explaining that the authority to "enjoin specific conduct that the court f[inds] unconstitutional" is "a power that rests with the judiciary").

Much has changed for Class Members since this case was filed almost two years ago. What was perceived and articulated by Class Counsel as an "unconstitutional risk" of deprivation of counsel has become more than a risk for many Class Members. Defendants surely understand how things have deteriorated, as they have to contend with this problem every day. The Court concludes that it cannot as a fiduciary for the Class Members approve this SA, or any SA, unless it addresses this primary obstacle to reaching other laudable aims of the proffered SA.

The Court has further concluded that concerns about quality, monitoring, supervision, or training of counsel cannot be factually or legally disentangled from the more fundamental problem—there are simply not enough qualified attorneys available to provide effective assistance, and the problem is getting worse.[7] The suggestion that the issue of non-representation can wait, and that Class Members can individually raise the issue at a review hearing or at another point further along in the process, is not, as Justice Douglas noted, a sustainable solution.

[7] While there have been new factual developments since the filing of this case, non-representation and actual denial of counsel were theories asserted in the Complaint. *See* Pls.' Compl. ¶¶ 79-80 ("The systemic structural limitations in Maine's system, including but not limited to MCILS's failure to even satisfy its own statutory requirements, have resulted in a system that denies Plaintiffs, and those similarly situated, with actual representation, as guaranteed by *Gideon* and its progeny.").

Finally, the constitutional claims asserted two years ago, and the current constitutional crisis, are all rooted in fundamental rights guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 6 of the Maine Constitution. From the point of view of Class Members, the issues of non-representation and the claims regarding the unconstitutional "risk" of deprivation of counsel should be resolved in the same case. Class Members cannot be expected to file another class action. It is absurd for the parties to suggest otherwise.

The Court has consistently supported and encouraged the parties in this case to try and reach an agreement, and as noted above, finds that many of the terms of the SA are in the best interests of some Class Members. And the Court understands that there are risks to both sides if the case is litigated. However, under the present circumstances, because the SA fails to address or provide enforceable relief for the ever-increasing number of unrepresented indigent defendants, the SA cannot be said to be fair, reasonable, or adequate, or otherwise in the best interests of all the Class Members.

The next part of this Combined Order addresses the Court's authority to manage the next stages of this litigation. It is intended to provide a fair process to adjudicate the issues articulated in the initial pleadings, as well as issues generated by the increasing number of unrepresented Class Members.

FUTURE COURSE OF PROCEEDINGS AND ASSOCIATED STANDARD OF REVIEW

Standard of Review. Rule 23 of the Maine Rules of Civil Procedure affords the Court the flexibility to create subclasses for purposes of expediting the resolution of the case and facilitating management of the class action. Rule 23(d) states that when conducting a class action, "the court may make appropriate orders . . . determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence

or argument." M.R. Civ. P. 23(d)(1). Moreover, Rule 23(c)(4) provides that "[w]hen appropriate ... a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." M.R. Civ. P. 23(c)(4).

Interpreting parallel provisions of the Federal Rules of Civil Procedure, courts have endorsed the use of so-called "case-management subclasses" as "'appropriate procedural innovations'" to facilitate the orderly resolution of class action cases. *Casale v. Kelly*, 257 F.R.D. 396, 408-09 (S.D.N.Y. 2009) (quoting *Am. Timber & Trading Co. v. First Nat. Bank of Oregon*, 690 F.2d 781, 786-87 (9th Cir. 1982)). Federal courts have found case-management subclasses to be proper when "there is no actual conflict among class members in the underlying claims common to the entire class" and the subclass is "created solely to expedite resolution of the case by segregating [a distinct legal] issue [that is] common to some members of the existing [class]." *Id.* (quotation marks omitted) (alterations in original). Authority also suggests that case-management subclasses are informal creations that need not be evaluated for commonality, numerosity, typicality, and adequacy of representation, as set forth in M.R. Civ. P. 23(a). *See Timber & Trading Co.*, 690 F.2d at 787 n.5; *Casale*, 257 F.R.D. at 408-09; *Solberg v. Victim Services, Inc.*, No. 14-cv-05266-VC, 2018 WL 6567072, *2 (N.D. Cal. Dec. 12, 2018).

Whether created for case management purposes or to avoid a conflict of interest, the rules afford the Court the "flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear." *Marisol A. v. Giuliani*, 126 F.3d 372, 378-79 (2d Cir. 1997); *see also* M.R. Civ. P. 23(c)(1) (providing that an order of class certification "may be altered or amended before the decision on the merits"). Thus, subclasses may be created after initial class certification and on the Court's own initiative. M.R. Civ. P. 23(c)(1), 23(c)(4),

23(d)(1); *see also Shook v. Bd. of Cnty. Commissioners of Cnty. of El Paso*, 543 F.3d 597, 607 (10th Cir. 2008); *Santillan v. Gonzales*, 388 F. Supp. 2d 1065, 1071-72 (N.D. Cal. 2005).

Discussion. As noted, the Court has concluded it has authority under the rules and caselaw, as set out above, to manage this litigation, including to create subclasses so long as "there is no actual conflict among class members in the underlying claims common to the entire class" and the subclass is "created solely to expedite resolution of the case by segregating [a distinct legal] issue [that is] common to some members of the existing [class]." *Casale*, 257 F.R.D. at 408-09 (quotation marks omitted) (alterations in original). The Court will therefore create a Subclass consisting of Class Members who remain unrepresented after initial appearance or arraignment, unless the right to counsel has been waived by an individual Class Member. The Court further finds that creation of this subclass does not create a conflict between claims common to the entire class and would promote expeditious resolution of the case.

This class action will progress in two phases. In Phase 1, the Court will adjudicate the federal and state claims and defenses regarding non-representation as they relate to the subclass above. In Phase 2, claims which allege that systemic conditions or practices exist which may pose an "unconstitutional risk" of deprivation of counsel will then be adjudicated. The parties are urged to consider settling the Phase 2 issues apart from, and without prejudice to, either side's right to adjudicate claims and defenses in the Phase 1 trial.

Motions may be filed to amend pleadings and add parties for Phase 1 proceedings, but any such motions must be filed by March 8, 2024, with any Opposition to such motions due by March 15, 2024. The Phase 1 trial will take place during the last week of June 2024. Discovery for Phase 1, including designation of any experts, shall close on May 31, 2024.

The Court will conduct an in-person conference of counsel at the Capital Judicial Center on March 15, 2024 at 9:00 a.m. Adjustments to the above deadlines will be considered so long as they do not result in delay of the trial of Phase 1. Deadlines for Phase 2 discovery and trial shall be discussed and ordered on this same date.

CONCLUSION

The entry will be: The Supplemental Joint Motion to Conduct Preliminary Review of Amended Class Action Settlement, Direct Notice to Class Members of Amended Proposed Settlement, and Make Further Orders as Part of the Settlement Approval Process is **Denied**. The Court's Order to Conduct Further Proceedings is issued as set forth above.

The clerk is directed to incorporate this Combined Order on the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: February 27, 2024

Michaela Murphy
Justice, Maine Superior Court