

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NIGHT BOX
FILED

JUL 15 2004

CLARENCE MADDOX
CLERK, USDC / SDFL / MIA

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

Plaintiffs,

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

vs.

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

Defendants.

**JOINT MOTION AND MEMORANDUM OF LAW FOR
APPROVAL OF AMENDED SETTLEMENT AGREEMENT**

Plaintiffs, as representatives of the certified class, and Defendants, sued in their official capacities, jointly¹ move this Honorable Court to approve the Amended Settlement Agreement (the "Agreement") which has been filed with this Court and a copy of which is attached hereto. The parties believe the Agreement is a fair resolution of this case which will also ensure against the unnecessary utilization of scarce judicial resources that would otherwise be required to resolve complicated and novel questions of federal statutory constitutional law. The parties respectfully offer the following memorandum of law in support of their joint motion.

¹ The parties have agreed that this document will be signed by the undersigned only, even though it is filed jointly, in order to facilitate prompt filing.

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MEMORANDUM OF LAW

I. STATEMENT OF FACTS

This action was filed on March 25, 1998 by six individuals, each of whom was then confined to one of Florida's four Developmental State Institutions for persons with developmental disabilities ("DSIs"), on behalf of themselves and similarly situated individuals. Plaintiffs seek community-based placements.² The Plaintiffs' factual allegations are set forth in detail in their original Complaint (Docket No. 1) and their proposed Amended Complaint (Docket No. 253).³

Florida is familiar with the provision of community services to people with developmental disabilities and has an extensive array of community services, including small group homes, supported living services, and supported employment programs.

Beginning in 2000, after this lawsuit was commenced, the Department of Children and Family Services (Department) began a five-year plan to phase down and ultimately close the Community of Landmark (Landmark), one of the four DSIs. That phase down process will end with the closure of that facility on June 30, 2005. With the closure of Landmark, there will be three remaining DSIs.

² Their claims are brought pursuant to the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* (ADA), and the regulations promulgated pursuant to the ADA, the Rehabilitation Act of 1973, 42 U. S. § 1983, 29 U.S.C. §794, the Social Security Act, 42 U.S.C. §§1396 *et seq.*, and the regulations promulgated pursuant to the Social Security Act, and the Due Process and Equal Protection Clauses of the United States Constitution.

³ The Plaintiffs' motion for leave to file the proposed Amended Complaint is pending.

The parties agree that many individuals currently residing in DSIs could live in the community, if appropriate community-based supports and services are available. However, some individuals and/or their families and guardians may prefer institutional rather than community placements.

On March 10, 1999 the court entered an order certifying a class. The Defendants appealed. (Doc. No. 140.) On February 3, 2000, the Eleventh Circuit issued an opinion reversing and vacating the class certification order, remanding the matter back to the Court for further action with instructions to certify the class as follows:

all individuals with developmental disabilities who were residing in a Florida DSI as of March 25, 1998, and/or are currently residing in a Florida DSI who are Medicaid eligible and presently receiving Medicaid benefits, who have properly and formally requested a community-based placement, and who have been recommended by a State-qualified treatment professional or habilitation team for a less restrictive placement that would be medically and otherwise appropriate, given each individual's particular needs and circumstances.

Brown v. Bush, No. 99-11544, slip op., at 5 (11th Cir. Feb. 3, 2000). The Eleventh Circuit also identified the “core claims” of the named, individual plaintiffs to be “that they are institutionalized in DSIs, they qualify to be transferred from DSIs to less restrictive, community placements, and they want to be transferred, but there is a lack of appropriate, available, community placements.”⁴ Accordingly, on February 11, 2000, this Court issued a Revised Order Certifying Class. (Doc. No. 161.)

⁴ The court held that Plaintiffs had not satisfied the criteria for class certification on the claims involving institutional conditions. Plaintiffs subsequently moved to amend their complaint to delete the claims pertaining to the conditions of their confinement at the DSIs, to add new named

Through the course of the litigation, the parties have engaged in significant discovery, utilizing interrogatories, document productions, expert discovery, and oral depositions. The court set the case for trial during the two-week trial period beginning on January 26, 2004. In November and December 2003, the parties participated in three days of mediation with the assistance of an independent mediator.⁵ After further, lengthy mediation and negotiations, the parties were ultimately able to execute a Settlement Agreement on May 11, 2004, which was filed with the court on May 21, 2004. (Doc. Nos. 292 & 293). In response to language in the most recent Appropriations Act, the parties agreed to amend the Settlement Agreement and on June 14, 2004, submitted an executed Amended Settlement Agreement.⁶

II. SUMMARY OF THE AGREEMENT

At least annually, every DSI resident participates in an individual support planning process, conducted by an interdisciplinary team including treatment professionals. The parties

plaintiffs, and add certain other claims. (Doc. No. 253). As noted above, that motion to amend is pending. Several discovery related motions are also pending. (Doc. Nos. 242 and 248).

⁵ As the mediation seemed likely to result in a settlement of the case, on December 29, 2003, the parties filed a Joint Motion to Stay the Case, including all pending motions. (Doc. No. 284.) That motion was granted and was subsequently renewed at the request of the parties. (Doc. Nos. 285, 290.)

⁶ The original Settlement Agreement was amended to permit Defendants to utilize both the Supported Living Home and Community-Based Services Waiver (Supported Living Waiver) and the Developmental Disabilities Home and Community-Based Services Waiver (“the DD Services Waiver”) to serve clients residing in the four (4) Developmental Services Institutions (DSIs) as per the Settlement Agreement. For fiscal year 2004-2005, the Florida Legislature has significantly increased funding for the Supported Living Waiver, and only modestly increased funding for the Developmental Disabilities Waiver. The original Settlement Agreement had focused only on the DD Waiver as a source of community-based placement funding for clients of the DSIs.

recognize the importance of the planning process in decisions about discharge and placement. The Agreement provides for changes to the support planning process⁷ and for related educational programs for both parents and staff. The Agreement provides that successful experiences at Landmark will be used as models for these efforts. The program for staff will be designed to ensure that informed professional judgments are made about community placement and services. Plaintiffs believe that the modifications and the training will benefit all DSI residents, their families, and the DSI staff and treatment professionals. Defendants retain the flexibility to modify both programs based on best practices and experience. Agreement, at 4-5.

The Department will comply with Policy Number 02-01, which provides for due process for individuals residing at the DSIs who seek enrollment on the DD Waiver or the Supported Living Waiver. *Id.* at 3-4.

The Agreement also provides that the Department will close Landmark, consistent with the Department's current plans, no later than June 30, 2005. Also by June 30, 2005, the Department will develop a plan for closure of Gulf Coast Center. Gulf Coast Center will be gradually phased down, in a similar manner to what has occurred at Landmark, and will close by July 1, 2010, after the termination of the Agreement. *Id.* at 5.

By June 30, 2007, the Department will reduce the combined census of all of the DSIs by at least 180 individuals, at a rate of 60 persons per year. The Agreement does not require that

⁷ The support planning process for all individuals residing in the DSIs will first determine the supports and services that the individual needs to live in the community. The process will be based upon a positive view of the individual's abilities and skills. Based on the determination of the supports and services that the individual needs to live in the community, the treatment team will then make a recommendation, based on professional judgment, about whether the individual is appropriate for community placement. (Agreement, at. 3.)

these 180 individuals come from any particular facility.⁸ At least 85% of the 180 persons moving from the DSIs over the life of the Amended Settlement Agreement will be enrolled on the DD Waiver or the Supported Living Waiver. *Id.* at 5-6. The Agreement acknowledges that additional funding is necessary to accomplish these goals. For fiscal years 2005-2006 and 2006-2007, the Department will submit Legislative Budget Requests seeking the “start up” funding necessary to accomplish the census reduction activities described above in each of these respective fiscal years and will seek the amount of funding necessary to provide services to individuals transitioned from the DSIs in their first year on a waiver program. The Department will utilize its best efforts to secure this funding. *Id.* at 6-7.

Additionally, there are residents of the DSIs who are near the top of the waiting list who will likely be served if the Legislature appropriates any funding to serve the waiting list. For fiscal year 2004-2005, the Department will serve up to 50 class members in the rank order they appear on the waiting lists to the extent that funds have been appropriated. These class members placed based on rank order shall be in addition to the census reduction of 60 persons for the fiscal year 2004-2005.⁹ *Id.* at 6.

⁸ The overall census reduction amount includes persons discharged to a placement other than another DSI subsequent to June 30, 2004, as a result of the closure of that facility.

⁹ Further, the Agreement provides that it shall not be interpreted to deny services to any individuals who would otherwise be served by the waivers based on rank order and the availability of funding for services. Should funding be available to serve more than 50 class members from in the rank order they appear on the developmental disabilities waiting lists, then any additional persons served in fiscal year 2004-2005 shall count toward the 60 person census reduction requirement for fiscal year 2005-2006.

If, despite the actions described above, the Legislature fails to adequately fund the Department's budget in a manner that prevents the Department from implementing the census reduction, then the failure to comply with the census reduction provisions will not be deemed to be a material breach of the Agreement. *Id.* at 7.

No plaintiff or class member will be responsible for payment of any attorney fees or costs pursuant to the terms of settlement. The Plaintiffs have agreed to waive payment of attorneys' fees and costs by Defendants pursuant to civil rights attorneys' fees provisions in this case, so long as Defendants do not materially breach the terms of this Agreement. The defendants reserve the right to contest a petition for fees, if any. *Id.* at 10-11.

To enable Plaintiffs' counsel to ensure compliance with the terms of the Agreement, Plaintiffs' counsel, the Advocacy Center for Persons with Disabilities, Inc. (Advocacy Center), will have input in various areas, and will receive certain documentation. (*See e.g.*, Agreement, Part II, ¶¶3, 5, 10 and Part III, ¶5.)

The Agreement provides that the Court will retain jurisdiction of this litigation until June 30, 2007, at which time, the claims for prospective declaratory and injunctive relief of all class members *who have not moved* from the DSIs will be dismissed *without prejudice*. All other claims of class members will be dismissed with prejudice, if there is no pending motion asserting material breach as of June 30, 2007. The Agreement also provides for notice and cure prior to the filing of a motion asserting material breach. *Id.* at 8-9. The Agreement is not to be deemed a consent decree and is not itself an enforceable court order. *Id.*

III. THE STANDARDS FOR APPROVAL OF SETTLEMENT FOR CLASS ACTION LITIGATION

Rule 23(e), Federal Rules of Civil Procedure, provides that settlement of a class action requires approval by the court, and that the court may approve a settlement “that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.” The standards to be applied in determining whether to approve a class action settlement are well established. As binding precedent provides, “in class action suits, there is an overriding public interest in favor of settlement.” *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).¹⁰ The approval of a class action settlement is committed to the sound discretion of the Court. *Id.* As the Seventh Circuit has noted, “[s]ettlement of complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.” *Armstrong v. Board of School Directors*, 616 F.2d 305, 313 (7th Cir. 1980).

In assessing a proposed settlement, “[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff’s likelihood of success on the merits against the amounts and form of the relief offered in the settlement.” *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981). The court must find that “the settlement is fair, adequate, and reasonable and is not the product of collusion between the parties.” *Cotton*, 559 F.2d at 1330. The elements to be considered in evaluating the fairness of a class settlement, include:

- (1) the complexity, expense and duration of litigation;

¹⁰ The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions handed down prior to close of business on September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

- (2) the stage of proceedings at which the settlement was achieved;
- (3) the likelihood of plaintiffs' success at trial;
- (4) the range of possible recovery;
- (5) the absence of fraud or collusion behind the settlement;
- (6) the opinion of class counsel;
- (7) the substance and amount of opposition to the settlement;¹¹
- (8) whether the settlement is in not illegal or against public policy; and,
- (9) whether notice to the class was adequate.¹²

See *Bennett v. Behring*, 737 F.2d 982, 986 (11th Cir. 1984); *Cotton*, 559 F.2d at 1330-32; *Ressler v. Jacobson*, 822 F. Supp. 1551 (M.D. Fla. 1992). See also *Sterling v. Stewart*, 158 F.3d 1199, 1204 (11th Cir. 1998). Furthermore, courts "do not decide the merits of the case or resolve unsettled legal questions." *Carson*, 450 U.S. at 88 n. 14 (1981). Finally, as the Eleventh Circuit has noted, "compromise is the essence of a settlement." *Bennett*, 737 F.2d at 986.

IV. THE SETTLEMENT AGREEMENT MEETS THE STANDARDS SET BY FED. R. CIV. P. 23(e) AND THE ELEVENTH CIRCUIT

The Agreement, which is the product of months of arms' length negotiations with the assistance of a mediator, meets all the criteria set forth by Fed. R. Civ. P. 23(e) and the Eleventh Circuit. Given the risks and the delays that would occur in hard fought litigation involving novel constitutional and statutory claims, the uncertainty of the scope and extent of a remedy, if any, that the court might order, and the concrete benefits of the Agreement, the Agreement is fair, adequate, and reasonable, and therefore warrants approval by this Court.

¹¹ Obviously, this fact must be evaluated after notice has been provided and class members have had the opportunity to express their views both in writing and in appearance at the fairness hearing.

¹² The parties have jointly moved for distribution of an agreed notice to all current residents of the DSIs, their legal guardians and/or family members. The parties believe that this notice is more than adequate given the class definition and the difficulties that individuals with developmental disabilities who are class members may have in advocating for themselves.

A. The Complexity, Expense, and Duration of Litigation Favor Court Approval

The complexity of the factual and legal issues involved in this litigation cannot be underestimated. This case is on the cutting edge of constitutional and statutory (ADA) litigation. The factual issues are complex. If the case was litigated, the earliest the parties could obtain a decision from the district court is the late fall of 2004. Appeals to the Eleventh Circuit and perhaps to the Supreme Court might take years. Further, even if the plaintiffs ultimately prevailed on an appeal, it is likely the case would be remanded for further proceedings just as the Supreme Court remanded *Olmstead* to the Eleventh Circuit which six months later remanded the decision to the district court. *See Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999); *Olmstead v. L.C. by Zimring*, 198 F.3d 1259 (11th Cir. 1999). *See also, Frederick L. v. Dep't. of Public Welfare of Comm. of Pennsylvania*, 364 F. 3d 487, 501 (3d Cir. 2004) (reversing in part judgment for the defendants and remanding an ADA integration case to the district court for further proceedings). In the absence of this settlement, therefore, class members might have to wait for years for a resolution of the case. The expense of further litigation, including testimony and travel by nationally known experts, would be substantial. Likewise, judicial resources are conserved by settlement. As the *Cotton* court noted, "settlements contribute greatly to the efficient utilization of our scarce judicial resources." 559 F.2d at 1331.

B. The Stage of the Proceedings and the Amount of Discovery Completed Favor Court Approval of the Agreement

Consideration of this factor looks to ensure that Plaintiffs have had access to sufficient information to evaluate the case and "determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation." *Ressler*, 822 F.

Supp. at 1555. The Agreement was executed only after the case was pending for six years, after extensive discovery, and just before the last few weeks of discovery and the trial. Plaintiffs and Defendants each have deposed numerous fact witnesses and conducted extensive expert tours and other expert-related discovery. The Parties have exchanged expert reports, and the defendants have deposed the Plaintiffs' experts. Plaintiffs and their experts have reviewed thousands of pages of relevant documents produced by the Defendants. As in *Ressler*, the discovery has reached an advanced stage where the parties "certainly have a clear view of the strengths and weaknesses of their cases." *Ressler*, 822 F. Supp. at 1555 (citation omitted).

C. The Likelihood of Plaintiffs' Success on the Merits in a Case Involving Novel Issues of Law Favors Court Approval of the Agreement

This case raises complex issues of law that create some uncertainty about the ultimate success on the merits. The parties evaluate the strength of the various claims and defenses differently, creating a degree of uncertainty in the outcome for each.

The parties agree that the core claims in this case are brought pursuant to the ADA, the federal regulations setting forth an "integration mandate," and the Supreme Court's decision in *Olmstead*, which was issued more than a year after this case was filed. In that case the Supreme Court addressed the question of whether the ADA's bar on discrimination "may require placement of persons with mental disabilities in community settings rather than in institutions," and answered with "a qualified yes," explaining that

[s]uch action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities

527 U.S. at 587.

Here, there is no dispute that the State's treatment professionals have determined that community placement is appropriate for class members and that the affected individuals do not oppose the transfer to a less restrictive setting. Thus, the heart of the legal dispute in this case is the question of whether placement of class members can be "reasonably accommodated." Therefore, one key issue at trial would be whether defendants have a comprehensive, effectively working plan for placing qualified persons with developmental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated. *See* 527 U.S. at 605-06.¹³

The question of what constitutes an effective plan that complies with *Olmstead* has not been definitively resolved. The parties have exchanged expert reports on this issue. Not surprisingly, the experts disagree, at least in part, about whether Florida and the relevant Defendants have a plan that is being implemented as required by *Olmstead*. The Plaintiffs and Defendants have separately and carefully assessed the evidence that each party is likely to present in support of its claim or in its defense. As noted, the parties evaluate the facts and the strengths and weakness of their respective positions on

¹³ Defendants assert that the existence of an effectively working plan is only one among several factors which may be considered by the Court in determining whether community placement may be reasonably accommodated. Accordingly, Defendants would also plan to present evidence at trial on other factors which are relevant on this issue (for example, the need to provide an array of services to individuals with developmental disabilities, including both community-based services and institutional services, and the way that class relief would effect the State's ability to provide this array of needed services).

this crucial issue differently. The resulting degree of uncertainty of the outcome, therefore, buttresses the advisability of a negotiated settlement.

In addition to fact-based defenses, the Defendants have raised or would raise numerous other constitutional and legal issues that would need to be litigated, at least on appeal, in the event that this case proceeded to trial.¹⁴ First, the defendants contend that, to the extent that it requires relief in this case, the ADA violates the sovereign immunity provided to states by the Eleventh Amendment. Because this case seeks solely injunctive and declaratory relief plaintiffs, on the other hand, believe that *Ex Parte Young*, 209 U.S. 123 (1908) is dispositive.

Defendants also might argue that the ADA's integration requirement is not a valid regulation, that the rights set forth in the regulations are not privately enforceable under the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001), and that the Social Security Act does not create privately enforceable rights. Plaintiffs believe that *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), which held that health providers could enforce the Medicaid Act, pursuant to §1983, is dispositive. See *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004). Both sides recognize that there is some uncertainty about which interpretation of the case law would ultimately prevail on these and other complex legal issues.

Therefore, an analysis of this factor favors approval of the Agreement.

¹⁴ The court has denied Defendants' motion to dismiss. (Docket No. 132). Obviously, if the case goes to trial, legal issues resolved in the motion to dismiss may still be appealed.

D. The Range of Possible Recovery

The Parties jointly recognize the benefits of devising a remedy to the alleged violations and to providing class members with community opportunities. Indeed, the parties believe that the Agreement provides a broader range of recovery than might otherwise be available in this case.

This Agreement provides concrete benefits to every individual who currently resides at a DSI by ensuring that all treatment staff and individuals with developmental disabilities and their guardian members and families receive necessary information about the benefits of community placement. The Agreement provides for educational programs for treatment staff, individuals, and guardian members and families. The Agreement also provides for changes in the support planning process. The Agreement provides that individuals in DSIs who request community placement (and have been recommended for community placement by their treating professionals) will be enrolled on either the DD Waiver or Supported Living Waiver based on their rank order on the developmental disabilities waiting list (this is the single waiting list for individuals seeking supported living and DD waiver services), to the extent that funding exists to serve such individuals.

The Agreement also ensures the closure of an institutional facility, which is now well on its way to closure, and provides for the commencement of a closure plan for a second institution. That second facility, Gulf Coast, has the largest number of identified class members, according to information provided by the Defendants. Thus, as a result of this Settlement Agreement, there will only be two DSIs in the State of Florida as of July 2, 2010. While the actual closure of the second DSI will not occur during the life of the Agreement, the combined census for all of the

DSIs will be reduced by at least 180 individuals and at least 85% will receive funding for their supports and services from either a DD Services Waiver or Supported Living Waiver.

Under this Agreement, most, if not all, class members will be placed within the next three years, all Landmark residents will have the opportunity for community placement by June 30, 2005, all Gulf Coast residents will have the opportunity for community placement by June 30, 2010, and all DSI residents will receive the benefits of improved support planning and education for treatment staff and families and guardians. In the event that defendants did not complete the closure of Gulf Coast after the dismissal of this case, those DSI residents remaining at Gulf Coast (as well as DSI residents at the two remaining facilities, Sunland Marianna and Tacachale Center) would be able to file a separate lawsuit for prospective injunctive and declaratory relief challenging their continue confinement in a DSI. Given all of these factors, this Agreement is a fair, adequate, resolution of this case.

E. The Absence of Fraud or Collusion in the Settlement Favors Court Approval

The parties reached this case with the assistance of a federal court mediator after nearly six months of arms' length bargaining. Plaintiffs' counsel represent to this Court that they have agreed to this Agreement only because they sincerely believe that this Agreement is in the best interest of the entire class.

F. The Recommendations of Experienced Counsel Support Court Approval of this Agreement

In appraising the fairness of a proposed settlement, the view of experienced counsel favoring a settlement is entitled to significant weight. *See Cotton v. Hinton*, 559 F.2d 1326, 1330-32 (5th Cir. 1977). In reviewing a settlement, "the trial judge, absent fraud, collusion, or the like,

should be hesitant to substitute its own judgment for that of counsel.” *Id.* at 1330. The Agreement in this case was the result of non-collusive, intensive negotiations by counsel who are seasoned litigators with many years of experience in comparable litigation.

Plaintiffs were represented by an experienced team of attorneys from the Advocacy Center and by outside counsel. The Advocacy Center is federally funded to provide protection and advocacy for individuals with developmental disabilities, among others. 42 U.S.C. § 15043a. Peter Nimkoff, who filed the case with Ellen Saideman and was counsel from 1998 to 2001, practiced law extensively in this Court and served as a United States Magistrate from 1982-1986. Ms. Saideman, who has more than sixteen years of experience in class action litigation involving individuals with disabilities, has remained active in active in the case as outside counsel since relocating to Rhode Island in 2000. The Advocacy Center’s General Counsel, Hubert Grissom, has worked on this matter since 2001, and is also experienced in class action litigation. Mr. Nimkoff, Ms. Saideman, and Mr. Grissom have extensive experience with settlement agreements with defendants here involving services to individuals with developmental disabilities.¹⁵ Class counsel Robert D. Fleischner and Steven J. Schwartz work with the Center for Public Representation in Massachusetts. Each has more than thirty years experience in the

¹⁵ Mr. Nimkoff and Ms. Saideman were class counsel in two other cases involving individuals with developmental disabilities. In *Cramer v. Chiles*, 33 F. Supp. 2d 1342 (S.D. Fla. 1999), although Judge Ferguson initially rejected approval of the Settlement Agreement, he subsequently allowed the plaintiffs’ motion for summary judgment on the law, but left the appropriate remedy to be developed by a panel of experts. *Id.* at 1354. Thereupon, class counsel worked with defendants to negotiate a settlement agreement. A negotiated settlement agreement also resolved *Prado-Steiman v. Bush*, 98- 6496-Civ-Seitz/Bandstra in which Mr. Nimkoff, Ms. Saideman, and Mr. Grissom have served as class counsel. In both *Cramer* and *Prado-Steiman*, plaintiffs’ counsel have closely monitored the agreement in accordance with the terms of the agreements.

litigation, negotiation, and implementation of structural reforms on behalf of individuals with mental and developmental disabilities confined to institutions. Their resumes were filed with their motions to appear *pro hac vice*. (Docket Nos. 220, 221) The record thus indicates that plaintiffs' knowledgeable counsel will act aggressively to ensure compliance with the Agreement.

Defendants are also represented by competent and experienced counsel. Senior Assistant Attorney General Chesterfield Smith, Jr., is Chief of the State Programs Branch and has litigated cases involving the individuals with disabilities for more than a decade, while Senior Assistant Attorney General Stephanie Daniel has litigated similar issues since 1998. The Defendants have also retained Thomas York of Pennsylvania-based Dilworth Paxson LLP as co-counsel. That nationally known firm among other things, represents states in cases involving individuals with disabilities. Experienced and knowledgeable defense counsel also recommends court approval of the Agreement.

After full review and analysis of the evidence and legal issues, Plaintiffs' counsel are satisfied that this Settlement confers significant, concrete benefits upon the class members and is fair, reasonable and adequate in light of the complexity, delay and possible risks attendant to continued litigation. Those individuals who are class members and who are not discharged by the end of this case retain the right to seek further relief in subsequent litigation. Plaintiffs' counsel believe that this Agreement is in the best interests of all members of the class and deserves court approval. In light of the experience of plaintiffs' counsel in disability law and with the track record of Defendants in this case in performing in similar agreements, this Court

should give great weight to their views. *See, e.g., Wyatt v. Sawyer*, 219 F.R.D. 529, 535-36 (M.D. Ala. 2004).

V. **THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE, AND THEREFORE DESERVES COURT APPROVAL.**

As noted in detail above, the Agreement is imminently reasonable because it affords immediate relief to individuals and provides some relief to all DSI residents. Thus, class members and other DSI residents will receive substantial benefits from this settlement. Further, to the extent that class members are not actually discharged from a DSI before July 1, 2007, their declaratory and injunctive relief claims will be dismissed without prejudice. Also, the Agreement ensures that DSI residents will be afforded due process as it relates to adverse determinations on requests for services.

CONCLUSION

The Amended Settlement Agreement in this case is fair, adequate and reasonable. The Parties respectfully request that the Court enter an order approving the Amended Settlement Agreement for all of the foregoing reasons, after a fairness hearing.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and by United States Mail to Stephanie A. Daniel, Esquire, Senior Assistant Attorney General, Office of the Attorney General, The Capitol, Suite PL-01, Tallahassee, Florida 32399-1050 and Thomas B. York, Esquire, Dilworth Paxson LLP, 112 Market Street, 8th Floor, Harrisburg, PA 17101 and by mail only to Mark Dubin, Esquire, Civil Rights Division, United States Department of Justice, 1425 New York Avenue N.W., Room 4002, Washington, D.C. 20005; Veronica Harrell-James, Esquire, Assistant U.S. Attorney and Marcos Daniel Jimenez, Esquire, United State Attorney, Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132, this 15th day of July 2004.


Hubert A. Grissom

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

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

Plaintiffs,

vs.

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

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

Defendants.

AMENDED SETTLEMENT AGREEMENT

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

I. DEFINITIONS

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

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

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

II. PLAN OF COMPLIANCE

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

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

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

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

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

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

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

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

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

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

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

The program will include a description of:

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

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

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

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

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

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

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

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

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

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

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

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

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

III. RESOLUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For Plaintiffs:

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