

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

WALTER STEPHEN JACKSON, et al.,

Plaintiffs,

vs.

CIV No. 87-0839 JP/KBM

LOS LUNAS CENTER FOR PERSONS with  
DEVELOPMENTAL DISABILITIES, et al.,

Defendants,

and

ARC of NEW MEXICO,

Intervenors,

and

MARY TERRAZAS, et al.,

Intervenors *pro se*.

**SETTLEMENT AGREEMENT**

**I. Purpose**

1. The purpose and intent of this Settlement Agreement is to identify those services, safeguards, and protections from harm that will be provided to the plaintiff class and to ensure that a durable remedy is in place when this litigation ends and this case is dismissed. The Plaintiffs and Defendants enter into this Settlement Agreement to memorialize a resolution that allows the Court to conclusively end this litigation and terminate all orders and decrees relating to this matter with a durable remedy in place.

2. On January 23, 2018, the Tenth Circuit Court of Appeals issued its decision in *Jackson v. Los Lunas Community Programs*, 880 F.3d 1176 (10th Cir. 2018) instructing the District Court to determine if there were ongoing violations of federal law, and if not, whether the

Defendants had created a durable remedy to ensure that prior federal law violations would not re-occur. The Tenth Circuit further instructed that, if a durable remedy was created, the District Court is to decide whether it would be equitable for the Court to dismiss this litigation in its entirety.

3. On April 2, 2018, the Defendants filed a Supplement (ECF No. 2188) to their Motion to Terminate All Remaining Orders in *Jackson et al v. FSH & TS* (ECF No. 2053). The parties have conducted fact discovery related to that Motion and Supplement and determined that the most efficient and appropriate resolution of the Motion and this litigation is to enter a Settlement Agreement to Resolve the Litigation (Settlement Agreement).

4. This Settlement Agreement sets forth the actions which the Defendants must take in order to terminate the litigation. Except as to the court orders listed in Section II, ¶ 5(11) below, this Settlement Agreement replaces all existing orders of the Court and will be the sole source of Defendants' remaining obligations to class members during the Term of this Settlement Agreement. The Settlement Agreement applies only to the class members as defined in Section II, ¶ 5(1).

## **II. Definitions**

5. The following terms will have the following meanings for the purposes of this Settlement Agreement.

(1) "Class member" means a member of the plaintiff class, as defined by the Court in its Order on Class Reconfiguration, ECF No. 890.

(2) "Current" means state policies, procedures, practices, and waiver standards in effect as of the date of the entry of this Settlement Agreement.

(3) "DD Waiver Standards" means the current Service Standards for operating New Mexico's Developmental Disability Home and Community-Based Waiver for adults, dated January 2019, and Mi Via Self-Directed Waiver Program Service Standards

Effective Date March 1, 2016, both approved by the Centers for Medicare and Medicaid Services (CMS). The citations herein to DD Waiver Standards are to the January 2019 Standards for the Developmental Disability Home and Community-Based Waiver.

(4) “DDSD” means the Developmental Disability Supports Division of the Department of Health.

(5) “DHI” means the Division of Health Improvement of the Department of Health.

(6) “Defendants” mean the Departments of Health (DOH), the Human Services Department (HSD), and the Division of Vocational Rehabilitation (DVR) of the Public Education Department.

(7) “Joint Stipulation on Disengagement” or “JSD” means the Stipulation on Disengagement, dated November 19, 1997, and approved by the Court in its Order Approving Stipulation on Disengagement, ECF No. 1064.

(8) “Parties” means the Plaintiffs, the Intervenor Arc of New Mexico, and the Defendants.

(9) “Plaintiffs” means the plaintiff class, as revised by the Court in its Order on Class Reconfiguration, ECF No. 890.

(10) “Qualified Provider Agreement Initiative” means the revised provider agreement between DDSD and community providers of developmental disability services, including the process for reviewing provider applications, and ensuring compliance with the terms of the revised provider agreement.

(11) Court orders which remain in effect during the term of this Settlement Agreement include: (1) the Memorandum and Order of December 28, 1990, ECF No. 679; (2) the Memorandum and Order Approving Motion to Amend Complaint, ECF No.

831; and (3) the Memorandum and Order on Class Reconfiguration, ECF No. 890.

(12) “Term of this Settlement Agreement” means the period of time from court approval of this Settlement Agreement until final dismissal as specified in Section VI, ¶ 21.

### **III. Actions to Resolve the Litigation**

#### *A. Removal of the Jackson Compliance Administrator*

6. The Magistrate Judge has determined that the Jackson Compliance Administrator will cease all monitoring or consultation activities and will no longer have any role in the oversight of Defendants’ operations upon preliminary approval of the Settlement Agreement by the Senior United States District Judge.

#### *B. Incident Management*

7. The Defendants will conduct timely and adequate investigations and take necessary remedial actions, as required by current DHI policies and procedures including Immediate Action and Safety Plan: Procedure and Guidelines; DIV.DHI.IMB.13.260.003 – IMB Conducting Investigations of Abuse, Neglect, and Exploitation (ANE); DIV.DHI.IMB.13.260.005 – IMB Investigation Quality Assurance Review, including its Operational Procedure Detail; and DIV.DHI.IMB 13.260.006 -- Corrective and Preventive Action Plans.

8. The Defendants will eliminate the backlog of outstanding or overdue investigations by December 31, 2019. DIV.DHI.IMB.13.260.003 – IMB Conducting Investigations of Abuse, Neglect, and Exploitation (ANE).

#### *C. Mortality Review*

9. The Defendants will conduct timely and adequate mortality reviews of deaths and take necessary remedial actions, as required by current DOH/DHI policies

including DIV.DDSD.DHI.13.CPS.03 (Post-Mortality Setting Safety Check);  
DIV.DDSD.DHI.13.CPS.23 (Developmental Disabilities Mortality Review); and  
DIV.DDSD.13.GA.21 (Developmental Disabilities System Quality Improvement  
Committee), ¶ V.B.4 (MRC).

10. The Defendants will eliminate the backlog of outstanding or overdue mortality reviews by December 31, 2019. DIV.DDSD.DHI.13.CPS.23 (Developmental Disabilities Mortality Review).

*D. Health*

11(a). Medical - The Defendants will review all class members currently designated as high-acuity pursuant to DD Waiver Standards, Ch. 13, ¶ 13.2.13 (high-acuity individuals) to determine whether they should be receiving a higher level of living supports pursuant to DD Waiver Standards, Ch. 10, ¶ 10.1. If a class member should be receiving a higher level of living supports, based on the standards, the class member's budget will be revised to reflect the appropriate level of living support. None of these individuals will be moved to a lower category of living supports. The Defendants will add state-employed nurses in DDSD with the authority to review and monitor the health care status of *Jackson* class members and to direct corrective actions when necessary. Using current acuity levels as identified by e-CHAT and ARST, the Defendants will utilize state-employed nurses to monitor the nursing functions required for those individuals in DD Waiver Standards, Ch. 13, ¶ 13.2.13 by performing document reviews as necessary and performing a minimum of one unannounced, face to face monthly visit to each of those individuals. At this visit the State nurse will review those documents that are required to be present and up to date in the individual's home and will speak with direct care staff. The State nurse will also speak with the individual's nurse at that time or within five (5)

business days of the visit. Failure by the provider to adhere to the standards will result in reporting and referral for contract management. If there is a situation in which an individual has suffered, or is likely to suffer serious harm, the state-employed nurse will take immediate action to protect the individual.

11(b). Behavior - Defendants will continue to collect data on class members pursuant to the At Risk Criteria currently utilized to identify class members who demonstrate high behavioral needs. Those individuals identified as meeting criteria for the At Risk list will be reviewed to determine if they should be receiving a higher level of living supports pursuant to DD Waiver Standards, Ch. 10, ¶ 10.1. If the class member should be receiving a higher level of living supports, the individual's budget will be revised to receive this support. Defendants will utilize state behavioral specialists to review and analyze the behavioral support plans of those individuals identified on the At Risk list and perform at least one, unannounced, monthly face to face visit with the class members identified in the behavioral component of the At Risk list, review those documents required to be in the home, and document the state behavioral specialists' assessment of the effectiveness of the Positive Behavior Support Plan and any recommended adjustments. Failure of any provider (residential, day or therapist) to adhere to the applicable standards will result in reporting and referral for in contract management. If there is a situation in which an individual has suffered, or is likely to suffer serious harm, the state-employed nurse will take immediate action to protect the individual.

11(c). Case management of high acuity and/or high behavioral individuals - Defendants will utilize state-employed case management coordinators to perform an unannounced quarterly visit to the case management agency for each high-acuity/high

behavioral individual to review the site visit forms and any other medical, health or behavioral record relating to those high acuity/ high behavioral services. The state employed case management coordinator will determine if the case manager is meeting the health/medical/ behavioral requirements of the standards for those high acuity/high risk individuals as defined in the 2018 standards. The case management agency's failure to adhere to the standards in DD Waiver Standards, Ch. 8, ¶ 8.2 will result in reporting and referral for contract management.

12. The Defendants will provide health related services as required by the DD Waiver Standards, and specifically Ch. 5, ¶ 5.1, 5.5; Ch. 13, ¶¶ 13.1 – 13.3; and Ch. 20, ¶¶ 20.2 - 20.6.

*E. Provider Oversight*

13. The Defendants will implement the Qualified Provider Agreement Initiative and enforce the terms of the revised provider agreement through DOH contract management and IRC policies, including DIV.DDSD.13.01 – Regional Office Contract Management; DIV.DHI.DDSD.13.GENADMIN.06.21 – Imposition of Administrative Actions, Penalties, and Sanctions Against Community-Based Agency Providers; and DDSD Waiver Standards, Ch. §§ 16.9, 18.8, and 19.2.

*F. Supported Employment*

14. The Defendants will ensure that person-centered assessments address the individual's interests and abilities for all class members of working age, as required by Employment First Authorization and Implementation Policy and Procedure, and by DD Waiver Standards, Ch. 4, ¶¶ 4.2, 4.3, 4.5; Ch. 6, ¶ 6.6.3.4; Ch. 8, ¶ 8.2.1; Ch. 11, §§ 11.1, 11.2, and 11.4.

G. *Individual Quality Review (IQR)*

15. The current Community Monitor, Lyn Rucker, will continue to transfer the IQR process to DHI and complete the transfer by June 30, 2020. During this transfer period, the Defendants will hire and employ a total of at least five reviewers and one supervisor, each of whom will pass a core competency test, will be mentored in at least one region, and will independently complete reviews in a second region. At that time, the Community Monitor and the state supervisor jointly will evaluate the state staff person and determine if the individual is qualified to conduct the IQR. In the event that the Community Monitor and the state supervisor disagree, the matter will be submitted to the Court which will make a final decision. The Community Monitor or her designees and the state supervisor will jointly conduct the case judging process during the transition year. The Community Monitor will no longer use independent contractors once the Defendants have sufficient qualified staff to conduct individual reviews and the case judging process. The Defendants will conduct the IQR process, with technical assistance from Lyn Rucker, using a substantially similar sampling, protocol instrument, review, and data reporting methodology through June 30, 2021, and thereafter continue an individual quality review process, as a component of DHI's quality program management, consistent with DD Waiver Standards, Ch. 16, ¶ 16.10. Ms. Rucker will cease serving as Community Monitor by June 30, 2020. Ruby Moore, appointed Supported Employment expert in the JSD, will cease all activity related to the IQR process and will no longer have any role in the oversight of any of Defendants operations upon the Court's approval of this Settlement Agreement.

**IV. DOH Consultant**

16. The Defendants will hire a consultant to assist in the implementation of this



Settlement Agreement as soon as practicable after the Court enters an order preliminarily approving the Settlement Agreement. The consultant will be retained after hiring until this matter is dismissed by the Court. That consultant may advise and otherwise provide input as to the implementation of this Settlement Agreement, may assist in the development of the renewed DD waiver, and may not offer testimony on behalf of either party. The Defendants' decision to accept or reject the advice provided by any retained consultants is discretionary, and any input provided by the consultant may be accepted or rejected by Defendants as they deem appropriate. The Defendants are not required to obtain the other parties' consent as to the selection of the consultant.

**V. Compliance and Disengagement**

17. The Defendants will implement all of the Actions set forth in Section III, *supra*, within eighteen months of the date of the Court's approval of this Settlement Agreement. The Defendants will maintain their compliance with all of these Actions for the Term of this Settlement Agreement and until this case is dismissed.

18. The Defendants will provide data specific to the actions described in this Settlement Agreement to the Plaintiffs and Intervenor Arc to demonstrate that they are making reasonable progress in implementing the Actions set forth in Section III of this Settlement Agreement. The specific actions taken to meet the terms of this Settlement Agreement will be provided on a quarterly basis on the 15<sup>th</sup> of the month following the end of each quarter. The parties will meet quarterly with the Court, at least two weeks after the production of the specific data, to discuss this information, the Defendants' progress, and any obstacles to implementing the Actions set forth in Section III. The first production of this data will be due on the 15<sup>th</sup> day of the month following the end of the quarter following the Court's approval of this Agreement.

19. When the Defendants believe they have substantially implemented an Action set forth

in Section III of this Settlement Agreement, they will notify the Plaintiffs and Intervenor Arc. The notice will state the basis for the Defendants' belief that they have substantially implemented the Action(s), including the facts then known supporting their claim of compliance. At any time after thirty days from this notice, the Defendants may file a motion for a finding of partial compliance and disengagement of the Action(s). If the motion is contested, the parties will request that the Court hold a hearing and enter its findings and conclusions. If the Court determines that the Defendants have complied with the Action(s) of this Settlement Agreement, it will terminate its oversight of that Action(s). In such event, the Defendants will no longer be required to report on these Action(s) or compensate the Plaintiffs for attorney time spent monitoring such Action(s).

#### **VI. Modification and Termination**

20. The Court retains the inherent authority to interpret, clarify, modify, or enforce this Settlement Agreement.

21. The Defendants may file a motion at any time requesting the Court to find that they have complied with all provisions of this Settlement Agreement and have maintained that compliance of all previously-disengaged Actions. The motion will include sufficient information to allow the Plaintiffs to make an informed judgment concerning compliance and sustained compliance. If the motion is contested, the parties will request that the Court hold a hearing and enter its findings and conclusions. If the Court determines that the Defendants have complied with all provisions of this Settlement Agreement, it will issue an order declaring that the Defendants are in compliance with this Settlement Agreement, other than any outstanding issues related to plaintiffs' attorneys' fees and costs, vacate all remaining orders in this case, and dismiss this case with prejudice.

22. During the term of this Settlement Agreement, the Defendants will include in any application to renew the DD waiver and the related DD Waiver Standards, the provisions and protections for class members which are contained in the current DD Waiver Standards, with the

exception of Sec. 11.6.2 (27). During the term of this Settlement Agreement, the Defendants will continue the provisions and protections for class members which are contained in their regulations related to the DD Waiver, as set forth in NMAC 8.314.5. Although the Defendants do not intend to modify those protections, the Defendants may amend, change, forego, or otherwise alter the processes and protections afforded to class members after the Court has dismissed this matter.

## **VII. Miscellaneous**

23. This Settlement Agreement binds the parties and the employees, agents, and any successors in interest of the Defendants' agencies and officials.

24. This Settlement Agreement does not bar individual class members from bringing individual legal actions on matters not raised in the Plaintiffs' Amended Complaint and not included in this Settlement Agreement.

25. If this document is adopted and approved unaltered by the Court, the parties agree not to appeal from that order. The parties will represent to the Court that this Settlement Agreement is fair and reasonable under Fed. R. Civ. Pro. 23. The parties retain the right to appeal from any order which modifies or alters this document.

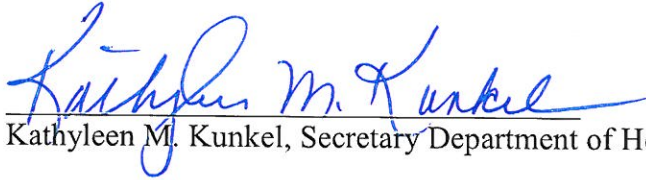
26. If the Court approves this Settlement Agreement and no party appeals such order, the Court will vacate all current and pending orders of the Court in this case, except for the court orders listed in Section II, ¶ 5(11), *supra*.

27. The terms of this Settlement Agreement constitute the entirety of the agreement between the parties.

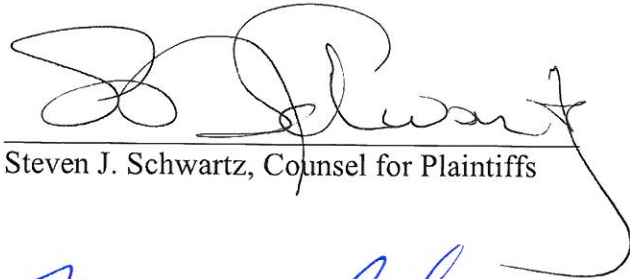
Entered this 17th day of April, 2019.



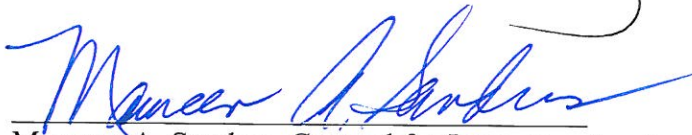
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