

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

VERNA BAILEY, as legal guardian and next of friend of Lonnie Dale Wright, Jr.

Plaintiff,

v.) Civil Action No. 99-A-1321-N

KATHY SAWYER, as Commissioner of Department of Mental Health and Mental
Retardation, et al.

Defendant.

SETTLEMENT AGREEMENT

1. Introduction

This lawsuit was filed by Verna Bailey, as the legal guardian of her son Lonnie Dale Wright, Jr., on behalf of him and all others similarly situated ("Plaintiffs or Plaintiff class") pursuant to Title 11 of the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. ("ADA"), Section 504 of the Rehabilitation Act of 1973, 42 U.S.C. §791, et seq. ("Section 504"), and the Fourteenth Amendment to the Constitution of the United States against Kathy Sawyer, in her official capacity as Commissioner of the Alabama Department of Mental Health and Mental Retardation ("DMHMR"). Plaintiffs allege that DMHMR is discriminating against the Plaintiff Class by failing to provide qualified interpreters, and physicians, psychologists, social workers, caseworkers, nurses and support staff who are fluent in American Sign Language and by failing to provide adequate culturally and linguistically appropriate mental health services. The parties disagree whether DMHMR has complied with the requirements of federal law. However, the parties desire to settle this action without the burden of prolonged

litigation and to focus instead on their shared interest of affording members of the Plaintiff Class an equal opportunity to participate in and receive the benefits of the mental health, mental retardation and substance abuse services ("services") provided by DMHMR in its facilities and through contracts with community providers. This Settlement Agreement ("Agreement") is intended to resolve all the allegations that have been made or could have been made by the Plaintiff Class in their complaint pursuant to the aforementioned federal statutes. It is not the intent of this Agreement and the parties expressly agree that this Agreement shall not be interpreted or construed to require DMHMR to provide services to persons who are not eligible for such services under criteria established by DMHMR. The parties agree that DMHMR shall retain its authority to establish criteria to determine eligibility for the services that it provides in its facilities and through contracts with community providers.

2. Jurisdiction and Venue

The Court has jurisdiction over this lawsuit pursuant to 28 U.S.C. §§1331 and 1343. Venue is proper in the Middle District of Alabama pursuant to 28 U.S.C. §1391.

3. Plaintiff Class

a. *The parties agree the Plaintiff Class shall be defined as all deaf or hard of hearing persons who currently or in the future receive services in a facility operated by DMHMR or receive services pursuant to a contract between DMHMR and a community provider of services ("community provider").*

b. For settlement purposes only, parties agree that the requirements of Rule 23(a) *F.R.Civ.P.* are satisfied. Defendant admits that the number of persons currently receiving services in a facility operated by DMHMR or pursuant to a contract between DMHMR and a community provider, who have some degree of hearing impairment and may be classified as deaf or hard of hearing, exceeds 50. Plaintiffs contend that the exact number of deaf or hard of hearing persons who meet the eligibility criteria for such services exceeds 100. Defendant agrees that all persons who may meet the eligibility criteria for such services are not presently known to DMHMR. The parties agree that this litigation presents common questions of both law and fact which can be most expeditiously handled through a class action. The parties further agree that the claims asserted by the named plaintiff are typical of the claims that could be asserted by absent class members. Further, the parties agree that the named Plaintiff is an adequate representative of the class as a whole. Verna Bailey has

actively participated in this litigation through consulting with her attorneys, by attending hearings held in the case, by participating in the mediation of the case, and by giving her deposition and cooperating in other discovery aspects of the litigation. The parties also agree that the attorneys representing the Plaintiff and Plaintiff class are experienced lawyers who have participated in numerous nationwide and statewide class actions. The parties also agree that Andrew C. Allen and Russell Jackson Drake have had extensive experience, in both individual and class actions, litigating constitutional claims including those of the mentally ill.

c. For settlement purposes only, the parties agree that this action and the proposed settlement should be certified under Rule 23(b)(2) *F.R.Civ.P.* This action does not seek monetary damages; injunctive relief only is sought. The parties recognize that under the requirements of Rule 23(b)(2) *F.R.Civ.P.* normally notice to class members is not required. However, the parties agree that the class should, in this instance, be given limited notice of the settlement. The parties agree that a notice of the time, place, and date of the fairness hearing to be conducted in this case, together with a copy of the proposed settlement, will be given to The Alabama Association of the Deaf and The Alabama Disabilities Advocacy Program. The parties recognize that the deaf community in Alabama is a relatively small and tight-knit group. By giving notice of the proposed settlement and notice of the manner and time within which objections must be made to these organizations, the information regarding objections will be disseminated throughout the deaf community by these organizations in a wide enough manner that anyone who wishes to object to the settlement will have notice of the manner in which to do so.

4. Framework for Evaluation Services to DMHMR Consumers

The purpose of this Agreement is to memorialize all obligations and commitments that the parties agree to undertake as well as the duties, rights and remedies they mutually acknowledge. Upon judicial approval, this Agreement shall provide the framework for evaluation of DMHMR's provision of services to persons who are deaf or hard of hearing in its facilities and pursuant to contracts with community providers.

5. Definitions

a. Terms and Phrases

All terms and phrases used in this Agreement shall be interpreted consistently with the definitions and use of such terms and phrases in the ADA and Section 504 and the implementing federal regulations.

b. Deaf or Hard of Hearing Persons

The term deaf or hard of hearing person is intended by the parties to mean a qualified individual with a disability as that term is defined by the ADA and Section 504.

6. Term of Agreement

a. Effective Date

The effective date of this Agreement shall be the date of the District Court's entry of an Order approving this Agreement, following the requisite fairness hearing for this class action.

b. Court Jurisdiction During the Term of this Agreement

The District Court shall retain jurisdiction of this case for the limited purpose of enforcing this Agreement pursuant to the process specified in paragraphs 6(c) and 7.

c. End of Agreement

The parties acknowledge that this Agreement should end and the District Court's jurisdiction over this litigation should expire when DMHMR has fulfilled all obligations and commitments pursuant to the specific provisions of this Agreement. The projected ending date is not later than September 30, 2002.

Promptly after DMHMR has fulfilled all obligations and commitments stipulated in this Agreement, whether that occurrence comes on or before September 30, 2002, the parties shall cooperate in the filing of a joint motion, or other appropriate pleading for an Order which declares DMHMR's compliance with this Agreement and ends the Court's jurisdiction. The Commissioner of DMHMR shall notify Plaintiffs' counsel, in writing, when DMHMR has achieved compliance sufficient to warrant a judicial declaration that DMHMR is entitled to be released from this Agreement.

If the Plaintiffs do not agree that DMHMR has fulfilled all obligations and commitments pursuant to the specific provisions of this Agreement, the parties or their representatives shall, not less than 10 working days after receipt by Plaintiffs' counsel of the Commissioner's notice, meet to confer in good faith to reach a consensus for stipulation of compliance or for a remedy or action which ends this Agreement. If the parties fail to reach a

consensus, either party may request that the Court appoint a mediator. This procedure shall be deemed a condition precedent to the filing by Plaintiffs or DMHMR of a proper pleading to enforce this Agreement or declare that compliance has been achieved.

7. Compliance and Resolution of Disputes

No court appointed monitor, master, committee or other formal system of monitoring shall be implemented for this Agreement. Six (6) months after the effective date of this Agreement, and every six (6) months thereafter for the duration of this Agreement, DMHMR shall provide a written report ("Report") to Plaintiffs' counsel regarding its efforts to comply with this Agreement. The Commissioner of DMHMR shall notify Plaintiffs' counsel, in the report, when DMHMR has achieved compliance with a specific obligation or commitment in this Agreement. If Plaintiffs reasonably believe that DMHMR is not in compliance with the specific obligation or commitment of this Agreement identified in the Report, Plaintiffs' counsel shall promptly notify, in writing, the Commissioner of the facts and circumstances to support their opinion and to propose a recommended remedy or corrective action. Not less than ten (10) working days after receipt of this notice by the Commissioner, the parties or their representatives shall meet and confer, in good faith, to resolve the dispute. If they fail to reach an agreement that resolves the dispute, either party may request that the Court appoint a mediator. If Plaintiffs agree that DMHMR is in compliance with the commitment or obligation of this Agreement identified in the Report, Plaintiffs' counsel will promptly notify, in writing, the Commissioner.

This procedure shall be deemed a condition precedent to Plaintiffs filing of any enforcement motion with the District Court. The parties also intend that the procedure in this paragraph 7 shall be followed to resolve any disagreement that the Plaintiffs may have with a decision of the Commissioner or designee in paragraph 8 (e).

8. Obligations and Commitments of DMHMR

a. Within thirty (30) days of the effective date of this Agreement, the Commission of DMHMR will appoint a planning committee ("Committee") to plan for the provision of and the future development of services for people who are deaf or hard of hearing. The parties intend that this planning committee shall include consumers, family members and service providers. The parties agree the Commissioner of DMHMR shall retain discretion to appoint and remove members of the Committee. The Commissioner of DMHMR shall request a list of 5 persons as nominations for appointment to the Committee from the Alabama Disabilities

Advocacy Program and from the Alabama Association for the Deaf, a list of 5 consumers, a list of 5 family members, and 2 separate lists of 5 persons. The Commissioner shall appoint one person from each list to serve on the Committee, and if any person is removed, resigns, or is otherwise unable to serve, then the group that nominated that member shall submit a new list of 5 persons from which a replacement will be selected. The parties intend that the Committee will consist of at least 11 persons. Further, the parties agree the Commissioner shall retain discretion to accept, reject or modify the recommendations of the Committee. As soon as practicable after the recommendations of the Committee are received by the Commissioner, DMHMR will promulgate a plan for the provision of and the future development of services in the State of Alabama for people who are deaf or hard of hearing("the Plan").

b. DMHMR will apply its best efforts to secure such legislative appropriations or other funding allocations as are reasonably necessary to provide and develop the services identified in the Plan.

Notwithstanding the foregoing, the Parties stipulate and agree that any failure by the Legislature to appropriate the necessary funding to implement the Plan shall not alone be a sufficient basis for an action by Plaintiffs for breach of this Agreement; nor shall the failure to secure legislative appropriations alone excuse Defendants from any of the obligations of the Agreement.

c. DMHMR will as soon as practicable after the effective date of this Agreement employ a qualified person to function as a statewide coordinator of services to people who are deaf or hard of hearing ("Coordinator"). The parties agree that the minimum requirements for this position shall be a doctoral degree in a human service field, such as psychology, social work, counseling, and three years experience in managing a mental health program for deaf or hearing impaired persons or a masters degree with five years experience. The parties further agree that the job duties and responsibilities shall be developed during and as a part of the planning process set forth in paragraph 8(a) above.

d. DMHMR will develop an acute-care inpatient program, in a DMHMR facility, for deaf or hard of hearing people to serve consumers of mental health services. The program will have available auxiliary aids and services, including qualified interpreters when necessary, to afford the consumers an equal opportunity to participate in and benefit from the services provided by the facility.

e. Assessment of Consumers

DMHMR will continue to conduct interdisciplinary team ("team") meetings and to develop an individualized treatment plan for each person residing in a DMHMR facility. As part of the assessment process, the team will determine whether the person is deaf or hard of hearing if the person's condition allows such determination. When such a determination is made, and as soon as the person's condition reasonably allows, the team will determine whether auxiliary aids and services are necessary to ensure (i) effective communication between the person and facility staff, and (ii) that the person has the equal opportunity to participate in and benefit from the facility's services. If auxiliary aids and services are determined to be necessary, the team will also determine the timing, duration and frequency with which such aids and services should be provided. The parties recognize and agree that the ADA and Section 504 do not require modifications if they will fundamentally alter a program or result in an undue financial or administrative burden. A fundamental alteration is one that substantially changes the purpose or mission of a specific program almost to the point of creating a new program. The term "undue burden" means significant difficulty or expense. DMHMR is not required by this Agreement to make modifications that fundamentally alter a program of services or provide aids and services that will result in an undue financial or administrative burden. The Commissioner of DMHMR or designee will determine whether any requested modification or determination of the team will fundamentally alter the facility's program of services or result in an undue financial or administrative burden. In the event the Commissioner or designee determines that any requested modification or determination of the team is not required under the ADA or Section 504, Plaintiffs' counsel will be immediately notified in writing.

If Plaintiffs' counsel does not agree with the decision of the Commissioner or designee, the parties or their representative may proceed under the provisions of paragraph 7 above to resolve the dispute.

f. DMHMR will establish a toll-free statewide emergency TTY crisis line to answer calls from deaf or hard of hearing people 24 hours a day, 7 days a week. Persons assigned to answer the crisis line shall receive training to be prepared to respond to deaf or hard of hearing persons and to route the call to an appropriate staff person.

g. DMHMR will develop standards of care to ensure that the community providers, with whom it contracts, will be in compliance with the ADA and Section 504 and that those persons who are deaf or hard of hearing have an equal opportunity to participate in and receive the benefits of their services. DMHMR will develop the

standards of care with the involvement of consumers, family members, service providers and the Committee. DMHMR will promulgate the standards of care in its Administrative Code.

h. DMHMR will provide in-service training to the staff of its facilities, who have responsibility for the care and treatment of consumers that addresses the special needs of deaf or hard of hearing persons. This training will include, but not be limited to, the objectives of identifying the communication needs and preferences of persons who are deaf or hard of hearing. DMHMR will also make available to its staff, training in American Sign Language and sensitivity training in providing care and treatment to deaf or hard of hearing persons.

i. DMHMR will, as soon as practicable after the effective date of this Agreement, enter into a contract with a community provider to develop a group home specifically and exclusively for persons who are deaf or hard of hearing.

j. DMHMR will as soon as practicable after the effective date of the Agreement enter into a contract with a community provider of services in the areas of Huntsville, Birmingham, Montgomery and Mobile to fund a full time equivalent clinical staff person ("Regional Coordinator") in each of the four areas to coordinate services to deaf or hearing impaired persons. The job duties and responsibilities of the Regional Coordinator shall be developed during and as a part of the planning process set forth in paragraph 8(a) above.

k. DMHMR will develop a system to make qualified interpreters available to the community providers who have entered into a contract with DMHMR to provide services to the people of Alabama. As part of this system, DMHMR will develop a training program and standards for interpreters in mental health programs.

l. DMHMR has developed and operates an internal Advocacy Program. The Advocacy Program is designed to educate persons about consumer rights, and to review and/or investigate complaints of rights violations in DMHMR facilities and in certified community programs. Issues concerning the rights of deaf or hard of hearing persons under the ADA and Section 504 shall be included in the Advocacy Program. During the term of this Agreement, DMHMR will continue to maintain this Advocacy Program.

9. Process for Resolving Complaints of the Plaintiff Class

The parties agree to the procedures set forth in this paragraph 9 to resolve any individual complaint of any member of the Plaintiff Class. DMHMR has incorporated into its internal Advocacy Program a complaint procedure whereby a consumer of services from a DMHMR facility or from a community provider under contract with DMHMR may file a complaint alleging a rights violation.

10. Non-waiver

Failure by any party to seek enforcement of this Agreement pursuant to its terms shall not be construed as a waiver to such enforcement.

11. Non-Discrimination

DMHMR will not deny its services to any prospective or actual class member based on the fact that the person is deaf or hard of hearing.

12. Public Document

This Agreement constitutes a public agreement and a copy of this Agreement, or any information concerning its contents (unless sealed by the Court) may be available to any person.

13. Disclaimer of Liability

Nothing in this Agreement shall be construed as an admission by DMHMR of any liability or fault or that it engaged in any wrongful or illegal activity, or that any of the facts alleged in the Plaintiffs' complaint are true, or that any person suffered any injury as a result of the events described therein. Further, nothing contained in this Agreement shall be construed or interpreted as a waiver by DMHMR of any defense to an individual claim, action or cause of action by any person. This Agreement shall not be offered or received in evidence in any action or proceeding in any court or other tribunal as an admission or concession of liability or wrongdoing of any nature on the part of DMHMR, except in an action challenging DMHMR's compliance with this Agreement pursuant to the process specified in paragraphs 6(c) and 7, above.

14. Binding

a. In the event the Court grants final approval to the proposed settlement as outlined herein, the named Plaintiff, the Plaintiff class, the Defendant and her successors shall be bound by the terms and conditions of this settlement agreement.

b. The parties agree that during the term of this settlement agreement, no member of the Plaintiff class may bring a claim for injunctive relief against DMHMR that has been alleged or could have been alleged in this litigation.

15. Release

a. The named plaintiff hereby releases any claims made, and all claims that could have been made in this litigation, including any claims for monetary damages, prior to the date of the judicial approval of this settlement agreement.

b. All class members will be bound by the principles of *resjudicata* and collateral estoppel. All class members thus hereby release any claims made, and all claims that could have been made in this litigation prior to the date of the judicial approval of this settlement agreement. The claims to be released include all claims that have been made or could have been made under the ADA, Section 504, 42 U.S.C. §§1981, 1982, 1983, and 1985. The claims to be released also include any and all claims that were or could have been asserted by any member of the Plaintiff class pursuant to the *Constitution of the United States*, any Alabama statute, and any claim that could have been asserted under the *Alabama Constitution*. Because no claim for money damages has been made in this action on behalf of the Plaintiff class, the released claims of the Plaintiff class do not include any claim for money damages that could be made by any class member, except those claims barred by the applicable statute of limitations. The released claims do include any claim for injunctive relief that has been made or could have been made by the named Plaintiff or any member of the Plaintiff class.

16. Attorney Fees and Expenses

The parties acknowledge that the Plaintiffs are entitled to recover from the Defendant their reasonable attorneys fees and reasonable expenses. There has been no negotiation over the amount of any fees to be sought by the Plaintiffs. After this agreement is executed and after preliminary approval, if given, has been extended the parties will negotiate with respect to the amount of fees and expenses to be recovered by Plaintiffs. In the event the parties are unable to agree on those amounts, then Plaintiffs will file an appropriate motion with the Court at least ten days prior to the fairness hearing.

17. Execution of Agreement

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