UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RICHARD MESSIER, ET AL.	:	No. 3 :94-CV-1706(EBB)
v.	:	
SOUTHBURY TRAINING SCHOOL	:	May 25, 2010

SETTLEMENT AGREEMENT

INTRODUCTION

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

I. THE FRAMEWORK

A. Purpose

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

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

B. Policy

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

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

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

C. Professional Judgment

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

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

D. Resource Development

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

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

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

E. Informed Choice

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

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

II. BENCHMARKS

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

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

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

- Exercising professional judgment regarding most integrated setting and community inclusion;

- Other areas deemed necessary by the remedial expert.

(Within six (6) months COS – Commencement of Settlement[1]).

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

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

a) Defendants shall provide to all class members, advocates, families and their guardians informational material that describes the revised portability policies that explains in plain language how portability allows anyone in the DDS system to utilize their resources to receive supports and services in another location and from another provider or through hiring their own staff.

b) Methods to assure that information is available upon which informed choice can be made will include:

- Ongoing information for team members about current service options in the community so they can be a resource for families, class members, advocates and guardians

- Written information and presentations to families, advocates, class members and guardians about community services and providers. Information sessions will be offered to small groups of guardians, advocates and families or on an individual basis

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

- Information provided by the Remedial Expert at individual team meetings

- STS will invite providers to make presentations to groups of interested guardians, advocates, class members and family members

- STS will offer provider fairs twice a year which will be open to class members, advocates, families, guardians and staff

- Regional staff will be available to attend any individual or group meetings to discuss community services, HCBS waivers and transition planning

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ROLE OF REMEDIAL EXPERT AND DISPUTE RESOLUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. JURISDICTION AND SUNSET

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

V. ATTORNEYS' FEES AND COSTS

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

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

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

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

FOR THE PLAINTIFFS

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

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

FOR THE DEFENDANTS

RICHARD BLUMENTHAL
ATTORNEY GENERAL

BY: James P. Welsh

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

Henry Salton
Assistant Attorney General

Thomas York, Esq.