

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

NANCY MARTIN, ET AL.,

CASE No. C2-89-362

PLAINTIFFS,

VS.

JUDGE SARGUS

ROBERT TAFT, ET AL.,

MAGISTRATE JUDGE KING

DEFENDANTS

CONSENT ORDER

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."

The Court takes notice that the parties have reached a settlement in this case. In aid of this settlement, the parties have entered into 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.

2. Residential services in Ohio have traditionally been biased toward services in segregated institutions, and this “institutional bias” has been furthered by the Medicaid system, which Ohio uses to fund the vast majority of its services.
3. The actions of Defendants taken since 1999 have given relief to many in the class by providing them with choices in housing and supports.
4. In October 2000, Governor Taft received Ohio’s MR/DD Vision Paper: Final Report to the Governor. The paper is the blue print for the future of Ohio’s MR/DD service delivery system and contains 27 recommendations that address issues facing Ohioans with disabilities. The paper, which was developed by a 17-member committee of stakeholders in the system, is divided into four vision philosophies: System Values, Consumer and Family Supports, System Structure and System Finance. A core system value is that individuals with MR/DD have the fundamental right to choice of services and supports – limited by available resources. Another core system value is that persons with MR/DD are entitled to services that meet their health and safety needs.
5. In February of 2001, Governor Taft received the Final Report on Ohio Access for People with Disabilities. This report is Ohio’s Olmstead Plan and provides a blueprint for future services using three guiding principles: increasing community capacity, prioritizing resources, and assuring quality

and accountability. Governor Taft received an update of that report in February, 2004.

6. 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:

- a. ODMR/DD developed and implemented an internet-based centralized reporting system to report and track major unusual incidents (MUIs) in its state MR/DD system. The system is used by county boards to report MUIs to the state, by the state to follow up on investigations and remediation related to MUIs, as well as for analysis of patterns and trends related to MUIs. The Centers for Medicare and Medicaid Services has included Ohio's Incident Tracking System and Quality Assurance Program as part of its series **highlighting best practices** being developed by states. **Ohio is one of only six states recognized for these accomplishments.**
- b. In 2002, the State of Ohio established an on-line abuse registry that lists workers who have substantiated charges of abuse or theft against them. Providers are prohibited from hiring any person on the abuse registry and must document that they reviewed the registry prior to hiring staff.
- c. County boards responsible for administering community services programs must be accredited by ODMR/DD. The state's assessment

focuses on four domains: service planning and delivery, health/safety/welfare, rights, and administration.

- d. Approximately 400 ICF/MRs and almost 900 community-based licensed facilities, which provide service to individuals enrolled on waivers, are surveyed annually by ODMR/DD.
- e. Tax equity. Approximately \$14 Million in state funds has been provided to tax-poor counties to assist with Medicaid Redesign.

7. Ohio has provided increased residential service options for individuals in the class:

- a. Supported Living and Home and Community Based Waiver Services. In 1989 HB 257 established Supported Living Services in statute, and in 1990 the state capital budget included housing funds for persons with MR/DD. This permitted persons to live in the community in a residence of their choice, and paid for housing, transportation, personal care, habilitation, training, and therapy costs. Approximately 800 individuals are currently living in the community under supported living programs. A Medicaid waiver entitled the Individual Options Waiver was established in 1991. Only 420 people had waiver-funded support in FY 1992. That waiver has been expanded since its inception and now provides over 9000 slots. Another Medicaid waiver entitled the Residential Facility Waiver was effective July 1, 1997 and permitted individuals to live in licensed residential facilities. That

waiver will transition to provide the same benefits as the Individual Options waivers over the next several years. That waiver provides services to just under 2800 individuals. Currently those two waivers have the capacity to serve more than 10,600 persons statewide. In addition, 2338 individuals with MR/DD are supported in the community under the Transitions Waiver administered by ODJFS.

- b. The Level I Waiver, which supports individuals who continue to live at home, was approved in 2003 and is currently being implemented. It will have the capacity to serve 6000 people when fully implemented in 3 years.
- c. Private residential facility services. A provision establishing a maximum number of beds for the purpose of issuing licenses for residential facilities, including ICF/MRs, was codified as R.C. § 5123.196 in 2003.
- d. County operated ICF/MR services. Over 700 individuals are living in ICF/MR placements owned or managed by a county board of mental retardation / developmental disabilities.
- e. State Developmental Centers. Both the number of developmental centers and the number of individuals residing in developmental centers decreased during the pendency of the case. Broadview Developmental Center closed in 1993. By implementing various measures to control admissions, the number of individuals served in

developmental centers declined from 2,359 in FY 1992 to 1,835 in December 2003. ODMR/DD also identified waiver slots to be used in the Self Determination Project in which individuals in the developmental centers moved into community placements. To date 41 individuals have moved to a community setting through the Self Determination Project. As each person moved, the licensed bed was vacated and closed. In 2003 the CAM waiver was submitted to CMS. When approved this waiver will provide opportunities for 155 additional individuals to be served in the community.

- f. Nursing facilities. In 2003, O.R.C. § 5126.042(E) was enacted which established a new priority category for waiver enrollment for no more than 40 individuals, each year, not to exceed 5 years, who currently reside in nursing facilities, are eligible for home and community-based services, and choose to move into the community.
8. Grants. In 2003 ODMR/DD received two grants from CMS. One grant is centered on gaining approval of an Independence Plus waiver that supports self-determination. ODMR/DD also was granted from CMS a Real Choice Systems Grant for Community Living to design and implement a quality information management system that identified areas of improvement in effectiveness and efficiency.
9. Defendants make no admission of liability or wrongdoing by entering into this settlement.

The Court adopts these stipulations as findings of fact and, based on the stipulations of the parties and for good cause shown, orders that:

1. **ICF/MR OPTIONAL SERVICE ELIMINATED /WAIVER** -- Defendants shall take the following steps to ensure that class members are provided opportunity to choose community based services.
 - a. Governor Taft shall include in his Executive Budget for state fiscal years 2006 and 2007 as submitted to the Ohio General Assembly a proposal for the elimination of intermediate care facilities for the mentally retarded (ICF/MR) as an optional service under the State of Ohio's Medicaid program.
 - b. If the proposal described in paragraph 1(a) is adopted by the Ohio General Assembly, the defendants shall develop with, and seek approval by, the U.S. Department of Health and Human Services (HHS), a waiver to provide services to current and future residents of the existing ICFs/MR. The defendants would seek approval of this waiver from HHS during state FY 2007.
 - c. The waiver shall insure for each resident the ability to choose the setting in which to have services provided to them.
 - d. The Plaintiffs, the Plaintiff class, and the Defendants agree to use their best efforts to seek the enactment of Governor Taft's Executive Budget on these issues

- e. The waiver described in paragraph 1.b shall be considered priority work for the Departments and shall be in addition to existing or planned ICF/MR waivers (RFW, IO, Level 1, CAMS, Level III) or shall provide for their inclusion and incorporation into the new waiver, except that nothing in this order shall preclude the termination of the RFW waiver upon provision of services to RFW recipients under another, comparable, waiver.

2. CHOICE DEFINED –

- a. For the purposes of paragraph 1.c of this decree, “choice” means self determination as that process is defined by Defendant Ritchey, but at a minimum shall mean that the class member and his or her closest allies (including but not limited to the class member’s guardian, if any, and members of the class member’s immediate family, if not objected to by the class member) shall decide where and by whom services will be provided.
- b. Services chosen pursuant to this paragraph that are funded by Medicaid dollars must be provided by a certified Medicaid provider.
- c. Services chosen pursuant to this paragraph must be listed on the class member’s individual plan where such plan is required by law, and developed in accordance with the appropriate protocol for such plan.

3. INTERIM PRIORITY OF I/O WAIVER SLOTS FOR COMMUNITY

INTEGRATION -- Immediately upon approval of this order, and prior to

implementation of paragraph (1), Defendant Ritchey shall allocate one hundred of the two thousand (2000) slots approved for the IO waiver in December of 2003 to individuals who choose to leave intermediate care facilities for mental retardation for a waiver placement. Defendant Ritchey may allocate these one hundred slots in any manner he chooses. Defendant Ritchey shall further allocate one out of every twenty new approved Individual Options waiver slots for individuals who choose to leave an intermediate care facility for mental retardation for community waiver placements until such time as there is no longer a need to use the slots for this purpose.

4. **NF PRIORITY** – Within 90 days of the effective date of this order, Defendant Ritchey shall file a rule under Ohio Revised Code Chapter 119 to implement the priority specified in R.C. 5126.042(E) for residents of nursing homes, which will provide that the priority shall begin in state FY 2005 and will last through state FY 2010.
5. **DC SURVEY** -- Defendant Ritchey shall conduct a survey of the residents of developmental centers operated by the Ohio Department of Mental Retardation and Developmental Disabilities to determine which of the residents may wish to choose a community placement if one would be available. The results will be compiled and shared with plaintiffs. The process shall be completed by March 31, 2005. The results of the survey shall

be used solely for informing the budget cycle and shall not be used for litigation or for determining future placement for the individuals surveyed.

6. **ICF/MR SURVEY** -- Defendant Hayes shall conduct a survey of the residents of private ICFs/MR in Ohio and ICF/MRs operated by county boards of mental retardation and developmental disabilities and/or boards of county commissioners in Ohio to determine which of the residents may wish to choose a community placement if one would be available. The results will be compiled and shared with plaintiffs. The process shall be completed by March 31, 2005. The results of the survey shall be used solely for informing the budget cycle and shall not be used for litigation or for determining future placement for the individuals surveyed.
7. **EFFECTIVE DATE** -- The effective date of this decree shall be the day on which the Court enters its Order and Judgment approving this Consent Decree.
8. **MONITORING and ENFORCEMENT** --
 - a. Defendants will provide quarterly reports to the trial counsel for the plaintiffs and the plaintiff class (hereinafter class counsel) as to the status of the implementation of the Settlement Agreement.
 - b. Class counsel may request a meeting to discuss any aspect of implementation, and Defendants shall agree to meet at least once a quarter.

- c. Class counsel shall have access to all documents related to implementation of this order including, but not limited to, all documents regarding the application for the waiver required at paragraph 1.b., to the same extent as if the request for documents was governed by the Ohio Public Records Act (OPRA), Ohio Revised Code § 149.43.
 - d. In the event of a dispute over the production of any record, the plaintiffs shall have available to them any remedy under the OPRA. For the purposes of any such action, this litigation shall be deemed terminated. Defendants shall not raise the availability of discovery as an alternative remedy (civil-Steckman).
 - e. Class counsel or its representative may attend any meeting regarding the waiver required by paragraph 1.b upon request and as agreed upon by the parties.
 - f. Nothing in this order shall be construed to limit access by class counsel to officials of the United States Department of Health and Human Services on matters related to the waiver required by section 1.b of the order.
9. Any party seeking to enforce the Settlement Agreement shall first initiate negotiations with other affected parties. Failure to initiate and conduct negotiations for 60 days shall preclude enforcement relief.
10. Any duty that is given to a specific party by this decree may be enforced only as against that party, and no joint liability shall be ascribed to other parties in that circumstance.

11. Any party may seek relief or modification of this order as justice requires pursuant to Federal Rule of Civil Procedure 60(b). Prior to seeking relief from the Court, the party shall notify all other parties of their intent to do so, and the parties shall negotiate for a period not to exceed 60 days.
12. Unless further ordered by the Court, this order shall terminate on December 31, 2008.
13. The terms of this order apply to the parties' agents, successors, and assigns.
14. Nothing in this order shall be interpreted to limit or otherwise modify the ready access of plaintiffs' class counsel or any other employee or agent of the Ohio Legal Rights Service as specified in R.C. § 5123.60 or 42 U.S.C. § 15001, et seq.
15. Each party shall bear their own costs and attorneys' fees, except that:
 - a. Defendants shall pay up to eighty thousand dollars (\$80,000) in litigation related expenses and costs to the Plaintiffs. Plaintiffs shall submit an itemized accounting and supporting documentation to the Defendants within thirty (30) days of the effective date of this Consent Order, and such documentation shall be presumed sufficient unless, upon motion by defendants and for good cause shown, the Court orders further documentation, and
 - b. Plaintiffs may seek fees and costs for enforcement of this consent order.

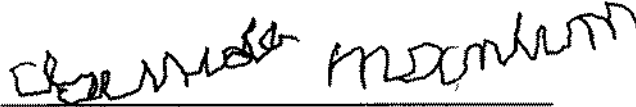
IT IS SO ORDERED.

Edmund A. Sargus, Jr.
United States District Judge

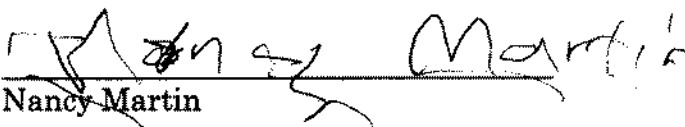
Date: _____

Agreed to:

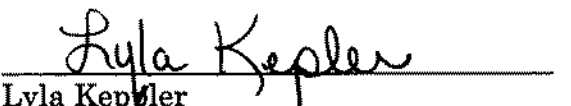
Plaintiffs



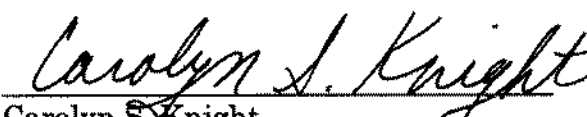
Claude Martin



Nancy Martin

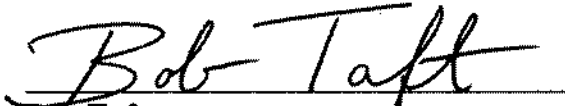


Lyla Keppler
in her capacity as Guardian of Warren B.

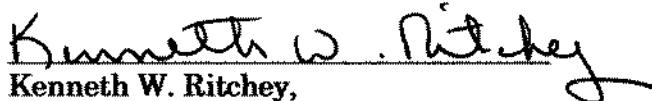


Carolyn S. Knight,
in her capacity as Executive Director,
Ohio Legal Rights Service,
Next Friend of Kathy R.


Defendants



Bob Taft
in his official capacity as Governor,
State of Ohio

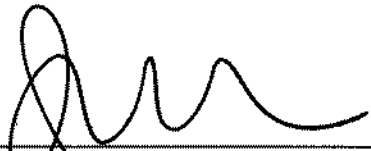


Kenneth W. Ritchey,
in his official capacity as Director,
Ohio Department of Mental Retardation and
Developmental Disabilities



Thomas J. Hayes,
in his official capacity as Director,
Ohio Department of Job and Family Services

Approved:



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



Ann E. Henkener, Asst. Attorney General
Trial Attorney for Bob Taft and Kenneth
W. Ritchey



Alan P. Schwepe, Asst. Attorney General
Trial Attorney for Thomas J. Hayes