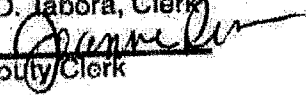


UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

11/18/2010  
Roberta D. Tabora, Clerk  
By  Deputy Clerk

RICHARD MESSIER, et al.  
Plaintiffs,

v.

SOUTHBURY TRAINING SCHOOL, et al.  
Defendants.

No. 3:94-CV-1706 (EBB)

ORDER RE APPROVAL & IMPLEMENTATION OF SETTLEMENT AGREEMENT

Pending before the Court in this class action is a motion pursuant to Fed.R.Civ.P. 23(e) for an order approving the proposed settlement agreement filed by the parties on July 12, 2010. In addition, the parties have moved for an order requiring the plaintiffs to file their claims for costs and fees within sixty days of this Order.

For the following reasons, the Court finds that the proposed settlement agreement is fair, adequate and reasonable and accordingly grants the motion.

**Background**

On July 8, 1996, pursuant to Federal Rule of Civil Procedure 23(b), the court certified the plaintiff class to include all current residents of Southbury Training School ("STS"), persons who might be placed at STS in the future, and persons who were transferred from STS, but remain under the control of the STS Director.<sup>1</sup> The defendants are STS, the Director of STS, and the Commissioner of the Connecticut Department of Developmental Services ("DDS") (formerly

---

<sup>1</sup>Because new admissions to STS were closed by court order in 1986 and thereafter by state statute in 1997, and because there is no longer any person transferred from STS who remains under the control of the STS Director, the class members who are bound by the settlement agreement are the individuals who are residents of STS at the time the Court enters this order approving the settlement agreement. Currently there are approximately 445 class members residing at STS.

known as the Department of Mental Retardation).<sup>2</sup>

In their class action complaint, the plaintiffs' alleged, *inter alia*, that STS and DDS violated their constitutional and statutory rights by failing to exercise professional judgment in making decisions about whether class members should be placed in the community rather than at STS.

After a lengthy trial, the Court, on June 5, 2008, issued an order resolving the case on the issue of liability. See generally, *Messier v. Southbury Training School*, 562 F. Supp.2d 294 (D. Conn. 2008). Specifically, the Court found the plaintiffs had established that the defendants "failed adequately to provide for the evaluation of all class members for community placement and had failed to place in the community class members for whom such placement was found to be appropriate by the defendants' treatment professionals and who had consented to or requested such placement either through their guardians or, where appropriate, themselves." Id. at 335-45.

In order to fashion an appropriate remedy to address the deficiencies identified by the Court, a hearing on remedies was ordered at which the defendants were to present data as to placements made by them since the date of the trial and set forth the procedures they would implement to assure future placements would be appropriately made. Id. at 345.

After a lengthy discovery period, a hearing on remedies commenced on February 16, 2010. After five days of evidence, the parties began earnest and extensive settlement discussions under the supervision of the Hon. Joan Margolis, U.S.M.J., and the hearing on remedies was adjourned. The negotiation process was often difficult and contentious. Nonetheless, during the

---

<sup>2</sup>In 2007, the Department of Mental Retardation was renamed the Department of Developmental Services.

discussions the parties exchanged numerous drafts of proposed settlement agreements and were ultimately successful in their efforts to resolve the issues. On May 12, 2010 they jointly filed their proposed settlement agreement along with a motion seeking its preliminary approval, an order requiring notice to the class, and for a fairness hearing. On July 15, 2010, the Court entered an order preliminarily approving the proposed settlement agreement, directed notice of the settlement be given to the class, and scheduled a fairness hearing. The Court also authorized interested persons to file comments by September 20, 2010.

A Fairness Hearing was held on October 4, 2010.<sup>3</sup>

### **Summary of the Proposed Settlement**

The settlement agreement requires the defendants to address the constitutional and statutory violations that the Court identified in its ruling on liability. In particular, it adequately addresses the defendants' duty to exercise professional judgment in determining the most integrated setting for class members and the appropriateness of community placement for each of them as well as the defendants' obligation to ensure that class members, guardians and family members have sufficient information to make informed decisions. Quite properly, it makes no provision regarding the closing or possible closing of STS, it does not contain any provision calling for the transfer of all STS residents to community settings and it does not provide for the automatic return of class members to STS, as none of these issues were before the Court in this action.

As the agreement states, its purpose "is to assure that the department and its staff commit

---

<sup>3</sup>Familiarity with the underlying proceedings, facts and issues is presumed. For a full account, reference may be had to the numerous rulings, opinions and orders issued by this Court over the course of this lengthy litigation.

that each class member has the opportunity to have an assessment of the supports that would be needed to live successfully in a community setting; to assure that the class member, guardian, involved family member, or other personal representative, has sufficient information to make an informed decision about the merits of community placement to meet the particular needs of the class member including the status of programs and services at STS and to ensure that information will be provided to each class member and his/her guardian to enable them to make an informed choice as to an integrated setting and transition to an appropriate community setting within a reasonable time after professional judgment has been exercised by the IDT. It is recognized that the ultimate decision about residence rests with the guardian unless the department believes that this legal representative is not making decisions in the best interest of the class member.”

More specifically, the salient provisions of the settlement agreement<sup>4</sup> provide for (1) training of Interdisciplinary Team (IDT) staff members regarding the exercise of “professional judgment” that they must use in recommending the “most integrated setting” commensurate with each class member’s needs; (2) implementing, after training, the process for recommending the “most integrated setting” based on the professional judgment of the IDT; (3) providing information to residents, guardians and families about, and exposure to, community-based alternatives to assure that informed choices are made; (4) recognizing in DDS policy that the concept of “portability” – the re-allocation of funding from STS and from any publicly operated ICF/MR to the DDS Regions to support community-based alternatives – applies to STS residents and residents of publicly operated ICF/MR facilities; (5) exercising professional judgment in

---

<sup>4</sup>All of the provisions of the settlement agreement, which is attached hereto as Attachment A, are fully incorporated herein and are made part of this Order.

assessing, evaluating and recommending community transition services and support; (6) planning for transition and identifying and developing resources for STS residents for whom there is a professional judgment/recommendation that the individual can be supported in a more integrated setting and for whom informed consent to community placement has been provided by the resident or guardian; (7) transitioning STS residents to the community placement including establishing time lines for effecting transition; (8) retaining a "Remedial Expert" to assist in the training curriculum, the IDT process, the informational efforts and in effecting the community placement of STS residents for whom the IDT has recommended community placement and the resident or guardian does not oppose such recommendation; and (9) providing for regular meetings of the parties and the Remedial Expert to assess progress under the terms of the settlement agreement and for resolving disputes associated with the settlement agreement.

In addition, the settlement agreement requires the defendants to discontinue the use of the EMPOWER policy and the Quarterly Assessment of Choice Process. Further, it emphasizes that IDTs and STS residents and their families or guardians must discuss and determine the "most integrated setting"<sup>5</sup> for each class member as well as the community services and supports that would be needed to enable them to live successfully in the community. It also provides for the appointment of advocates for STS residents who request them as well as in situations where the family or guardian is not willing to participate in the community placement process. Overall, the provisions of the settlement agreement are designed to ensure that guardians, family members, advocates and class members will have the necessary information about community placements

---

<sup>5</sup>The term "most integrated setting" is defined in a manner consistent with federal law and the ruling of this Court as the setting that enables individuals with disabilities to interact with non-disabled persons to "the fullest extent possible."

(including the option to visit potential placements) they will need to be fully informed and able to make an informed choice to ensure that the needs of class members will be fully addressed in community placements.

In sum, the settlement agreement fully addresses the violations of law that the Court iterated in its ruling on liability and its implementation will bring the defendants into compliance with the law.

#### **Standard for Evaluating the Proposed Settlement**

Pursuant to Rule 23(e), Fed.R.Civ.P., a class action cannot be dismissed or compromised without court approval. Consequently, this Court is charged with the responsibility of closely and carefully scrutinizing the settlement agreement to determine its fairness, adequacy and reasonableness. County of Suffolk v. Long Is. Lighting Co., 907 F.2d 1295, 1323 (2d Cir. 1990); Plummer v. Chem. Bank, 668 F.2d 654, 658 (2d Cir.1982). A class action settlement must be both procedurally and substantively fair and reasonable. D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001).

Rule 23(e)(1) requires the Court to find that appropriate notice was provided to the class members who will be bound by the settlement. The court also must consider (1) the substantive terms of the settlement compared to the likely result of a trial and (2) the negotiating process, examined in light of the experience of counsel, the vigor with which the case was litigated and the coercion or collusion that may have marred the negotiations. Malchman v. Davis, 706 F.2d 426, 433 (2d Cir. 1983). In conducting that analysis, there are nine Grinnell factors that are commonly considered: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of

discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). Here, the Court will only consider the relevant Grinnell factors and not those that concern maintenance of class certification, the risks of establishing liability and damages, the defendants' ability to withstand a greater judgment, and the reasonableness of the settlement fund, as they are not relevant in the current posture of this case.

Finally, the Court notes that "Rule 23(e) does not give a district court the power to modify a proposed settlement agreement or require parties to accept a settlement to which they all have not agreed." Evans v. Jeff D., 475 U.S. 717, 726 (1986). A court "should approve or disapprove a proposed agreement as it is placed before [her] and should not take it upon [herself] to modify its terms." In re Warner Commc'ns Sec. Litig., 798 F.2d 35, 37 (2d Cir. 1986). In other words, the "settlement must stand or fall as a whole." Brooks v. Ga. State Bd. of Elections, 59 F.3d 1114, 1119 (11<sup>th</sup> Cir. 1995).

#### **Reasons for the Court's Approval of the Settlement**

As noted, the Court has given due consideration to the relevant factors and finds the settlement agreement to be procedurally and substantively fair, adequate and reasonable in all respects.

##### **A. Notice**

Adequate notice, in the manner directed by the Court in its preliminary order and in full

compliance with the requirements of Rule 23, was given to the class members who would be bound. The form and manner of the notice was the best notice practicable under the circumstances. It precisely defined the class, clearly informed class members of the nature of the case, explained the material terms of the settlement such as “professional judgment,” “community placement,” and “informed consent,” and fairly apprised the class members of the substance of the proposed settlement and the options open to them to present their objections and concerns. In sum, the notice clearly comported with due process.

The notice was mailed to class members on July 23, 2010 and copies of it were published in six newspapers on July 23, 2010, fourteen days before the comment period was initially scheduled to close and twenty-eight days before the original date of the fairness hearing. At the request of several guardians, the Court extended the deadline for submitting comments to September 28, 2010, and the date of the fairness hearing to October 4, 2010. Defendants provided notice to the class of these changes and class members had sufficient time to prepare for the hearing.

The Court has received proof of the mailing of the notice and all class members and other interested parties have been given an opportunity to be heard. No person or organization has challenged the adequacy of the form and content of the notice

**B. The Negotiation Process**

The settlement agreement is the result of arms-length negotiations conducted by experienced, competent and zealous counsel with the assistance of an experienced and able mediator who helped ensure that the proceedings were free of conflicts of interest and undue pressure.

Plaintiffs' lead counsel has a great deal of experience in similar federal class action litigation. E.g., C.A.R.C. v. Thorne, No. H-78-653(TEC); P.J. v. State of Conn., No. 2:91cv180(RNC); ARC/CT v. O'Meara, 3:01cv1871(JBA); Hillburn v. Maher, 795 F.2d 252 (2d Cir. 1986). Counsel for the organizational plaintiffs also have considerable experience litigating and resolving complex civil rights cases on behalf of individuals with severe disabilities.

The settlement was reached after sufficient discovery had been completed, including an expert tour of STS, depositions of defendants' experts and administrators and examination of the files of STS residents who had been referred for community placement, all of which enabled the plaintiffs to evaluate the strengths and weaknesses of their positions.

The Court is satisfied that the settlement agreement is the product of arm's length negotiations that were aimed at providing effective relief to class members and was free from collusion or other factors that might taint the fairness of the settlement to the class as a whole.

**C. Complexity, Expense & Likely Duration of the Litigation**

To date, the litigation has been especially costly. If the settlement had not been reached, the costs would only escalate. As noted, the action involved complex factual and legal issues and was actively prosecuted over many years. The parties invested considerable resources in the case through data collection, litigation efforts, and settlement negotiations. The trial on liability alone took 123 days and there was extensive post-trial briefing after the close of evidence. As the docket reflects, after the Court ruled on liability and prior to the commencement of the hearing on remedies, the parties engaged in extensive discovery and motion practice. Completing the hearing on damages would have added considerable costs, especially when considering the

necessary post-hearing briefing and argument. Moreover, in the absence of settlement, it is likely that appeals would be taken from the Court's remedial orders, and this would further delay relief to the class members and would increase the costs substantially.

It is clear that, by negotiating and reaching the settlement, counsel avoided the likelihood of further complex, lengthy and expensive proceedings. Given this, acceptance of the settlement at this stage is appropriate.

**D. Reaction of the Class**

After dissemination of the notice to the class, the Court received comments from families or guardians of seventy-one of the 445 current residents of STS. There were no specific objections to the actual terms of the settlement agreement. The majority of the comments expressed concern that STS may be closed and that class members may be forced to move out of STS over the objection of their guardians or family members. At the fairness hearing, many guardians and family members addressed the Court and voiced these concerns.

More specifically, comments made by the families or guardians of six current STS residents approved the settlement agreement and/or stated that they would consider community placement. Comments made on behalf of forty-nine class members either opposed community placement in general, opposed community placement if the class member's guardian or family objected, opposed closing STS, and wanted the settlement agreement to provide for automatic readmission to STS if community placement for class members did not work out. Comments made on behalf of sixteen class members expressed similar concerns, i.e., opposing the closing of STS; the necessity for including a provision in the agreement providing that guardians or family members would have unfettered discretion to have their wards readmitted to STS if community

placement did not work out; the necessity for including a provision in the settlement agreement clarifying and specifying that guardians or family members would make the final decision about community placement; the necessity for including a provision in the settlement agreement that specifically provides that STS may be designated as the most integrated setting; and the necessity for including a provision in the settlement agreement requiring that the health needs of each class member be appropriately addressed during the placement process. In addition to these comments, the family of one class member objected to the settlement agreement as being too vague and another family strongly objected to the agreement because they did not want their relative to leave STS.

None of these comments, concerns, or omissions detract from the reasonableness, adequacy and overall fairness of the settlement agreement vis-a-vis the majority of class members and thus do not require the Court to disapprove the settlement agreement.

Specifically, the comments concerning the need for additions or modifications to the terms of the settlement agreement are untenable because the Court does not have the power or authority to make changes or additions to the parties' agreement. Evans, 475 U.S. at 726-27. In other words, the Court cannot order the settlement agreement be amended to provide, for example, that STS may be designated "the most integrated setting" for a class member<sup>6</sup> or that STS will remain open. In sum, the concerns about, *inter alia*, closing STS, returning class members to STS if community placement does not work out and mandating community

---

<sup>6</sup>Indeed, such a provision would run counter to the Court's specific finding that STS is not an integrated setting, but "is a segregated institution in which all residents are mentally disabled." Messier, 562 F. Supp.2d at 326. In any event, such a provision is not necessary because the agreement provides that an IDT may determine that community placement is not an appropriate placement for a particular individual.

placement over the objection of guardians or family members are unfounded and specific language in the settlement agreement addressing these issues is not necessary.

First, there is nothing in the settlement agreement that expressly or impliedly provides for the closing of STS. Closing STS was never an issue in this case.

Second, there are a number of provisions in the settlement agreement which will ensure that class members will not be placed in the community over the objection of guardians or family members. The agreement expressly makes it clear that guardians and family members are the primary decision makers with regard to community placement and are the ones who will decide whether to accept or reject a proposed community placement. Only in exceptional cases will a guardian's ultimate control over the decision be challenged, *i.e.*, where a guardian is not involved in the decision making or where the views of class members and/or the medical judgments of STS professionals are ignored. But these exceptions would apply only in rare cases and thus the absence of such a specific provision does not warrant disapproval of the settlement agreement.

Third, it is also unnecessary for the settlement agreement to include a provision requiring the community placement plan to contain specific identification of and access to comparable medical care for each class member in the community placement. The agreement has numerous provisions requiring identification and development of resources that will be needed to meet the class members' needs and allowing guardians or family members to oppose community placement if the medical and other needs of class members are not adequately addressed.

Fourth, the absence of a provision guaranteeing the automatic return of class members to STS from an unsuccessful community placement does not require disapproval of the settlement agreement. Although the settlement agreement is silent on the issue of readmission, it contains

numerous provisions that would adequately address the issue in the rare event it were to arise, not to mention the existing DDS policies<sup>7</sup> and state laws that could come into play, *e.g.*, Conn. Gen. Stat. § 17a-210 (providing for a formal hearing process when necessary to address transfer issues). The Court is satisfied that the agreement's provisions requiring the defendants to identify and meet the needs of class members during the transition to community living will be sufficient to ensure that this issue will rarely, if ever, arise, but in the unlikely event it should, the Remedial Expert will be there to take appropriate action to remedy the situation.

Finally, the appointment of a Remedial Expert is an important safeguard of the rights of class members. That individual will be responsible for determining whether the concerns of family members, guardians, advocates and class members are addressed and met and he is expressly authorized to take appropriate action to ensure that the defendants meet those needs, including resort to the Court. The Remedial Expert will ensure full implementation of the settlement agreement, including proper training and education for STS staff and professionals; the exercise of professional judgment and informed choices and consent in the placement process; the appropriate transition to community settings; and implementation of dispute resolution procedures.

In sum, the settlement agreement requires the defendants to fully address the violations of the rights of class members that the Court identified in its decision of the merits. See Messier v. Southbury Training School, 562 F. Supp.2d 294 (D. Conn. 2008). Accordingly, the Court orders that the Settlement Agreement be implemented in accordance with its terms and provisions.

---

<sup>7</sup>While not part of the settlement agreement, the Court understands that DDS has a policy providing for readmission in such circumstances.

### **Continuing Court Jurisdiction**

As stipulated by the parties, the Court will retain jurisdiction over this case to resolve disputes and enter appropriate orders to insure the implement of all provisions of the settlement agreement.

### **Application for Fees and Costs**

The Court orders the plaintiffs to file their motion for costs and attorneys' fees within sixty days of this order approving the settlement agreement. See Fed. R. Civ. P. 23(h) & 54(d). The parties shall take advantage of the additional time to engage in further negotiations to reach an agreement on this issue.

### **Conclusion**

For the foregoing reasons, the Court finds that the Notice to the Class of the Proposed Settlement Agreement meets the requirements of Rule 23 and that the proposed settlement agreement is a fair, reasonable and adequate resolution to the dispute over appropriate remedial orders. Accordingly, the Court hereby approves the settlement agreement (attached hereto as Attachment A) in its entirety and ORDERS that it be implemented in accordance with its provisions.

The Court also ORDERS that, in the absence of an agreement as to costs and fees, the plaintiffs shall file their motion for fees and costs within sixty days of the date of this order.

SO ORDERED.

*/s/ Ellen Bree Burns, SUSDJ*

ELLEN BREE BURNS  
SENIOR UNITED STATES DISTRICT JUDGE

Dated this 18<sup>th</sup> day of November, 2010 at New Haven, Connecticut.

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

RICHARD MESSIER, ET AL. : No. 3 :94-CV-1706(EBB)

v. :

SOUTHBURY TRAINING SCHOOL : May 25, 2010

**SETTLEMENT AGREEMENT**

**INTRODUCTION**

This Settlement Agreement is created to address the *Memorandum of Decision and Order* issued by the Court in this case on June 5, 2008. The Settlement Agreement consists of five components: (1) The Framework – statements of purpose, principle and policy which were developed by the parties to this case; (2) Benchmarks – the objective and measureable activities and obligations of the Defendants which are the substance of the remedy requested by the Court; (3) The Role of Remedial Expert – an individual mutually selected by the parties to facilitate and monitor implementation of the benchmarks, to have a primary role in dispute resolution, and to serve a “gatekeeper” function related to any future necessity of Court involvement or intervention; (4) Jurisdiction and Sunset; and (5) Attorneys’ Fees and Costs – establishing a process to reach agreement of decision based upon the *Memorandum of Decision and Order*.

**I. THE FRAMEWORK**

**A. Purpose**

The purpose of this Settlement Agreement is to assure that the department and its staff commit that each class member has the opportunity to have an assessment of the supports that would be needed to live successfully in a community setting; to assure that the class member, guardian, involved family member, or other personal representative, has sufficient information to make an informed decision about the merits of community placement to meet the particular needs of the class member including the status of programs and services at STS and to ensure that

information will be provided to each class member and his/her guardian to enable them to make an informed choice as to an integrated setting and transition to an appropriate community setting within a reasonable time after professional judgment has been exercised by the IDT. It is recognized that the ultimate decision about residence rests with the guardian unless the department believes that this legal representative is not making decisions in the best interest of the class member.

### **B. Policy**

The department shall discontinue the use of the policy EMPOWER, to guide community transition decisions for STS residents. The use of the quarterly assessment of choice shall also be discontinued.

All current policies in the area of Level of need (LON) assessment, Individual Plan (IP) planning, case management, safeguards, guardian involvement, portability, placement planning and transition activities apply to all class members who reside at STS. Once a class member transfers to a community setting, which is not an ICF/MR, all DDS waiver policies, procedures and guidelines are applicable. The only additional procedure to be issued by the department, in accordance with this Settlement Agreement, will articulate the department's commitment to professional judgment being rendered by each team for each STS class member, including recommendations for a "most integrated setting" as appropriate to class member needs. The team will assure the active involvement of class members, guardians, advocates, and other personal representatives, and will schedule meetings at convenient times and locations to encourage such participation.

The Defendants will transition class members to the most integrated setting, in accordance with the professional judgment exercised by the IDT, with individualized support services, provided the class member and guardian, as applicable, makes an informed choice not to oppose such determination. For purposes of this agreement the "most integrated setting" is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35 app. A at page 571 (2009); *Olmstead*, 527 U.S. at 592. Parties acknowledge and accept the Court's finding that STS is a segregated institution. *Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 326 (D. Conn. 2008).

### **C. Professional Judgment**

DDS will assure that professional judgment is made by each Interdisciplinary Team (IDT) as to the most integrated setting appropriate to meet the needs of each class member. When the team determines that community services and supports can reasonably meet the needs of the class member, and is the most integrated setting, this recommendation will be made in the OPS (IP) and will be discussed with the guardian and the class member at the IDT meeting and documented in the OPS (IP). The team will determine the individualized services, supports and accommodations the class member needs to transition to an integrated community setting and how these supports can be provided in an integrated community setting. Once a class member or guardian, as applicable, has voiced an interest to pursue community transition, a DDS regional case manager will be assigned to join the team.

The team, assisted by the Remedial Expert, will identify record and address guardian, advocate, family and class member concerns and offer suggestions to overcome any identified concerns that create a barrier to successful community placement. Transition from STS to an integrated community setting shall be considered individually for each class member and pursued unless the guardian exercises informed choice not to pursue community placement as described in Benchmark #8 below.

### **D. Resource Development**

The Level of Need (LON) assessment and Individual Plan (IP) will be used to determine the level of resources the class member will need to transition to the community, including having employment, day service, medical, dental, health and clinical supports.

The parties agree that DDS has the ways and means to make resources available for each and every class member who wishes to transition from STS to an integrated community setting with appropriate individualized services and supports. There is no financial or resource barrier to community placement for any class member who desires to transition. STS class members will not be in competition for resources allocated for any other individual or target group served by DDS.

DDS will revise its portability policies and procedures to explicitly include and be applicable to all STS class members.

#### **E. Informed Choice**

The Department commits itself to taking actions and putting processes in place to make sure that guardians, family members, advocates, and class members have sufficient information about community options to make an informed choice about team members' recommendations for the most integrated setting to meet the class member's needs.

Prior to a class member or guardian making an informed choice, all interested guardians, advocates, class members and family members will be offered opportunities to visit day and residential programs and services that would be appropriate to meet the individual needs of the class member. Class members shall have the opportunity to spend time in community residential homes prior to transition from STS.

## **II. BENCHMARKS**

The parties agree that the following benchmarks and other requirements of this settlement agreement shall be used by the parties, the remedial expert and the Court to assess and determine Defendants' compliance with this agreement. The Defendants shall implement these benchmarks within the time frames set forth herein:

1. Complete the development of a training curriculum for Case Managers and IDT members regarding the exercise of "professional judgment" in recommending transition to the most integrated setting appropriate to meet the needs of class members. The training curriculum shall include:

- The ADA, as interpreted in *Olmstead* and related cases;
- DDS policies and procedures regarding community placement, transfer requirements and individual rights;
- HCBS waivers;
- Access to community services and supports;

- Exercising professional judgment regarding most integrated setting and community inclusion;
- Other areas deemed necessary by the remedial expert.

(Within six (6) months COS – Commencement of Settlement<sup>1</sup>).

2. Complete implementation of competency-based training for Case Managers and IDT members in accordance with the established curriculum. (Within twelve (12) months COS), and establish schedule for such training for new Case Managers and IDT members.

3. Complete community education plan setting forth strategies and approaches, and any necessary policy/procedures, which provide opportunities for information/education and exposure to community placement, services and support for class members, guardians, family, advocates, and personal representatives (within six (6) to twelve (12) months COS). The education plan shall include the following:

- a) Defendants shall provide to all class members, advocates, families and their guardians informational material that describes the revised portability policies that explains in plain language how portability allows anyone in the DDS system to utilize their resources to receive supports and services in another location and from another provider or through hiring their own staff.
- b) Methods to assure that information is available upon which informed choice can be made will include:
  - Ongoing information for team members about current service options in the community so they can be a resource for families, class members, advocates and guardians
  - Written information and presentations to families, advocates, class members and guardians about community services and providers. Information sessions will be offered to small groups of guardians, advocates and families or on an individual basis

---

<sup>1</sup> The Commencement of Settlement occurs when the Settlement Agreement is signed by the parties, approved by the Court and the Remedial Expert is retained. This must occur within thirty days of court approval of the Settlement Agreement.

- Information provided by the Remedial Expert at individual team meetings.
- STS will invite providers to make presentations to groups of interested guardians, advocates, class members and family members
- STS will offer provider fairs twice a year which will be open to class members, advocates, families, guardians and staff
- Regional staff will be available to attend any individual or group meetings to discuss community services, HCBS waivers and transition planning

4. Complete implementation of community education plan for class members, guardians, family, advocates, and personal representatives (within twelve (12) to eighteen (18) months COS, and on-going).

5. For each class member at STS, complete and document assessment evaluation, and recommendations, in the exercise of professional judgment as to whether the individual can be supported in an integrated community setting, documented by IDTs, regarding community transition, services and support. (Within thirty (30) months COS). Professional judgment shall identify the most integrated setting appropriate to the needs of the class member regardless of severity of disability, in accordance with the ADA, its regulations and the *Memorandum of Decision and Order* of the Court in this case. See section I. B above.

6. Complete transition planning and resource identification/development for class members for whom there is a professional judgment/recommendation that the individual can be supported in a more integrated setting than the current placement, and the informed class member or guardian does not oppose such placement. (Within three (3) months of the determination). Where class member or guardian raises concerns about the community transition, options to address such concerns are presented at each succeeding IDT meeting and the class member or guardian are offered ways to address concerns with the involvement of the expert, as needed. The planning and community transition process shall provide for the transition to the community in accordance with the

Benchmark # 7 below, and provide equal opportunity regardless of severity of disability.

7. Community transition for class members identified through the IDT determinations and redeterminations will occur within six (6) to eighteen (18) months from determination (or annual redetermination), or as indicated in the class member's transition plan, with reasonable accommodation to the specific needs, desires and circumstances of the class member. Resources will be made available to implement the class member's transition plan.

8. Exercise of informed choice about community placement by a guardian and/or class member only after they have been informed of the benefits of community placement and have had an opportunity to visit a community and day program that is appropriate to meet their needs. Visits to community settings appropriate to meet the needs of the class member, in the judgment of the team, must occur within three (3) months of a decision that the class member can live in an integrated community setting.

9. The Remedial Expert will identify, record and evaluate the Department's response to concerns of family, advocates, guardians and class members, and to identified systemic barriers to the implementation of professional judgments for community transition. The Department will develop a plan to address such concerns or barriers within thirty (30) days of identification. Such plans will be shared with the Remedial Expert and the Plaintiffs.

10. Issues raised by the expert or the Plaintiffs in quarterly meetings are to be addressed by the Remedial Expert in accordance with the processes set forth in this Settlement Agreement, which relies upon the Defendants to respond to issues to the satisfaction of the Remedial Expert.

11. All class members recommended for community transition through the exercise of professional judgment will be disclosed to both parties and the Remedial expert at quarterly meetings of the parties.

12. Advocates, independent from the department, will be sought and obtained for each class member who requests one and who does not have a guardian who is willing and able to obtain information relative to making informed choice or to participate in the community placement process, including team meetings and community visitations, and for whom no other

arrangements have been made for family, advocate, or personal representative involvement. These independent advocates should be individuals who are open to the recommendations of the team, in the exercise of professional judgment, and who will seriously consider what is the most appropriate integrated setting in which the class member can be supported.

13. Quarterly for the first year and semi annually thereafter, the Department will identify and report on class members for whom community transitions are being planned, as a result of the exercise of professional judgment and guardian support. This written report will identify the nature and severity of disability of the class members being placed, the types of support/programs being planned, any capacity issues or barriers related to community transition, and, as applicable specify how such capacity issues or barriers will be addressed and resolved.

14. DDS will negotiate a contract/agreement with the Remedial Expert within 30 days of COS to secure his services as set forth under Section III of this Agreement. Systemic issues identified by the Remedial Expert as presenting barriers to implementation of any benchmark, whether raised by Plaintiffs or not, shall be addressed and resolved by Defendants within the time frame specified by the Remedial Expert unless addressed in a benchmark.

15. All new or revised rules, regulations, policies, plans, guidelines, directives, instructions, protocols, and other material proposed by Defendants pursuant to this Agreement shall be made available to Plaintiffs for comment. Defendants shall respond to the Plaintiffs' comments within the time frame established by the Remedial Expert.

16. The DDS will proceed in accordance with the final transfer process and hearing rights set forth in Section 17a-210 of the Connecticut General Statutes if the guardian's objection to community placement is not consistent with what the team believes is in the class member's best interest to move, after all reasonable measures to address the guardian's concerns have been taken. The parties acknowledge that the informed opposition of a guardian to transition the class member to a community setting, by itself, is not a basis to propose and commence the transfer hearing process, in accordance with Section 17a-210 of the Connecticut general Statutes, nor a basis to challenge or seek review of the guardianship in the Probate Court.

### **III. ROLE OF REMEDIAL EXPERT AND DISPUTE RESOLUTION**

The parties agree to the appointment of Mr. Tony Records as the Remedial Expert under this Agreement.

The Remedial Expert shall serve as long as the Court maintains jurisdiction in *Messier v Southbury Training School*, and shall undertake the tasks described herein. The Remedial Expert shall have the following duties and responsibilities:

1. **Parties Meetings.** The Remedial Expert shall convene and chair parties meetings and disseminate a written summary of each meeting. The summary shall include action steps and agreements of the parties including timeframes for follow-up activities. Meetings would be held monthly for the first six months and quarterly thereafter. The Remedial Expert shall also assist DDS in developing reporting protocols, class member data and formats for updating the parties on settlement agreement activities.

2. **Evaluation of Compliance:** The Remedial Expert shall independently review the Defendants' compliance with this Agreement.

3. **Written Reports.** The Remedial Expert shall provide quarterly reports on each of the areas addressed in the benchmarks of this Settlement Agreement. Reports shall describe progress in each area, barriers to implementation and recommendations to address cited problems. These reports will be distributed to the parties and, at the discretion of the Remedial Expert, to the Court. It would be expected that these reports would also be presented and discussed at the parties' meetings. DDS shall be responsible to respond to the issues and recommendations offered by the Remedial Expert to secure implementation of the benchmarks.

4. **Dispute Resolution.** The Remedial Expert will respond to complaints concerning compliance with benchmarks and other requirements set forth in this Agreement. The Remedial Expert will assist the parties in dispute resolutions through problem solving exercises, written proposals to correct the cited area of concern, and mediation. In the event disputes appear to be not resolvable, the Remedial Expert will memorialize the issues with proposed recommendations to the parties and, if necessary, to the court. The Remedial Expert will also establish dispute resolution processes

as appropriate to resolve concerns of families, guardians, advocates and class members relating to the implementation of the benchmarks.

**5. Professional Judgment.** The Remedial Expert shall assist DDS in developing the training curriculum, protocol and format for teams' exercise of "professional judgment" regarding the most integrated setting appropriate for each class member. The Remedial Expert shall also attend and observe a reasonable number of annual planning meetings to evaluate the effectiveness of the decision-making process and deliberations about the most integrated setting.

**6. Informed Consent.** The Remedial Expert shall assist DDS in working with the STS Teams, community professionals, guardians, families, advocates and class members in exercising informed choice in accordance with the benchmarks.

**7. Training and Education.** The Remedial Expert shall assist DDS in developing a plan to provide competency-based training and education. The Remedial Expert, in his discretion, may also provide some training directly regarding Olmstead and the benefits of community living. The Remedial Expert shall assist DDS in developing the community education plan and its implementation as required under the benchmarks.

**8. Family Education and Training.** The Remedial Expert shall be available to meet directly with the families, guardians and advocates regarding community services, community transition recommendation and requirements of the Settlement Agreement. The Remedial Expert shall assist DDS in meeting with small groups of families regarding the benefits of community living and community options.

**9. Community Transition.** The Remedial Expert shall review and evaluate all individual community transition plans for their thoroughness, appropriateness and established timetables. The Remedial Expert shall also conduct site visits to new community living programs within 30 days of a class member's move.

**10. Budget:** The Remedial Expert shall be compensated by the Defendants in accordance with a contract/agreement, and a budget negotiated by the Defendants and the Remedial Expert, which shall include and be based upon the scope of work called for in the Settlement Agreement.

and shall provide for the performance of all of the work required by the role of the Remedial Expert under this Agreement. The contract/agreement shall address the entire time period for which the Remedial Expert may be retained under this Agreement, and the Remedial Expert may submit proposed modifications to the budget to the Defendants annually based upon the scope of work.

**11. Access.** The Remedial Expert shall have access to all documents and data relating to class members, their agents, contractors, evaluators, and providers necessary to perform his functions, including access to the class members themselves, their guardians, advocates and their programs. The Remedial Expert shall have the authority to receive information relevant to the Defendants' obligations under this Agreement. The Expert shall also be free to meet with any of the parties or their agents on an informal basis to discuss issues relating to settlement agreement activities. The Remedial Expert shall have access to all STS staff and team members. All rules, regulations, policies, plans, guidelines, directives, instructions, protocols and other material proposed by Defendants pursuant to this Agreement shall be made available to Plaintiffs and to the Remedial Expert.

**12. Enforcement.** The Remedial Expert shall have the authority to take actions necessary to fully implement this Agreement including seeking resolution of disputes with the court when necessary. The Remedial Expert shall attempt to resolve disputes with the parties and allow the Defendants an opportunity to address the issue before referring the matter to the court in accordance with the procedures set forth herein.

**13. Replacement of the Expert.** In the event Mr. Records cannot or will not continue to serve as the Remedial Expert for any reason, the Plaintiffs and Defendants shall attempt to agree on a successor Remedial Expert with relevant experience; in the event that they are unable to reach agreement, the parties will attempt to agree on candidates for Remedial Expert and shall submit the list of candidates to the Court for appointment. The Defendants will use the same methods and procedures for contracting with a replacement remedial expert as set forth in Benchmark 10.

**14. Dispute Resolution and Enforcement.** This Agreement shall be subject to the approval of the Court, and, if so approved, shall be entered as a court order. This Agreement and any obligations thereunder shall be enforceable only as follows:

Plaintiffs shall notify Defendants and the Remedial Expert of any alleged noncompliance with this Agreement and request a meeting with the Remedial Expert for the purpose of attempting to resolve the problems identified by the Plaintiffs regarding the Defendants' alleged noncompliance.

Should the parties fail to resolve, through said informal means, the problems identified by the Plaintiffs, then only the following process (hereinafter Compliance Process) shall be utilized. Plaintiffs shall identify the alleged noncompliance with this Agreement in a written Petition sent to the Remedial Expert and the Defendants, who respond in writing within three weeks of its receipt. The Remedial Expert may meet further with the parties or other persons, shall in writing make findings and render a compliance determination and as appropriate issue recommendations for compliance with timelines for compliance. The compliance determinations of the Remedial Expert are final.

The Remedial Expert shall make a determination within 30 days of the submission of the written statements by the Defendants. If Defendants fail in the written opinion of the Remedial Expert to fully implement the recommendations for compliance issued by the Remedial Expert, Plaintiffs may request in writing that the Remedial Expert certify compliance issues to the Court which shall be granted in the sole discretion of the Remedial Expert. Upon such certification, Plaintiffs may file a motion with the Court seeking a judicial determination that Defendants are not complying with the Agreement and an order to the Defendants to comply with recommendations of the Remedial Expert.

Plaintiffs may petition the court for an award of attorneys' fees and costs incurred in connection with the Compliance Process and any Court proceeding authorized by the certification granted by the Remedial Expert, including any proceedings to enforce the order in accordance with or resulting from this process. Plaintiffs will be considered prevailing parties only if the Court orders the Defendants to comply with recommendation(s) of the Remedial Expert or the Defendants comply voluntarily after certification is granted.

Plaintiffs are also entitled to reasonable attorneys' fees and costs for securing approval and defending the Settlement Agreement.

The parties agree that one hundred (100) hours per year is a reasonable estimate of the hours that will be necessary for Plaintiffs' counsel to monitor implementation of this Agreement. Any future petition for attorneys' fees and costs for routine monitoring activities by Plaintiffs' counsel will not exceed 100 hours per year unless Plaintiffs, upon a written application to the Court in advance of incurring such fees and/or costs, show exceptional circumstances that justify an award of fees for monitoring activities that exceed 100 hours. The Plaintiffs shall submit a request for fees related to monitoring on or before December 31 each year. If the parties cannot resolve their differences over the claim for fees and costs for monitoring within two weeks of submission, Plaintiffs may file a Motion for Attorneys' Fees and Costs with the Court. The parties agree that the issue of hourly rates for activities related to this provision is reserved for future negotiation or resolution by the Court. The Parties agree that the Plaintiffs are entitled to reimbursement of attorneys' fees and costs associated with the successful litigation of their fee claim. The parties hereby waive any objection to the resolution of such application by the Magistrate Judge.

#### **IV. JURISDICTION AND SUNSET**

When in the judgment of the Remedial Expert, the Defendants have fully implemented and accomplished each and every benchmark within the timelines specified, the Remedial Expert shall report to the Court and certify to the Court that Defendants are in compliance and class members are receiving the full benefits of the settlement agreement. The Court shall retain jurisdiction over this matter to resolve disputes and enter appropriate orders during the term of this Agreement and for all remedial purposes for 36 months after the receipt of the Remedial Expert's compliance certification. Any dispute occurring during this "sunset" period will be addressed in accordance with paragraph 14 under the Role of the Remedial Expert and Dispute Resolution. Jurisdiction may be extended or terminated by the Court upon the recommendation of the Remedial Expert or upon good cause shown by either party.

#### **V. ATTORNEYS' FEES AND COSTS**

Claims for attorneys' fees and costs generated prior to approval of this Settlement Agreement shall be addressed separately from approval of this

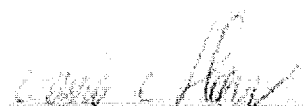
Settlement Agreement, either through negotiations supervised by the Magistrate Judge or through proceedings before the Court.

The Plaintiffs shall file a Motion for attorneys' fees and costs with the Court for attorneys' fees and costs incurred up to Court approval of this Settlement Agreement. The Parties shall attempt to resolve this claim for retrospective fees and costs through the Magistrate Judge before the Motion for attorneys' fees and costs is filed. If the Parties cannot resolve their differences through negotiations by the date the Court approves the Settlement Agreement, the Plaintiffs may file a Motion for attorneys' fees with the Court. Said Motion shall be filed within sixty days of the Court's final approval of this Settlement Agreement. The Court shall have jurisdiction to hear and decide Plaintiffs' Motion for retrospective fees and costs.

The Court retains jurisdiction over this case in accordance with the terms of this Settlement Agreement.

*FOR THE PLAINTIFFS*

*FOR THE DEFENDANTS*

  
David C. Shaw, Esq.  
Law Office of David C. Shaw, LLC  
34 Jerome Ave., Suite 210  
Bloomfield, CT 06002

RICHARD BLUMENTHAL  
ATTORNEY GENERAL

BY: 

James P. Welsh  
Special Assistant Attorney  
General  
460 Capitol Avenue  
Hartford, CT 06106

Frank J. Laski, Esq.  
Judith Gran, Esq.

Henry Salton  
Assistant Attorney General

Thomas York, Esq.

**Dana Grubb**

**From:** CMECF@ctd.uscourts.gov  
**Sent:** Friday, November 19, 2010 9:21 AM  
**To:** CMECF@ctd.uscourts.gov  
**Subject:** Activity in Case 3:94-cv-01706-EBB Messier, et al v. Southbury Training, et al Docket Annotation

**This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.**

**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\* Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

**U.S. District Court**

**United States District Court for the District of Connecticut**

**Notice of Electronic Filing**

The following transaction was entered on 11/19/2010 at 9:21 AM EST and filed on 11/19/2010

**Case Name:** Messier, et al v. Southbury Training, et al

**Case Number:** 3:94-cv-01706-EBB

**Filer:**

**Document Number:** 1055

**Docket Text:**

**Docket Entry Correction: Replaced PDF of [1054] ORDER granting 1050 Motion for Approval of Settlement Agreement and ORDER re Approval & Implementation of Settlement Agreement. Signed by Judge Ellen Bree Burns on 11/18/2010. (Pesta, J.)**

**3:94-cv-01706-EBB Notice has been electronically mailed to:**

Richard J. Scarola [rjjs@selaw.com](mailto:rjjs@selaw.com)

David Paul Friedman (Terminated) [dfriedman@Murthalaw.com](mailto:dfriedman@Murthalaw.com), [jwhite@murthalaw.com](mailto:jwhite@murthalaw.com)

David C. Shaw (Terminated) [dshaw@dcshawatty.com](mailto:dshaw@dcshawatty.com), [csmith@dcshawatty.com](mailto:csmith@dcshawatty.com)

James P. Welsh (Terminated) [james.welsh@po.state.ct.us](mailto:james.welsh@po.state.ct.us)

Frank J. Silvestri, Jr [fsilvestri@levettrockwood.com](mailto:fsilvestri@levettrockwood.com), [ameehan@levettrockwood.com](mailto:ameehan@levettrockwood.com), [litigation@levettrockwood.com](mailto:litigation@levettrockwood.com), [skezer@levettrockwood.com](mailto:skezer@levettrockwood.com)

Henri Alexandre [henri@crumbielaw.com](mailto:henri@crumbielaw.com), [lauren@crumbielaw.com](mailto:lauren@crumbielaw.com)

Hugh Barber hugh.barber@ct.gov, robert.kiley@ct.gov

Richard J. Lynch richard.lynch@ct.gov

Henry A. Salton Henry.Salton@ct.gov

Marianne Horn marianne.horn@ct.gov

Frank J. Laski (Terminated) flaski@mhlac.org

Thomas B. York (Terminated) tyork@yorklegalgroup.com, dgrubb@yorklegalgroup.com

Laurie J. Weinstein laurie.weinstein2@usdoj.gov

Judith A. Gran general@pilcop.org

Barbara E. Ransom general@pilcop.org

Robert M. Frost, Jr rfrost@znclaw.com, avoos@znclaw.com

Martha M. Dwyer mdwyer@nbclaw.com

**3:94-cv-01706-EBB Notice has been delivered by other means to:**

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1034868047 [Date=11/19/2010] [FileNumber=2484090-0] [4ce1fa35e85f50048a35724735635edeaeefd22aab30de41a6cc6cc87baeae716e2be49a62e9cd81e56a1b1c353b1d38a33c1886a60abdda2dbd729952601b6]]