

decisions concerning whether and when class members should return home.

d. When a decision is made that a class member should not return home, DHR shall seek a timely dispositional hearing pursuant to Alabama Code §12-15-62(c) (1975).<sup>45</sup>

e. When the goal is that the class member not return home, the "system of care" shall vigorously seek a permanent living situation for the class member.

-51- The "system of care" shall promote stability in class members' living situations.

a. The "system of care" shall be designed to minimize multiple placements. The "system of care" shall be based on the philosophy that the disruption of a placement is a failure of the system, not a failure of the class member.

b. Individualized service plans shall identify whether a class member is at risk of experiencing a placement disruption and, if so, will identify the steps to be taken to minimize or eliminate the risk.

c. Appropriate training will be required for, and appropriate supportive services will be provided to, foster parents and staff of residential facilities in order to minimize placement disruptions. In the case of foster parents, the services shall include intensive home-based services and respite care.

d. The "system of care" shall forbid summary

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<sup>45</sup> See also 42 U.S.C. §675(5)(C).

discharges from placements. DHR shall promulgate a policy, acceptable to both parties, that describes steps that must be taken prior to a class member's discharge from a placement. The policy may permit in exceptional circumstances the placement of a class member in a temporary, emergency setting without prior notice to DHR.

e. The "system of care" will avoid temporary, interim placements.<sup>46</sup> Class members shall be placed in settings that could reasonably be expected to deliver longterm care if necessary.<sup>47</sup> To this end, DHR will not place class members in shelters unless (i) the full array of services the class member needs can be provided the class member while residing in the shelter and (ii) it is likely that the class member's stay in foster care will not extend beyond his/her stay in the shelter.

f. The "system of care" will vigorously seek to ensure that law enforcement officers, juvenile court personnel, and others do not remove class members from their home and place them in foster care or DHR custody without first notifying the "system of care" and providing the system an opportunity to intervene to prevent the removal or placement.

52. The "system of care" shall ensure that the services identified in individualized service plans are accessed and

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<sup>46</sup> This "principle" is not meant to prohibit respite care.

<sup>47</sup> It has not been decided whether it is appropriate to make an exception to this standard that would permit DHR to make an initial placement in an "emergency" or "short-term" foster home when it is not known whether the child will need longterm foster care. This issue shall be resolved in the Implementation Plan.

delivered in a coordinated and therapeutic manner.

53. Services shall be provided by competent staff who are adequately trained and supervised and who have appropriate caseloads. The competence of staff, staff's training and supervision, and staff's caseloads shall be deemed adequate when the "system of care" is able to comply with the standards set forth in this decree.

54. Services provided class members and their families shall meet relevant professional standards in the fields of child welfare, social work, and mental health.

55. The "system of care" shall require that any behavior modification program employed in the treatment or management of a class member be individualized and meet generally accepted professional standards, including that:

a. The program rely primarily on rewards instead of punishments;

b. The program be based on a careful assessment of the antecedents of the behavior that the program is designed to change; and

c. The program be consistently implemented throughout the day, including in school,<sup>4</sup> residential, and leisure activity settings.

56. The "system of care" shall take an active role in

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<sup>4</sup> It is recognized that defendant cannot assure that a local education agency will consistently implement the behavior modification plan. Defendant's obligation is to seek to assure that the local agency will do so.



seeking to ensure that local education agencies<sup>49</sup> and the Alabama Department of Education (i) recognize class members' educational rights and (ii) provide class members with educational services in accord with those rights. Among other things, the "system of care" shall advocate for class members who are subjected to inappropriate and/or illegal disciplinary measures.

a. DHR staff, foster parents, and staff of residential programs shall receive training concerning:

(i). Class members' educational rights and needs, including their right to special education; and

(ii). The rights of class members under the IDEA and Section 504 of the Rehabilitation Act<sup>50</sup> with respect to school discipline, including expulsion, suspension, and the use of corporal punishment.

b. Individualized service plans shall incorporate information about class members' educational needs and identify how these needs will be met through the provision of specific services.

c. Before a class member is placed,<sup>51</sup> consideration must be given to:

(i). Whether the class member's educational needs can be met in the proposed placement; and

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<sup>49</sup> See 42 U.S.C. §1401(a)(8).

<sup>50</sup> 29 U.S.C. §794.

<sup>51</sup> It may be necessary to create limited exceptions to this rule. The matter of whether such exceptions should be developed shall be addressed in the Implementation Plan.

(ii) If not, what steps shall be taken to ensure that the class member will receive appropriate educational services while in the placement.

d. The "system of care" will take steps to ensure that surrogate parents are appointed for class members as required by 20 U.S.C. §1415(b)(1)(B) and 34 C.F.R. §500.514.

e. Appropriate representatives of the "system of care" shall request to attend IEP meetings<sup>52</sup> and to participate in other similar efforts to plan appropriate educational services for class members entitled to receive special education.

f. Appropriate representatives of the "system of care" shall request to attend IFSP<sup>53</sup> meetings and to participate in other similar efforts to plan appropriate early intervention services for class members entitled to receive services under Part H of the IDEA.

g. The "system of care" shall seek to ensure that class members' IEP's are consistent with class members' individualized service plans.

h. DHR shall comply with all relevant requirements of the IDEA in those circumstances in which it acts as a "public agency" within the meaning of the IDEA.<sup>54</sup>

57. The "system of care" shall promote smooth transitions for class members to adult service systems and/or independent

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<sup>52</sup> See 42 U.S.C. §1414(a)(5); 34 C.F.R. §§300.343 & 300.344.

<sup>53</sup> See 42 U.S.C. §1477; 34 C.F.R. §§303.340 & 303.342-3.

<sup>54</sup> See 34 C.F.R. §§300.2 & 300.11.

living when class members "age out" of the system. The individualized service plans of class members who are expected to "age out" of the system shall provide for such transitions.

58. The "system of care" shall accord class members the following rights: the right of access to counsel and the courts, the right of access to family members, the right to be free of excessive medication, and the right to be free from unnecessary seclusion and restraint. DHR shall promulgate policies, acceptable to both parties, describing and protecting these rights. The policies shall provide that:

a. Class members shall be permitted to freely communicate by telephone or mail with (i) legal counsel of the class member's choosing, including the class member's guardian ad litem, and (ii) organizations that provide legal services.

b. Class members shall be permitted to freely communicate by telephone or mail with (i) the class member's parents and family members and (ii) adult friends of the class member including former foster parents. This right may be restricted only pursuant to procedures and in circumstances specifically identified in written policy.

c. Class members retain the right to communicate and visit with their parents and family even when the class member is in the permanent custody of DHR (i.e., parental rights have been terminated). When the class member is in permanent custody, the matter of his/her communication with parents and family members shall be addressed in the class member's individualized service



plan. Such communication may be restricted when it would undermine or defeat attainment of the goal or objectives identified in the plan.

59. Class members, parents and foster parents shall be made aware, in an effective manner, of the availability of advocacy services to assist them in protecting and advancing their rights and entitlements.

60. Class members shall be provided effective assistance and support in applying for SSI benefits. (Where it is necessary that the class member's parents apply for benefits, such assistance and support shall be provided to the parents.)

61. Class members shall be enrolled, if eligible, in the EPSDT program and shall receive comprehensive screens that meet the requirements of federal law<sup>35</sup> and are provided according to a professionally acceptable schedule.

62. The "system of care" shall promote early identification and timely intervention in order to enhance the likelihood of positive outcomes.

63. The "system of care" will identify, assess, and disseminate state-of-the-art methods, strategies, and materials for serving class members and their families.

#### IX. Implementation.

64. The parties shall enter into an Agreement Regarding Implementation, the terms of which shall be incorporated herein by reference and shall be enforceable by the Court.

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<sup>35</sup> 42 U.S.C. §1396d(r)(1); 34 C.F.R. §§441.56(b) & 441.58.

65. The Agreement Regarding Implementation shall require the development of an Implementation Plan (i.e., a plan of operations, with specific goals and timetables, for implementing the requirements of this decree), which shall be presented to the Court, by October 1, 1992, for the Court's approval.<sup>56</sup>

66. The Implementation Plan shall assure compliance with this decree by October 1, 1999.

67. The Implementation Plan shall meet any and all specific requirements contained in the Agreement Regarding Implementation.

68. The Implementation Plan will specifically describe the duties of the monitor during the period that the Plan is being implemented and the means by which the monitor will fulfill those duties.

69. Defendant shall ensure that:

a. By October 1, 1991, DHR promulgates and implements the policies required by paragraphs 58 and 72.

b. By October 1, 1992, DHR promulgates and implements the policies required by paragraphs 30, 44, and 45(d).

c. The definitions required by paragraphs 7(a) and 7(c) and the policies required by paragraphs 48(b), 49, and 51 are promulgated and implemented in accordance with the Implementation Plan.

70. If necessary to address staffing needs identified in

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<sup>56</sup> In the parties' view, the anticipated increase of \$3.5 million in the budget of the Division of Family and Children's Services for FY 1992 should be sufficient to finance the creation of the Implementation Plan.



the Implementation Plan and/or to acquire staff needed to assure compliance, defendant may modify state government administrative requirements, especially those imposed by the personnel system. When he determines that it is necessary to exercise his authority under this paragraph, defendant shall give prior notice to the State Personnel Director as soon as practicable, so as to give the State Personnel Director the opportunity to obviate the necessity for defendant's action.

71. During each budget cycle, defendant shall prepare and submit to the Legislature a needs-based budget designed to assure compliance with this decree and the Implementation Plan. In addition, defendant shall prepare and submit to the Legislature for its approval such legislation as is needed to assure compliance with this decree and the Implementation Plan.

X. Plaintiffs' Counsels' Right of Access.

72. Plaintiffs' counsel and their agents shall have reasonable access to: class members; placements in which class members reside<sup>57</sup>; the staff of such placements; case records concerning class members and their families; and DHR state-office and county-office staff.<sup>58</sup> DHR shall promulgate a policy,

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<sup>57</sup> Such placements include foster homes, therapeutic foster homes, small group homes, group homes, child care institutions, institutions, and placements licensed or certified by DMH/MR and/or DYS.

<sup>58</sup> Plaintiffs' counsel has represented that it is not their intention to exercise their access in a way that is unreasonable or overly intrusive or to make unreasonable requests for information. If defendant believes that plaintiffs' counsel are exercising their access rights in an unreasonable or overly intrusive fashion, defendant may raise the issue with the Court.

acceptable to both parties, providing for such access. The policy shall provide plaintiffs' counsel at least the same access that plaintiffs' counsel enjoyed pursuant to the Court's orders of April 26, 1990, regarding access to class members and to DHR employees and staff and of October 19, 1990, concerning access to DHR county offices.

73. Plaintiffs' counsel shall have access to information and documents obtained, compiled, or generated by:

- a. Consultants utilized to assist in the development of the Implementation Plan;
- b. The quality assurance program required by the Implementation Plan; or
- c. The monitor.

74. The Protective Order Regarding Confidentiality, entered June 13, 1989, shall remain in effect, and plaintiffs' counsel and their agents and employees shall continue to abide by the terms of the order.

XI. Monitor.

75. By August 1, 1992, the defendant shall appoint a monitor in a manner mutually agreed to by the parties.<sup>9</sup>

76. The monitor shall be independent of the parties. The monitor shall:

- a. Monitor compliance with this decree and the

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<sup>9</sup> If the monitor is replaced, his/her replacement shall also be selected in a manner mutually agreed to by the parties. The monitor shall be replaced if he resigns; is unable to perform his/her duties due to illness, disability, or death; or is dismissed pursuant to paragraph 81 below.

Implementation Plan;

b. Issue semiannual reports concerning defendant's progress in implementing this decree and the Implementation Plan;

c. Otherwise keep the parties apprised of defendant's progress and the status of compliance;

d. Upon request of either party, meet with the parties to discuss progress and further measures needed to achieve compliance;

e. Make recommendations concerning means to facilitate compliance;<sup>60</sup> and

f. Timely respond to written inquiries from the parties.

77. The monitor shall have access to all information and documents the monitor requires to perform his/her job. This access shall include access to: class members; placements in which class members reside<sup>61</sup>; the staff of such placements; case records concerning class members and their families; and DHR state-office and county-office staff.

78. The monitor shall abide by the terms of the Protective Order Regarding Confidentiality, entered June 13, 1989. (The order shall apply to him/her as if he/she were a party or counsel to a party.)

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<sup>60</sup> The monitor shall not have the power to enforce his recommendations.

<sup>61</sup> Such placements include foster homes, therapeutic foster homes, small group homes, group homes, child care institutions, institutions, and placements licensed or certified by DMH/MR and/or DYS.



79. The parties shall negotiate an agreement concerning whether and in what circumstances they may engage in ex parte communications with the monitor. If they are unable to reach an agreement, they shall refer the matter to the Court. No party shall engage in ex parte communications until the parties have negotiated an agreement concerning such communications or the matter has been resolved by the Court.

80. The monitor's compensation shall be sufficient to attract a person with the requisite background and skills. DHR shall pay the monitor's expenses and fees per a written contract.

81. The monitor may be dismissed and replaced (a) by agreement of the parties or (b) by the Court upon petition of either party when exceptional circumstances are shown.

82. The provisions of paragraphs 75-81 shall remain in effect until compliance is achieved with this decree and the Implementation Plan.

#### XII. Primacy of this Decree.

83. Defendant must comply with his obligations under this decree and the Implementation Plan, despite orders to the contrary issued by any state official or by any state court (including in the course of Juvenile Court proceedings).<sup>62</sup>

84. Despite orders to the contrary issued by any state

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<sup>62</sup> Paragraphs 83-85 should not be interpreted as requiring the defendant to place himself in contempt of a state court order before seeking protection or relief from this Court. Instead, they should be interpreted as requiring defendant to seek relief from this Court from any state court order that would require action contrary to this decree.

official or by any state court (including in the course of Juvenile Court proceedings), defendant may refuse to place class members in particular placements and may refuse to provide class members and their families particular services if doing so would require defendant to violate his obligations under this decree or the Implementation Plan.

85. Despite orders to the contrary issued by any state official or by any state court (including in the course of Juvenile Court proceedings), defendant may refuse to provide DHR-funded services to a class member or a member of the class members's family before a determination has been made, acceptable to DHR, whether the services are appropriate for the class or family member.

86. Only this Court, the monitor, or another person or entity appointed by the Court shall have the authority to determine compliance with this decree.

87. Nothing in this decree is intended to create an independent cause of action, right, or liberty or property interest under state law.

#### XIII. Plaintiffs' Costs and Attorneys' Fees.

88. Plaintiffs are "prevailing parties" in this litigation and shall recover<sup>43</sup> (a) the expenses of their counsel<sup>44</sup> and (b) a

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<sup>43</sup> In agreeing to this paragraph, the defendant has relied upon plaintiffs' representation that the reasonable expenses and attorneys' fees to date are in the range of \$500,000-\$600,000.

<sup>44</sup> This includes (a) plaintiffs' counsel's travel expenses (including the expense of lodging, meals, and transportation while away from home) and (b) the fees and expenses of expert witnesses.



reasonable<sup>65</sup> attorneys' fee.<sup>66</sup>

89. The parties shall negotiate in good faith the amount of plaintiffs' recovery of expenses and attorneys fees. If a settlement is not reached by August 1, 1991, plaintiffs may file a petition with the Court for an award of expenses and attorneys fees. Plaintiffs shall not file any such petition during the parties' negotiations up to and including August 1, 1991.

90. Plaintiffs' counsel are entitled to be reimbursed by the defendant for expenses<sup>67</sup> and time reasonably expended by plaintiffs' counsel in the course of:<sup>68</sup>

a. Monitoring or securing the implementation of this decree or the Implementation Plan;

b. Efforts to promote the development of, and/or negotiations concerning, the Implementation Plan; or

c. Opposing efforts by defendant or others to modify or vacate this decree or the Implementation Plan.

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<sup>65</sup> The hourly fee for work performed by attorney Burnim shall be no less than \$110 and no more than \$150; the hourly fee for attorneys Schoen, Jackson, and Johnson shall be no less than \$90 and no more than \$125.

<sup>66</sup> Plaintiffs' counsel's hours shall not be reduced based on any contention that counsel's work related to any specific claim should not be compensated.

<sup>67</sup> This includes (a) plaintiffs' counsel's travel expenses (including the expense of lodging, meals, and transportation while away from home) and (b) the fees and expenses of expert witnesses.

<sup>68</sup> The hourly rate and expenses of both plaintiffs' counsel and their agents, including experts, shall be a reasonable one. The defendant may challenge as unreasonable any reimbursement sought by plaintiffs' counsel. Disputes that cannot be resolved by mutual consent will be resolved by the Court.



XIV. Deadlock of the Parties.

91. This decree anticipates ongoing efforts by the parties to resolve matters by mutual consent. If the parties are unable to resolve a matter by mutual consent, the matter shall be referred to the Court for resolution. The Court will resolve the matter in a manner consistent with the purposes and goals of this decree.

92. The failure of the parties to reach mutual agreement on any matter or matters shall not invalidate or nullify this decree or any requirement of this decree.

XV. Termination of this Decree.

93. On or after October 1, 1999, the defendant may move for termination of this decree<sup>69</sup> upon a showing that he is in substantial compliance with the requirements of the decree and of the Implementation Plan and that there is a reasonable prospect that he will remain in substantial compliance.

Done, this \_\_\_\_\_ day of \_\_\_\_\_, 1991.

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U.S. District Judge

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<sup>69</sup> Termination of this decree would terminate the requirements of the Implementation Plan as well.

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

R.C., by his next friend,  
the ALABAMA DISABILITIES  
ADVOCACY PROGRAM, on behalf  
of himself and those  
similarly situated,

Plaintiffs,

vs.

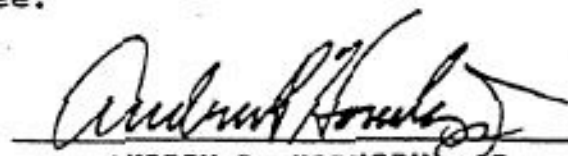
ANDY HORNSBY, Commissioner  
of the Alabama Department  
of Human Resources,

Defendants.

Civil Action  
No. 88-H-1170-N

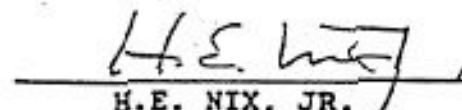
CONSENT TO ENTRY OF CONSENT DECREE

The undersigned consent to the entry of the attached conse  
decree.



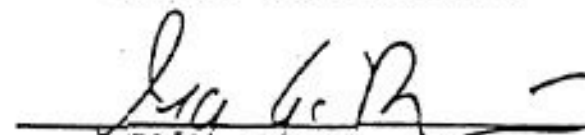
ANDREW P. HORNSBY, JR.  
Commissioner of the Alabama  
Department of Human Resources

Date: 5/29/91



H.E. NIX, JR.  
Counsel for Defendant

Date: 5/29/91



IRA A. BURNIM  
Counsel for Plaintiffs

Date: 5/16/91

PLAINTIFF  
EXHIBIT  
20

297 Joyd School  
287 Brever Porch  
14614 Brever Porch SITIZ. Program  
315 The Bridge  
196 Bryce  
382 Camp Sunshine  
211 Caper House  
661 Chalkville  
376 Cornerstone  
180 Enola Adolescent Center  
380 Fairway  
204 Family & Child Service (Gateway)  
5875 Glenwood Wilderness Camp  
312 Hickory House  
11485 Hillcrest Sunrise Treatment Center  
288 Lee County Youth Dev. Center  
313 McDonough House  
250 Mt. Melba Campus  
655 Pathway, Inc.  
14930 Pines  
13698 Presbyterian Home Treatment  
12867 Southeastern Adolescent Program  
8366 Three Springs  
5796 Tri-Vil/Porta Casa  
320 Turning Point  
660 YACCA  
277 Alabama Baptist Childrens Home (Northport)  
347 Baldwin County Youth Services Home  
351 Bell Road Group Home  
298 Brentwood  
354 Colbert County Attention Home  
352 Coosa Valley Regional Attention Home  
357 Golden Group Home  
359 Group Home (CUMING)  
290 Harris Home  
13071 Holy Innocents  
11086 King's Ranch - Adairhold  
358 King's Ranch - Oneonta  
355 Lauderdale Attention Home  
263 Lee County Shelter  
9475 Lee County D & E  
377 Mobile County Halfway House  
365 Mobile Group Home for Boys  
348 Riverplace, Inc.  
278 St. Mary's Home

3376 Salvation Army Youth Services  
368 Shelby County Youth Services  
379 Sojourn  
371 Troy State University Group Home  
372 United Methodist - Gensie  
249 United Methodist - Settlement  
323 United County Youth Services