

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

RECEIVED
APR 15 1987
Minnesota D.D.
Council

Patricia Welsch, et al.

Plaintiffs,

v.

NEGOTIATED

SETTLEMENT

Sandra S. Gardebring, et al.,

No. 4-72 Civ. 451

Defendants.

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	INTERIM COMPLIANCE PROCEEDINGS UNDER 1980 CONSENT DECREE	6
III.	NEGOTIATED SETTLEMENT CONTINGENT ON ENACTMENT OF CASE MANAGEMENT APPEALS LEGISLATION	8
IV.	TERMINATION OF 1980 CONSENT DECREE	12
V.	SUMMARIES, REPORTS AND PROTOCOLS TO BE PREPARED BY THE DEPARTMENT OF HUMAN SERVICES	13
VI.	CHILDREN IN REGIONAL TREATMENT CENTERS	18
VII.	MAINTAINING STAFF RATIOS AT REGIONAL TREATMENT CENTERS	21
VIII.	QUALITY ASSURANCE MEASURES: OUTSIDE MONITORING	27
IX.	CONDITIONS FOR TERMINATION OF FEDERAL COURT JURISDICTION	35
X.	TERMINATION OF FEDERAL COURT JURISDICTION	44
XI.	LIMITED FEDERAL COURT REVIEW OF DAY SERVICES	46
XII.	ACCESS FOR COUNSEL FOR THE PLAINTIFFS	48
XIII.	PRESERVATION OF STATE'S ELEVENTH AMENDMENT RIGHTS	50
XIV.	ATTORNEYS' FEES	51

I. INTRODUCTION

A. This is a Negotiated Settlement entered into by the parties to this action in order to avoid protracted litigation concerning compliance by the Department of Human Services (hereinafter Department) with the terms of the Consent Decree entered by the federal court in this action on September 15, 1980, and interpretation of paragraph 111 of that Consent Decree. This constitutes a good faith effort by the parties to replace the 1980 Consent Decree with a document containing clearly measurable goals which will, when attained, form the basis for the federal court to terminate its jurisdiction over this action.

B. For purposes of this document the term "parties" refers to the Department of Human Services and class members, as that term is defined below, represented through their counsel, Legal Advocacy for Persons with Developmental Disabilities. The term "commissioner" refers to the commissioner of human services.

C. Class Membership. Pursuant to an order filed April 15, 1974 in this action, the class was certified as consisting of "judicially committed mentally retarded residents of Minnesota State Hospitals at Brainerd, Cambridge (including Lake Owasso Annex), Faribault, Fergus Falls, Hastings and Moose Lake." Pursuant to the order filed August 15, 1980 the class was expanded to include judicially committed mentally retarded residents of St. Peter, Rochester, and Willmar State Hospitals. Unless otherwise specified in this agreement, all provisions apply only to persons certified as class members pursuant to the

above Orders and no provision is to be read as an admission by defendants that class membership extends to any person other than those certified in the Orders.

In 1978 the state hospital at Hastings closed. In 1982, the state hospital at Rochester closed. At the present time the facilities previously known as state hospitals are called regional treatment centers. Lake Owasso is no longer operated by the State of Minnesota.

D. All provisions in this document dealing with regional treatment centers relate only to programs at those facilities which are licensed pursuant to Minn. Rules pts. 9525.0210 to 9525.0430.

E. In this document, the term "person with, mental retardation" has the meaning given to the term "mentally retarded person" in Minn. Stat. § 252A.02, subd. 2 (1986) and includes persons with related conditions as defined in Minn. Stat. § 252.27, subd. 1 (1986) and includes, but is not limited to, class members.

F. In order to reach a Negotiated Settlement, the parties have filed a joint request to the federal court to extend the 1980 Consent Decree until September 30, 1987, or until further order of the federal court.

G. It is the intent of the parties to bring the Negotiated Settlement before the court for approval as soon as possible upon a joint motion and with notice to all class members of its terms, as required by Fed. R. Civ. P. 23(d) and (e).

H. Part II of this Negotiated Settlement sets forth the method the parties have agreed upon for handling problems which may arise under the Consent Decree approved on September 15, 1980 until the effective date of the Court's order approving the Negotiated Settlement.

I. Part III of this Negotiated Settlement describes legislation allowing persons with mental retardation to appeal case management decisions made by county agencies, and describes a bulletin to be issued by the Department in the event that the legislation is enacted. At such time as those events occur, the parties will seek an order from the Court approving the balance of the Negotiated Settlement, set forth in Parts IV through XIII of the Negotiated Settlement.

J. Part XIV of this Negotiated Settlement is the agreement between the parties concerning negotiation of attorneys' fees for plaintiffs' counsel.

K. This Negotiated Settlement is premised on the appropriation of sufficient funds to the Department to meet its terms. No later than seven (7) working days after the adjournment of the 1987 regular or special session of the Minnesota Legislature in which the 1988-1989 biennial budget of the Department is approved, the Department agrees to notify counsel for the plaintiffs regarding the availability of monies to fund its requirements. If at that time, the Department notifies plaintiffs' counsel that insufficient funds are available for the purpose of funding the provisions of the

Negotiated Settlement, the parties are not bound by the terms of this Negotiated Settlement. In the event that a court order approving the Negotiated Settlement has been issued, counsel for the plaintiffs may move the court to vacate the order and set aside this Negotiated Settlement on the basis that the Department cannot comply with its terms.

L. In the event that provisions of Minn. Rules pts. 9525.0210 to 9525.0430 or pts. 9525.0015 to 9525.0165 are amended following the Court's order approving provisions of this Negotiated Settlement, the parties agree to be bound by such subsequent amendments for purposes of this action.

M. Nothing in this Negotiated Settlement is to be construed as an admission by the Department that they are or ever have been out of compliance with the terms of the 1980 Consent Decree. Nothing in this Negotiated Settlement shall be construed as an admission by the Department that it has violated any state or federal law, the Constitution of the State of Minnesota or the Constitution of the United States. Nothing in this Negotiated Settlement is to be construed as an admission on behalf of the class members that the Department has substantially complied with the provisions of the 1980 Consent Decree. In the event that the Negotiated Settlement is disapproved by the federal court, neither side waives any arguments it may choose to raise concerning compliance with the Consent Decree entered on September 15, 1980 or the federal court's jurisdiction over this action.

II. INTERIM COMPLIANCE PROCEEDINGS UNDER 1960 CONSENT DECREE.

A. From the date that this Negotiated Settlement is signed by the parties until the effective date of the Court Order approving this Negotiated Settlement, the monitor may issue initial determinations of non-compliance in accord with paragraphs 95(d) and (e) of the Consent Decree approved on September 15, 1980. However, the parties will request that the monitor hold no formal conferences and defer all responses on non-compliance matters, except as specified in section C of this part.

B. The parties agree that for any period from the effective date of the Court Order approving this Negotiated Settlement until the legislation referred to in Part III is effective and the commissioner has taken the actions required in Part III, section B, the monitor shall not pursue any issues of non-compliance arising under the Consent Decree approved on September 15, 1980, except as specified in section C of this part.

C. If the matter is an emergency, or a case involving children presently in regional treatment centers who are covered by provisions of paragraphs 17-20 of the Consent Decree approved on September 15, 1980 and whose one-year anniversary will fall within the period specified, and a delay would unreasonably prejudice the interests of a class member protected by that Consent Decree, the Court Monitor shall handle the matter in a manner consistent with the provisions set forth below:

1. The monitor may conduct a formal conference in the manner set forth in the last sentence of paragraph 95(f) of the Consent Decree approved on September 15, 1980;

2. If either party is dissatisfied with the result of the formal conference, the monitor shall conduct, or retain a qualified hearing examiner to conduct, an evidentiary hearing regarding the specific question of non-compliance raised. Evidence shall be received in accordance with the standards established in Minn. Stat. § 14.60 (1986). The monitor shall submit to counsel for the parties and to the court findings of fact based upon the record presented at this hearing together with whatever recommendation regarding corrective action the monitor may deem appropriate.

3. Recommendations made by the monitor shall not be implemented except on motion to the Court by either of the parties or by the Court, after notice and an opportunity for all parties to be heard by the court. Reports, recommendations, and findings of fact made by the monitor may be received in evidence in any further interim compliance proceedings.

D. Once the the legislation referred to in Part III, section A is effective and the commissioner has taken the actions required in Part III, section B of the Negotiated Settlement the monitor's authority under this section shall terminate.

III. NEGOTIATED SETTLEMENT CONTINGENT ON ENACTMENT OF
CASE MANAGEMENT APPEAL LEGISLATION.

This Negotiated Settlement is premised on passage of state legislation altering procedures for persons with mental retardation to appeal case management decisions made by counties and which incorporates the principles listed in section A below.

A. A draft of legislation has been developed by the parties who recognize that amendments to the draft may be made. Any version which substantially accomplishes each of the following will fulfill the terms of this agreement.

1. The appeal may be taken by a person with mental retardation who is a recipient of county case management services provided pursuant to Minn. Stat. § 256B.092, subds. 1 through 1b (1986).

2. The appeal would be initiated by a written request for review to the local agency.

3. The person could challenge the following:

a) whether case management services have been provided in accordance with applicable laws and rules; and

b) whether the local agency has assured that the services identified in the recipient's individual service plan have been delivered in accordance with the laws and rules governing the provision of those services.

4. The appeal mechanism must include the option for a conciliation conference. The appeal mechanism must either require the county to conduct a conciliation conference and issue

a report within thirty days from receiving the request for the conference, or the appeal mechanism must include the option that a recipient may request a hearing before a state welfare or human services referee if the county fails to conduct the conciliation conference and issue its report within thirty days.

5. The recipient must be allowed to submit a written request for a hearing before a state welfare or human services referee at any time up to ninety days after the conciliation conference is held.

6. Conduct of the hearing, preparation of a recommended decision to the commissioner, and issuance of an order by the commissioner shall be in a manner consistent with Minn. Stat. § 256.045 (1986).

7. The commissioner shall issue a final order within sixty days of the receipt of a request for a hearing unless the commissioner rejects the referee's order in which case the commissioner shall issue a final order within ninety days.

8. The provisions of Minn. Stat. § 256.045, subd. 6 (1986) are applicable to such appeals.

9. Judicial review shall be permitted in a manner consistent with Minn. Stat. § 256.045, subds. 7 through 9 (1986).

10. Services shall continue pending state court judicial review in a manner consistent with Minn. Stat. § 256.045, subd. 10 (1986).

11. The conciliation conference process is not required for an applicant who appeals the denial of such

services, or for an applicant or recipient who appeals the local agency's failure to act with reasonable promptness or the suspension, reduction or termination of services.

B. To implement the appeals legislation, the Department agrees to issue a bulletin to the counties which clarifies the following:

1. The county is to inform the commissioner of the submission of a request for review when it is received.
2. The commissioner will designate a department representative who shall attend the conciliation conference in order to assist in the resolution of issues without a hearing.
3. The county is to conduct the conciliation procedure in accordance with procedures for reconsideration found in Minn. Rules pts. 9525.0075, subp. 5 and 9525.0105, subp. 6.
4. Within a specified time, the county is to inform the recipient in writing of the action the county is going to take following the conciliation conference and when that action will be taken.
5. The county is required to inform recipients of the availability of advocacy services. The bulletin will include a list of advocacy services in the State of Minnesota which will be provided to the Department by counsel for the plaintiffs.
6. Clients who appeal pursuant to the new case management appeals process shall have available to them at public expense the services of a qualified independent examiner to conduct an assessment, diagnosis or evaluation if the appeals

referee determines that the assessment, diagnosis or evaluation is relevant to and necessary for fair adjudication of the issues presented.

7. The bulletin shall describe procedures and contain suggested forms for counties to use in this appeal process and written examples of reconsideration procedures which the local agencies could use pursuant to Minn. Rules pt. 9525.0075, subp. 5 and Minn. Rules pt. 9525.0105, subp. 6.

8. The Department will develop an information sheet which will be included with the bulletin explaining the appeal process, appealable issues, and steps to initiate an appeal for persons under state or private guardianship so that individuals and organizations receiving the bulletin have a sheet to distribute to any interested persons.

C. At such time as the legislation is enacted which substantially accomplishes each of the principles set forth in section A of this part and the bulletin described in section B of this part is issued, the parties agree to move the Court for an order approving the Negotiated Settlement.

IV. TERMINATION OF 1980 CONSENT DECREE.

With the Negotiated Settlement, the parties will submit to the Court a proposed Order seeking approval of the Negotiated Settlement, incorporating portions of the Negotiated Settlement, specifying which actions must be taken before jurisdiction of the Court will terminate, and providing that the Negotiated Settlement will replace the Consent Decree approved on September 15, 1980, except that the Consent Decree approved on September 15, 1960 will remain in effect for the limited purpose of resolving disputes which arise under Parts II (Interim Compliance Proceedings Under 1980 Consent Decree) and XI (Limited Federal Court Review of Day Services) of the Negotiated Settlement. If disputes arise under Part II or Part XI, the Consent Decree approved on September 15, 1980 shall serve as the basis for resolution of the disputes except as specifically limited by the terms of Parts II and XI of the Negotiated Settlement.

V. SUMMARIES, REPORTS AND PROTOCOLS TO BE PREPARED BY THE DEPARTMENT OF HUMAN SERVICES.

A. Training.

By September 30, 1988 the Department will issue a report describing training which was offered by the Department to county case managers, regional treatment staff, licensing division staff and community provider staff in state fiscal year 1988 on topics related to persons with mental retardation and the number of persons in each group who attended the training session. This report will also list the training courses to be offered to these groups on related topics by the Department in state fiscal year 1989.

B. Quality Assurance.

1. By December 1, 1987, the Department will prepare a protocol for the review of individual habilitation plans for persons in the regional treatment centers with special needs, defined for this purpose as persons who are blind, deaf or have severe physical handicaps or behavior management problems. The reviews will be conducted by Department staff or consultants not assigned to the residential unit where the person reviewed lives, or the day program which the person attends. By December 1, 1988, the Department will complete 200 reviews. Commencing December 1, 1988, additional reviews shall be completed at an average rate of fifty or more per each three month period until an additional 200 have been completed or this action is dismissed, whichever is sooner. Beginning April 15, 1988 and

each quarter thereafter, counsel for the plaintiffs will be provided with a list of persons whose individual habilitation plans have been reviewed.

2. By December 1, 1987, the Department will prepare a protocol to evaluate the community service needs of persons in regional treatment centers who are blind, deaf or have severe physical disabilities or behavior problems. The Department intends to use this protocol to review the specificity of the community needs assessments for these persons, no less than annually, at the time of the annual planning meeting. Copies of the revised community needs assessments will be provided to the county of financial responsibility and the Mental Retardation Division of the Department when completed so that the community needs assessments may be used in planning placements for these persons when discharged from the regional treatment centers.

3. Beginning January 1, 1988, and every six months thereafter, the Department will issue a summary of its efforts to improve the quality of physical therapy services at the regional treatment centers, and strategies to overcome the barriers to such services.

4. Beginning January 15, 1988, the Department will issue quarterly summaries of psychotropic medication use in each regional treatment center for each month, including the number of persons receiving specific psychotropic medications and the mean daily drug dose for that medication. The data will be reported for each regional treatment center and by residential unit within

each regional treatment center. For the purposes of this section the definition of "psychotropic medication" is any medication prescribed for behavior modifying purposes, such as anti-psychotic, anti-anxiety, anti-depressant, stimulant, sedative/hypnotic, or anti-mania medications, or miscellaneous medications including carbamazepine (Tegretol), propranolol (Inderal), and fenfluramine (Pondimin).

5. By December 1, 1987, the Department will develop a protocol to monitor the side-effects of psychotropic medications for persons in the regional treatment centers.

6. By April 1, 1988, the Department will develop a protocol for use by Licensing Division staff of the Department and county case managers to review documentation of psychotropic medication use, including the monitoring of side effects.

7. December 1, 1987, the Department shall develop a protocol for review of the individual service plan at the time of discharge.

a. The protocol will specify that the discharge planning team should:

- (1) review the capability of the providers of community services to render the services in accordance with the individual service plan;
- (2) review the assessment and program planning processes to see that they are likely to lead to the development of an individual habilitation plan which will promote integration of the person into the community;

- (3) determine if the proposed community services take into account the person's physical or sensory handicaps, communication deficits or behavior problems;
- (4) review the capability of the providers of community services to effectively monitor anti-convulsant or psychotropic medications and their side effects;
- (5) review the capability of the providers of community services to provide sufficient adequately trained staff or consultants to meet the individual's needs;
- (6) authorize any member of the discharge planning team to seek review by the Mental Retardation Division of the Department when he or she believes the proposed discharge should not take place.

b. The protocol will also specify that the county case manager shall submit a placement evaluation to the regional treatment center within sixty days of discharge which analyzes whether the individual is receiving services in accordance with the individual service plan.

C. Counsel for the plaintiffs and the monitor shall be provided with copies of all summaries, protocols, and reports required pursuant to this part of the Negotiated Settlement and shall be provided no less than monthly with admission reports, individual service plans for persons discharged, placement evaluations by the county case manager within sixty days of discharge, death reports, and serious injury reports from the regional treatment centers. In the event that the parties cannot agree upon an order incorporating specific reporting

requirements, counsel for the plaintiffs may move the Court for an appropriate order implementing this paragraph.

D. The Department retains the discretion and sole authority to determine the contents of the summaries, protocols and reports so long as they meet the descriptions in this part. Nothing in this Negotiated Settlement confers any right on the plaintiffs to challenge the contents of the summaries, protocols, and reports on any other basis.

E. If the Department fails to produce the summaries, protocols and reports described in this Part or to take the actions specified in this part, plaintiffs may move the Court for an order compelling the Department to comply with the requirement. Failure of the Department to comply, with such an order may be considered by the Court in deciding a motion brought by the defendants under Part X of this Negotiated Settlement to dismiss this action.

F. The Department's obligations under this part do not extend beyond the date when the Court dismisses this action pursuant to Part X of this Negotiated Settlement.

VI. CHILDREN IN REGIONAL TREATMENT CENTERS.

A. Within thirty days after the order approving this Negotiated Settlement, regional treatment center programs licensed under Minn. Rules pts. 9525.0210 to 9525.0430 will be licensed to serve only persons who are eighteen years of age or older.

B. Effective thirty days after the order approving this Negotiated Settlement, admission of persons under the age of eighteen to these programs will only be permitted pursuant to a variance issued by the Licensing Division of the Department in consultation with the Mental Retardation Division of the Department.

C. Effective ninety days after the order approving this Negotiated Settlement, or prior to the one year anniversary of initial admission, whichever is sooner, continued residence of persons under the age of eighteen in these facilities will be permitted only pursuant to a variance issued by the Licensing Division of the Department, in consultation with the Mental Retardation Division of the Department.

D. All variances will be time-limited and will be issued only if the county has submitted a plan for community placement of the child, specifying the date for such placement. Any license variance issued to allow placement or continued residence of a child which extends up to the child's eighteenth birthday shall require as a condition of the variance that after the child reaches eighteen, the admission will continue to be time-limited

and the child will continue to have a plan for community placement specifying a date for placement.

E. For children currently residing in a regional treatment center who were admitted since September 15, 1980, the initial variance may not exceed the one year anniversary of their admission to the facility.

F. Any license variance issued for a child in a regional treatment center shall be reviewed by the Department at three-month intervals and will expire on the date for community placement under the county plan, unless an additional variance is granted.

G. Beginning October 15, 1987, for the quarter ending September 30, 1987, and fifteen days after the end of each quarter thereafter, the Department shall prepare a report with the following information and provide a copy to counsel for the plaintiffs:

1. child's name and date of birth
2. admission date
3. license variance expiration date
4. planned discharge date and description of proposed services
5. county case manager name and address
6. name of regional treatment center.

H. If any person is admitted to a regional treatment center program licensed under Minn. Rules pts. 9525.0210 to 9525.0430 prior to attaining age eighteen, but is not discharged

from that program prior to attaining age eighteen, the Department will continue to include information on that person in the reports issued under section G of this part.

I. The Department's obligations under this part do not extend beyond the date when the federal court dismisses this action pursuant to Part X of this Negotiated Settlement.

VII. MAINTAINING STAFF RATIOS AT REGIONAL TREATMENT CENTERS.

A. For the purpose of interpreting this part, the following terms are defined:

1. The term "resident population" includes, for purposes of determining the staff allocations required to meet staff ratios, all persons with mental retardation residing at the regional treatment centers as well as persons assigned to the regional treatment centers who are absent due to visits, camping, medical leave, provisional discharge or who have a comparable temporary absence which would not require a formal readmission to permit the person to return to the regional treatment center.

2. "Full time equivalent positions" are those state complement positions which are authorized and funded by the legislature.

3. The terra "direct care staff" includes those classifications of persons employed at a regional treatment center in the human services series and other non-professional health care classifications who are responsible directly for providing a resident with care, treatment, training and the like. Persons in civil service classifications other than those mentioned in the preceding sentence may be included within the direct care staff, subject to the prohibition against double counting stated in section B.10.b. of this part.

4. The term "supervisory staff" refers to persons in residential program services or daytime program services at a regional treatment center who have responsibility for supervision

of the staff assigned to a building, unit, or other similar component of the residential living areas or daytime program services such as day program supervisor, an assistant group supervisor,- unit director, group supervisor, or other person having supervisory responsibility for a living unit or portion of the daytime program services at a regional treatment center.

5. The term "professional staff" refers to persons who are Qualified Mental Retardation Professionals as that term is defined in 42 C.F.R. S 442.401 (1985) and any other persons with a bachelor's degree who have specialized training in providing care or training for mentally retarded persons and one year of experience in providing care or training to mentally retarded persons.

6. The term "semi-professional staff" refers to persons with education and experience greater than that required of direct care staff but lesser than that required of professional staff.

B. The department agrees to seek funding to maintain sufficient full time equivalent positions to meet the following ratios of staff to total number of persons with mental retardation at each regional treatment center:

1. Licensed physicians:
1:175 of physicians to persons with mental retardation in each regional treatment center;

2. Registered nurses:
1:45 of nurses assigned to the residential living areas;

3. Physical therapists:

1:50 of such therapists to the total number of non-ambulatory persons with mental retardation at each regional treatment center, except that if it is not possible to hire enough physical therapists to fulfill this requirement, professionals such as occupational therapists may be used to meet this ratio.

4. Therapy aides:

1:30 of qualified physical therapy assistants to the total number of non-ambulatory persons with mental retardation at each regional treatment center.

5. Social workers and social worker case aides:

1:40 of such staff, except that no more than 50 percent of such persons shall be social worker case aides;

6. Direct care staff in residential programs:

10.55 full time equivalent positions for each household. For the purposes of this section, the number of households in a regional treatment center shall be equal to the total number of persons with mental retardation in that center, divided by 15.

The number of direct care staff allocated to meet the 10.55 full time equivalent positions may be reduced to the extent that direct care staff in daytime program services provided by paragraph "8" are routinely assigned to assist in the residential programs.

7. Supervisory staff, professional staff, and semi-professional staff in residential living areas:

1:8 of such staff. No more than 25 percent of these positions may be filled by semi-professional staff persons. Persons filling these positions to meet the overall 1:8 ratio may not be considered in assessing compliance with the 10.55 full time equivalent positions required in paragraph "6" above.

6. Direct care staff in daytime program services:
1:5 of such staff to the total number of residents who do not receive such services from the public school.

a. The number of direct care staff allocated to meet this 1:5 ratio may be reduced to the extent that residential care staff provided by paragraph "6" are routinely assigned to follow residents and to engage in teaching and training in daytime program services.

b. The maximum number of residential direct care staff counted to meet the 1:5 ratio will be .5 positions from each household of persons served by daytime program services. The number of households will be deemed to be equal to the number derived by dividing the total number of persons in daytime program services by 15.

9. Supervisory, professional, and semi-professional staff in daytime program services:
1:6.5 ratio of such staff to the total number of residents who do not receive such services from the public schools.

a. No more than 40 percent of these positions may be filled by semi-professional staff persons.

b. A maximum of 37.5 percent of the persons required by this section may also be counted in determining compliance with the direct care ratio of paragraph "B" if these persons were routinely assigned to the teaching and training-of residents.

10. Use of staff.

a. Although the allocation of direct care positions for residential services under paragraph "6" is to be at 10.55 per household, the actual deployment of staff on each household need not be uniform. Actual deployment of staff shall take into account the special needs of physically handicapped persons, persons with severe behavior problems, and persons with substantial communication deficiencies.

b. In assessing compliance with the paragraphs in this section, positions allocated to meet the requirements of one paragraph may not be counted again to meet the requirements of a second paragraph. The only exceptions to this prohibition on double counting are the provisions for counting of direct care staff in paragraphs "6" and "8";

C. Nothing in this Negotiated Settlement shall prohibit the Department from providing any of its staff services through contract with an outside individual or organization rather than through direct employment of persons when the Department has determined it is preferable to do so, so long as the equivalent level of service is provided.

D. Although the ratios in this section are expressed in whole numbers, portions of full-time equivalent positions may be allocated, and will be sufficient if assigned in proportion to the ratio.

E. The Department will not treat the ratio for physical therapists as a maximum ratio. The Department intends to increase physical therapy services and to undertake an aggressive recruitment program for qualified physical therapists. The Department also intends to identify existing barriers to provision of appropriate physical therapy services and to develop strategies to overcome those barriers. The Department's actions will be incorporated in the report required pursuant to section B.3 of Part V of this Negotiated Settlement.

F. The Department's obligations under this part do not extend beyond the date when the federal court dismisses this action pursuant to Part X of this Negotiated Settlement.

VIII. QUALITY ASSURANCE MEASURES: OUTSIDE MONITORING.

A. Office of Quality Assurance.

1. The parties agree that an external monitoring system designed to investigate and evaluate services provided to persons with mental retardation in regional treatment centers and community programs is desirable. The Department supports the development of an external monitoring office to assure the effective use of public resources in providing appropriate service to persons with mental retardation.

2. The parties agree to work toward the passage of legislation establishing an external monitoring office with adequate funding. The parties agree that the essential components of legislation establishing an external monitoring system are:

a. The external monitoring office must be established by statute and must be independent from the Departments of Human Services, Health, Education, and Jobs and Training.

b. A qualified director of the external monitoring office must be appointed by the governor and must be removable only for cause.

c. The director must be authorized to hire staff, to retain consultants, and to enter into contracts. The office must be funded at a level no less than the level of the monitor described in section B of this part when the statute is enacted.

d. Duties of the office must include:

(i) Investigating the quality of services to persons with mental retardation.

(ii) Determining the extent to which quality

assurance mechanisms within state and county government work effectively to protect the health, safety and welfare of persons with mental retardation.

e. The director must have the authority to issue public reports regarding results of investigations or changes in practice necessary to promote the provision of quality services for persons with mental retardation.

f. The office must have access to private data on individuals as defined in the Minnesota Government Data Practices Act, Minn. Stat. § 13.02, subd. 12 (1986), and data obtained by the office would retain that classification.

g. The office must have access to information and documents retained by state and county agencies necessary for the discharge of the duties of the office.

h. The governor or director of the office must have authority to appoint advisory committees and a medical review panel.

B. Monitor's Office.

At the time of the Negotiated Settlement, there was no legislation enacted which created an external monitor. Until the position of the monitor is terminated pursuant to paragraph 12 of this section, the Department agrees to fund a monitor to perform certain functions which are set out in paragraph 6 of this section.

1. The incumbent monitor shall continue in that position until further order of the Court pursuant to paragraph 11 of this section, or until he resigns, or until the position is terminated pursuant to paragraph 12 of this section.

2. In the event of a vacancy in the monitor position, counsel for the parties may, if they are able to agree, submit to the Court for approval their joint nominee for a person qualified to serve in that position, or counsel for the plaintiffs or the Department may submit a nominee for that position for approval and appointment by the Court after notice and an opportunity to be heard by opposing counsel.

3. The monitor shall have the education and experience necessary to perform the duties specified in paragraph 6 of this section. The monitor shall be a person with experience in the field of mental retardation and with familiarity with community-based programs and institutional programs for persons with mental retardation.

4. The monitor's rights and responsibilities shall be limited to those specified in Part II and this section of the Negotiated Settlement and shall be performed in his or her capacity as a neutral officer of the Court.

5. The parties further agree that the responsibility of the Court Monitor under the Consent Decree entered September 15, 1980 to hold compliance hearings will end upon approval of the Negotiated Settlement by the Court. Under the

terms of this Negotiated Settlement, responsibilities of the monitor will be limited to those set out in paragraph 6 of this section.

6: The monitor's duties under this agreement are" limited to the following:

a. To review the quality of services and the living environment provided persons with mental retardation residing in the regional treatment centers.

b. To review the quality of services and the environment in licensed residential and day programs and services provided persons with mental retardation who have been discharged from the regional treatment centers since September 15, 1980.

c. Among the matters which the monitor may consider are the following:

(i) the extent to which quality services and appropriate living environments have been provided persons with mental retardation who are blind, deaf or have severe physical handicaps or severe behavior problems;

(ii) the extent to which the use of psychotropic medication and the use of aversive or deprivation procedures have been appropriately monitored and evaluated;

(iii) the extent to which community-based programs funded under the Title XIX waiver to provide home and community-based services appropriately meet the individual needs of persons in those programs; and

(iv) the extent to which the programs and services provided promote the independence of persons with mental

retardation, their integration with persons who are not disabled, and their productivity.

d. With respect to deaths of or serious injuries to persons with mental retardation in the regional treatment centers or residents of state-operated community services, to investigate the circumstances surrounding the death or injury, the thoroughness of any investigation made by personnel employed by the Department, and the adequacy of any follow-up action taken.

e. To issue recommendations and reports based upon these reviews to the commissioner and the appropriate local agency or provider of services. Copies of all such reports and recommendations shall be provided to the commissioner, counsel for the commissioner and counsel for the plaintiffs. The monitor may, at his or her discretion, publish reports and recommendations provided that the provider or agency affected is afforded an opportunity to review the report or recommendation and is afforded reasonable opportunity (no less than sixty days) prior to publication to submit a written response of reasonable length to be incorporated in the report or recommendation, and appropriate action is taken to protect the identity of individual persons with mental retardation.

f. To consider requests by the commissioner to investigate, evaluate and report on specific problems which she determines require an independent evaluation.

7. Neither the commissioner, the other defendants, the local agencies nor any provider of services shall be required to respond to, comment upon, or take any action in response to reports or recommendations by the monitor, nor are the reports and recommendations binding on the parties.

8. The defendants shall cooperate with the monitor and any consultants retained by the monitor to assure that the functions of the monitor may properly and effectively be carried out. To that end, the commissioner shall provide access to the grounds, buildings, and all pertinent records of the regional treatment centers and shall provide access to pertinent records and information at the Department and in community facilities and programs licensed by the commissioner. In addition, the commissioner will assure that the individual service plans for persons discharged from the regional treatment centers include a provision that the monitor has access to records of individuals from regional treatment centers placed in community facilities and programs licensed by the commissioner and access to those community facilities and programs.

9. The monitor shall provide reasonable advance notice to the appropriate chief executive officer of the regional treatment center or other agency administrator of any visit to or inspection of an institution or community program.

10. a. The Department shall provide funding for the office of the monitor in the amount of \$120,000 per year commencing July 1, 1987, or upon entry of an order approving this Negotiated Settlement, whichever is later.

b. The method of funding and the compensation for the personal services of the monitor shall be consistent with the contract approved as to form by the Court in an Order dated October 31, 1990. The commissioner shall make payment to the William Mitchell College of Law by July 15, 1987 or within thirty days following approval by the Court of this Negotiated Settlement, whichever is later. In the event that William Mitchell College of Law terminates the contract, the parties will work with the monitor to develop a similar contract so that office space, equipment, telephone service and clerical support are available. Funds not spent in one year shall be available for expenditure in subsequent years.

c. The monitor shall not spend more money for his or her personal services, for consultant and support personnel, or other expenses than provided by paragraph 10 of this section.

d. The monitor may retain qualified consultants and support personnel necessary for adequate performance of the duties described in paragraph 6 of this section.

e. The Department and counsel for plaintiffs shall cooperate with the monitor should the monitor seek to employ persons under any program which requires a state agency or a non-profit corporation to be the sponsoring agency for such employment.

f. Any party may move the Court to resolve disputes with regard to the method of funding or the personal compensation of the monitor.

g. Funds unspent upon termination of the monitor position shall be refunded to the State of Minnesota.

11. The monitor shall serve at the pleasure of the Court. Any party may move the Court for replacement of the monitor for failure to fulfill the functions specified in the Negotiated Settlement and Order incorporating its provisions.

12. The position of the monitor shall be terminated by order of the court:

a. When legislation is enacted creating an external monitoring office with the components described in section A.2 of this part and the director assumes his or her duties; or

b. On June 30, 1989, if of the conditions for termination of the Court's jurisdiction specified in Part IX, sections A to G, except E, are met; or

c. At such time after June 30, 1989, when all of the conditions for termination of the court's jurisdiction specified in Part IX, sections A to G, except E, are met.

13. Compensation for the personal services of the monitor shall not be terminated pursuant to paragraph 12a or c of this section without three months prior notice to the monitor.

IX. CONDITIONS FOR TERMINATION OF FEDERAL COURT JURISDICTION

A. On-Site Review by Licensing Division.

1. The Licensing Division of the Department will conduct an on-site review of the licensed programs for which there are outstanding initial notices of non-compliance issued by the monitor pursuant to his authority under the Consent Decree entered September 15, 1980. For residential facilities licensed pursuant to Minn. Rules pt. 9525.0210 to 9525.0430, the reviews will be conducted within six months of the Court's approval of the Negotiated Settlement. For training and habilitation service providers, the reviews will be conducted within six months of the effective date of Minn. Rules pts. 9525.1500 to 9525.1690 [proposed].

2. The Licensing Division of the Department will send plaintiffs' counsel copies of correction orders, if any, issued following the on-site visits.

3. Completion of the reviews specified in paragraph 1 and forwarding of the correction orders specified in paragraph 2 are conditions of termination of the Court's jurisdiction over this action.

B. Relationship of Caseload Size to Case Management Services.

1. By September 30, 1988, the Department will issue a report including data by county regarding the average caseload ratio and the caseload ratio range of case managers to persons with mental retardation as those terms are defined in Minn. Rules

pt. 9525.0015, subp. 5 and subp. 20. These data shall be collected between June and August, 1988. The report will also include summaries of findings made by Department personnel with regard to the adequacy of the case management provided persons with mental retardation pursuant to Minn. Rules pts. 9525.0015 to 9525.0165 based upon reviews of individual habilitation plans in the regional treatment centers in accordance with Part V, section B.1. of this Negotiated Settlement, field reviews of services to persons with mental retardation conducted pursuant to section D of this part of this Negotiated Settlement and such other reviews or investigations as the Department may choose to make.

2. The purpose of the report is to determine whether the average caseload ratio by county is decreasing, and whether there are problems with case management services which are related to caseload size. If there are problems related to the size of caseload, the report will analyze the extent to which funding contributes to the problems and include recommendations for addressing the problems, including funding problems.

3. Completion of the report is a condition of termination of the Court's jurisdiction over this action.

C. Publication of Rules.

1. By October 3, 1988, the Department agrees to submit for publication in the State Register proposed rules to:

a. Revise Minn. Rules pts. 9525.0210 to 9525.0430 governing residential services to persons with mental retardation; and

b. License individuals or agencies that provide supervised living services or other similar services to persons with mental retardation under the state's Title XIX home and community-based waiver program.

2. Publication of the proposed rules in the State Register is a condition to termination of the federal Court's jurisdiction. However, in the event that the Department lacks the statutory authority at that time to propose either rule, the plaintiffs agree that the Department will not be obligated under this Negotiated Settlement to publication of that rule, and that publication of it will not be a condition for termination of the Court's jurisdiction over this action.

D. Field Reviews of Services to Persons With Mental Retardation.

1. By September 1, 1987, the Department will select a sampling methodology and develop a protocol for use in field reviews of services to persons with mental retardation.

2. The field reviews will be conducted by persons who are not employed by the county human services agency providing case management services. The purpose of the field review will be to determine whether these services:

- a. promote integration of the person into the community;
- b. promote use of informal support and networks;
- c. are provided in the least restrictive setting;

- d. are appropriate to the age of the person;
- e. promote maximum independence and development of functional skills;
- f. lead to consumer satisfaction with services.

3. The Department will select the cases for field review in some systematic manner and may target certain types of cases taking into account geographical distribution.

4. Notice of problems identified in the field reviews will be given to the county providing services.

5. The Department will provide immediate technical assistance and the Licensing Division of the Department will be notified if the field review raises questions regarding whether the health or safety of a person is at risk.

6. Data collected from the field reviews will be analyzed and included in the report required under section B of this part.

7. For purposes of determining compliance with this section, plaintiffs' counsel may have access to data collected in the course of the field reviews for persons with mental retardation residing in regional treatment centers or discharged from regional treatment centers since September 15, 1980 who are under guardianship of the commissioner of human services.

8. The Department will complete 250 field reviews and include the available relevant information derived from the data collected from those reviews in the report required under section B of this part. At least 150 of these field reviews must

be for persons with mental retardation who reside at the regional treatment centers or have been discharged from a regional treatment center since September 15, 1980. Compliance with this paragraph is a condition of termination of the Court's jurisdiction over this action.

E. Placement of Persons With Special Needs.

1. The parties agree that persons with mental retardation who have complex needs and require intensive service should have the opportunity to benefit from community placements similar to that afforded persons with less severe disabilities.

2. For the purposes of measuring compliance with the paragraphs of this section E, the Department agrees to discharge a certain number of persons from the regional treatment centers who meet the following criteria:

a. Current residents of regional treatment centers who:

- (1) have received a rating of 3 [no useful hearing] in category 25 [Hearing] of the 1985 or 1986 Quality Assurance and Review administered by the Minnesota Department of Health; or
- (2) have received a rating of 3 [must be turned and positioned] in category 20 [Bed Mobility] of the 1985 or 1986 Quality Assurance and Review administered by the Minnesota Department of Health; or
- (3) have severe behavior problems and have been reported to be in mechanical restraint, separation or seclusion in at least four different months between August 1, 1981 and April 2, 1987; or

- (4) are at Willmar Regional Treatment Center and as of April 10, 1987 are being treated with intense procedures as those are defined in the Residential Facilities Manual issued by the Department, Policy Number 7000, dated January 31, 1986; and

b. Persons who are admitted to regional treatment centers after April 10, 1987, for a period in excess of thirty days who at the time of their admission to the facility:

- (1) receive a rating of 6 [no useful hearing/deaf] in category 18 (Hearing) on the Screening Document for Individuals with Mental Retardation [DHS Form 2658, P2-02658-01, effective 11/1/85 - or its equivalent]; or
- (2) receive a rating of 5 [not mobile due to overriding medical condition] in category 20 [Mobility] on the document referenced in clause (1); of this paragraph; or

c. Persons who are admitted to regional treatment centers after April 10, 1987 who have severe behavior problems and for whom a controlled procedure implemented at the regional treatment center has been reauthorized so that a report would be required pursuant to Minn. Rules pt. 9525.2750, subp. 4 [proposed].

3. As a condition of termination of the Court's jurisdiction, the Department agrees to discharge a certain number of the persons identified pursuant to paragraph 2, above, from the regional treatment centers to community services consistent with the standards contained in Minn. Rules pts. 9525.0015 to 9525.0165. The number to be discharged shall be the lesser of either:

- a. 100 of those persons; or
- b. 25 percent of the total number of persons with mental retardation [excluding persons admitted for respite care or for a stay of less than thirty days] discharged during the period from July 1, 1987 through June 30, 1989.

The Department may count any person discharged after April 10, 1987 toward the totals in "a" or "b", but no person shall be counted who was admitted for respite care or for a stay of less than thirty days. Nothing in this Negotiated Settlement shall preclude the Department from discharging more than the minimum number of persons with special needs specified in this paragraph.

4. At any time that the regional treatment center receives notice of a county's plan to discharge a person within the group defined in paragraph 2 of this section, the regional treatment center will give notice to counsel for the plaintiffs. Counsel for the plaintiffs shall also be notified of the discharge planning meeting no less than one week in advance of the meeting.

5. The parties agree that all persons with mental retardation presently residing in the regional treatment centers (including, but not limited to, those persons described in paragraph 2 of this section) or the parents or guardians of those persons may object to a proposed discharge by appealing the placement decision pursuant to Minn. Rules pt. 9525.0135 and

Minn. Stat. § 256.045 if the parents or guardians believe that the standards of Minn. Rules pts. 9525.0015 to 9525.0165 are not met. With respect to persons under guardianship of the commissioner, the commissioner shall promptly review and respond to requests to initiate such appeals.

6. The parties agree that issues with respect to the community services provided persons with mental retardation discharged from the regional treatment centers are not to be heard and determined by the federal court in this action except as specifically permitted under Part XI of this Negotiated Settlement, but may be heard and determined in an appeal brought pursuant to Minn. Stat. § 256.045 or other appropriate proceeding for redress. The outcome of these appeals will not affect the count of persons discharged under paragraph 3 of this section. F. Staff Ratios.

1. At the time defendants seek an order of the Court for termination of the federal Court's jurisdiction over this action/ it shall present reports kept in the ordinary course of business that the staff ratios set forth in Part VII have been substantially met for the three immediately preceding calendar quarters.

2. Unless the accuracy of the reports is challenged by the plaintiffs, the reports shall constitute conclusive evidence that the staff ratios have been met.

3. Compliance with the staff ratios in the three immediately preceding calendar quarters is a condition for termination of the federal court's jurisdiction over this action.

G. Children in Regional Treatment Centers.

1. At the time the defendants seek an order from the Court for termination of the Court's jurisdiction over this action, the Department will present a report demonstrating that:

a. All regional treatment centers are licensed to serve only persons eighteen years of age and over; and

b. Any child residing in a regional treatment center at that time has a time-limited license variance and a plan for community placement specifying the date for such placement.

2. Compliance with 1a and 1b is a condition of termination of the Court's jurisdiction over this action.

H. The Department's obligations under this, part do not extend beyond the date when the federal court dismisses this action pursuant to Part X of this Negotiated Settlement.

X. TERMINATION OF FEDERAL COURT JURISDICTION.

A. As set forth in the Introduction to this Negotiated Settlement, it is the intention of the parties that upon completion of the obligations set forth in Part IX of this agreement they shall jointly move to terminate the jurisdiction of the federal court over this action.

B. Upon completion of the obligations set forth in Part IX, sections A through E, the parties separately or jointly may move this Court for an order dismissing this action. At the time of the hearing on such motion, the defendants must present a prima facie case of their compliance with Part IX, sections A through G. The plaintiffs bear the burden of persuading the Court by a preponderance of the evidence that the Department has failed to meet its obligations under Part IX, sections A through

G. In reaching its decision, the Court may also consider whether the Department has complied with any order issued pursuant to Part V, section E of this Negotiated Settlement.

C. If the Court concludes that the Department has complied with its obligations, it shall dismiss this action and all obligations under this Negotiated Settlement shall end, except that the parties agree that if the legislation specified in Part VIII, section A has not passed at that time, and it is a date prior to June 30, 1989, the Department will continue to fund the office of the monitor and the provisions of Part VIII, section B will remain in effect until June 30, 1989.

D. If at any time after June 30, 1989 the Department has met the obligations set forth in Part IX, sections A through D, but not the obligations in section E, the parties separately or jointly may move this Court for an order terminating the office of the monitor. At the time of the hearing on such motion, the defendants must present a prima facie case of their compliance with Part IX, sections A through G, except section E. The plaintiffs bear the burden of persuading the Court by a preponderance of the evidence that the Department has failed to meet its obligations under Part IX, sections A through G, except E. The Court may also consider whether the Department has complied with any order issued pursuant to Part V, section E of this draft Negotiated Settlement. If the Court concludes that the Department has complied with its obligations under Part IX, except section E, the office of the monitor will be terminated. Compensation for the personal services of the monitor shall be paid by the Department for three full months following the date of such an order.

E. At such time as the Court issues an order dismissing this action, all obligations under the Negotiated Settlement shall end, except as provided in section C of this part.

XI. LIMITED FEDERAL COURT REVIEW OF DAY SERVICES.

A. Class members who have been discharged from regional treatment centers since September 15, 1980 may challenge in this Court the amount and frequency of day training and habilitation services provided, or proposed to be provided, only if:

1. A request for review has been submitted pursuant to Minn. Stat. § 256.045; and

2. A conciliation conference has been held and a report adverse to the class member has been issued, or thirty days have elapsed from the submission of the request for review.

B. Plaintiffs agree that questions with regard to the quality or appropriateness of day training and habilitation services will not be raised with the Court. Instead, only questions related to the failure to provide the amount and frequency of such services may be raised. These allegations shall be heard by the Court or United States Magistrate, if the parties agree, and not by the monitor or some other hearing officer and may be considered in light of the Consent Decree entered September 15, 1980.

C. The parties preserve all claims and defenses which they might make in the presentation of issues to the Court pursuant to this part, including, but not limited to, claims and defenses with regard to the proper construction of provisions of the Consent Decree entered September 15, 1980. In addition, the Department preserves its right to oppose plaintiffs' efforts and

to raise any other defenses at that time, including defenses concerning the federal court's authority either to consider the questions raised or to grant the relief requested.

D. At such time as legislation is effective in a form which confirms the county responsibility to provide day training and habilitation services in accordance with an individual service plan established pursuant to Minn. Rules pt. 9525.0075, the parties will jointly move the court for an order vacating the part of the Order approving the Negotiated Settlement which is premised on this part.

E. The provisions of this part do not extend beyond the date when the federal court dismisses this action pursuant to Part X of the Negotiated Settlement.

XII. ACCESS FOR COUNSEL FOR THE PLAINTIFFS.

A. The commissioner shall take necessary action to ensure reasonable access for counsel for the plaintiffs and other persons with their written authorization to the buildings and grounds of, and pertinent records of persons with mental retardation at, the regional treatment centers and state operated community facilities, for the purpose of observation and examination and, with respect to those persons under state guardianship residing at regional treatment centers or state operated community facilities, to case management records.

B. With respect to those persons with mental retardation discharged from regional treatment centers since September 15, 1980 who are under the guardianship of the commissioner, the commissioner shall authorize access for counsel for the plaintiffs and others with their written authorization to observe and evaluate programs provided and review records of those persons.

C. The commissioner shall promptly review and respond to requests by counsel for the plaintiffs to initiate appeals pursuant to Minn. Stat. § 256.045 on behalf of those persons with mental retardation under the guardianship of the commissioner presently residing in the regional treatment centers or discharged from the regional treatment centers since September 15, 1930.

D. Nothing in paragraphs A through C, above, shall be construed to limit in any way any right of access which counsel

for the plaintiffs may have under any other provision of state or federal law, rule, or regulation.

E. The obligations of the commissioner under this part do not extend beyond the date when the federal court dismisses this action pursuant to Part X of this Negotiated Settlement.

XIII. PRESERVATION OF STATE'S ELEVENTH AMENDMENT RIGHTS.

The parties agree that no provision of this Negotiated Settlement shall be read to constitute a waiver of the state's eleventh amendment immunity, including immunity to suit in federal court with respect to any claims which are based on state law.

XIV. ATTORNEYS' FEES.

A. Plaintiffs' counsel reserve the right to claim an award of attorneys' fees pursuant to 42 U.S.C. § 1988, subject to the limitation amount previously provided counsel for the Commissioner on March 13, 1987, for time spent until the parties sign the Negotiated Settlement.

B. The parties may incorporate an agreement with respect to attorneys' fees in an addendum to the Negotiated Settlement.

C. In the event that no agreement is reached between the parties on the amount of attorneys' fees, plaintiffs' counsel reserve the right to petition the Court for an award of such fees, subject to the limitation amount previously provided counsel for the Department on March 13, 1987, except that plaintiffs may claim an additional award of fees for time spent by them (or time spent by counsel representing them) in obtaining an award of fees.

D. No provision in this part shall be construed as an admission by defendants that plaintiffs are a "prevailing party" within the meaning given that term in 42 U.S.C. § 1988. In the event no agreement is reached between the parties on an for amount to be paid to counsel plaintiffs or any other issues related to

attorneys' fees, defendants preserve all defenses with respect to any claim for fees made by counsel for plaintiffs.

Dated: April 14, 1987.

LEGAL ADVOCACY FOR PERSONS
WITH DEVELOPMENTAL DISABILITIES

MINNESOTA DEPARTMENT OF HUMAN
SERVICES

By:


LUTHER A. GRANQUIST

By:


SANDRA S. GARDEBRING
Commissioner

By:


ANNE L. HENRY
222 Grain Exchange Building
323 Fourth Avenue South
Minneapolis, MN 55415
Telephone: (612) 332-7301

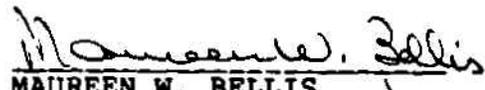
Attorneys for Plaintiffs

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By:


BEVERLY JONES HEYDINGER
Assistant Attorney General

By:


MAUREEN W. BELLIS
Special Assistant
Attorney General

Suite 200
520 Lafayette Road
St. Paul, MN 55155
Telephone: (612) 297-1075

Attorneys for Defendants