

SETTLEMENT AGREEMENT

PARTIES

The parties to this settlement agreement (hereinafter, "Agreement") are the following:

The State of Oregon, by and through its Governor, the Mental Health & Developmental Disability Services Division (hereinafter, "MHDDSD") of the Department of Human Services (hereinafter, "DHS"); and

The Oregon Advocacy Center, Legal Aid Services of Oregon and Garvey, Schubert & Barer, (hereinafter, "Advocates"); and

James Staley, by and through his mother and next friend, Karen Staley; Helen Healy, by and through her mother and next friend, Susan Schrepping; Tara Peters, by and through her mother and next friend, Chris Kannier; John Duffield, by and through his mother and guardian Laurie Duffield; Molly Drummond, by and through her mother and guardian, Diann Drummond, and The Arc of Oregon (hereinafter, "Plaintiffs").

RECITALS

Whereas, plaintiffs have brought an action against the Governor of the State of Oregon, the Director of DHS, and DHS in the United States District Court for the District of Oregon, *Staley, et al. v. Kitzhaber, et al.*, Case Number CV00-0078-ST ("the Lawsuit"), alleging that the State has failed to provide services in the most integrated possible setting to adults with mental retardation and/or developmental disabilities eligible for placement in an intermediate care facility for the mentally retarded (ICF/MR); and

Whereas, the United States Court of Appeals for the Eleventh Circuit held in *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) that individuals with developmental disabilities are entitled to receive Medicaid-funded developmental disabilities services with reasonable promptness, and other courts around the country have concurred; and

Whereas, legislation was enacted in 1999 (hereinafter, SB 919) that required MHDDSD to present a plan that describes how services to Oregonians with developmental disabilities can be uniformly accessed statewide by all eligible individuals and their families; and

Whereas, MHDDSD has developed, with assistance from the effected parties, a plan as required by SB 919; and

Whereas, the SB 919 plan addresses, to some extent, many of the issues raised by the lawsuit; and

Whereas, the parties agree that plaintiffs and other adults with mental retardation and developmental disabilities will be better served if they are provided supports and services as set forth in this Agreement in lieu of further litigation, and that the SB 919 plan provides, in part, a foundation for the development of these supports and services;

Therefore, in consideration of the mutual covenants and agreements contained herein, the parties agree as follows:

AGREEMENT

I. Governing Principles.

The parties recognize that many adults with developmental disabilities have been placed on waiting lists for comprehensive and/or support services. Provision of such services has been constrained by funding limitations, insufficient capacity to provide services in the community, and other factors. This Agreement is intended to eliminate or substantially reduce waiting lists and improve provision of services consistent with the SB 919 plan by (1) increasing the availability of comprehensive services on a non-crisis basis; (2) providing universal access to support services for all eligible individuals; and (3) defining an appropriate planning process and implementation procedures for the services to be provided under this Agreement.

II. Definitions and Terms.

“Individual Support Plan” (ISP) means a plan as defined in OAR 309-041-0405(26) and based upon person-centered planning principles.

“Individual Support Plan (ISP) Team” means the team defined in OAR 309-041-0405(27).

“Support Services” means in-home or personal supports costing up to \$20,000 per year. Services may include but are not limited to personal care, job coaching or employment supports, in-home staffing, respite care, community inclusion activities, minor environmental adaptations, or other supports that assist the individual to live and work in the community.

“Comprehensive Services” means 24-hour residential care, including care provided in a group home, supported living, or foster care. Comprehensive services also include intensive in-home supports that exceed \$20,000 per year. Intensive supports may include in-home shift care, respite care, employment and other day program supports, community inclusion activities, environmental adaptations, or other services needed to support an individual with complex needs.

“Individual” means an adult with a developmental disability eligible for services as defined in OAR 309-041-0405(15), (16), or (17).

“Crisis Services” means immediate services needed by an individual with a developmental disability to avert a crisis as defined in OAR 309-041-0310.

“Non-Crisis Services” means either support or comprehensive services needed by an individual with a developmental disability who does not face an immediate crisis as defined in OAR 309-041-0310.

“Person Centered Planning” means a process that focuses service planning, funding and delivery on the strengths, capabilities, needs, and preferences of the individual with developmental disabilities.

III. Availability of Comprehensive Services on a Non-Crisis Basis.

A. Governing Principles.

The parties agree that out-of-home comprehensive services must (1) be made available pursuant to an ISP designed to best meet the needs of each individual eligible for comprehensive services; (2) be provided in accordance with a process that respects and maintains the dignity of the individual and his/her family; (3) supplement or replace each individual's natural support system only as necessary to provide the needed support or services; (4) be of acceptable standards, applied uniformly across the State; and (5) be provided in a way that allows the State to utilize limited resources efficiently by, for example, prioritizing the development of services through non-shift care models.

B. Availability and Eligibility.

1. The State shall ensure that the number of individuals receiving non-crisis comprehensive services statewide increases at the rate of 50 per year for the term of this agreement, unless the parties agree differently in writing.

2. An individual shall be eligible to enroll for non-crisis comprehensive services if:

a. The ISP team determines that in-home support services are inadequate to meet the individual's needs; and

b. The individual, the individual's family members, or the individual's representative have requested comprehensive services.

3. Since it is likely that the number of individuals enrolled for non-crisis comprehensive services in a given year will exceed the number of non-crisis comprehensive service slots funded under this Agreement, MHDDSD shall promulgate within 12 months of the effective date of this Agreement a rule establishing a reasonable priority system, for example, requiring the provision of available services first to those individuals with the oldest primary caretakers.

C. Procedures.

1. The ISP team will document an individual's enrollment for non-crisis comprehensive services under the above criteria, without regard to any priority factors. The ISP team shall review and document the individual's continuing request for such services on an annual basis.

2. Following a determination of eligibility based on the reasonable priority and allocation system provided for in administrative rules, the ISP team shall also be responsible for planning for the transition to non-crisis, comprehensive services. Such planning shall be based upon a person-centered plan and shall consider (a) the best interests of the individual, taking into account the individual's wishes and family circumstances; and (b) the type of services that will best fit the individual's needs that are then available or must be developed.

3. Planning for transition to non-crisis comprehensive services described in paragraph III.C.2 above shall occur within the first six months of the next biennium. Services shall be provided to eligible individuals, to the extent required to satisfy the State's obligation in paragraph III.B.1 above (and based upon the prioritization system to be developed pursuant to paragraph III.B.3 above) within 18 months after completion of the planning process. The same timelines will apply in each succeeding biennium for the life of this Agreement.

IV. Universal Access to Support Services.

A. Governing principles.

1. Appropriate support services shall be made available to all adults eligible for developmental disability services as defined in OAR 309-041-016 and the SB 919 plan, including those enrolled and waiting for non-crisis comprehensive services. The nature and extent of support services shall be determined by the ISP team, applying the principles of person-centered planning described above. Services shall be allocated in a

fair and equitable manner, and be made available to eligible individuals in all areas of the State.

2. In expanding support services to achieve universal access, state and county plans shall promote service models combining features of regional consolidation, administrative efficiency, cost-effectiveness, and strong consumer involvement and oversight. Such planning should emphasize, whenever possible, the development of organizational capacity among non-governmental agencies to provide support services. Training and technical assistance should focus on building capacity for service planning based on person-centered principles, fiscal intermediary services, and recruitment of needed staff to implement individual and family service plans.

B. Implementation Procedure.

1. Within 12 months of the effective date of this Agreement, DHS shall adopt administrative rules that (a) confirm that eligible individuals and their families have a right to universal access to support services; (b) specify the process for ensuring that such services are provided, consistent with the governing principles set forth above; and (c) provide for adequate data collection, monitoring, and quality assurance. Public notice of proposed rulemaking shall be given no later than 8 months after the effective date of this Agreement.

2. The rules shall address the operation of the individual planning process, methods of setting and adjusting rates, and a process for appealing eligibility determinations and decisions regarding the amount or type of support services to be provided consistent with federal Medicaid fair hearing requirements and with the grievance and contested case process described below.

3. The rules shall not require DHS to spend more than \$20,000 per year for support services for an adult individual with developmental disabilities unless the individual is eligible to receive crisis or non-crisis comprehensive services . The \$20,000 cap shall be subject to adjustment annually to account for inflation.

4. Universal access to support services shall be phased in as provided in the rules to be adopted by DHS, with the understanding that, by the end of the second biennium after the Agreement becomes effective all eligible individuals will be receiving the services contained in the agreed-upon ISP, and that, thereafter, all individuals who become eligible to receive support services will receive the services contained in the agreed-upon ISP within 90 days after they become eligible.

V. Fair Hearing Requirements.

Individuals who are found ineligible for services, denied requested services or the provider of their choice, or otherwise believe the State has taken an action erroneously may utilize the grievance and other procedures contained in OAR 309-041-1370, regarding eligibility and the appropriateness of services proposed or provided. After exhausting or waiving the grievance procedure, individuals (or their legal representatives, family members, or Advocates) may appeal the Administrator's final decision by filing a written request for a contested case hearing within 30 days of the Administrator's final decision. The contested case shall proceed in accordance with ORS chapter 183 and the Attorney General's model rules for contested case proceedings set forth in OAR 137-003-0001 through 0092. The grievance/contested case procedures shall comply with the fair hearing requirements set forth in 42 CFR, Part 431, Subpart E.

VI. Public Participation.

1. The State will ensure that consumers, families and providers will be meaningfully involved at the state and local level in all aspects of rulemaking, policy development, service design, implementation and evaluation regarding the provision of support services and comprehensive services pursuant to this Agreement.

2. If new management entities are created for the provision of developmental disabilities services, as discussed in the SB 919 plan, DHS will ensure that consumers, families and providers will be meaningfully involved in all aspects of rulemaking, policy

development, service design, implementation, and evaluation regarding the services provided by these entities.

VII. Relief to Plaintiffs.

The State agrees to provide immediate comprehensive services to the individual plaintiffs named in the lawsuit as determined through an appropriate Person Centered Planning process. Planning for these comprehensive services shall be completed by September 30, 2000, unless an individual plaintiff agrees to a longer period of time because a delay appears to be necessary in order to provide appropriate services. Services called for in the ISP shall be fully implemented by December 15, 2000, unless an individual plaintiff agrees to a longer period of time because a delay appears to be necessary in order to provide appropriate services. In addition, those individual plaintiffs who opt to receive comprehensive services in their family home shall have the right to promptly transition, at the individual's request, to non-crisis comprehensive placement in an out-of-home setting, should the parent or guardian request this, at any time during the life of this Agreement. If this Agreement becomes subject to modification or termination under Section VIII.G below, the individual plaintiffs' right to receive comprehensive services under this Agreement shall continue to the end of the biennium in which the agreement is modified or terminated. Thereafter, the State shall utilize its best efforts, in good faith, to continue providing services to the individual plaintiffs until at least June 30, 2007 notwithstanding any modification or termination of this Agreement. If an individual plaintiff's comprehensive services are reduced or eliminated as a result of modification or termination of this Agreement, he or she shall retain the right to contest through administrative or other proceedings such reduction or elimination of services.

VIII. General Provisions.

A. Funding.

1. Within 60 days of the date of this Agreement, DHS shall present a request to the Emergency Board for funding in the amount of \$500,000 for initial expenses

associated with the necessary infrastructure and a planned transition to the system provided for in this Agreement. The Governor shall support this request, and DHS shall use its best efforts to obtain approval of this request.

2. The Governor shall include in the DHS budget for the 2001-03 biennium funds that will be sufficient to allow DHS to comply with this Agreement, taking into account the preliminary budget entitled “Six Year Phase-In of Services” (attached hereto as Exhibit A). The parties agree that, beyond the 2001-03 budget, the “Six Year Phase-In of Services” document will be relevant to the question of whether the State is making an adequate effort to comply with this Agreement.

3. To the extent compliance with this Agreement is dependent upon federal funding that is subject to the approval of the federal Health Care Financing Administration (HCFA), the State’s obligations under this Agreement are contingent upon obtaining HCFA’s approval. DHS shall use its best efforts to obtain any necessary approvals from HCFA.

B. Reporting.

1. **Comprehensive services.** DHS shall maintain data and issue a biennial report, with data in a mutually agreed upon format to be provided at least annually, on (a) the number of individuals requesting non-crisis comprehensive services without regard to any prioritization factor; (b) the number of individuals who received non-crisis comprehensive services during the biennium and the nature of the services received; and (c) the number of individuals requesting non-crisis comprehensive services who have not yet received such services because of resource availability, and the nature of the services recommended by each individual’s ISP team.

2. **Support services.** DHS shall maintain data and issue a biennial report, with data in a mutually agreed upon format to be provided at least annually, summarizing (a) the number of individuals found to be eligible for support services; (b) the type and cost of services provided; and (c) after phase-in to the point of universal access to support

services, information detailing the circumstances of any individual required to wait more than 90 days to receive services.

3. In addition to receiving the above data and reports from MHDDSD, plaintiffs or the Advocates may at any time request specific data from MHDDSD regarding implementation of the services provided for in this Agreement. MHDDSD shall make its best efforts to honor such a request within a reasonable period of time, or promptly inform plaintiffs or the Advocates why it deems the request to be unduly burdensome. If MHDDSD so informs plaintiffs or the Advocates, the parties shall negotiate in good faith regarding ways to satisfy the request without creating an undue burden for MHDDSD.

C. Enforcement.

1. The parties intend this Agreement to be a binding contract and incorporate by this reference those terms and conditions of ORS 279.312-.320 required by all public contracts. The parties will attempt to resolve any claim of material breach of this agreement through negotiations. An attempt at informal resolution, as described below, will be a prerequisite to either party's request for relief from the court for an alleged material breach of this agreement.

2. The court will retain jurisdiction solely for the purpose of enforcing compliance with this Agreement. Before relief is sought from the court, the following process will be used by the parties:

- a. Either party claiming that a material breach has occurred under this Agreement will give notice of the claim in writing to opposing counsel and will propose a resolution of the issue to the other party.
- b. The responding party will have thirty (30) days following receipt of the written claim to respond in writing, unless the period is enlarged by Agreement of the parties.

c. If after thirty (30) days the party asserting the claim is dissatisfied with the other party's response, or no response is received, the party asserting the claim may, after providing fourteen (14) days' written notice to opposing counsel, pursue relief before the United States District Court for the District of Oregon, or participate in an alternative dispute resolution mechanism agreed upon by the parties.

3. The parties have stipulated to the joinder of The Arc of Oregon as an additional party plaintiff. The Arc of Oregon and other parties to this Agreement shall be entitled to seek relief to enforce compliance with this Agreement, subject to the process described in paragraph III.C.2 above.

D. Material Breach Defined.

A "material breach" of this Agreement means any of the following:

1. Failing to perform a specific duty required by this Agreement. The legislature's failure to appropriate sufficient funds to allow the State to fully comply with the terms of this Agreement shall not excuse a material breach.

2. Changing the standards for determining eligibility for developmental disability services, unless required by federal law.

3. Changing the eligibility criteria for crisis/diversion services, unless required by federal law.

4. Eliminating services currently available to adults or children with developmental disabilities, or reducing the funding for those services, including without limitation crisis/diversion services, in order to fund the services to adults provided for in this Agreement.

5. Failing to request from the Oregon legislature sufficient funding to provide the comprehensive and support services required by this Agreement; and

6. Failing to utilize best efforts to enact any statutory revisions required to fully implement this Agreement.

E. Attorneys' Fees, Expenses and Costs.

Plaintiffs may seek to recover their reasonable attorneys' fees and costs incurred in connection with this litigation, none of which will go to Legal Aid Services of Oregon. The State reserves its right to object to all or any part of plaintiffs' fee request on any basis. In the event that the parties cannot agree to the amount of reasonable attorneys' fees, expenses and costs, as defined above, plaintiffs shall file a fee application with the court within ninety (90) days of the effective date of this Agreement.

F. Certification of Settlement Class, Dismissal of Lawsuit and Forbearance from Future Litigation.

1. This Agreement is intended to provide relief not only to the named plaintiffs but also to all other similarly-situated individuals with developmental disabilities who are or may be eligible to receive services under the federal Medicaid program. The parties shall stipulate to an order certifying the Lawsuit as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure for purposes of settlement only. If the Agreement is approved by the court after notice has been given to the class, it shall be binding on all members of the class. The parties stipulate that Legal Aid Services of Oregon shall withdraw as attorney of record immediately prior to the time any action is taken to have this Lawsuit certified as a class action.

2. Subject to Section VIII.C above concerning enforcement, the Lawsuit shall be dismissed. The relief set forth in this Agreement constitutes full and final relief for each plaintiff and other similarly-situated individuals, on the claims set forth in plaintiffs' complaint, as amended, up to and including the effective date of this Agreement.

3. During the life of this Agreement, the Advocates and The Arc of Oregon shall forebear from commencing any action on behalf of adults with developmental disabilities eligible for ICF/MR services on the basis of claims that are substantially the same as the claims asserted by plaintiffs in the Lawsuit; provided, however, that nothing

in this section shall be construed to prevent an Advocate from commencing an action to redress or prevent injury to an individual with developmental disabilities including alleged improper denial of eligibility or of requested services. After this Agreement has terminated or expired, the Advocates shall have the right to commence any action, including a class action on behalf of adults with developmental disabilities eligible for ICF/MR services challenging the policies, practices, or procedures that are the subject of this Agreement.

G. Term of Agreement.

1. This Agreement shall terminate on June 30, 2007, unless terminated pursuant to subsections 2 or 3 below or extended in writing. The parties shall confer in good faith during the year 2005 and immediately prior to the termination date regarding the extent to which the goals of this Agreement have been met and the desirability of extending or modifying this Agreement.

2. This Agreement shall terminate automatically if a court determines that (a) the State is in material breach of this Agreement; and (b) enforcing compliance with this Agreement would effectively violate the limitations on future debt set forth in Article XI, § 7 of the Oregon Constitution.

3. This Agreement shall be subject to modification if ballot initiatives 91 or 8 are approved by Oregon voters in November 2000 and go into effect. In addition, the Agreement shall be subject to modification if, in future years, a ballot initiative with substantially similar or greater negative fiscal impact than measures 91 or 8 is passed by Oregon voters and goes into effect. If such a ballot initiative is passed and goes into effect, the parties shall negotiate in good faith to modify the Agreement to reflect the State's diminished fiscal ability to comply with its terms. If the parties are unable to agree on modification of the Agreement, then any party may seek Court approval to terminate the Agreement. A party seeking to terminate under this provision shall first notify the other parties of its intent to terminate and the basis for its decision to do so.

Following receipt of the notice of intent to terminate, the other parties shall have 30 days to respond in writing to such notice. If the party seeking termination is dissatisfied with the opposing parties' written responses, the party seeking termination may, after providing 14 days written notice to the other parties, participate in an alternative dispute resolution mechanism agreed upon by the parties or request that the court approve termination.

H. Miscellaneous Provisions.

1. This Agreement is the compromise of disputed claims and shall not be deemed to be an admission of liability or wrongdoing by any party for any purpose.
2. The rights and obligations of this Agreement shall inure to the successors and assigns of the parties. To the extent that MHDDSD's duties, functions, and powers are imposed, transferred, or vested in any other State agency or commission, the State shall act through the successor agency or commission for purposes of this Agreement.
3. If action beyond the control of MHDDSD, such as a change in State or federal law or action by another governmental agency, prohibits MHDDSD from performing a material provision of this Agreement, the remaining parts shall not be affected and shall remain in full force and effect.
4. This Agreement contains the entire agreement between the parties. The Agreement may not be modified except in writing.
5. If the federal government, through Congress, the Health Care Financing Agency, or otherwise, imposes different or additional requirements upon states than those currently in place regarding the provision of developmental disability services, the protections to be afforded individuals with developmental disabilities, or other matters within the purview of this Agreement, this Agreement shall not limit the State's responsibility to comply with such requirements.
6. This Agreement shall be governed by the laws of the State of Oregon.

7. There are no third party beneficiaries to this Agreement.

Dated this ___ day of _____, 2000.

STATE OF OREGON

By: _____
John A. Kitzhaber
Governor

DEPARTMENT OF HUMAN SERVICES

By _____
Gary W. Weeks
Director, DHS

By _____
Barry S. Kast
Administrator, MHDDSD

By _____
James Toews
Assistant Administrator,
Developmental Disabilities
Services

OREGON ADVOCACY CENTER

LEGAL AID SERVICES OF OREGON

By: _____
GARVEY, SCHUBERT & BARER

By: _____

By: _____

PLAINTIFFS:

Karen Staley

Chris Kannier

Susan Schrepping

Diann Drummond

Laurie Duffield

THE ARC OF OREGON

By: _____