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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JAMES STALEY, by and through his mother
and next friend KAREN STALEY; HELEN
HEALY, by and through her mother and next
friend SUSAN SCHREPPING; TARA
PETERS, by and through her mother and next
friend CHRIS KANNIER; JOHN DUFFIELD,
by and through his mother and guardian
LAURIE DUFFIELD; and MOLLY
DRUMMOND, by and through her mother
and guardian DIANN DRUMMOND,

Plaintiffs,

v.

TED KULONGOSKI, Governor of the State
of Oregon, individually and in his official
capacity; JEAN THORNE, Director of the
Oregon Department of Human Services,
individually and in her official capacity; and
OREGON DEPARTMENT OF HUMAN
SERVICES,

Defendants.

Case No. CV00-0078-ST

DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION FOR APPROVAL
OF MODIFICATION OF SETTLEMENT
AGREEMENT

Defendants¹ urge the court to approve the Modification Agreement reached by the parties. The Modification Agreement represents a fair and reasonable resolution in light of the State's fiscal crisis.

The negotiations that led to the Modification Agreement began after it became clear to Oregon's Department of Human Services (DHS) that full compliance with the terms of the Settlement Agreement was no longer possible in light of Oregon's fiscal crisis. DHS implemented massive cuts in social service programs during the latter stages of the 2001-03 biennium because of unanticipated revenue shortfalls. Those cuts are summarized in a document posted on DHS's website; a copy of that document is attached as Exhibit A. During the course of negotiations, DHS froze enrollments for services under the Settlement Agreement. Before the biennium ended, DHS obtained legislative approval for funding sufficient to maintain the service levels already provided and preserve the brokerage agreements that form the basic infrastructure of the Settlement Agreement. This allowed DHS to keep the core elements of the Settlement Agreement in place while it sought to obtain funding from the 2003 Legislative Assembly to continue providing services to the class of adults with developmental disabilities previously certified by this court.

The Modification Agreement presently before the court represents the results of those efforts. In light of the State's fiscal crisis, DHS's prospects for obtaining the full amount of funding needed to provide the services set forth in the Settlement Agreement were nonexistent. DHS would have been forced to eliminate services described in the Settlement Agreement if it could not reach agreement with plaintiffs on an acceptable modification and obtain funding sufficient to provide those services. This undoubtedly would have resulted in further litigation.

If litigation had proceeded, DHS would have offered any defenses available to it under the law or a plausible extension of the law. Among other things, DHS may have contended that

¹ Pursuant to Fed. R. Civ. P. 25(d), Oregon Governor Ted Kulongoski and DHS Director Jean Thorne are automatically substituted as parties, replacing their respective predecessors in office.


class members had no legally enforceable rights to receive services, particularly in light of the State's fiscal crisis. Final resolution of litigation on these issues—including any appeals—would likely have taken years. The State's program of providing services to adults with developmental disabilities may have been fundamentally altered—and possibly even eliminated—during this time. The final outcome of any litigation and its effect on the State and plaintiff class could not be predicted with any certainty.

The Modification Agreement eliminates the uncertainties associated with costly litigation and focuses the State's resources on providing needed services to the class at a cost that was acceptable to the Legislative Assembly and the Governor in crafting a balanced state budget. Court approval of the Modification Agreement is not only in the best interests of the parties to this litigation, it is also in the *public* interest. Accordingly, the joint motion for preliminary and final approval of the Modification Agreement should be granted.

DATED this 31st day of October, 2003.

Respectfully submitted,

HARDY MYERS
Attorney General


STEPHEN K. BUSHONG #85130
Attorney-in-Charge
Trial Attorney
Of Attorneys for Defendants
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January 2003 DHS Budget Reduction Actions

Including Legislative Restorations Under SB 5548*

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
1	Adult & Family Services (AFS)	January 1	Eliminate the regular <u>Emergency Assistance Program</u> for the rest of the 2001-2003 biennium. It serves approximately 250 people a month who have crises that relate to shelter issues. (Emergency Assistance benefits for victims of domestic violence will continue.)	November 2002 Rebalance
2	Developmental Disabilities (DD)	January 1	Do not open one of the two planned <u>state-operated crisis homes</u> during the 2001-03 biennium, which eliminates stabilization and placement planning for 20 children with developmental disabilities.	November 2002 Rebalance
3	Mental Health (MH)	January 1	Reduce efforts directed by 2001 Legislative action to increase <u>community-based mental health treatment</u> for children and adolescents.	November 2002 Rebalance
4	MH	January 1	Delay until April 2003 the opening of a new <u>Oregon State Hospital ward</u> , needed because the facility is consistently at capacity.	November 2002 Rebalance
5	Office of Medical Assistance Programs (OMAP)	January 1	Implement voluntary <u>co-pays on prescription drugs</u> and ambulatory services for Oregon Health Plan fee-for-service clients.	2001 Budget
6	OMAP	January 1	<u>Eliminate coverage for Lines 559-566</u> on the Oregon Health Plan Prioritized List of Health Care Services.	November 2002 Rebalance
7	Senior & Disabled Services Division (SDSD)	January 1	Cap the number of participants under the <u>1915(c) waiver</u> . 53 people who would have received in-home and community-based services that allow them to stay out of nursing facilities will be put on waiting lists.	Special Session 3

* SB 5548 restorations are effective only through 6/30/03.

February 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
1	Adult & Family Services (AFS)	February 1	Reduce <u>JOBS Program</u> funding.	December Revenue Forecast
2	AFS	February 1	Further reduce <u>JOBS Program</u> spending.	HB 5100
3	AFS	February 1	Co-pays paid by families in the <u>Employment Related Day Care (ERDC)</u> program increase \$18 per month.	HB 5100
4	AFS	February 1	Reduce eligibility for <u>ERDC</u> , eliminating 446 families from the program.	HB 5100
5	AFS	February 1	Reduce <u>Temporary Assistance for Needy Families (TANF)</u> cash benefits by an average of \$5 per month, which also eliminates 164 families from eligibility (since eligibility standards are tied to the amount of benefits).	HB 5100
6	AFS	February 1	Eliminate the <u>lower co-pays charged to new ERDC families</u> for their first two months and increase co-pays for all families by an additional average \$19 per month.	HB 5100
7	Developmental Disabilities (DD)	February 1	Eliminate the second of two planned <u>state operated crisis homes</u> , eliminating stabilization and placement planning for another 20 children with developmental disabilities per year.	HB 5100
8	Health Division (HD)	February 1	Eliminate \$42,500 from the \$250,000 General Fund expansion of the <u>Office of Multicultural Health</u> .	December Revenue Forecast
9	HD	February 1	Eliminate an additional \$125,000 from the expansion of the <u>Office of Multicultural Health</u> .	HB 5100
10	HD	February 1	Eliminate core funding for 20 <u>school-based health clinics</u> , reducing services and referrals.	HB 5100

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February 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
11	HD	February 1	Reduce support of contracted <u>perinatal and prenatal</u> programs.	HB 5100
12	HD	February 1	Reduce state support to county public health departments for <u>communicable-disease control</u> .	HB 5100
13	HD	February 1	Eliminate all funding for the <u>Council on Health Care Interpreters</u> and for efforts to train and certify health-care interpreters.	HB 5100
14	Mental Health (MH)	February 1	Eliminate remaining funding for <u>coordinated planning and delivery of mental-health services</u> , as outlined under House Bill 3024 passed by the 2001 Legislature.	November 2002 Rebalance
15	MH	February 1	Reduce funds for 24-hour, seven-day <u>mental-health crisis services</u> in all counties.	December Revenue Forecast
16	MH	February 1	Reduce funding for the mental health <u>Office of Consumer Technical Assistance Services</u> , which provides technical assistance to clients, and people who are developing support networks and serving on advisory groups.	December Revenue Forecast
17	MH	February 1	Terminate contracts with the <u>17 hospitals</u> that have private psychiatric units which serve Oregon Health Plan clients.	December Revenue Forecast
18	MH	February 1	Eliminate the mental-health <u>Supported Employment program</u> for 121 people with mental illness.	HB 5100
19	MH	February 1	Eliminate 164 <u>Psychiatric Day Treatment</u> slots for children and adolescents.	HB 5100
20	MH	February 1	Eliminate funding for <u>community mental health services</u> for approximately 10,450 non-Medicaid clients.	HB 5100
21	MH	February 1	Eliminate funding for 122 beds of <u>adult residential mental-health treatment</u> . (Pending litigation may delay the closure of 96 beds in Multnomah County until April 15.)	HB 5100

* SB 5548 restorations are effective only through 6/30/03

February 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
22	MH	February 1	Eliminate <u>community mental health services</u> for 3,730 non-Medicaid children. <i>Funding completely restored under SB 5548.</i>	HB 5100
23	MH	February 1	Further reduce efforts directed by the 2001 Legislative action to <u>increase community-based mental health treatment</u> for children and adolescents	HB 5100
24	MH	February 1	Completely <u>eliminate 24-hour, seven-day mental-health crisis response</u> in all counties.	HB 5100
25	MH	February 1	Reduce <u>administrative fees</u> paid to mental health organizations, which help cover costs of such activities as federal reporting and quality improvement.	HB 5100
26	MH	February 1	Reduce the <u>consulting contract with the OHSU Department of Psychiatry</u> , which helps review the quality of services provided in local communities.	HB 5100
27	MH	February 1	Close the <u>Transitional Living Center ward</u> at Oregon State Hospital, a forensic ward that serves 44 patients a year.	HB 5100
28	MH	February 1	Reduce development of additional, specialized, <u>community-residential placement capacity</u> . This means 25 people with special needs will have to remain in the state hospital because of a lack of community-care resources.	HB 5100
29	Office of Alcohol & Drug Programs (OADAP)	February 1	Reduce funding for non-Medicaid <u>outpatient alcohol and drug treatment</u> , affecting approximately 150 people.	December Revenue Forecast
30	OADAP	February 1	Reduce non-Medicaid adult <u>residential alcohol-and-drug treatment</u> capacity by 115 beds, leaving a total of 372.	HB 5100

* SB 5548 restorations are effective only through 6/30/03

February 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
31	Office of Medical Assistance Programs (OMAP)	February 1	<p>Implement "OHP 2" by moving 110,000 Oregon Health Plan clients into "OHP Standard." These are adults with incomes below the Federal Poverty Level who do not otherwise qualify for Medicaid on the basis of fitting into a "category" of eligibility.</p> <p>Changes in benefits for OHP Standard clients include elimination of coverage for vision, non-emergency transportation and medical equipment; reduced dental benefits; mandatory co-payments for services; and increased amounts and strengthened payment requirements for premiums.</p>	2001 Budget
32	OMAP	February 1	Begin requiring that <u>OHP Standard</u> clients have been <u>uninsured for six months</u> before becoming eligible.	2001 Budget
33	OMAP	February 1	<u>Delay the expansion of OHP Standard</u> to people with incomes at 110% of the Federal Poverty Level until July 2003.	November 2002 Rebalance
34	OMAP	February 1	As a result of <u>SDSD eliminating services to levels 15-17</u> , about 2,800 clients will lose eligibility for OHP Plus. (300 may be able to qualify for OHP Standard and about 2,000 will get help paying Medicare premiums.)	HB 5100
35	OMAP	February 1	<p>Eliminate the <u>Medically Needy Program</u>, affecting about 8,000 clients. This program provides limited benefits to elderly and disabled people with incomes too high to qualify for Medicaid or the Oregon Health Plan.</p> <p><i>SB 5548 provided funding to cover medications for approximately 475 former clients who have HIV or are at risk for organ rejection. Funding was also provided to improve the department's ability to respond to public requests for alternate services.</i></p>	HB 5100
36	OMAP	February 1	Do not distribute funding to <u>Safety Net Clinics</u> , which provide health care to people with barriers to accessing health care.	HB 5100
37	Services to Children & Families (SCF)	February 1	Eliminate the <u>Employment Related Foster Care</u> day-care pilot program in three counties, which serves an average of 202 children per month.	November 2002 Rebalance

* SB 5548 restorations are effective only through 6/30/03

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February Reductions

February 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
38	SCF	February 1	Reduce <u>statewide residential treatment for children.</u>	December Revenue Forecast
39	SCF	February 1	Reduce <u>special contracts for children</u> who need specialized short-term placements.	December Revenue Forecast
40	SCF	February 1	Reduce <u>Portland State University contracts</u> that fund research and training designed to enhance child welfare practices.	December Revenue Forecast
41	SCF	February 1	Reduce <u>family treatment</u> and support funds for child welfare services.	HB 5100
42	SCF	February 1	Eliminate all <u>System of Care</u> resources, including flexible funds and staff, meaning services will not be available for approximately 3,400 children per month.	HB 5100
43	SCF	February 1	Reduce <u>regular foster care payments</u> by 7.5% for approximately 5,500 children.	HB 5100
44	SCF	February 1	Reduce special rates paid to foster families for <u>special-needs children.</u>	HB 5100
45	SCF	February 1	Reduce the <u>Supportive Remedial Day Care</u> program for children in foster care.	HB 5100
46	SCF	February 1	Reduce <u>Adoption Assistance</u> payments by 7.5% for almost 7,700 adopted children who have special needs.	HB 5100
47	SCF	February 1	Reduce <u>child-welfare residential treatment</u> for children in state custody by 30 beds.	HB 5100
48	Senior & Disabled Services Division (SDSD)	February 1	Eliminate General Funds for <u>Retired Senior Volunteer Program (RSVP).</u>	December Revenue Forecast

* SB 5548 restorations are effective only through 6/30/03

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February Reductions

February 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
49	SDSD	February 1	Eliminate <u>inflationary increases for nursing facilities</u> , affecting approximately 5,400 clients and 138 nursing facilities. <i>Funding was completely restored under SB 5548.</i>	December Revenue Forecast
50	SDSD	February 1	Reduce average monthly <u>assisted living payments</u> , affecting approximately 3,200 clients and all 163 Medicaid assisted living providers. <i>Funding was completely restored under SB 5548.</i>	December Revenue Forecast
51	SDSD	February 1	Reduce <u>Oregon Project Independence</u> funding by \$1.2 million General Fund. This leaves a statewide budget of \$10 million, down from the original \$13.7 million for the biennium.	December Revenue Forecast
52	SDSD	February 1	Eliminate 95% of the <u>General Assistance Program</u> (2,678 clients).	December Revenue Forecast
53	SDSD	February 1	Eliminate the <u>remaining 5% of the General Assistance Program</u> .	HB 5100
54	SDSD	February 1	Eliminate in-home services and services in 24-hour facilities for 4,177 long-term-care clients in <u>survivability levels 15-17</u> . (Also affects OMAP.)	HB 5100
55	SDSD	February 1	Reduce <u>rates paid to 138 nursing facilities</u> by an average of \$14.51 per day per Medicaid resident. Along with the elimination of inflationary increases, this means nursing facility reimbursement rates will drop by \$17.83 per day. <i>Funding was completely restored under SB 5548.</i>	HB 5100
56	SDSD	February 1	Reduce the <u>base rate paid to 3,900 providers of residential care and adult foster care</u> . Rates will go from \$917 per month to \$780 per month, affecting 7,100 clients. <i>Funding was completely restored under SB 5548.</i>	HB 5100

* SB 5548 restorations are effective only through 6/30/03

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February Reductions

February 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
57	SDSD	February 1	Because OMAP is eliminating the <u>Medically Needy Program</u> , SDSD will have a reduction in eligibility work done by its staff.	HB 5100
58	Vocational Rehabilitation Division (VRD)	February 1	Eliminate the remainder of the <u>Sheltered Services Program</u> for approximately 93 people with severe disabilities.	HB 5100
59	Department-wide	February 1	Eliminate <u>44 positions</u> throughout the department.	November 2002 Rebalance
60	Department-wide	February 1	Reduce <u>training and staff development</u> .	November 2002 Rebalance
61	Department-wide	February 1	Reduce <u>service and supply costs</u> , <u>office expenses</u> and <u>Attorney General fees</u> .	November 2002 Rebalance
62	Department-wide	February 1	Reduce <u>HIPAA</u> contingency reserve and funds for HIPAA-related computer changes.	November 2002 Rebalance
63	Department-wide	February 1	Eliminate <u>38 positions</u> .	December Revenue Forecast
64	Department-wide	February 1	Reduce <u>data processing</u> purchases and other <u>information technology</u> projects.	December Revenue Forecast
65	Department-wide	February 1	Further reduce <u>professional services</u> , <u>expendable property</u> and <u>Attorney General fees</u> .	December Revenue Forecast
66	Department-wide	February 1	Further reduce <u>HIPAA</u> budget.	December Revenue Forecast

* SB 5548 restorations are effective only through 6/30/03

February 2003 DHS Budget Reduction Actions

Including Legislative Restorations Under SB 5548*

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
67	Department-wide	February 1	Eliminate <u>246 positions</u> .	HB 5100
68	Department-wide	February 1	Further reduce <u>HIPAA</u> budget.	HB 5100
69	Department-wide	February 1	Reduce funds for <u>software which enhances integration</u> of DHS computer systems.	HB 5100

* SB 5548 restorations are effective only through 6/30/03

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February Reductions

March 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
1	Developmental Disabilities (DD)	March 1	Eliminate all <u>non-24-hour care for children and adults</u> with developmental disabilities, as consolidated under the <u>Staley Agreement</u> . 5,512 people will lose services and all 10 regional programs established to provide services will close their doors, affecting an estimated 750 jobs. SB 5548 restored \$7.4 million of the original \$11.9 million General Fund cut.	HB 5100
2	Mental Health (MH)	March 1	Reduction from OMAP's eliminating outpatient <u>mental-health benefits</u> for <u>OHP Standard clients</u> .	November 2002 Rebalance
3	MH	March 1	Reduction resulting from OMAP's changing the <u>eligibility date for OHP Standard clients</u> to the first day of the month following eligibility approval.	December Revenue Forecast
4	Office of Alcohol & Drug Programs (OADAP)	March 1	End payments for <u>drunk-driving diversion treatment</u> made by the Intoxicated Driver Program Fund, affecting 700 indigent and low-income people.	November 2002 Rebalance
5	OMAP	March 1	<u>Further reduce OHP Standard benefits</u> by eliminating the remainder of dental benefits and coverage for medical supplies, outpatient mental health and chemical dependency services. (Also affects Mental Health.)	November 2002 Rebalance
6	OMAP	March 1	Reduce " <u>outlier</u> " payments to <u>DRG hospitals</u> (50 or more beds, usually in urban areas) for patients who have unusually high costs because of prolonged stays or more-complicated treatment. (The payments would continue for children under one year old in hospitals that serve a disproportionate share of low-income patients.) Also, reduce inpatient and outpatient reimbursement rates for all DRG hospitals.	December Revenue Forecast
7	OMAP	March 1	Change the <u>eligibility date for OHP Standard clients</u> to the first day of the month following eligibility approval. (Also affects Mental Health.)	December Revenue Forecast

* SB 5548 restorations are effective only through 6/30/03.

March 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
8	OMAP	March 1	Eliminate the requirement to reimburse <u>Type B hospitals</u> (less than 50 beds, within 30 miles of another hospital) at 100% of their costs. (Requires statutory change.)	HB 5100
9	OMAP	March 1	Eliminate the requirement to reimburse <u>Type A hospitals</u> (less than 50 beds, in rural areas) at 100% of their costs. (Requires statutory change.)	HB 5100
10	OMAP	March 1	<u>Eliminate prescription drug benefits</u> for OHP Standard clients. <i>Benefits were restored under SB 5548, effective March 14.</i>	HB 5100

* SB 5548 restorations are effective only through 6/30/03.

April 2003 DHS Budget Reduction Actions

*Including Legislative Restorations Under SB 5548**

Revised March 17, 2003

#	DHS Areas Affected	Effective Date	Reduction	Reason for Reduction
1	Mental Health (MH)	April 1	Further delay opening of the new <u>Oregon State Hospital ward</u> until June. (Originally postponed from January.)	December Revenue Forecast
2	Office of Medical Assistance Programs (OMAP)	April 1	As a result of <u>SDSD eliminating services to levels 10-14</u> , about 4,800 clients will lose eligibility for OHP Plus. (450 may be able to qualify for OHP Standard and about 3,500 will get help paying Medicare premiums.) <i>SB 5548 restored funding to provide services to levels 10 and 11.</i>	HB 5100
3	OMAP	April 1	Reduce <u>OHP pharmacy reimbursement</u> to "average wholesale price" minus 15%, pending federal approval.	December Revenue Forecast
4	OMAP	April 1	Phase in a expansion of the requirement for <u>prior authorization of prescription drugs</u> .	HB 5100
5	Senior & Disabled Services Division (SDSD)	April 1	Eliminate long-term-care services for 4,813 clients in <u>survivability levels 10-14</u> who are receiving care in their homes and in facilities. Also affects OMAP. <i>SB 5548 restored funding to provide services to levels 10 and 11.</i>	HB 5100
6	Health Division (HD)	April 15	Suspend the <u>Tobacco Prevention and Education Program (TPEP)</u> for the balance of the biennium.	SB 859

Staley v. Kulonski USDC 00-0078-ST
Defts' Memo in Supp of Mtn for Appr of Modification
Exhibit A Page 12 of 12

CERTIFICATE OF SERVICE

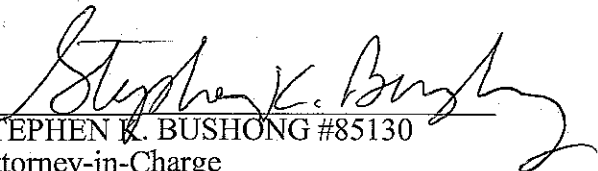
I certify that on October 31, 2003, I served the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF MODIFICATION OF SETTLEMENT AGREEMENT upon the parties hereto by the method indicated below, and addressed to the following:

James Wrigley
Kathleen L. Wilde
Oregon Advocacy Center
620 SW Fifth Avenue – 5th Floor
Portland, OR 97204

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