

Martin v. Taft, No. 89-CV-00362

Exhibit A

Proposed Consent Order

IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

NANCY MARTIN, <i>et al.</i> ,	:	
	:	CASE NO. 89-CV-00362
Plaintiffs,	:	
	:	JUDGE SARGUS
vs.	:	
	:	MAGISTRATE JUDGE KING
BOB TAFT, <i>et al.</i> ,	:	
	:	
Defendants.	:	

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**CONSENT ORDER**

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This matter is before the Court on the Third Amended Complaint of Plaintiffs and the Defendants' Joint Answer to the Plaintiffs' Third Amended Complaint. The class in this case is certified as "all mentally retarded or developmentally disabled Ohioans who are, or will be, in need of community housing and services which are normalized, home-like and integrated, and a subclass who, in addition to being members of the class, are or will be, Medicaid recipients." As determined in the Court's order of November 28, 2005, "[i]f an individual with Mental Retardation or other Developmental Disabilities is not, or will not be, in need of community housing and services, they are not member of the Class, lack standing to pursue a judicial resolution, and will not be bound by any decision of this Court." Opinion and Order, R. 736, p. 5.

The Court takes notice that the parties have reached a settlement in this case. The parties have agreed to the following stipulations:

1. Plaintiffs filed this lawsuit to compel Defendants to provide them with a choice of community based, integrated residential services that are readily available. Since its

filing, the State of Ohio has undertaken a shift away from institutions to community based services as the primary choice of residence for persons with disabilities.

2. Ohio provides a wide range of services and supports to people with Mental Retardation and Developmental Disabilities (MR/DD).
3. The Ohio Department of Job and Family Services (ODJFS) and the Ohio Department of Mental Retardation and Developmental Disabilities (ODMR/DD) are public entities as defined by the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et. seq.
4. ODJFS and ODMR/DD are public entities for the purpose of “community integration” as defined by 28 C.F.R. § 35.130(d).
5. The Supreme Court case of *Olmstead v. L.C.*, 527 U.S. 581 (1999), contains authority which governs and guides this case.
6. The actions by the State of Ohio have assisted the class by increasing options for individuals with MR/DD who want to live in the community.
  - a. In 2000, the “Ohio’s MR/DD Vision Paper: Final Report to the Governor” contained twenty-seven recommendations that addressed issues facing Ohioans with disabilities. The paper established two core system values: an individual with MR/DD has a fundamental choice of services and support, limited by available resources, and is entitled to services that meet his or her health and safety needs.
  - b. In 2001, Ohio created its *Olmstead* Plan, “Ohio Access for People with Disabilities.” Ohio Access contained three guiding principles: increasing community capacity; prioritizing resources; and assuring quality and accountability. Ohio Access was updated in 2004.

- c. Ohio has decreased the population of Developmental Centers (DC). As of June 2006, only 1,607 individuals lived in DCs, which represents a 20% reduction since 2000. As part of the census decrease, Ohio closed two DCs -- Springview Developmental Center in 2005 and Apple Creek Developmental Center in 2006. Each resident was given a choice as to their placement. Individuals chose to move to other DCs, private ICFs/MR, or community placements. Of the 236 residents who left Springview and Apple Creek DCs, 134 went to other DCs, 62 went to private ICFs/MR, and 40 received a waiver and moved to a community placement. In order to make room for residents who chose to move to another DC or to a private ICF/MR, residents in those facilities were also given the option to move to another placement. From those facilities, 31 DC residents and 39 private ICF/MR residents received a waiver and moved to community placement. In addition, Ohio recently decreased the population of Warrensville Developmental Center from 218 in 2005 to 180 in June 2006.
  - d. The State of Ohio also implemented a DC Self-Determination project in 2002 which assisted individuals moving from DCs to the community. ODMR/DD has developed a strategic plan with stakeholders to address the future role of DCs in Ohio's service delivery system for individuals with MR/DD.
  - e. In fiscal year 2004, ODMR/DD distributed \$5,384,019 in housing funds to county boards of MR/DD, with \$1,195,056 available to provide homes for individuals leaving DCs. In fiscal year 2005, ODMR/DD distributed \$7,355,878 for housing, with \$2,397,874 earmarked for DC residents moving to the community.
7. Ohio has created residential service options for class members through Home and Community Based Services (HCBS) Waivers.

- a. There are three waivers available for individuals with MR/DD to receive HCBS services. They are the Individual Options (IO), Level One and Transitions waivers. The IO waiver was approved in 1991. As of October 2006, 11,726 people were enrolled on the IO waiver. The Level One waiver was approved by the Center for Medicare and Medicaid Services (CMS) on May 1, 2003. As of October 3, 2006, 4,126 persons were enrolled on the Level One waiver. The Transitions waiver became effective in 2002 enrolling 1,867 individuals. As of October 3, 2006, 2,969 persons were enrolled on the Transitions waiver.
  - b. Ohio covers Targeted Case Management (TCM) under its Medicaid state plan. Case managers assess individual needs, develop individual service plans, assist in choosing providers, coordinate and monitor services implemented under the plan and ensure that each person has a personal advocate. Waiver enrollees and Medicaid recipients with MR/DD who are at least three years old are eligible for this service. During Fiscal Year 2005, 71,000 individuals with MR/DD received these services in Ohio.
8. Ohio has improved its ability to assure the health and safety of individuals with MR/DD residing in the community and receiving publicly funded supports.
9. Consistent with the November 28, 2005 Order, this Order does not require individuals to leave ICFs/MR against their wishes, and does not require the closure of any Developmental Center or ICF/MR.
10. Any duty that is given to a specific party by this Order may be enforced only as against that party, and no joint liability shall be ascribed to other parties in that circumstance.
11. The Defendants are sued in their official capacity and therefore, are representing the State of Ohio in this agreement. Federal Rule of Civil Procedure 25(d) shall apply.

12. This Order does not limit or otherwise modify the access of Plaintiffs' class counsel or any other employee or agent of OLRs as specified in R.C. § 5123.60 or 42 U.S.C. § 15001, et. seq.
13. This Order was reached in good faith by the Parties. Defendants do not admit any liability or wrongdoing on their part and this Consent Order does not create an admission of liability or wrongdoing by Defendants.

### **PREAMBLE**

By signing this Consent Order, Governor Taft expresses his unqualified support for the terms of the parties' agreement, described below, as they are consistent with the direction and goals of his Administration as expressed in the Ohio Access plan. With his approval, the Ohio Office of Budget and Management (OBM) has granted ODMR/DD an exception to the budget request limitations OBM imposed in anticipation of the next biennial budget, in order to accommodate the agreement. Governor Taft encourages the next Administration and General Assembly to give full consideration to the terms of this settlement agreement and the formal materials related to it that will be submitted as part of the FY08-09 budget process.

### **TERMS OF THE AGREEMENT**

The Court adopts the above stipulations and for good cause shown, the Court orders that:

- 1. INDIVIDUAL OPTIONS WAIVER SLOTS:** ODMR/DD and ODJFS will request that funding for an additional 1500 IO waiver slots be included in the FY08-09 executive budget. These slots shall be funded with federal and state dollars, and shall be in addition to any planned expansion of locally (county) funded slots, as determined by the Preliminary Implementation Component Tool ("PICT") process. If the requested funding for the additional 1500 IO waiver slots is subsequently appropriated in the State of Ohio's operating budget for the FY08-09 biennium by the General Assembly and approved by the incoming Governor, ODMR/DD will make a good faith effort to fill 600 slots during FY08 and 900 slots during FY09. One-hundred (100) slots per fiscal year will be available for persons currently residing in ICFs/MR. Forty (40) slots per fiscal year will be available for persons currently residing in NFs. With the exception of the enumerated

slots for the persons leaving an ICF/MR or NF, ODMR/DD shall allocate the waiver slots to the county boards of MR/DD in accordance with a formula developed by ODMR/DD. Such formula shall include as a factor for consideration the person's position on the waiting lists maintained by the county boards of MR/DD.

If, after making a good faith effort, ODMR/DD is unable to fill all the 1500 slots in FY08 and FY09 as enumerated above, ODMR/DD will allocate the unfilled slots and have those slots assigned to individuals by June 30, 2009 so they can be enrolled as soon thereafter as reasonably practical, consistent with the health and safety of the individuals.

2. **DEVELOPMENTAL CENTER SURVEYS:** ODMR/DD will conduct a survey of residents of DCs to determine which of the residents may wish to choose a community placement, if one were available. In this paragraph, a community placement is defined as a HCBS waiver. The results will be compiled and shared with Plaintiffs, and shall be completed no later than June 30, 2007. The results of the survey shall not be used for litigation or determining placement of the surveyed individuals.
3. **ICFs/MR SURVEYS:** ODJFS will conduct a survey of residents of both privately run ICFs/MR and county operated ICFs/MR to determine which of the residents may wish to choose a community placement, if one were available. In this paragraph, a community placement is defined as a HCBS waiver. The results will be compiled and shared with Plaintiffs, and shall be completed no later than June 30, 2007. The results of the survey shall not be used for litigation or determining placement of the surveyed individuals.
4. **HOUSING:** Director Ritchey shall apply to the Controlling Board for the release of up to \$4,280,000 from the 2005-2006 ODMR/DD Capital Budget (Line Item CAP-480) to County Boards of MR/DD for participation in the Community Capital Assistance



Housing Program and the Residential Handicap Accessibility Project. Director Ritchey agrees to allocate 7% of the \$4,280,000 to the Residential Handicap Accessibility Project. The purpose of both of these programs is to provide affordable community housing to individuals with MR/DD through non-profit housing corporations contracting with County Boards of MR/DD. After obtaining approval from the Controlling Board for the release of the \$4,280,000, Director Ritchey shall allocate the funds to County Boards of MR/DD in accordance with the allocation methodology developed in accordance with Ohio Administrative Code § 5123:1-1-03 (F), whereby ODMR/DD funds 75% of the median cost of a home in the particular county. Allocation of the funds under the Residential Handicap Accessibility Project shall be in accordance with Ohio Administrative Code § 5123:1-1-17.

5. **RESTORATION OF THE CASE:** If there is not substantial compliance with the funding provision of the additional 1500 IO waiver slots specified in this settlement agreement in the FY08-09 Budget, the Plaintiffs may move to set aside the settlement. The Court shall then make a determination on the question of substantial compliance and decide whether to restore the case to the Court's active docket and schedule it for trial. This provision terminates 15 days after the enactment of the FY08-09 Budget Bill.
6. **RELEASE:** Defendants, Defendants' successors, and any other successor agencies are released from current and future claims or actions regarding any and all matters that are or could have been brought as part of this litigation.
7. **COURT RETAINING JURISDICTION:** This Court shall retain jurisdiction over this matter for the purpose of enforcement of this Order. Jurisdiction shall terminate on June 30, 2009.

8. **COSTS:** If Plaintiffs do not restore this case pursuant to paragraph six of this Order, each party shall bear their own costs and attorney's fees, except that Defendants shall pay Plaintiffs up to one hundred and fifty thousand dollars (\$150,000) in litigation related expenses and costs. At that time, Plaintiffs shall submit a spread sheet of costs certified by the Ohio Legal Rights Services' director or counsel as supporting documentation to the Defendants. Upon receipt of that documentation, Defendants will seek approval for payment by the Controlling Board and make payment to Plaintiffs within a reasonable amount of time.
9. **EFFECTIVE DATE:** The effective date of this Order shall be the day on which the Court enters its Order and Judgment approving this Consent Order pursuant to Federal Rule of Civil Procedure 23(e).
10. **COURT APPROVAL, AGREEMENT TO SUPPORT:** The parties agree that they will recommend approval of this agreement to the Court. The parties also agree that they will fully support this agreement and continued certification of the class during any and all proceedings under Federal Rule of Civil Procedure 23(e).
11. **TERMINATION DATE:** The Order shall terminate on June 30, 2009.

**IT IS SO ORDERED.**

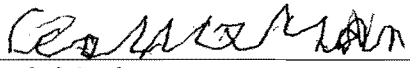
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Edmund A. Sargus, Jr.  
United States District Judge

Date: \_\_\_\_\_

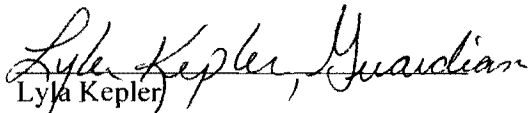
*Martin v. Taft,*  
Case No. 89-CV-00362  
Consent Order Nov. 2006

**AGREED TO:**

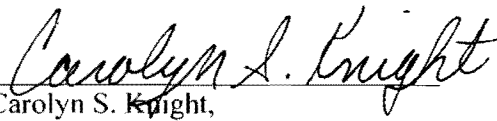
**PLAINTIFFS**

  
\_\_\_\_\_  
Claude Martin

11/17/06  
DATE

  
Lyla Kepler  
In her capacity as Guardian of Warren B.

11-21-06  
DATE

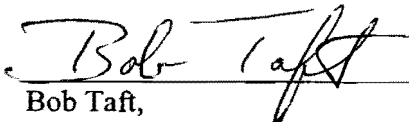
  
Carolyn S. Knight,  
In her capacity as Executive Director  
of Ohio Legal Rights Services,  
Next of Friend of Kathy R.

10/20/06  
DATE

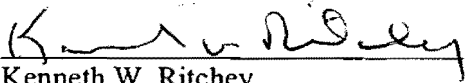
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**AGREED TO:**

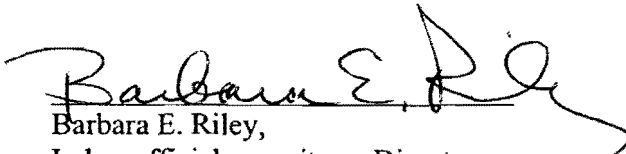
**DEFENDANTS**

  
\_\_\_\_\_  
Bob Taft,  
In his official capacity as Governor  
of the State of Ohio

11-20-06  
DATE

  
\_\_\_\_\_  
Kenneth W. Ritchey,  
In his official capacity as Director  
of the Ohio Department of Mental  
Retardation and Developmental Disabilities

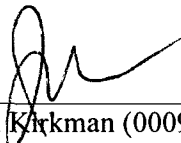
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Barbara E. Riley,  
In her official capacity as Director  
of the Ohio Department of Job and  
Family Services

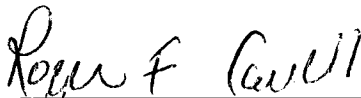
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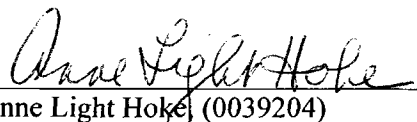
**APPROVED BY:**

  
\_\_\_\_\_  
Michael Kirkman (0009854)  
Trial Attorney for the Plaintiffs  
and the Plaintiff Class

11-27-2006  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
Roger F. Carroll, (0023142)  
Principal Assistant Attorney General  
Trial Attorney for Defendants Bob Taft  
and Kenneth Ritchey

11-27-06  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
Anne Light Hoke (0039204)  
Senior Assistant Attorney General  
Trial Attorney for Defendant Barbara Riley

11-27-06  
\_\_\_\_\_  
DATE