

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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U.S. DISTRICT COURT
S.D. OF FLORIDA - MIAMI

**SHELYNDRA BROWN, by her
mother and next friend,
JESSE O'NEIL, et al.,**

Plaintiffs,

vs.

CASE NO.: 98-673-CIV-MARTINEZ/DUBE

**JEB BUSH, in his official
capacity as Governor of the
State of Florida, et al.,**

Defendants.

_____ /

AMENDED SETTLEMENT AGREEMENT

The Plaintiffs, as representatives of the certified class, and Defendants have reached an agreement as to a plan for settling this litigation. The Parties are hereby filing this Settlement Agreement (Agreement or Agreement of the Parties) with the Court, and ask that the Court approve the Agreement pursuant to Fed. R. Civ. P. 23(e), which approval is a condition precedent to the Agreement's effectiveness. The Parties jointly enter this Agreement. Upon approval of the Agreement by the Court, all further proceedings in this case will be stayed or abated until no later than June 30, 2007, as discussed further below in Part III, paragraph 6.

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I. DEFINITIONS

1. "DD Waiver" means the Florida Developmental Disabilities Home and Community Based Services Waiver.
2. The "Supported Living Waiver" means the Supported Living Home and Community Based Services Waiver.
3. The "developmental disabilities waiting list" means the waiting list maintained by the Department for persons seeking enrollment on either the DD Waiver or the Supported Living Waiver.
4. "Department" means the Department of Children and Family Services.
5. "Advocacy Center" means the Advocacy Center for Persons with Disabilities, Inc.
6. "Systemic problems or deficiencies" shall mean problems or deficiencies which are common in the Defendants' compliance with the requirements of this Agreement and inconsistent with the terms of this Agreement. Isolated instances of deficiencies or problems in compliance with the requirements of this Settlement Agreement, without evidence of more pervasive conduct, are not "systemic" in nature.
7. "DSI" means any of the four (4) Developmental Services Institutions which are owned and operated by the State of Florida. The acronym "DSIs" shall be used to refer to all four (4) of the Developmental Services Institutions.
8. The term "Defendants" shall refer to the named Defendants in this case.

9. "Material breach" shall mean systemic deficiencies in compliance with the requirements of the Settlement Agreement. Minor or isolated delays in compliance, without evidence of more systemic deficiencies shall not constitute material breach.

10. "Class members" shall refer to members of the class as certified by this Court.

II. PLAN OF COMPLIANCE

The Defendants agree to do the following to settle this action:

1. The support planning process for all individuals residing in the DSIs will first determine the supports and services that the individual needs to live in the community. The process will be based upon a positive view of the individual's abilities and skills. Based on the determination of the supports and services that the individual needs to live in the community, the treatment team will then make a recommendation on whether the individual is appropriate for community placement.

2. The Department will begin to administer the Individual Cost Guideline tool on May 1, 2004, and will implement the tool for all individuals who are residing in DSIs, by May 1, 2005.

3. During the term of this Agreement, the Department will provide copies of all community placement or discharge plans for DSI residents to the Advocacy Center, as counsel for the class, within ten days of completion of the plan, but at least thirty days prior to discharge, unless the DSI resident or his or her guardian or guardian ad litem opposes the provision of such copies to the Advocacy Center.

4. The Department will comply with Policy ## 02-01 (Due Process Policy) implemented on May 1, 2002, or amendments to this policy, as it relates to individuals residing

at the DSIs who seek enrollment on the DD Waiver or the Supported Living Waiver, including adverse determinations made on requests for particular waiver services.

5. During the term of this Agreement, the Department will provide copies of any due process letters for DSI residents to the Advocacy Center, as counsel for the class, within ten days of issuance, unless the DSI resident or his or her guardian or guardian ad litem opposes the provision of such copies to the Advocacy Center.

6. This Agreement itself creates no right to monitor the adequacy of community-based placements. To the extent that DSI residents believe that the package of community-based supports and services, or the alternative placement they are being offered is inadequate, that inadequacy may be addressed in fair hearings separate from this litigation.

7. The Department will develop and implement an education and training program substantially similar to what has been utilized at Landmark, for treatment team members and other DSIs staff designed to ensure that informed professional judgments are made about community placement and services. Defendants retain the flexibility to modify the program based on best practices and experience.

8. The education and training program will include a description of the services and supports available to people with developmental disabilities in the community, the professional standards for determining how persons with developmental disabilities can best be served in the community, and the benefits of community living.

9. The Department will provide an education program, substantially similar to what has been utilized at Landmark, for consumers, families, guardians, and guardian advocates. Defendants retain the flexibility to modify the program based on best practices and experience.

The program will include a description of:

- a. the services and supports available in the community;
- b. the experiences of people with developmental disabilities who live in the community; and
- c. the professional judgment concerning the benefits for persons with developmental disabilities to live in the community.

10. By July 1, 2004, the Plaintiffs and the Department will work together to develop the outline and materials for the family education program. However, the final content of the educational program outline and materials will be in the sole discretion of Department. The Plaintiffs and the Department will cooperate in implementing the program.

11. The Department will close Landmark no later than June 30, 2005 and will develop a plan for closure of Gulf Coast Center by June 30, 2005.¹ The plan will include those actions necessary to close the facility by July 1, 2010.

12. By June 30, 2007, the Department will reduce the combined census of the DSIs by at least 180 individuals, at a rate of 60 persons per year. At least 85% of the 180 persons will be enrolled on the DD Waiver or the Supported Living Waiver. The death of a DSI resident shall not count toward census reduction. Additionally, to the extent that the Legislature appropriates funding to serve persons from the developmental disabilities waiting list, there are residents of the DSIs who are near the top of that waiting list who would likely be served if the funding is available to serve the waiting list. For fiscal year 2004-2005, to the extent that funding

¹The Parties understand and agree that the actual closure of Gulf Coast Center will not be accomplished during the life of this Settlement Agreement.

is appropriated to address either the DD Waiver or the Supported Living Waiver, the Department will serve up to 50 class members from the developmental disabilities waiting list in the rank order they appear on the waiting list. These class members shall be in addition to the census reduction of 60 persons for the fiscal year 2004-2005. Should funding be available and the Department is able to serve more than 50 class members from the developmental disabilities waiting list in the rank order they appear on the waiting list, then any additional persons served in fiscal year 2004-2005 shall count toward the 60 person census reduction requirement for fiscal year 2005-2006.

13. For fiscal years 2005-2006 and 2006-2007, to the extent that the Legislature appropriates funding to address the developmental disabilities waiting list, and there are persons from the DSIs who are enrolled on the DD Waiver or the Supported Living Waiver from the developmental disabilities waiting list, those individuals would be counted toward the 60 person overall census reduction for each fiscal year. Nothing in this Agreement shall be interpreted to deny services to any individual who would otherwise be served by the DD Waiver or the Supported Living Waiver based on rank order and the availability of funding for services.

14. The above-mentioned census reduction cannot be accomplished if there are prolonged delays in the discharge process (or the process leading up to ultimate discharge). The parties agree to work together to avoid any unnecessary delays in the discharge process.

15. The Department agrees that additional funding is necessary to accomplish the phasing down of the census of the DSIs as noted above. This funding must be sufficient to provide services to individuals transitioned from the DSIs in their first year to the DD Waiver or the Supported Living Waiver.

16. The Department has already submitted a Legislative Budget Request seeking the necessary funding to move 60 persons out of Landmark for fiscal year 2004-2005 and to serve approximately 3,200 persons from the developmental disabilities waiting list. This is also included in the Governor's Budget Recommendations.

17. For fiscal years 2005-2006 and 2006-2007, the Department will submit a Legislative Budget Request seeking the necessary "start up" funding necessary to accomplish the census reduction activities described in paragraph 12 above in each of these respective fiscal years. The Legislative Budget Request shall seek the amount of funding necessary to provide services to individuals transitioned from the DSIs in their first year on the DD Waiver or the Supported Living Waiver.

18. The Department will utilize its best efforts to secure the funding described in paragraph 17.

19. If, despite taking the actions described above, the Legislature fails to adequately fund the Department's budget in a manner which prevents the Department from implementing the census reduction described in this agreement, then the failure to comply with the provisions of paragraphs 12 and 13 in this Part will not be deemed to be a material breach of the Agreement.

III. RESOLUTION

1. The Parties agree that the Plan of Compliance set forth in Part II, paragraphs 1- 19 above, resolves all issues which have been raised in the pleadings in this cause, and should be implemented.

2. The parties have entered into this Agreement in order to avoid the uncertain outcome of litigation. Nothing in this Agreement should be construed as an admission of liability by Defendants, and cannot be used as an admission by either party in this or any other proceeding. Neither this Agreement nor any action to carry out this Agreement is or may be used as an admission by or against the class members or class counsel regarding the lack of merit of the claims asserted. The parties agree not to use this Agreement or any of its terms or provisions in any other case or matter to argue that any party has conceded that any particular action must be taken or not taken.

3. This Agreement, including the Plan of Compliance, is the product of multiple lengthy negotiation sessions, and compromise by the Plaintiffs, the Plaintiff Class, and the Defendants.

4. To help ensure effective implementation of the Plan of Compliance, the State Defendants have received input, through counsel from the Class Plaintiffs, who are the intended beneficiaries of the Plan of Compliance.

5. The Department shall provide quarterly reports to the Advocacy Center and to the lead plaintiffs' attorney (as designated by the Advocacy Center) of its progress in implementing this Agreement. At the request of either party, a meeting to discuss implementation issues shall be scheduled within ten days.

6. The Parties have agreed that the Court will retain jurisdiction of this litigation until June 30, 2007, at which time this case will be dismissed with prejudice except as to the claims for prospective declaratory and injunctive relief of class members who have not been discharged from the DSIs, unless there is a pending motion asserting material breach. If, prior to

June 30, 2007, Plaintiffs in their sole discretion, believe the Defendants have materially breached the terms of this Settlement Agreement, Plaintiffs may move the Court to lift the stay and proceed to trial pursuant to the requirements in this Part and paragraphs 7, 8 and 9 below.

7. Plaintiffs agree to give the Defendants notice, at least thirty (30) days prior to filing a motion, of their intent to proceed to trial.

8. If Plaintiffs believe Defendants have materially breached the Settlement Agreement, Plaintiffs are required to give Defendants, in writing, specific reasons why they believe the Defendants have materially breached the terms of the Settlement Agreement. Defendants shall provide a written response to the Plaintiffs' notification within 15 days of its receipt. The Defendants' response shall contain an outline of the steps the Defendants took to investigate the issues the Plaintiffs' notice addressed, the results of the investigation and a specific plan for addressing the described problems. The response may contain a request by the Defendants to extend the Agreement for a negotiated and agreed upon period of time. If no corrective action is anticipated by reason of technical impracticality, funding constraints, or legal considerations, the Defendants' response shall include the reason and any statutes, regulations or technical bases upon which they are relying. Plaintiffs agree to advise the Defendants of their acceptance or rejection of the Defendants' response within 5 days of its receipt.

9. If the Parties are unable to reach agreement on curing the systemic problems identified in the Plaintiffs' notice letter, Plaintiffs may then, within 5 days, move the Court to lift the stay and seek a resumption of the litigation.

10. If the stay is lifted, the Parties agree that they need and will jointly request that the Court give them at least six months for discovery with a two-month discovery cut-off prior to trial.

11. The Parties agree that during the period of abatement contemplated by this Agreement, all discovery is stayed and will not be resumed unless or until the stay is lifted.

12. During the life of this agreement, the Defendants specifically reserve the right to change, alter, amend or rescind the manner in which they provide developmental services, so long as such amendments, alterations or changes conform to federal constitutional, statutory, regulatory, or legal minima. Plaintiffs have the right to challenge in this action any such change, alteration, amendment or rescission only on the grounds that it fails to conform to federal constitutional, statutory, regulatory or legal minima, and that such change leads to a material breach of this agreement.

13. Prior to requesting any amendment of the Medicaid State Plan that affects rights secured by this Agreement, Defendants will give reasonable notice to the Advocacy Center of their intent to seek such an amendment. The Parties agree that if Defendants request a waiver for any provision of federal law applicable to the delivery of Medicaid or other developmental services and the waiver is granted by the United States Departments of Health and Human Services or the Center for Medicare and Medicaid Services as the case may be, Defendants will not be deemed to be in non-compliance with the terms of this Agreement.

14. The Plaintiffs agree to waive attorneys' fees and costs in this case, so long as Defendants do not materially breach the terms of this Agreement. In the event that Plaintiffs seek to resume litigation of the merits of the underlying claims in this action, and are awarded

relief on the merits, Plaintiffs reserve the right to seek the award of reasonable attorneys' fees and costs since the inception of this litigation. Defendants also reserve the right to challenge any such request for attorneys' fees and costs.

15. All Parties and their counsel will use their best efforts to obtain Court approval pursuant to Rule 23(c) of this Agreement.

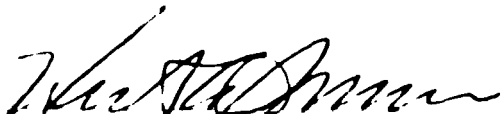
16. The Parties' breach, or alleged breach, of this Agreement (or of the terms contained herein) will not be used by any party as a basis for any further litigation.

17. Each of the signatories to this Settlement Agreement on behalf of the Defendants represents that he or she will take all necessary steps to comply with the requirements of Florida Statute § 45.062, Fla. Stat. (2003).

IN WITNESS WHEREOF, the Parties to this Settlement Agreement have executed the same as of the 14th day of June, 2004.

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