

## AGREED ORDER AND SETTLEMENT

This Agreed Order and Settlement (“Agreement”) is between Plaintiff Shawn Murinko (“Mr. Murinko”), Plaintiff Disability Rights Washington (“DRW”) (collectively “Plaintiffs”) and Defendants Cheryl Strange in her official capacity as Secretary of the Washington State Department of Social and Health Services (“DSHS”) and Susan Birch in her official capacity as Director of the Washington State Health Care Authority (“HCA”) (collectively “Defendants”).

## RECITALS

*Shawn Murinko and Disability Rights Washington v. Cheryl Strange and Susan Birch*, No. 2:19-cv-00943-MJP (this “Action”) is a civil action pending before the United States District Court for the Western District of Washington. Plaintiff Mr. Murinko originally filed this Action on June 17, 2019. Plaintiffs filed their First Amended Complaint on August 2, 2019, adding DRW as a plaintiff alleging associational standing on behalf of constituents including Mr. Murinko “and other people with developmental disabilities and related conditions who need the type of community-based residential habilitation services that Plaintiff Murinko needs and lost.” First Amended Complaint at 2. Plaintiffs alleged Defendants are violating Title XIX of the Social Security Act, the Title II of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. Defendants denied Plaintiffs’ allegations.

Plaintiffs filed a Motion for Preliminary Injunctive Relief which the Court denied. Plaintiffs then filed a Motion for Summary Judgement as to their claims. Defendants filed a Motion for Summary Judgement alleging that Mr. Murinko’s claims were moot and further alleging that Plaintiff DRW lacked standing to bring claims on behalf of its alleged constituents. The Court has not issued rulings with respect to either summary judgment motion.

## PURPOSE AND OBJECTIVES

The Parties enter into this Agreement for the purposes of settling all claims alleged as to Mr. Murinko and DRW in Plaintiffs’ First Amended Complaint.

The Parties have a mutual interest in delivering Home and Community Based Services through Medicaid waivers to eligible individuals who would otherwise require services in an institutional setting and providing services with safeguards to protect these individuals’ health and welfare. The objective of this settlement agreement is to improve continuity of residential habilitation services, prevent avoidable service disruptions from supported living programs, and prevent unnecessary institutionalizations such as institutionalizations based solely on Defendants’ inability to provide residential habilitation services reasonably promptly. An institutionalization shall not be considered unnecessary if it is due to the individual’s medical needs or due to findings made by a court pursuant to chapter 71.05 RCW. Furthermore, nothing in this Agreement shall prevent Defendants from offering

services in a hospital, Skilled Nursing Facility or Intermediate Care Facility for Individuals with Intellectual Disabilities pursuant to 42 U.S.C. § 1396n(c)(2)(C). A central purpose and objective of this Agreement is for Defendants to improve the availability of community-based services such that individuals eligible for waiver-funded supported living are not prevented from receiving reasonably prompt community-based services based solely due to service unavailability.

The Agreement is not an admission of liability or wrongdoing by any party.

## AGREEMENT

**1. Definitions.** As used in this Agreement, and for the purposes of this Agreement only, the following terms have the below stated meanings:

1.1 “The Parties” means Plaintiffs and Defendants.

1.2 “DDA” means the Developmental Disabilities Administration of DSHS.

1.3 “Person Centered Service Planning” means the process for developing or revising a plan that includes services that meet an individual’s assessed needs, support the client’s goals, reflect the client’s chosen setting, reflect client strengths and preferences, and satisfies all elements of 42 C.F.R. § 441.301(c).

1.4 “Substantial compliance” shall mean adherence to the requirements of the Agreement in all material aspects, recognizing that 100% compliance is not required. Defendants must demonstrate that they have implemented an effectively working plan reasonably calculated to satisfy the Purposes and Objectives of this Agreement. Non-systemic deviations from the requirements of the Agreement shall not prevent a finding of substantial compliance, provided that Defendants demonstrate that they have satisfied the Purposes and Objectives of this Agreement.

**2. Representations and Warranties.** The Parties, and each of them, represent and warrant that they are voluntarily entering into this Agreement as a result of arm’s-length negotiations; in executing this Agreement they are relying upon their own judgment, belief and knowledge, and the advice and recommendations of their own counsel, concerning the nature, extent and duration of their rights and claims hereunder and regarding all matters which relate in any way to the subject matter hereof. The Parties, and each of them, represent and warrant that they have carefully read the contents of this Agreement; they have made such investigation of the facts pertaining to the Settlement, this Agreement and all of the matters pertaining thereto as they deem necessary; and this Agreement is signed freely by each person executing this Agreement on behalf of each party. Each individual executing this Agreement on behalf of any other person does hereby represent and warrant to the other Parties that he or she has the authority to do so.

**3. No Admission of Liability.** The Parties understand and agree that this Agreement embodies a compromise and settlement of disputed claims, and that nothing herein shall

be deemed to constitute an admission of any wrongdoing by any Party nor any admission of any liability as to such claims. Neither the fact nor the terms of this Agreement shall be offered or received in evidence in any action or proceeding for any purpose, except in an action or proceeding to enforce this Agreement.

4. **Terms of Release.** Plaintiffs agree to dismiss their claims against all Defendants and release them from liability for all alleged past actions or inactions set forth in Plaintiffs' First Amended Complaint in exchange for the terms set forth below in this section.

4.1 *System Improvements.* Defendants agree to make the following changes to meet the objectives of this agreement.

4.1.1. Client Critical Case Protocol. DDA will adopt and implement within six months of execution of this Agreement Policy 4.20, attached hereto as Exhibit A, for the purpose of identifying clients at risk of disruption of services in supported living programs and preventing disruption by implementing a Client Critical Case Protocol (CCCP). For the duration of this Agreement, Defendants may amend the policy with 30 days' notice to Plaintiffs' counsel and give Plaintiffs an opportunity to comment on the proposed changes, but must adhere to Person Centered Planning requirements and maintain the following elements:

- a. Require supported living providers to engage in the CCCP prior to giving 60 days' notice of intent to terminate services to the client;
- b. Require that the CCCP utilize a person-centered service planning process that satisfies the elements of 42 C.F.R. § 441.301;
- c. Provide for DDA to add or amend services necessary and available through a client's DDA waiver to prevent service disruptions and meet a client's assessed health and welfare needs; and
- d. Provide for clients to give informed consent to changes in services.

4.1.2. Supported Living Referrals. DDA will adopt and implement within six months of execution of this Agreement revisions to Policy 4.02, attached hereto as Exhibit B, for the purposes of amending its supported living referral and supported living provider-initiated termination requirements. For the duration of this Agreement, Defendants may amend the policy with 30 days' notice to Plaintiffs' counsel and give Plaintiffs an opportunity to comment on the proposed changes, but must maintain the following elements:

- a. Pre-referral procedure that supports clients' access to information about provider capacity, specialization, and regulatory compliance history for purposes of selecting providers to receive referrals;
- b. Procedure for supporting client communication with prospective providers;

c. Deadlines for sending and responding to referrals that are calculated to result in timely acquisition of services; and

d. Requirement to develop transition or interim plans and offer interim services appropriate to clients' assessed residential support needs.

4.1.3. Rulemaking. Pursuant to chapter 34.05 RCW, DSHS will implement changes to chapter 388-101D WAC to protect supported living clients from retaliatory service terminations and to be consistent with DDA Policies 4.02 and 4.20.

4.1.4. Training. DDA will provide initial training to case managers and resource managers, and offer initial training to supported living providers regarding Policy 4.20 and the revisions to Policy 4.02 within six months of the Effective Date of this Agreement. DDA will provide a copy of the training presentation to Plaintiffs' counsel for review and feedback. Plaintiffs will offer any feedback to Defendants' counsel within 15 (fifteen) calendar days of receipt of the presentation.

The trainings will cover the following topics:

- i. Requirements and deadlines contained in the policies; and
- ii. Refresh training on person-centered service planning aspects of assessments

4.1.5. Quality Assurance and Improvement. DDA will implement new Quality Assurance checks on a quarterly basis to ensure compliance with the requirements under the policies described in Sections 4.1.2 and 4.1.3 above.

a. DDA will submit to Plaintiffs' counsel a quarterly Quality Assurance and Improvement report, containing data on both a statewide and regional level that will include the following data:

- i. Percentage of pre-referrals sent to supported living providers within five business days of obtaining consent from a client;
- ii. Percentage of full referrals sent to supported living providers within two business days of a request from the provider;
- iii. Reasons provided by supported living providers for declining pre-referrals;
- iv. Reasons provided by supported living providers for declining full referrals;

- v. Number of times the Client Critical Case Protocol (CCCP) is initiated pursuant to DDA Policy 4.20;
- vi. Number of supported living providers that give notice of intent to terminate services to a client after the CCCP; and of those terminations:
  - (A) The length of time between a provider's notice to DDA and DDA's removal of the client from the provider's contract;
  - (B) The number of clients who transition to services in another community setting;
  - (C) The length of time between a provider's notice to DDA and the client's transition to another community setting;
  - (D) The number of clients who transition to an institutional setting; and
  - (E) The data described in paragraph 4.4.
- vii. Aggregated data from surveys completed by clients and/or their legal representatives at the conclusion of the CCCP addressing satisfaction with the CCCP process.
- b. Defendants will use the data collected pursuant to Section 4.1.5 to evaluate the adequacy of Defendants' waiver-funded supported living program and will outline in the quarterly reports Defendants' strategies for improving outcomes.

#### *4.2 Monitoring and Investigation.*

4.2.1 Protection and Advocacy. As the designated protection and advocacy system for the State of Washington, DRW shall have access authorized by the Developmental Disabilities Bill of Rights Act, 42 U.S.C. § 15043, to conduct monitoring and investigations of alleged abuse or neglect.

4.2.2. Individuals at Risk. With the consent of the individual, Plaintiff DRW may notify Defendants' counsel if any DDA client who is eligible for HCBS waiver-funded residential habilitation services appears to be at risk of harm or unnecessary institutionalization due to noncompliance with policies 4.02 and 4.20, Exhibits A and B, or any successor policies that comply with paragraphs 4.1.1 and 4.1.2. Defendants will review and respond to Plaintiff DRW's concerns.

4.2.3 Semi-annual meeting. The parties will convene upon request by either party and at minimum on a semi-annual basis to review quarterly data and progress towards meeting dismissal criteria set forth below in paragraph 4.4.

#### 4.3 *Attorneys Fees and Costs.*

4.3.1 Defendants agree to settle Plaintiffs' claims for costs and fees in the amount of \$479,780.00 for work completed and costs incurred prior to the Effective Date of Settlement. The payment shall be made within thirty (30) business days following the Effective Date of Settlement in accordance with instructions to be provided by Plaintiffs' counsel. Plaintiffs acknowledge that this is a complete and final release of such claims.

4.3.2. Defendants shall pay Plaintiffs' Counsel reasonable attorneys' fees, expenses, and costs incurred between the Effective Date and the expiration date of the Agreement for performing all work reasonably necessary to monitor, implement, and administer the Agreement, up to \$20,000 per year. The payments shall be made within thirty (30) business days after the beginning of each fiscal year in accordance with instructions to be provided by Plaintiffs' counsel.

4.4 *Dismissal of Litigation.* The case will be dismissed if data collected by DSHS over a twelve-month period show:

4.4.1. Services in 60 days. 75% of clients whose supported living providers terminate services and who continue to be eligible for waiver-funded supported living are offered services in the community within sixty (60) days of the date of the provider's termination notice, unless DDA documents within 60 days one of the following exceptions:

- a. the barrier to services is lack of housing that cannot be addressed with available supports;
- b. the client or their legal representative has limited their choice of provider to a single provider who is unable to serve the client; or
- c. inaction or resistance from the client and/or his or her family or guardian is the reason for the delay.

4.4.2. Services in 120 days. 90% of clients whose supported living providers terminate services and who continue to be eligible for waiver-funded supported living are offered services in the community within one hundred twenty (120) days of the date of the provider's termination notice, unless DDA documents within 120 days one of the following exceptions:

- a. that the barrier to services is lack of housing that cannot be addressed with available supports;
- b. the client or their legal representative has limited their choice of provider to a single provider who is unable to serve the client; or

c. inaction or resistance from the client and/or his or her family or guardian is the reason for the delay.

4.4.3. Services in 150 days. 85% of clients who are eligible for waiver-funded supported living, who are not already in contract with a supported living provider and are not covered by Section 4.4.1 and 4.4.2, are offered services in the community within one hundred fifty (150) days of providing consent for DDA to send referrals to supported living providers, unless DDA documents within 150 days one of the following exceptions:

a. that the barrier to services is lack of housing that cannot be addressed with available supports;

b. the client or their legal representative has limited their choice of provider to a single provider who is unable to serve the client; or

c. inaction or resistance from the client and/or his or her family or guardian is the reason for the delay.

4.4.4. Availability of Services. Defendants will demonstrate substantial compliance, as defined in Paragraph 1.4, with the purpose and objective to improve the availability of community-based services such that individuals eligible for waiver-funded supported living are not prevented from receiving reasonably prompt community-based services based solely due to service unavailability.

#### *4.5 Duration of the Agreement.*

4.5.1 Jurisdiction. Until such time as the metrics set forth in paragraph 4.4 are satisfied or the Action is dismissed, the Parties agree the United States District Court shall retain jurisdiction to enforce the terms of this Agreement.

4.5.2 Termination. The Parties' obligations herein will terminate when Defendants demonstrate that they have substantially complied with the criteria in paragraph 4.4. At that time, the criteria set forth in paragraph 4.4 will be the sole objective measure that, when accomplished, will indicate the Defendants are in substantial compliance with the terms of this Agreement such that the Action herein will be dismissed.

4.5.3 Noncompliance. If Defendants have not demonstrated compliance with the criteria in paragraph 4.4 by September 1, 2024, the parties will invoke the dispute resolution process as set forth below in Section 6 to negotiate a plan for Defendants to demonstrate substantial compliance with the terms of this Agreement.

**5. Effective Date of Settlement.** The "Effective Date of Settlement" will be the date the last signature is dated on this Agreement.

**6. Dispute Resolution.** Any claim, dispute, or other matter in controversy (dispute) arising out of or related to this Agreement, or the breach, implementation, or performance thereof, shall be resolved according to the procedure set forth below.

- 6.1. *Good Faith Direct Negotiation.* The Parties agree to convene, at a mutually agreeable time and place, and use their good-faith, best efforts to discuss and resolve the dispute. This initial meeting will be a direct negotiation between the Parties without the assistance of a mediator or other non-party.
- 6.2. *Mediator.* If the Parties are unable to resolve the dispute within thirty (30) days, or such other time frame upon which the Parties mutually agree, they may engage the mediation services of a mutually agreeable mediator for the purpose of mediating a resolution to the dispute.
- 6.3. *Motion.* Any Party may file an appropriate motion with the United States District Court in this matter after participating in the meeting described in Section 6.1. The moving party's counsel shall provide the appropriate notice to the opposing party's counsel of such action.
- 6.4. *Venue.* If any action is necessary to enforce the provisions of this Agreement, venue shall be had in the Western District of Washington.

**7. Severability.** The provisions of this Agreement are not severable.

**8. Amendment.** This Agreement may be modified or amended only by written agreement signed on behalf of all Parties.

**9. Waiver.** The provisions of this Agreement may be waived only by an instrument in writing executed by the waiving party. The waiver by any party of any breach of this Agreement shall not be deemed to be or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Agreement.

**10. Construction.** This Agreement has been jointly drafted and shall be construed according to the fair intent of the language as a whole and not for or against any party. None of the Parties hereto shall be considered to be the drafter of this Agreement or any provision thereof for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause the provision to be construed against the drafter thereof.

**11. Further Assurances.** Each of the Parties agree, without further consideration, and as part of finalizing the Settlement hereunder, that they will in good faith promptly execute and deliver such other documents and take such other actions as may be necessary to consummate the subject matter of this Agreement.

**12. Changes to Applicable Laws.** In the event federal or state law relevant to the items in this Agreement change, or Defendants' waiver(s) is/are modified, Defendants may revise the rules and policies referenced in this Agreement consistent with such changes. Provided, however, if such revisions are made before this Action is dismissed and are not consistent with the terms in Section 4.1, then Defendants shall provide Plaintiffs' counsel with thirty



(30) days' advance written notice of the changes. Nothing in this Agreement prohibits Defendants from implementing immediate changes necessary to conform to federal and state law.

**13. Frustration of Purpose/Force Majeure.** If the Defendants are unable to accomplish any of their obligations or meet timeframes under this Agreement due to events beyond their reasonable control (such as natural disaster, labor disputes, war, acts of God, or governmental action beyond state control), Defendants shall notify Plaintiffs' counsel within ten (10) business days of the date upon which Defendants become aware of the event and describe the event and its effect on performance. If performance is expected to be delayed or the event frustrates the purpose of the Agreement, the Parties shall negotiate in good faith to amend the Agreement.

**14. Entire Agreement.** This Agreement contains the entire agreement among the Parties relating to this Settlement. No agreements, representations, oral statements, understandings, or courses of conduct that are not expressly set forth in this Agreement shall be implied or will be binding on the Parties unless made in writing and signed by all of the Parties.

**15. Counterparts.** This Agreement may be executed by exchange of executed faxed or PDF signature pages, and any signature transmitted in such a manner shall be deemed an original signature. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which, when taken together, shall constitute one and the same instrument.

**16. Binding Effect.** This Agreement binds and inures to the benefit of the Parties hereto, their assigns, heirs, administrators, executors, and successors-in-interest, affiliates, benefit plans, predecessors, and transferees, and their past and present shareholders, officers, directors, agents, and employees.

**17. Release and Discharge.** Upon the Effective Date of Settlement, each party hereby releases and forever unconditionally and irrevocably discharges each other party of and from any and all claims, actions, demands, causes of action, complaints, agreements, promises (express or implied), contracts, undertakings, covenants, guarantees, grievances, damages (including, without limitation, actual, compensatory, consequential, exemplary, treble, punitive or otherwise), attorneys' fees and legal costs, injunctive relief and declaratory relief, whether known or unknown, of whatsoever kind or nature that each had, now has, or hereafter can, shall, or may have related to or arising out of claims that are asserted, or that could have been asserted in the Complaint or First Amended Complaint. This release shall be binding on Plaintiffs and their lawful guardians, heirs, beneficiaries, representatives, assigns, attorneys, and agents.

**PLAINTIFFS**

By:   
SHAWN MURINKO

Dated: 8/31/2020

By: Mark Stool  
DISABILITY RIGHTS WASHINGTON

Dated: 8/31/2020

**COUNSEL FOR PLAINTIFFS**

By: Susan Kas  
SUSAN KAS, Disability Rights Washington  
WSBA NO. 36592

Dated: 08/31/20

By: Sarah Eaton  
SARAH EATON, Disability Rights Washington  
WSBA NO. 46854

Dated: 8/31/2020

By: Andrew Biviano  
ANDREW S. BIVIANO, Paukert & Troppmann, PLLC  
WSBA NO. 38086

Dated: 8/31/2020

**FOR THE STATE OF WASHINGTON**

By: Cheryl Strange  
DEFENDANT CHERYL STRANGE  
Secretary of the Department of Social and Health Services

Dated: 08/31/2020

By: \_\_\_\_\_  
DEFENDANT SUSAN BIRCH  
Director of Washington State Health Care Authority

Dated: \_\_\_\_\_

**COUNSEL FOR DEFENDANTS**

By: \_\_\_\_\_  
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Dated: \_\_\_\_\_

By: \_\_\_\_\_ Dated: \_\_\_\_\_  
KATHRYN KRIEGER, Assistant Attorney General  
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By: \_\_\_\_\_ Dated: \_\_\_\_\_  
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