



failed to provide plaintiff class members with specialized services and community residential supports in a reasonably timely manner. The Defendants' Answer raises various defenses to the Plaintiffs' claims.

2. Definitions: The following terms shall have the following meanings for purposes of this Agreement:

(a) "Plaintiffs" means the individual names Plaintiffs, the plaintiff class, as defined in footnote 1, and the organizational Plaintiffs.

(b) The terms "class members" and "residents" mean those persons who meet the definition set forth in footnote 1, and are Massachusetts residents under applicable Medicaid law.

(c) "Defendants" means the executive Defendants in their official capacities, including their employees, agents, successors, and assigns.

(d) "Specialized services" are defined in 42 C.F.R. ? 483.120(2).

(e) "Residential supports" means services and staff supports which meet the individual's residential needs in a community setting.

## **II. COMMUNITY RESIDENTIAL SUPPORTS**

3. Standard. It is DMR's policy that its services and supports for nursing home class members should be appropriate to their needs and abilities, and that the provision of services in a community setting is desirable whenever it is appropriate for the individual's circumstances. DMR is committed to determining whether a community setting is appropriate for each class member. Whether a class member should be provided a community setting must be determined on an individual basis. The Defendants will offer community residential and other supports appropriate to the needs of the class member unless DMR, in its professional judgment, determines that the individual cannot "handle and benefit from" a community residential setting,<sup>2</sup> based on the factors set forth in this Agreement. The factors that the Defendants will consider in deciding whether someone can "handle and benefit from" a community setting, include: (1) opportunities to interact with family and friends; (2) accessibility to appropriate work or day supports; (3) opportunity for meaningful participation in aspects of community life; (4) the presence or absence of an advanced medical condition that would have a significant adverse effect on the individual's safety; (5) the presence or absence of fragile health condition such that the main supports are nursing services for medical and basic needs; (6) the presence or absence of a substantial risk of substantial transfer trauma which cannot be mitigated by individual clinical intervention; and (7) adequate levels of support in the community system to ensure safety.

4. Service Development Schedule. The Defendants will provide community residential and other supports to class members, subject to other provisions herein, according to the following schedule:

(a) In FY2000, provide residential and other supports to 75 class members, provided that the average annualized cost of such residential supports does not exceed \$55,000.

(b) In FY2001 and FY2002, respectively, provide residential and other supports to 175 class members, provided that the average annualized cost of such new residential supports does not exceed \$55,000.

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<sup>2</sup>See Olmstead v. L.C., 119 S.Ct. 2176 (1999)

(c) In FY2003, FY2004, FY2005, FY2006, and FY2007, respectively provide residential and other supports to up to 150 class members, provided that the aggregate annualized cost of such new residential supports equals but does not exceed a total of \$5,000,000 plus the annualized DMA offset of \$23,000 per person, subject to the standard and choice provisions set forth in this Agreement. When Defendants have completed the requirements under sub-parts (a) through (c), Defendants shall have no obligation under this Agreement in any subsequent fiscal years to provide additional residential supports.

(d) Divert persons with mental retardation or other developmental disabilities who would otherwise be admitted to nursing facilities as follows: at least 25 such persons in FY2000, and at least 50 such person in FY2001 through 2005, through the provision of residential and other supports.

(e) The decision as to the identity of those persons with mental retardation and other developmental disabilities to be offered residential and other supports under this Agreement rests with DMR's professional judgment. In addition, the number of residents that will live in each community setting shall be consistent with the then-existing DMR regulations. In implementing the provision of residential supports under this Agreement, DMR will utilize internal and external professional expertise as it deems appropriate.

(f) Defendants are not required to provide residential and other supports to a person with mental retardation or other developmental disabilities if the person knowingly objects to the provision of such supports. Any objection shall be based upon the preference of the person with mental retardation or other developmental disability, only after the person: (1) has an opportunity to express his or her interests and preferences and any ties he or she might have to a particular community or locale; (2) has been informed of the residential supports in a manner that reflects the person's ability to understand and communicate information; and (3) is provided the opportunity to visit and observe similar community settings. For those class members who knowingly object to offered residential supports, Defendants will reoffer the choice annually for a period of three years.

5. The Defendants' Discretion Concerning Residential Supports to Classmembers. Subject to paragraph 3 on the standard and paragraph 4 on the schedule, Defendants retain the discretion as to when to provide residential and other supports to individual class members under this Agreement. The Defendants may consider, in view of the available resources, the cost of providing the residential supports to the individual class member, the range of services the Defendants provide to other individuals with mental retardation, and the Defendants' intent to distribute those services equitably.

### **III. INDEPENDENT REVIEW**

6. The parties will jointly select an independent expert qualified by training and experience to review the appropriateness and the implementation of the DMR community placement process. The expert shall have experience with individuals with mental retardation and other developmental disabilities, including residents of nursing facilities and ICF/MR but shall not be a state employee. In the event that the parties cannot agree on an expert within thirty days of signing this Agreement, each party shall select its own expert. Within ten days, the parties' expert shall then select the independent expert.

7. In any quarter, if and when the rate of community placement recommendations

falls below 75% of the number of residents of nursing facilities with mental retardation and other developmental disabilities who are reviewed through the community placement process, the independent expert shall thereafter conduct quarterly reviews of the adequacy, accuracy, and appropriateness of the community placement process.

8. This review will include, among other matters, an analysis of the individual placement recommendations conducted as part of the community placement process and the decisions of the DMR nursing facility coordinator, as well as of placement recommendations which are objected to or refused. The review will address whether the process and its recommendations, including objections or refusals to consent to recommendations, are consistent with the DMR placement standard, accepted standards of practice, professional judgment, and requirements of federal law.

9. In any quarter, if and when the rate of determinations for specialized services falls below 75% of the total number of class members reviewed for specialized services during said period, the independent expert shall review these determinations for adequacy, accuracy, and appropriateness.

10. The independent expert will prepare and distribute a quarterly report of her findings and recommendations to the parties. The Defendants will consider in good faith the expert's recommendations.

#### **IV. APPEALS**

11. Any class member who is adversely affected by the Commonwealth's determination of his/her need for specialized services and/or community residential supports may seek administrative review of that determination pursuant to 115 C.M.R. ? 6.30 *et seq.*

#### **V. DIVERSION**

12. By March 1, 2000, after consultation with two of the Plaintiffs' representatives, the Defendants will establish a Diversion Plan designed to prevent the inappropriate or unnecessary admission of persons with mental retardation or other developmental disabilities into nursing facilities. DMR will take the lead role in designing, developing, and monitoring the Plan. The Plan will include:

(a) coordination with interested agencies to ensure that DMR is notified as soon as admission to a nursing facility is sought for a person who is believed to have mental retardation or a developmental disability other than mental retardation;

(b) a provision that DMR will review the status of all new admissions of persons with mental retardation or other developmental disabilities to nursing facilities;

(c) development of community supports for persons who do not meet the applicable criteria for admission to a nursing facility;

(d) training on diversion and service provision for staff involved in nursing facility admission;

(e) a description of the types of services which DMR can offer in the community.

13. The decision as to whether to make any modifications to its Diversion Plan shall remain vested solely with the Commonwealth and its agencies.

#### **VI. SPECIALIZED SERVICES**

14. The Defendants shall provide or arrange for the provision of specialized

services, as defined by 42 U.S.C. ? 1396r(7)(G)(iii) and 42 C.F.R. ?? 483.120, 483.440(a), to all Massachusetts residents, as defined in 42 C.F.R. ?? 483.110 & 435.403, with mental retardation or developmental disabilities who currently reside in nursing homes in the Commonwealth and who have been determined, pursuant to 42 U.S.C. ? 1396r(e)(7)(B)(ii)(II), to need such services. Consistent with the Defendants' policies and regulations, the Defendants may satisfy their obligations under this Agreement by providing class members with appropriate community residential and other supports.

15. Of the 858 nursing facility residents, according to the PASARR evaluators, were not receiving all specialized services recommended in their PASARR evaluations as of July 1, 1998, the Defendants shall provide or arrange for those specialized services to all such residents by December 31, 1999.

16. For all other Massachusetts residents who are class members whose PASARRs recommend specialized services, Defendants shall provide or arrange for the provision of those specialized services by April 30, 2000, or within 90 days of the individuals' admission to a nursing facility, which ever is later.

17. In determining what specialized services to provide or arrange for an individual, pursuant to the foregoing paragraphs, the Defendants will provide or arrange for the services necessary to meet all the specialized service needs identified in the most recent PASARR report, unless that individual or her guardian on her behalf makes an informed choice to refuse a particular service, after the Defendants offer a particular service and make reasonable efforts to inform the individual or her guardian of that service and encourage the individual or her guardian to visit or observe the service being offered or comparable services.

18. Defendants shall provide periodic reports to the Plaintiffs regarding Defendants' progress in providing or arranging for specialized services in accordance with the preceding paragraphs. Such reports shall be provided on the first business day of each month subsequent to the execution of this Agreement through December 1999. Such reports shall identify each individual subject to the preceding paragraph; shall indicate what specialized services, if any, the individual was determined to need according to the individual's most recent PASARR report; shall indicate what specialized services, if any, Defendants have provided or arranged for that individual during the reporting period; and shall indicate whether the individual has refused to accept any specialized services offered by the Defendants.

## **VII. IMPLEMENTATION**

19. For FY2000, EOHHS, DMR, and DMA, will execute an inter-agency service agreement ("ISA") to provide for the inter-agency transfer of funds (the DMA offset referred to in section II, paragraph 4(c) to support class members who leave nursing facilities. For all subsequent years covered by this Agreement, the DMA offset will be provided directly through some financial mechanism.

20. DMR will be the agency responsible for designing, developing, and monitoring community services for persons eligible for DMR services who reside in nursing facilities. DMR will be the lead agency in designing, developing, and monitoring community services for persons with developmental disabilities who reside in nursing facilities.

21. By March 1, 2000, DMR will issue a policy for nursing facility residents that will be consistent with the standard set forth in section II, paragraph 3.

22. The Commonwealth will amend its HCBS waiver, and/or adjust its HCBS waiver capacity, as necessary, to meet its obligations under this Agreement, subject to Federal regulatory approvals.

23. In implementing this Agreement, the Defendants will regard class members with mental retardation and class members with other developmental disabilities in the same manner consistent with the service development schedule contained in section II.

24. The Defendants will provide semi-annual reports to the Plaintiffs stating:

(a) the Defendants' progress in implementing the community residential support schedule, including: (1) the class members who have received recommendations for residential supports pursuant to the placement standard and procedures; (2) the class members who have received recommendations for continued nursing home placement including the reasons therefore; and (3) the cases reviewed by the independent clinicians; (4) the class members who have knowingly objected to a recommendation for residential supports; (5) the percentage of class members who have received a recommendation for residential support;

(b) the provision of specialized services to class members in the form prescribed in paragraph 18; and

(c) the number of persons with mental retardation and other developmental disabilities admitted to, and diverted from, nursing facilities.

25. By February 1, 2000, after consultation with a representative of the Plaintiffs, DMR will appoint a senior staff persons who will direct, coordinate, and monitor the provisions of specialized services, the Diversion Plan, and the provision of residential and other supports for class members, including the review of a representative sample of individual determinations regarding residential supports.

## **VII. FUNDING**

26. The Defendants' obligations under sections II and VI of this Agreement are subject to appropriations by the Legislature. The Defendants will seek as a priority the necessary funding to implement this Agreement, including the submission of annual H.1. budget requests from the Governor. Notwithstanding the foregoing, the Defendants will pay for Medicaid-covered services to the extent that such services are included under the Commonwealth's Title XIX State Plan, to class members who are Massachusetts Medicaid recipients, subject to appropriations by the Legislature, unless Title XIX of the Social Security Act requires the Commonwealth to pay for the same notwithstanding any limitations in state appropriations.

## **IX. ENFORCEMENT**

27. This Agreement shall be subject to the approval of the Court, and, if so approved, shall be entered as a court order, provided that the terms of this Agreement shall not be enforceable by contempt or by a breach of contract action in state or federal court.

28. Further proceedings in Civil Action No. 98-30208-KPN will be stayed, subject to the following provisions.

29. This Agreement and any obligations thereunder shall be enforceable only as follows: At any time after May 1, 2000, Plaintiffs may file a motion pursuant to paragraph 32 below.

30. No less than 30 days prior to filing such a motion, Plaintiffs shall notify

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

31. Should the parties fail to resolve the problems identified by the Plaintiffs, the parties shall engage in mediation with a mutually acceptable mediator for no less than two days, unless the parties reach agreement sooner.

32. Should the parties fail to resolve, through mediation, the problems identified by the Plaintiffs, the Plaintiffs may file a motion with the Court seeking a judicial determination that Defendants are not substantially complying with the Agreement. If the Court so finds, it may lift the stay imposed under paragraph 28, and the Plaintiffs may seek injunctive and other relief based upon the then existing facts and law.

33. These enforcement provisions are in addition to the provisions regarding independent review and appeals contained in sections III and IV, respectively, of this Agreement.

34. Defendants agree that Plaintiffs' counsel are entitled to reasonable attorneys' fees for work performed prior to the approval of this Agreement, in an amount to be determined. The parties anticipate that Plaintiffs will file a motion for attorneys' fees, and the parties agree that the motion should be decided by the Court, unless the parties resolve the attorneys' fees issues through negotiation, medication, or other appropriate means.

35. The parties shall voluntarily dismiss, Civil Action 98-30208-KPN on July 1, 2010, if the case has not been dismissed earlier or the deadline has not been extended. The Defendants' obligations under sections II and VI of this Agreement shall not survive the dismissal of the action.

36. The parties agree to execute all such documents as shall be reasonably necessary to effectuate the provisions of this agreement and the documents contemplated thereby.

#### **X. MISCELLANEOUS**

37. This Agreement is the entire agreement among the parties with respect to the subject matter hereof and supersedes all prior oral and written discussions and all agreements. Each part represents that it has not relied upon any statement of the other party except those statements set forth in this Agreement.

38. By mutual agreement, the parties may change the terms of this Agreement, including, but not limited to, the timetables for taking specific actions, provided that such mutual agreement be memorialized in writing and signed by the parties and approved by the Court. In the event that one party disagrees as to the appropriateness of any change proposed by the other party, the parties shall meet to attempt to resolve such dispute. Should the parties fail to reach agreement, the parties shall engage in mediation with a mutually acceptable mediator paid for by the Defendants.

39. By entering into and complying with this Agreement, no party makes any concession as to the merits of the opposing party's claims or defenses.

40. Neither this Agreement, nor any provision hereof, is intended nor shall it be construed, to constitute any formal or informal policy or procedure of the Commonwealth or its agencies or any reversal, change, or amendment to any formal or informal policy or procedure of such agencies. This provision will not affect the continuing validity of paragraph 21.

41. If the Court determines that court approval of this Agreement is subject to a fairness hearing pursuant to Fed.R.Civ. P. 23(e), the parties will jointly prepare a notice of this settlement which describes the process for filing written objections and includes the date for the fairness hearing. The notice shall be sent by the Defendants to all class members and their guardians, if any. The parties will cooperate in presenting this Agreement to the Court at the fairness hearing.

42. Nothing contained in this agreement shall preclude the Defendants from promulgating or amending regulations as they deem appropriate. This provision will not relieve the Defendants of their obligations contained in this Agreement.

43. The parties represent that each of them has cooperated in drafting this Agreement. Hence, no ambiguity in this Agreement shall be construed against any of them.

44. Nothing in this Agreement is intended to affect any rights of any party or non-party, other than those rights specifically addressed herein.

Dated 20 October 1999

The Plaintiffs,  
By their attorneys,

For the Defendants,  
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