

Message

COPIED

to Len P.
• Mike Morris

Madeline M OLSON - Harmon -- Settlement Reached

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Subject: Harmon -- Settlement Reached

We've finalized a settlement agreement with the Oregon Advocacy Center in *Harmon v. Fickle*. The signings will take place in the next couple days, and it's still subject to a process of court review in the weeks to come. But the deal is done.

Attached is the final version of the agreement. The meat of the agreement obligates DHS and the state hospital to take "all necessary steps within their control" to hire new staff and increase community placement on the timeline attached to the agreement as Exhibit A. OAC will receive \$37,500 from the Risk Management Fund in full payment of its attorney fees and costs. In exchange, plaintiffs will dismiss their suit with prejudice, subject to the court's retention of jurisdiction to enforce the agreement. The agreement expires on June 30, 2007. Until then, any complaints by patients about overcrowding or understaffing at the forensics units must be made within the context of the agreement's dispute resolution provisions. We are hopeful that by the time the agreement expires, conditions in the forensics units will have improved sufficiently that no new lawsuit will be filed.

Thanks to all for your contributions to the effort. Please let me know if you have any questions.

Charles

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 05-1855-BR

ANDREA HARMON, REBECCA
HERRERA, TONY COLLINS, LUCAS
ROOSA, CYNTHIA STONER, DANIEL
GARCIA, JOSHUA RAMSEY, TODD
VAUGHN, and CHRISTINA HOGENSON,
for and on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

MARVIN FICKLE, M.D., in his official
capacity as Superintendent and Chief Medical
Officer of Oregon State Hospital; BRUCE
GOLDBERG, in his official capacity as
Director of the Department of Human
Services; and THEODORE KULONGOSKI,
in his official capacity as Governor of the State
of Oregon,

Defendants.

SETTLEMENT AGREEMENT

Plaintiffs and Defendants, acting by and through their respective counsel, make the following Agreement in full settlement of all claims asserted by Plaintiffs against Defendants, subject to the approval of the Court pursuant to Fed. R. Civ. P. 23(e).

I. Introduction.

Plaintiffs filed a Class Action Complaint in the United States District Court of Oregon on December 8, 2005, on behalf of themselves and all other persons residing on the forensic units at the Oregon State Hospital (OSH). The Complaint alleged violations of the Due Process Clause of the Fourteenth Amendment and the First Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983. The Complaint generally alleged that Defendants (a) failed to provide the Plaintiffs with minimally adequate protection from harm; (b) failed to provide the Plaintiffs with minimally adequate psychiatric and psychological care; (c) failed to provide Plaintiffs with minimally adequate and meaningful treatment; (d) failed to provide constitutionally adequate numbers of professional and other direct care staff; and (e) violated the Plaintiffs' rights to privacy. Defendants have at all times contested Plaintiffs' claims.

II. Class Certification.

The parties agree to certification of a class under Fed. R. Civ. P. 23(b)(2) consisting of all patients residing on the forensics units at the Oregon State Hospital from December 8, 2005, to the Effective Date of this Agreement and all individuals who will reside on the OSH forensics units in the future, up to and including June 30, 2007.

III. Addressing Staffing Ratios at OSH Forensics Units.

Between January 1, 2006, and June 30, 2007, Defendants will take all necessary steps within their control to execute the Plan for Forensic Staffing (The Plan) attached hereto as Exhibit A. The Plan contains the following elements, which are designed to increase the ratio of direct care staff-to-patients on the OSH forensics units to 1.10 by March 31, 2006; 1.22 by June 30, 2006; 1.34 by September 30, 2006; and 1.377 by December 31, 2006.

Handwritten notes and calculations:

| | | |
|------------|----------|----------|
| 16 staff | 25 staff | 30 staff |
| 416 census | 387 | 380 |
| | | 389 |

A. Hiring of New Staff. The Oregon Department of Human Services (DHS) will take all necessary steps within its control to increase the number of qualified direct care mental health staff by 15 full time equivalents (FTEs) by June 30, 2006, and by another 15 FTEs by September 30, 2006. Those new staff will include additional doctors, psychologists, social workers and mental health specialists, who will be assigned so as to increase mental health treatment on the forensics units and provide additional treatment opportunities in the treatment mall. In addition, DHS will take all necessary steps within its control to add by March 30, 2006, four additional qualified staff assigned to assist in the development and management of new community placements for the conditional release of OSH patients found eligible for such community placement by the Psychiatric Security Review Board (PSRB). Nothing in this Agreement shall be construed to require DHS to breach any collective bargaining or other employment agreement in effect as of the Effective Date of this Agreement or to hire or retain staff that, in its professional judgment, are not sufficiently qualified. The parties intend that the new staff contemplated by this paragraph will result in net increases in the total number of staff as set forth in The Plan rather than being used to replace departing staff. DHS will take all necessary steps in its control to maintain the number of direct care staff set forth in The Plan for the life of this Agreement.

B. Increasing Community Placement Opportunities. DHS will take all necessary steps within its control to increase the number of community placement opportunities for the conditional release of OSH patients found eligible for such community placement by the PSRB as follows. In addition to the 128 new community placements planned and funded before January 1, 2006, DHS will take all necessary steps within its control to add 71 additional community placements, at least 30 of which will be intensive case management slots, on the schedule set forth in The Plan. DHS will develop those community placements with the expectation that as patients leave those placements, other eligible patients may be placed there.

The nature of those placements will otherwise be within the discretion of DHS, and nothing in this Agreement shall be construed to require DHS to maintain in existence any particular community placement. If DHS eliminates a community placement, it will take all necessary steps in its control to replace that community placement in such a way that such elimination will not result in a net loss of placements.

C. Taking All Steps Within Defendants' Control to Facilitate Patient Discharge.

OSH and DHS agree to use their best efforts in good faith to ensure that forensic patients are prepared for discharge or conditional release in a clinically appropriate manner and in a clinically appropriate timeframe and agree to use their best efforts to ensure that their actions do not cause unnecessary delays in such discharge or conditional release.

D. Funding for 2005-2007. Defendants represent that there exist sufficient funds in the DHS biennial budget for 2005-2007 to permit Defendants to fulfill their obligations under this Agreement. In the event that the Legislative Assembly or Legislative Emergency Board eliminates said funds from DHS' budget prior to the expiration of this Agreement, Defendants will have no further obligations under the terms of this Agreement. In that event, Plaintiffs are no longer bound by this Agreement or by their Release of Liability and may pursue any legal claims they may have against Defendants, notwithstanding their dismissal with prejudice of this action.

E. Funding for 2007-2009. DHS will request that the Governor include in his proposed 2007-2009 biennial DHS budget sufficient funds to increase the OSH forensics unit ratio of direct care staff-to-patients to 1.82 by June 30, 2009. DHS will, through June 30, 2007, use its best efforts to obtain such funds for its 2007-2009 biennial budget. The parties acknowledge that the actual 2007-2009 DHS appropriation for OSH requires legislative action and is therefore beyond the control of the parties.

IV. Monitoring.

The parties agree to confer in good faith concerning progress made toward implementation of The Plan. Beginning within 30 days after the effective date of this Agreement through June 30, 2007, DHS agrees to provide to the Oregon Advocacy Center (OAC) monthly written reports on Defendants' progress in implementing The Plan, including information concerning the hiring of new staff, the assignments of those staff, and the progress being made toward development of new community placements. Beginning within 30 days after the Effective Date of this Agreement through June 30, 2007, the OAC and DHS agree to confer monthly either in person or by teleconference concerning Defendants' progress in implementing The Plan.

V. Dispute Resolution.

If disputes under this Agreement arise, the parties will seek in good faith to resolve such disputes through negotiation without seeking intervention by the Court unless and until those good faith attempts at resolution are unsuccessful. The parties agree to the following informal process as a prerequisite to seeking judicial intervention.

A. A party claiming a material breach of this Agreement (the claiming party) will give notice of that claim in writing to counsel of record for the party alleged to be in material breach (the responding party). That notice will propose a resolution.

B. The responding party will provide a written response to that claim within 30 calendar days, unless the period to respond is enlarged by mutual agreement of the claiming and responding parties.

C. If the claiming party is unsatisfied with the response, the claiming party will notify the responding party within ten days of receipt of the response. The claiming and responding parties agree to seek in good faith then to resolve the claim through negotiations. If the parties cannot resolve the claim of breach within 20 calendar days of receipt by the responding party of notice from the claiming party that the claiming party is unsatisfied with the

response of the responding party, the claiming party may seek to pursue its claim of material breach with this Court.

VI. Circumstances Beyond the Control of the Parties.

The parties acknowledge that Defendants' ability to implement The Plan depends on circumstances not entirely within the control of Defendants. Those circumstances include, without limitation: (1) the possibility that additional qualified staff will not be hired despite DHS taking all necessary steps within its control to hire those additional staff; (2) the possibility that additional community placements will not be created despite DHS' taking all necessary steps within its control to create those additional community placements; and (3) the possibility that the PSRB will not order the conditional release of forensics patients. Therefore, no party will be in breach of this Agreement if the claimed breach is caused by circumstances beyond the control of that party, but in the event necessary funding is eliminated as described in paragraph III.D. above, the terms of that paragraph shall apply. Nothing in this Agreement shall be interpreted to require action by persons or entities not a party hereto. Specifically and without limitation, nothing herein shall be interpreted to require the Oregon Legislative Assembly to appropriate further funds, to require the PSRB to release patients to community placements or otherwise, or to require any governmental entity not a party to this Agreement to approve the creation or location of community placements.

VII. Termination of this Agreement.

Unless otherwise agreed between the parties, this Agreement terminates on June 30, 2007, except that any funds designated for the creation of new community placements that have not been spent due to circumstances beyond Defendants' control shall continue to be used to create new placements until 71 new placements have been created or the funds have been exhausted.

VIII. Continuing Jurisdiction of the Court.

This Agreement is contingent upon this Court retaining jurisdiction of this case through June 30, 2007, for purposes of enforcing this Agreement:

IX. Effective Date.

As used herein the "Effective Date" of this Agreement is the date on which this Agreement has been approved by the Court by final order.

X. Release.

A. "Covered Claims" means all claims asserted in the Class Action Civil Rights Complaint for Declaratory and Injunctive Relief filed in this action on behalf of Plaintiffs and all others similarly situated that have arisen as of the date the lawsuit was filed. "Covered claims" include attorney fees and costs claimed by Plaintiffs in this action incurred up to and including the effective date of this Agreement.

B. "Covered Claims" does not include any claims, including constitutional claims, that arise after the Effective Date of this Agreement. Neither does that term include claims based on circumstances in existence after the termination date of this Agreement.

C. Plaintiffs, including all class members, release Defendants, their employees, agents, and successors on all Covered Claims as of the Effective Date of this Agreement.

XI. Dismissal of this Action

Upon final approval by this Court of this Agreement, this Action shall be dismissed with prejudice, subject to the Court retaining jurisdiction of this case through June 30, 2007, for purposes of enforcing this Agreement.

XII. Attorney Fees, Costs, Disbursement, and Expenses.

Defendants agree to pay \$37,500 to the Oregon Advocacy Center in full compensation for Plaintiffs' attorney fees, costs, disbursements, and expenses in connection with this litigation and Agreement.

XIII. Settlement of Disputed Claims.

This Agreement reflects the settlement of disputed claims and is neither an admission of wrongdoing by Defendants nor an admission by Plaintiffs that their claims are without foundation.

XIV. Nullification of Agreement.

If the Court does not approve this Agreement or if the settlement does not become final for any reason, this Agreement shall be null and void. In addition, as provided in paragraph III.D. above, in the event that the Legislative Assembly or Legislative Emergency Board eliminates funds necessary to implement this Agreement from DHS' budget prior to the expiration of this Agreement, the parties' obligations under this Agreement shall cease pursuant to the terms of that paragraph III.D.

XV. Fairness, Adequacy and Reasonableness.

The parties and their respective counsel believe that this Agreement is a fair, adequate, and reasonable settlement of the claims of the class members.

XVI. Cooperation in Drafting.

The parties have cooperated in the drafting of this Agreement, which results from arms-length negotiations. For purposes of interpreting this Agreement, no party or group of parties shall be deemed its primary drafter.

XVII. Authority to Execute Agreement.

The signatories to this Agreement represent that they are expressly authorized by their clients to negotiate and execute this Agreement.

XVIII. Entire Agreement.

This Agreement represents the entire agreement between the parties and may not be modified except by mutual written consent and the approval of the Court.

XIX. Oregon Law.

This Agreement shall be governed by and interpreted under Oregon law.

XX. No Third Party Beneficiaries.

There are no third party beneficiaries to this Agreement.

On Behalf of Plaintiffs:

Kathleen L. Wilde OSB #97105
Oregon Advocacy Center
Of Attorneys for Plaintiffs
Class Counsel

Date

On Behalf of Defendants:

Dr. Bruce Goldberg
Director
Oregon Department of Human Services

Date

Charles E. Fletcher OSB #84218
Senior Assistant Attorney General
Oregon Department of Justice
Of Attorneys for Defendants

Date

Office of Mental Health and Addiction Services

Plan for Forensic Staffing

| Time line | Q4 05 | Q1 06 | Q2 06 | Q3 06 | Q4 06 | Q1 07 | Q2 07 | Q3 07 | Q4 07 | Total |
|-------------------------------|---------|---------|---------|-----------|---------|---------|---------|-----------|---------|--------------------------|
| Months | Oct-Dec | Jan-Mar | Apr-Jun | July-Sept | Oct-Dec | Jan-Mar | Apr-Jun | July-Sept | Oct-Dec | 12b Total |
| DEVELOPMENT PLAN | | | | | | | | | | |
| Existing Forensic Development | 10 | 25 | 37 | 0 | 19 | 37 | 0 | 0 | 0 | 12b Total |
| New Forensic Bed Development | 0 | 0 | 16 | 16 | 9 | | | | | 445 |
| New Forensic ICM* | | 5 | 15 | 10 | | | | | | 30 |
| OSHA Forensic Census | 449 | 444 | 413 | 387 | 378 | 378 | 378 | | | 378 OSHA Forensic Census |
| Ward Closings | | | 15 | 15 | 41A | | | | | |
| New OSH Staff | | 1.10 | 1.22 | 1.34 | 1.377 | 1.377 | 1.377 | | | |
| Staffing Ratio | 1.09 | 1.10 | 1.22 | 1.34 | 1.377 | 1.377 | 1.377 | | | |
| Forensic Staff | 490.5 | 490.5 | 505.5 | 520.5 | 520.5 | 520.5 | 520.5 | | | |
| New OMHAS Dev. Staff FTE | | 4 | | | | | | | | |

86 out of

*ICM = Intensive Case Management

Assumptions:

Existing includes the approved funding for 05-07. Existing development will address all caseload growth.

New means "New Development", and funding has not been approved for this project.

OSHA Forensic Census uses the 15 over budgeted capacity as the base.

Ward closure timing assumes a perfect match of beds with patients; i.e. sex, clinical need, forensic vs. civil.

Staffing ratio is the total Forensic "direct care staff" divided by the OSHA Forensic census.

New OMHAS Development Staff FTE: 05-07 New development would require the addition of the four following positions: (1) PT2 for Licensing duties, (1) PT2 for Extended Care Mgmt, (1) Program Analyst 2 for mgmt of Trust Deeds, and (1) AS1 for Support Staff duties. These positions would be hired in Quarter 1, 2006.