

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 1284-cv-0250

ROBERT CANTELL, et al.,
Plaintiffs,

v.

COMMISSIONER OF CORRECTION, et al.,
Defendants.

JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

Pursuant to Mass. R. Civ. P. 23(c), the parties hereby move this Court to approve the Settlement Agreement entered into by the parties in this class action and to retain jurisdiction of the case pursuant to Section IX(B)(3) of the Settlement Agreement. A copy of the Settlement Agreement is attached hereto as Exhibit A. As grounds therefor, the parties attach a Memorandum in Support of the Joint Motion for Approval of Settlement, and further state:

1. The Second Amended Complaint alleges that the defendants violated the rights of Massachusetts inmates held in Non Disciplinary Restrictive Housing, including their federal due process rights under the 14th Amendment to the U.S. Constitution, as set forth in *LaChance v. Comm'r of Correction*, 463 Mass. 767 (2012), their rights to equal "kindness" under M.G.L. c. 127, § 32, and their rights under 103 CMR 421.00 *et seq.*

2. The parties have entered into the Settlement Agreement, contingent upon approval by this Court and the retention of jurisdiction over the action. Ex. A, Section IX(B)(3) p. 30.

3. As more fully set forth in the attached Memorandum, this Court is required by Rule 23 (c) to approve any settlement in the case, and has the power to retain jurisdiction to enforce its terms.

4. The proposed Settlement Agreement is fair, reasonable, and adequate, and provides a significant benefit to the Class.

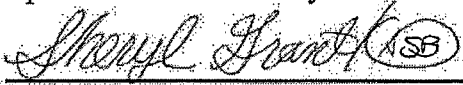
Therefore, the parties jointly request that the Court approve the proposed Settlement Agreement and retain jurisdiction as provided in the Settlement Agreement.

Respectfully submitted on behalf of the
Plaintiffs, by their attorney,



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Respectfully submitted on behalf of the
Defendants, by their attorneys,

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Dated: May 21, 2019

CERTIFICATE OF SERVICE

I certify that on this 21st day of May 2019, I served a copy of the foregoing Joint Motion on counsel for the Defendants by e-mail and first class mail: Sheryl Grant, Esq., Department of Correction – Legal Division, 70 Franklin St. Suite 600, Boston, MA 02110-1300.



Alexander Sugerman-Brozan, Esq.

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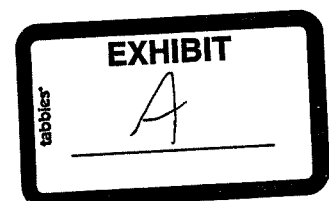
COMMISSIONER OF CORRECTION, et al.,
Defendants.

SETTLEMENT AGREEMENT

INTRODUCTION

The instant lawsuit, *Robert Cantell, et al. v. Commissioner of Correction, et al.*, Civil Action No. 1284-cv-0250, was filed as a putative class action. On January 20, 2012, Robert Cantell and Derrick Maldonado filed a complaint in Suffolk Superior Court, along with a motion for class certification. Those plaintiffs alleged that they either were then, or had been, held in Non-Disciplinary Restrictive Housing in a Special Management Unit (SMU) on awaiting action ("AA") status. The original complaint alleged that plaintiffs, and all other inmates being held in an SMU for "non-disciplinary" reasons, were entitled to the regulatory procedures in 103 CMR 421, Departmental Segregation Units, and that defendants' failure to follow the regulatory procedures in 103 CMR 421 violated their rights under that regulation, their due process rights under the United States Constitution, and their due process rights under the Massachusetts Declaration of Rights. Plaintiffs also claimed that their right to equal kindness under M.G.L. c. 127, § 32 was being violated because they did not receive the same privileges in the SMU that they would get in a Departmental Segregation Unit ("DSU"). The complaint sought declaratory and injunctive relief only. On April 12, 2012, an Amended Complaint was filed, which added Wilfredo Virella, John Fernandes, Luis Bizzarro, and Albert Jackson as plaintiffs. The claims alleged in the Amended Complaint were identical to those asserted in the original complaint.

On November 27, 2012, the Supreme Judicial Court decided *LaChance v. Comm'r of Correction*, 463 Mass. 767 (2012). On January 31, 2013, in a written Memorandum and Order, the Court in this Action, finding that *LaChance* had resolved all the claims alleged in the Amended Complaint, allowed a motion to dismiss that had been filed by defendants and denied plaintiffs' motion for class certification. The Court, in its order of dismissal, ordered that defendants had to extend the benefits of *LaChance* to all inmates held in Non-Disciplinary



Restrictive Housing on AA status. The allowance of defendants' motion to dismiss was without prejudice to plaintiffs filing an amended complaint to assert any claims that the Department of Correction was not complying with the requirements set forth in *LaChance*. On August 1, 2013, final judgment for defendants entered. All plaintiffs, except for Virella and Bizarro, appealed.

In *Cantell v. Comm'r of Correction*, 475 Mass. 745 (2016), the Supreme Judicial Court clarified that *LaChance* had only resolved the federal due process claim, but not the state claims. As a result, the dismissal in this Action was vacated and the matter was remanded back to Suffolk Superior Court for further proceedings consistent with the Supreme Judicial Court's decision.

After remand, plaintiffs filed a motion to amend the complaint to add new plaintiffs, remove two plaintiffs (Virella and Bizarro), and to modify their federal due process claim to allege non-compliance with the federal due process procedures recently established by the Supreme Judicial Court in *LaChance*. On April 21, 2017, the Court allowed plaintiffs' motion to amend and accepted the Second Amended Complaint, which is dated February 2, 2017, for filing. The Second Amended Complaint, which is now the governing complaint, added additional plaintiffs, and included the amended federal due process claim as set forth above, but did not otherwise amend the other legal claims previously alleged in the original or first amended complaints.

On June 23, 2017, the Court allowed Plaintiffs' motion for class certification and Plaintiffs became class representatives for the Class Members. The class representatives under the governing Second Amended Complaint are Robert Cantell, Derrick Maldonado, John T. Fernandes, Albert Jackson, Dale Holloway, Tony Gaskins, Michael Courage, and Justin Garcia. Plaintiffs are seeking declaratory and injunctive relief on behalf of themselves and all inmates who are now, or may be in the future, confined on Non-Disciplinary Restrictive Housing status in Restrictive Housing Units (formerly known as SMUs) within Massachusetts Department of Correction ("Department") correctional facilities. The Defendants, named in their official capacities only, are the Commissioner of Correction and the Superintendents of each Department facility that operates a Restrictive Housing Unit ("RHU") (formerly known as Special Management Units or SMUs). The Second Amended Complaint alleges a federal law claim under 42 U.S.C. § 1983 that Plaintiffs' confinement on Non-Disciplinary Restrictive Housing status in RHUs is in violation of their federal due process rights as articulated in *LaChance v. Commissioner of Correction*, 463 Mass. 767 (2012). The Second Amended Complaint also alleges state law claims that Plaintiffs are entitled to all the procedures in 103 CMR 421, Department Segregation Units, as a matter of due process under the Massachusetts Declaration of Rights and 103 CMR 421, and that Plaintiffs' confinement on Non-Disciplinary Restrictive Housing status in RHUs violates their rights under M.G.L. c. 127, § 32.

The Defendants deny that they have violated any such federal and state constitutional, statutory, or regulatory rights or provisions, or that the Plaintiffs are entitled to the procedures in 103 CMR 421 as a result of confinement on Non-Disciplinary Restrictive Housing status in RHUs.

The parties state that since the initiation of this Action, an Act Relative to Criminal Justice Reform, Chapter 69 of the Acts of 2018 ("CJRA"), was signed into law. Provisions of the CJRA pertaining to Restrictive Housing went into effect on December 31, 2018 and many such provisions bear directly on claims raised in this litigation. The provisions of the CJRA pertaining to Restrictive Housing were considered by the parties during the course of settlement negotiations and, as deemed appropriate, incorporated in this Settlement Agreement.

The parties have conducted extensive discovery.

Without conceding any infirmity in their claims or defenses, the parties have engaged in extensive and arms-length settlement negotiations to resolve the claims raised in this Action in a manner that is consistent with the provisions of the CJRA.

Plaintiffs and Defendants have reached an agreement for settling this litigation. The parties believe that this agreement is fair, reasonable, and adequate to protect the interests of all parties, as well as consistent with the provisions of the CJRA that govern the placement, retention, and procedural review of inmates in Non-Disciplinary Restrictive Housing status in Restrictive Housing Units.

This Settlement Agreement resolves all the claims that were alleged or could have been alleged in this Action, and only those claims, consistent with the class as certified by the Court, i.e., inmates who are now, or may be in the future, confined on Non-Disciplinary Restrictive Housing status in RHUs, which were previously known as Special Management Units. Such claims include: Plaintiffs' contention that their confinement on Non-Disciplinary Restrictive Housing status in RHUs is in violation of their federal due process rights as articulated in *LaChance v. Commissioner of Correction*, 463 Mass. 767 (2012); Plaintiffs' contention that inmates who are confined in Non-Disciplinary Restrictive Housing are entitled to all the procedures in 103 CMR 421, Department Segregation Units, as a matter of due process under the Massachusetts Declaration of Rights and 103 CMR 421; and Plaintiffs' contention that their confinement on Non-Disciplinary Restrictive Housing status in RHUs violates their rights under M.G.L. c. 127, § 32.

This Settlement Agreement shall not be construed as an agreement as to the lawfulness of placements, conditions, or treatment of inmates in any form of Disciplinary Restrictive Housing or of inmates in any unit other than an RHU. While provisions of the CJRA pertaining to Restrictive Housing were considered by the parties and are reflected herein as appropriate, nothing contained in this Settlement Agreement shall be construed as a limitation on the Class

Members' rights to bring any claims under the CJRA, or as a limitation on the defenses to such claims that the defendants may raise.

The parties will file this Settlement Agreement with the Court, and jointly move that the Court approve it.

I. PARTIES

The parties to this Agreement are Plaintiffs/Class Representatives Robert Cantell, Derrick Maldonado, John T. Fernandes, Albert Jackson, Dale Holloway, Tony Gaskins, Michael Courage, and Justin Garcia on behalf of themselves and all Class Members; and Defendants, in their official capacities, Commissioner of Correction Carol Mici and the Superintendents of each Department of Correction facility that operates a Restrictive Housing Unit ("RHU").

II. DEFINITIONS

Action – The above-captioned action.

Class Counsel – Bonita Tenneriello, Esq. of Prisoners' Legal Services, and any other attorneys who have entered an appearance on behalf of plaintiffs in this Action as of the date of this Settlement Agreement. Bonita Tenneriello is lead counsel for Plaintiffs.

Class Members – Inmates in Department facilities who are now, or may be in the future, confined on Non-Disciplinary Restrictive Housing status in Restrictive Housing Units, which units were previously known as Special Management Units.

Commissioner - The Commissioner of Correction for the Massachusetts Department of Correction, as defined in M.G.L. c. 27, § 1.

Court – Unless stated otherwise, any reference in this Settlement Agreement to the Court shall refer to the Suffolk Superior Court Department of the Trial Court in the Commonwealth of Massachusetts.

Criminal Justice Reform Act ("CJRA") - Chapter 69 of the Acts of 2018, an Act Relative to Criminal Justice Reform.

Department – The Massachusetts Department of Correction.

Department Disciplinary Unit ("DDU") - A restricted area or areas designated by the Commissioner to which an inmate has received a sanction recommended by a Special Hearing

Officer in accordance with 103 CMR 430, Inmate Discipline.

Disciplinary Detention - The Restrictive Housing of an inmate resulting from sanctions imposed under 103 CMR 430, Inmate Discipline. Such sanctions shall not exceed 15 days for one offense and no more than 30 days for all violations arising out of the same or substantially connected incident(s), unless specifically authorized by the Commissioner. Disciplinary detention does not refer to inmates sanctioned to the DDU.

Disciplinary Restrictive Housing - A placement of an inmate in Restrictive Housing to serve a Disciplinary Detention or DDU sanction after a finding has been made that the inmate has committed a breach of discipline in accordance with 103 CMR 430, Inmate Discipline.

Exigent Circumstances - Circumstances that create an unacceptable risk to the safety of any person.

Inmate Management System ("IMS") - The Department's automated information system that provides processing, storage, and retrieval of inmate-related information needed by the Department.

Non-Disciplinary Restrictive Housing - Except as otherwise set forth in this definition, any placement of an inmate in Restrictive Housing for any reason other than to serve a DDU or Disciplinary Detention sanction. Non-Disciplinary Restrictive Housing or Non-Disciplinary Restrictive Housing status shall **not** include:

- any placement or confinement that is ordered by a medical or mental health provider, including but not limited to, the placement of an inmate in a Health Services Unit, the placement of an inmate in a hospital, the placement of an inmate in a medical setting where treatment is being provided, or the placement of an inmate on a mental health watch;
- any placement that is for the purpose of discipline, i.e., the inmate has been found guilty of a disciplinary offense in accordance with 103 CMR 430, Inmate Discipline, and is serving either a Disciplinary Detention sanction or a Department Disciplinary Unit sanction.

Placement Review - A multidisciplinary examination to determine whether Non-Disciplinary Restrictive Housing continues to be necessary to reasonably manage risks of harm, notwithstanding any previous finding of a disciplinary breach, Exigent Circumstances, or other circumstances supporting a placement in Non-Disciplinary Restrictive Housing, as follows:

- **72-Hour Placement Review:** A Placement Review conducted by a Placement Review Committee of an inmate's status in Non-Disciplinary Restrictive Housing that takes place every Monday, Wednesday, and Friday.

- **Enhanced Placement Review** – A Placement Review conducted by a Placement Review Committee where:
 - (a) The inmate receives twenty-four (24) hours written notice prior to the Placement Review;
 - (b) The inmate has the opportunity to participate in the Placement Review in writing;
 - (c) If no placement change is ordered, the inmate is subsequently provided with a written placement decision describing the evidence relied on and the reasons for the decision, unless the inmate waives receipt of such decision in writing; and
 - (d) If no placement change is ordered, the inmate is subsequently provided with behavior standards and program participation goals that will increase the inmate's chances of a less restrictive placement upon the next Placement Review, unless the inmate waives receipt of such standards and goals in writing.

- **CPO Placement Review:** A Placement Review conducted by a Correctional Program Officer (CPO) within thirty (30) days of an inmate's initial placement in Non-Disciplinary Restrictive Housing where:
 - (a) The inmate receives forty-eight (48) hours written notice prior to the Placement Review;
 - (b) The inmate has the opportunity to participate in the Placement Review in person and/or in writing;
 - (c) If no placement change is ordered, the inmate is subsequently provided with a written placement decision describing the evidence relied on and the reasons for the decision; and
 - (d) If no placement change is ordered, the inmate is subsequently provided with behavior standards and program participation goals that will increase the inmate's chances of a less restrictive placement upon the next Placement Review.

- **90-day Placement Review:** A Placement Review conducted by a three (3) person Placement Review Committee, consisting of one (1) member of the security staff, one (1) member of the programming staff, and one (1) member of the mental health staff, within ninety (90) days of an inmate's initial placement in Non-Disciplinary Restrictive Housing and every subsequent ninety (90) days thereafter, where:
 - (a) The inmate receives forty-eight (48) hours written notice prior to the Placement Review;
 - (b) The inmate has the opportunity to participate in the Placement Review in person and/or in writing;
 - (c) If no placement change is ordered, the inmate is subsequently provided with a written placement decision describing the evidence relied on and the reasons for the decision; and

(d) If no placement change is ordered, the inmate is subsequently provided with behavior standards and program participation goals that will increase the inmate's chances of a less restrictive placement upon the next Placement Review.

Placement Review Committee - A multidisciplinary group, which shall include, but not be limited to: one (1) member of the security staff, one (1) member of the programming staff and one (1) member of the mental health staff. Except for the 90 Day Placement Reviews, this Committee may include the Superintendent, Deputy Superintendents, Director of Security, Director of Classification, Restrictive Housing Unit Captain, or their respective designees, and such other staff as deemed necessary to determine whether Restrictive Housing continues to be necessary to reasonably manage risks of harm, notwithstanding any previous finding of a disciplinary breach, exigent circumstances or other circumstances supporting a placement in Restrictive Housing.

Protective Custody/Special Housing Units - A form of separation from the general population for inmates requiring protection from other inmates for reasons of health or safety. The inmate's status is reviewed periodically in accordance with 103 DOC 422, Department Protective Custody Units, by the classification committee or designated group with the goal of terminating the separate housing assignment as soon as possible.

Qualified Mental Health Professionals - Treatment providers who are psychiatrists, psychologists, psychiatric social workers, psychiatric nurses, and others who by virtue of their education, credentials and experience are permitted by law to evaluate and care for the mental health needs of patients.

Restrictive Housing - A placement that requires an inmate to be confined to a cell for at least twenty-two (22) hours per day for the safe and secure operation of the facility.

Restrictive Housing Unit ("RHU") - A separate housing area from general population within institutions in which inmates may be confined to a cell for more than twenty-two (22) hours per day where: (a) it has been determined that the inmate poses an unacceptable risk to the safety of others, of damage or destruction of property, or to the operation of a correctional facility; (b) the inmate requires protection from harm by others; and/or (c) the inmate is serving a disciplinary detention sanction. RHUs were formerly known as Special Management Units ("SMUs").

Secure Adjustment Unit ("SAU") - A highly structured unit that is not Restrictive Housing and that provides access to cognitive behavioral treatment, education, programs, structured recreation, leisure time activities and mental health services for those inmates diverted from or released from Restrictive Housing.

Secure Treatment Unit ("STU") - A maximum security residential treatment program that is not Restrictive Housing and that is designed to provide an alternative to Restrictive Housing for inmates diagnosed with serious mental illness in accordance with clinical standards adopted by the Department. The STUs consist of the Secure Treatment Program ("STP") and the Behavioral Management Unit ("BMU") and serve as alternatives to Restrictive Housing.

Serious Mental Illness ("SMI") – The definition of SMI shall be consistent with the definition as set forth in M.G.L. c. 127, § 1. In the event the statutory definition changes during the term of this Settlement Agreement, said new statutory definition shall govern. The statutory definition, as of the date of this Settlement Agreement is as follows. A current or recent diagnosis by a Qualified Mental Health Professional of one or more of the following disorders described in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition: (i) schizophrenia and other psychotic disorders; (ii) major depressive disorders; (iii) all types of bipolar disorders; (iv) a neurodevelopmental disorder, dementia or other cognitive disorder; (v) any disorder commonly characterized by breaks with reality or perceptions of reality; (vi) all types of anxiety disorders; (vii) trauma and stressor related disorders; or (viii) severe personality disorders; or a finding by a Qualified Mental Health Professional that the inmate is at serious risk of substantially deteriorating mentally or emotionally while confined in Restrictive Housing, or already has so deteriorated while confined in Restrictive Housing, such that diversion or removal is deemed to be clinically appropriate by a Qualified Mental Health Professional.

III. CONTRAINDICATION TO PLACEMENT IN NON-DISCIPLINARY RESTRICTIVE HOUSING

If either a medical or mental health provider opines that there is a contraindication to an inmate's placement in Non-Disciplinary Restrictive Housing, absent Exigent Circumstances, the inmate shall not be placed in Non-Disciplinary Restrictive Housing so long as said contraindication exists.

IV. REVIEWS FOR INMATES IN NON-DISCIPLINARY RESTRICTIVE HOUSING

A. Placement Reviews Every Monday, Wednesday, and Friday

(1) After an inmate is placed in Non-Disciplinary Restrictive Housing, the inmate's status shall be reviewed every Monday, Wednesday, and Friday by a Placement Review Committee for the duration of the time the inmate remains in Non-Disciplinary Restrictive Housing.

(2) At each Monday, Wednesday, and Friday Placement Review, the Placement Review Committee shall determine whether:

- (a) The inmate's placement in Non-Disciplinary Restrictive Housing is reasonably expected to last more than thirty (30) days;
- (b) The inmate's continued placement in Non-Disciplinary Restrictive Housing is appropriate because it has been verified by the Department that the inmate requires separation from general population to protect the inmate from harm by others or the inmate poses an unacceptable risk (i) to the safety of others or self; (ii) of damage or destruction of property; or (iii) to the operation of a correctional facility;
- (c) Transfer of the inmate to an alternative unit is appropriate; and
- (d) Release of the inmate from Non-Disciplinary Restrictive Housing is appropriate.

(3) At each Monday, Wednesday, and Friday Placement Review, the Placement Review Committee shall also review the reason(s) for placement, threat to institutional security, pending disciplinary issues, disciplinary sanctions, classification issues, enemy situations, mental health issues, attitude toward authority, willingness and ability to live with others, and any other pertinent information. These reviews shall be documented in IMS.

(4) In the case of inmates held in Non-Disciplinary Restrictive Housing who have an SMI or who have been determined by Department officials to have verified safety needs, the Commissioner or designee shall also complete any certifications required by M.G.L. c. 127, § 39A(a) and (b).

B. Requirements Upon Determination That An Inmate is Expected to Remain in Non-Disciplinary Restrictive Housing for More Than Thirty (30) Days

(1) Upon a determination by the Placement Review Committee that an inmate's placement in Non-Disciplinary Restrictive Housing is reasonably expected to last more than thirty (30) days, within fifteen (15) days of such determination the inmate shall be served with written behavior standards and program participation goals, including a list of the specific programs being recommended for the inmate while in Non-Disciplinary Restrictive Housing at that facility, that will increase the inmate's chances of a less restrictive placement upon next Placement Review;

(a) An inmate's failure to meet some or all of the standards and goals shall not preclude an inmate's release from Non-Disciplinary Restrictive Housing.

(2) After the determination is made that the inmate's placement in Non-Disciplinary Restrictive Housing is reasonably expected to last more than thirty (30) days, for the duration of the time the inmate remains in Non-Disciplinary

Restrictive Housing, the inmate shall thereafter receive Enhanced Placement Reviews, as defined in Section II above, according to the schedule set forth in M.G.L. c. 127, §39B(a):

(a) Inmates with SMI in Non-Disciplinary Restrictive Housing shall receive Enhanced Placement Reviews every seventy-two (72) hours;

(b) Inmates held in Non-Disciplinary Restrictive Housing because they have verified safety needs, as determined by Department officials, shall receive Enhanced Placement Reviews every seventy-two (72) hours;

(c) Inmates held in Non-Disciplinary Restrictive Housing because they are awaiting adjudication of a disciplinary report shall receive Enhanced Placement Reviews every fifteen (15) days; and

(d) Inmates held in Non-Disciplinary Restrictive Housing for any other reason, shall receive Enhanced Placement Reviews every ninety (90) days.

(3) Once an inmate has been provided with behavior standards and program participation goals, after each ensuing Enhanced Placement Review, as applicable, the inmate shall be informed, in writing, as to how compliance with said standards and goals was unsatisfactory and/or whether additional time for compliance is indicated.

(4) The twenty-four (24) hour written notice required to be served on inmates prior to all Enhanced Placement Reviews, as defined in Section II above and conducted in accordance with Section III (B) shall:

(a) Inform the inmate he/she may participate in the Enhanced Placement Review in writing;

(b) Inform the inmate he/she may submit a written statement and/or documentation;

(c) Inform the inmate of the basis upon which the inmate is housed in Non-Disciplinary Restrictive Housing (e.g., awaiting a disciplinary hearing, pending investigation, etc.); and

(d) Inform the inmate of the nature of the threat requiring the Non-Disciplinary Restrictive Housing placement (i.e., whether the inmate needs to be separated from general population to protect the inmate from

harm from others or whether the inmate's retention in general population poses an unacceptable risk to: the safety of others; damage or destruction of property; or to the operation of a correctional facility);

C. Thirty (30) Day CPO Reviews for Inmates in Non-Disciplinary Restrictive Housing

(1) Within twenty-five (25) days of an inmate's placement in Non-Disciplinary Restrictive Housing, the Department shall schedule a review to be conducted by a Correctional Program Officer (CPO). The CPO review shall be conducted within thirty (30) days of the inmate's initial placement in Non-Disciplinary Restrictive Housing.

(2) In connection with the review conducted under this section, the inmate shall be provided:

(a) Forty-eight (48) hours written notice prior to the review;

(b) The opportunity to participate in the review in person and/or in writing;

(c) A written statement as to the evidence relied on and the reasons for the placement decision if no placement change is ordered; and

(d) Written behavior standards and program participation goals that will increase the inmate's chances of a less restrictive placement upon the next Placement Review if no placement change was ordered.

(3) The review process is as follows:

(a) **Notice:** A CPO shall provide the inmate with at least forty-eight (48) hours advance written notice of the review. Along with the notice, the inmate shall also be provided with copies of any documents not in the inmate's possession that the CPO intends to consider unless safety or security concerns could be implicated or an investigation could be negatively impacted. Notice shall be documented and may be waived by the inmate in writing. The notice shall:

(i) Inform the inmate he/she has the choice whether to participate in the review in person and/or in writing;

(ii) Inform the inmate of the availability of the Language Line if the inmate has limited English proficiency;

(iii) Inform the inmate that if the inmate uses American Sign Language (ASL), ASL interpretive services will be provided if the inmate participates in the review in person;

(iv) Inform the inmate of his/her ability to request accommodations pursuant to 103 DOC 408, Reasonable Accommodations for Inmates, for a physical or mental disability that impairs his/her ability to participate in the review;

(v) Inform the inmate he/she may submit documentation and/or a written statement;

(vi) Inform the inmate of the basis upon which the inmate is housed in Non-Disciplinary Restrictive Housing (e.g., awaiting a disciplinary hearing, pending investigation, etc.);

(vii) Inform the inmate of the nature of the threat requiring the Non-Disciplinary Restrictive Housing placement (i.e., whether the inmate needs to be separated from general population to protect the inmate from harm from others or whether the inmate's retention in general population poses an unacceptable risk to: the safety of others; damage or destruction of property; or to the operation of a correctional facility), in sufficient detail to permit the inmate to prepare for the review;

(b) Review: A CPO shall conduct the review. The inmate shall be offered the opportunity to participate in the review in person. The review shall not be conducted at cell-front. The inmate's refusal to appear at the scheduled review shall not be held against the inmate. The inmate's refusal to attend shall be documented in IMS.

At the review, if the inmate chooses to participate in person, the inmate may offer a verbal and/or written statement and/or submit documentation to contest the rationale for his/her placement in Non-Disciplinary Restrictive Housing; said written statement and/or documentation must be submitted to the CPO either at or before the review. If the inmate does not participate in the review in person, the inmate may still submit a written statement and/or documentation to contest the rationale for his/her placement in Non-Disciplinary Restrictive Housing. If the inmate chooses

to submit a written statement and/or other documentation in lieu of appearing in person at the review, the inmate shall submit any such statement and/or documentation to the CPO before the scheduled time of the review.

Unless safety or security concerns could be implicated or an investigation could be negatively impacted, during the Placement Review, the CPO will summarize the factual basis or bases for the Non-Disciplinary Restrictive Housing placement.

If the inmate had previously been provided with behavior standards and program participation goals, the CPO shall evaluate the inmate's compliance with said standards and goals at the review. An inmate's failure to meet some or all of the standards and goals shall not preclude an inmate's release from Non-Disciplinary Restrictive Housing.

At the conclusion of the review, if the inmate participated in person, the CPO shall orally inform the inmate of the recommendation as to whether there is a need for the inmate's continued placement in Non-Disciplinary Restrictive Housing.

(c) Recommendation: Within two (2) calendar days of the review, the CPO shall enter a recommendation in IMS as to whether the inmate should continue to be housed in Non-Disciplinary Restrictive Housing. A copy of this recommendation shall be served on the inmate. The recommendation shall include, but not be limited to, a description of the underlying basis that led to the Non-Disciplinary Restrictive Housing placement (e.g., pending disciplinary hearing), and a determination whether the inmate's return to general population would pose an unacceptable risk to self or others, property, or to the security or orderly running of the institution. Unless safety or security concerns could be implicated or an investigation could be negatively impacted, the written recommendation shall generally describe the factual basis or bases of the recommendation, including a brief description of any evidence relied upon by the CPO. The written recommendation shall also document whether the inmate made or submitted any statement or documents, and that any statement(s) and/or documents deemed relevant were considered. Where behavior standards and goals have previously been provided to the inmate, the recommendation will explain why Non-Disciplinary Restrictive Housing remains necessary and detail any non-compliance with the standards and

goals. An inmate's non-compliance with the standards and goals will not foreclose a recommendation for release from Non-Disciplinary Restrictive Housing.

When the recommendation is to retain the inmate in Non-Disciplinary Restrictive Housing, the CPO shall notify the inmate of the right to appeal to the Superintendent and the procedure for appealing. This notification shall be documented in IMS.

(d) **Standards/Goals:** Within two (2) calendar days of the review, the inmate shall also be served with written notice of the behavioral standards and program participation goals that will increase the inmate's chances of a less restrictive placement upon the next Placement Review. The written notice shall include a list of the specific programs being recommended for the inmate while in Non-Disciplinary Restrictive Housing at that facility.

(e) **Inmate Appeal:** If the inmate disagrees with the written recommendation of the CPO, the inmate may submit a written appeal to the Superintendent within five (5) business days of service of the written recommendation.

(f) **Final Decision:** The Superintendent or designee shall render the final decision in IMS and provide the inmate with such decision in writing within five (5) calendar days after the closing date of the appeal period. If the decision is that the inmate should remain in Non-Disciplinary Restrictive Housing, the written decision shall explain the reasons for the inmate's continued placement/status, including but not limited to, a description of the underlying basis that led to the Non-Disciplinary Restrictive Housing placement (e.g., pending disciplinary hearing) and an explanation why the inmate's return to general population would pose an unacceptable risk to life, property, staff or other inmates, or to the security or orderly running of the institution. Unless safety or security concerns could be implicated or an investigation could be negatively impacted, the written decision shall also describe the factual basis or bases for the decision.

D. Ninety (90) Day Placement Reviews.

(1) The parties agree to the following in regard to reviews required by *LaChance v. Commissioner of Correction*, 463 Mass. 767 (2012), and the Placement

Reviews required by M.G.L. c. 127, §39B(c) for Non-Disciplinary Restrictive Housing placements:

(a) The Department shall combine any review required by *LaChance* with a Placement Review under M.G.L. c. 127, § 39B(c) when said Placement Review would generally coincide with the time by which a review under *LaChance* would also be required (e.g., by day ninety (90) of the inmate's placement in Non-Disciplinary Restrictive Housing).

(b) The Department will schedule such ninety (90) Day Placement Reviews within eighty (80) days of an inmate's initial placement in Non-Disciplinary Restrictive Housing.

(c) The ninety (90) day Placement Reviews shall be conducted by a three (3) person Placement Review Committee ("Committee") consisting of one member of the security staff, one member of the programming staff, and one member of the mental health staff.

(d) The Department will provide the inmate with forty-eight (48) hours written notice prior to each ninety (90) day Placement Review.

(e) The Department will offer the inmate the opportunity to participate in person; the inmate may choose to participate in writing instead, and may also make a written submission if participating in person.

(f) Upon review, if no placement change is ordered, the Department will provide the inmate with a written statement of the information relied on and the reasons for the placement decision.

(g) The Department will provide the inmate, in writing, with behavior standards and program participation goals that will increase the inmate's chance of a less restrictive placement upon the next Placement Review if no placement change was ordered.

(2) The process for the Ninety (90) day Placement Reviews is as follows:

(a) **Notice:** The inmate shall be provided with at least forty-eight (48) hours advance written notice of the Placement Review. Along with the notice, the inmate shall also be provided with copies of any documents not in the inmate's possession that the Placement Review Committee intends

to consider unless safety or security concerns could be implicated or an investigation could be negatively impacted. Notice shall be documented and may be waived by the inmate in writing. The notice shall:

- (i) Inform the inmate he/she has the choice whether to participate in the Placement Review in person and/or in writing;
- (ii) Inform the inmate of the availability of the Language Line if the inmate has limited English proficiency;
- (iii) Inform the inmate that, if the inmate uses ASL, ASL interpretive services will be provided at the Placement Review if the inmate participates in the Placement Review in person;
- (iv) Inform the inmate of his/her ability to request accommodations pursuant to 103 DOC 408, Reasonable Accommodations for Inmates, for a physical or mental disability that impairs his/her ability to participate in the Placement Review;
- (v) Inform the inmate he/she may submit documentation and/or a written statement;
- (vi) Inform the inmate of the basis upon which the inmate is housed in Non-Disciplinary Restrictive Housing (e.g., awaiting a disciplinary hearing, pending investigation, etc.);
- (vii) Inform the inmate of the nature of the threat requiring the Non-Disciplinary Restrictive Housing placement (i.e., whether the inmate needs to be separated from general population to protect the inmate from harm from others or whether the inmate's retention in general population poses an unacceptable risk to: the safety of others; damage or destruction of property; or to the operation of a correctional facility), in sufficient detail to permit the inmate to prepare for the review;
- (viii) As applicable, inform the inmate of his/her ability to request that the Placement Review conducted one-hundred and eighty (180) days after initial placement in Non-Disciplinary Restrictive Housing, and every ninety (90) day Placement Review thereafter, be recorded. The inmate shall make any such request for recording at least twenty-four (24) hours before the scheduled Placement Review.

(b) Review: A three (3) person Placement Review Committee shall conduct the Placement Review. The inmate shall be offered the opportunity to participate in the Placement Review in person. The Placement Review shall not be conducted at cell-front. The inmate's refusal to appear at the scheduled Placement Review shall not be held against the inmate. The inmate's refusal to attend shall be documented in IMS.

At the Placement Review, if the inmate participates in person, the inmate may offer a verbal and/or written statement and/or submit documentation to contest the rationale for his/her placement in Non-Disciplinary Restrictive Housing; said written statement and/or documentation must be submitted to the Committee either at or before the Placement Review. If the inmate does not participate in the Placement Review in person, the inmate may still submit a written statement and/or documentation to contest the rationale for his/her placement in Non-Disciplinary Restrictive Housing. If the inmate chooses to submit a written statement and/or other documentation in lieu of appearing in person at the Placement Review, the inmate shall submit any such statement and/or documentation to the Committee before the scheduled time of the Placement Review.

When the inmate participates in the Placement Review in person, the Committee shall review with the inmate the information contained in the forty-eight (48) hour notice as to why the inmate's retention in general population is thought to pose an unacceptable risk to the safety of self or others, property, or to the security or orderly running of the institution. Unless safety or security concerns could be implicated or an investigation could be negatively impacted, during the Placement Review, the Committee will also summarize the factual basis or bases for the Non-Disciplinary Restrictive Housing placement.

If the inmate had previously been provided with behavior standards and program participation goals, the Committee shall evaluate the inmate's compliance with said standards and goals at the Placement Review.

At the conclusion of the Placement Review, if the inmate participated in person, the Committee shall orally inform the inmate of the recommendation as to whether there is a need for the inmate's continued placement in Non-Disciplinary Restrictive Housing.

The Placement Review conducted one-hundred and eighty (180) days after initial placement in Non-Disciplinary Restrictive Housing, and every ninety (90) day Placement Review thereafter shall be recorded if the inmate so requests. A copy of the recording for any Placement Review that was recorded will be provided to the inmate without charge if the inmate so requests.

(c) Recommendation: Within two (2) calendar days of the review, the Committee shall enter a recommendation in IMS as to whether the inmate should continue to be housed in Non-Disciplinary Restrictive Housing. A copy of this recommendation shall be served on the inmate. The recommendation shall include, but not be limited to, a description of the underlying basis that led to the Non-Disciplinary Restrictive Housing placement (e.g., pending disciplinary hearing), and a determination whether the inmate's return to general population would pose an unacceptable risk to self or others, property, or to the security or orderly running of the institution. Unless safety or security concerns could be implicated or an investigation could be negatively impacted, the written recommendation shall generally describe the factual basis or bases of the recommendation, including a brief description of any evidence relied upon by the Committee. The written recommendation shall also document whether the inmate made or submitted any statement or documents, and that any statement(s) and/or documents deemed relevant were considered. Where behavior standards and goals have previously been provided to the inmate, the recommendation will explain why Non-Disciplinary Restrictive Housing remains necessary and detail any non-compliance with the standards and goals. An inmate's non-compliance with the standards and goals will not foreclose a recommendation for release from Non-Disciplinary Restrictive Housing.

When the recommendation is to retain the inmate in Non-Disciplinary Restrictive Housing, the Committee shall notify the inmate of the right to appeal to the Superintendent and the procedure for appealing. This notification shall be documented in IMS.

(d) Standards/Goals: Within two (2) calendar days of the Placement Review, the inmate shall also be served with written notice of the behavioral standards and program participation goals that will increase the inmate's chances of a less restrictive placement upon the next Placement

Review. The written notice shall include a list of the specific programs being recommended for the inmate while in Non-Disciplinary Restrictive Housing at that facility.

(e) Inmate Appeal: If the inmate disagrees with the written recommendation of the Committee, the inmate may submit a written appeal to the Superintendent or designee within five (5) business days of service of the written recommendation.

(f) Final Decision: The Superintendent or designee shall render the final decision in IMS and provide the inmate with such decision in writing within five (5) calendar days after the closing date of the appeal period. If the decision is that the inmate should remain in Non-Disciplinary Restrictive Housing, the written decision shall explain the reasons for the inmate's continued placement/status, including but not limited to, a description of the underlying basis that led to the Non-Disciplinary Restrictive Housing placement (e.g., pending disciplinary hearing) and an explanation why the inmate's return to general population would pose an unacceptable risk to life, property, staff or other inmates, or to the security or orderly running of the institution. Unless safety or security concerns could be implicated or an investigation could be negatively impacted, the written decision shall also describe the factual basis or bases for the decision.

E. Written Notice to Inmates Who Refuse to Leave Restrictive Housing

When an inmate is in Non-Disciplinary Restrictive Housing solely due to his/her refusal to accept a housing placement in a general population unit, the inmate shall be informed in writing that he/she cannot remain and his/her continued placement is solely due to his/her refusal to leave. Thereafter, for the duration of the time the inmate remains in Non-Disciplinary Restrictive Housing due to the inmate's refusal to leave, Department officials shall encourage the inmate to leave Non-Disciplinary Restrictive Housing during weekly rounds and document this, as well as the inmate's stated reason(s) for refusing to leave, in IMS.

F. Assistance for Reviews

A CPO will assist the inmate in preparing for/participating in the thirty (30) day CPO Review, any Enhanced Placement Reviews, any Ninety (90) Day Placement

Reviews, and/or any appeal as needed if the inmate is illiterate or non-English speaking or has a mental or physical disability that impairs his/her ability to participate in such review or appeal. Such assistance may include, but not be limited to, reading to the inmate the written Notice and any other documents submitted in relation to the review; writing any statement the inmate wants to submit; utilizing the Language Line to communicate with the inmate; writing any appeal the inmate wants to submit; and/or, where the inmate may participate in a review in person, i.e., the thirty (30) day CPO review and the ninety (90) day Reviews, ensuring that arrangements for use of the Language Line or ASL interpretive services at the review are made.

G. Documentation of Reviews

(1) The twenty-four (24) or forty-eight (48) hour notice that was served on the inmate shall be documented by uploading a copy of the completed notice into IMS.

(2) Any handwritten statements or submissions from the inmate shall be documented by uploading copies into IMS.

(3) Any appeal submitted by the inmate shall be documented by uploading a copy into IMS.

(4) The Placement Review/CPO Review, Recommendation, and Decision shall be documented by entering such information into IMS.

(5) In the event a document cannot be uploaded into IMS for any reason, the original shall be retained and uploaded once the function becomes available in IMS.

IV. PROGRAMMING/ACTIVITIES IN NON-DISCIPLINARY RESTRICTIVE HOUSING

For purposes of settlement and without prejudice to the right of the Class Members or the Department of Correction and/or its employees to bring or defend claims under the CJRA outside the context of this Action, the Department agrees to the following:

A. After placement in Non-Disciplinary Restrictive Housing, inmates shall be reviewed by the Department, either directly or through a vendor, to determine which

programs would be appropriate for the inmate while the inmate remains in Non-Disciplinary Restrictive Housing.

B. Programming shall be available to all inmates after no more than thirty (30) days in Non-Disciplinary Restrictive Housing, or as soon as it is determined they are reasonably likely to remain in Non-Disciplinary Restrictive Housing for more than thirty (30) days, whichever comes first.

C. Facilitated Education, for the purpose of high school equivalency, will be offered to all inmates in Non-Disciplinary Restrictive Housing who have been determined to be in need of such programming and who are expected to remain in Non-Disciplinary Restrictive Housing for more than thirty (30) days:

(1) A licensed teacher will assess the educational needs of the inmates, provide inmates with grade-level appropriate in-cell work, and provide individual direction;

(2) Inmates with low literacy levels or limited English proficiency will be provided with instruction through a blended learning model that may include the use of technology (e.g., tablets) as well as teacher-led instruction for the purpose of becoming more proficient in English and increasing literacy levels.

D. The Department, either directly or through a vendor, with oversight from the Department's Program Services Division, will be responsible for implementing and monitoring tablet-based programming. The provision of tablet-based programming for inmates in Non-Disciplinary Restrictive Housing is subject to the availability and receipt of appropriated funds and the competitive procurement process.

(1) The tablet-based programming, subject to the availability and receipt of appropriated funds and the competitive procurement process, may include the following:

(a) Criminal Thinking Program – This program is designed to focus on altering the pro-criminal thinking patterns that have been identified as separating those who are serious repeat offenders from those who are not. The program focuses specifically on criminal sentiments and how to develop pro-social alternatives for them. The program assists the inmate in developing pro-social alternatives to past activities and associates;

(b) Substance Use Education - This program is designed to educate and raise awareness of the consequences of continued substance use. The

focus of the program is to educate the inmate about substances and issues related to their use. Emphasis is placed on biological, psychological, and social consequences of continuing to use substances while incarcerated.

(c) Violence Reduction – This program targets cognitions that contribute to violent behavior. The goals of the program are to decrease violent behavior and the likelihood of institutional disturbances. During the program inmates identify the specific cognitions which have led to their violent behavior. Once these cognitions are identified, inmates are taught pro-social strategies and skills to diminish the likelihood of continued violence.

(d) Relapse Prevention – This program is designed to assist inmates in identifying those high risk situations that may lead to relapse and to teach them skills to address these situations without relapse.

(e) Community Recovery Training (CRT) Curriculum – Community Recovery Training consists of self-help curricula such as “Understanding Your Feelings,” “Finding Your Direction,” “Coping Skills,” and modules that include the following topics:

- Module 1
Too Proud to Learn
Goals and Dreams
Sources of Strength
- Module 2
Guilt Kills
Self-Assessment
Keeping On
- Module 3
Old Friends
New Friends
New Groups
Recovery Partners
- Module 4
Family Ties
Using Help
Preparing for Home life

(2) Inmates who have an SMI and/or who are reasonably expected to remain in Non-Disciplinary Restrictive Housing for more than thirty (30) days will be prioritized for programming:

(a) Such inmates will be provided program tablets, subject to the availability and receipt of appropriated funds and the competitive procurement process, that contain the appropriate recommended programming as well as any workbooks that accompany such programming modules;

(b) The Department, either directly or through vendor staff, will advise such inmates as to the programming modules to be completed, monitor inmates' progress, and report such progress to Department staff.

(3) If a tablet is not available, the inmate may be provided with hard copies, e.g., booklets, handouts, etc., of materials necessary for the inmate to participate in the relevant program(s).

E. Inmate participation in programs will be monitored and tracked by the Department via IMS.

F. Inmates will be eligible to receive earned good time credit for successful participation in programs at the same rate and in the same manner as inmates in general population.

G. Upon release to general population, subject to availability in the appropriate facility and/or any program wait lists, inmates may continue and complete designated programs that were begun in Non-Disciplinary Restrictive Housing.

H. Upon transfer out of Non-Disciplinary Restrictive Housing to an alternative non-restrictive housing unit, such as an STU or SAU, inmates may continue and complete designated programs that were begun in Non-Disciplinary Restrictive Housing.

I. Subject to any disciplinary sanctions that might be imposed in accordance with 103 CMR 430, Inmate Discipline, upon placement in Non-Disciplinary Restrictive Housing, an inmate may keep either his/her personal tablet or personal radio, but not both. Said tablet or radio will be provided to the inmate within twenty-four (24) hours of the inmate's request.

J. Subject to any disciplinary sanctions that might be imposed in accordance with 103 CMR 430, Inmate Discipline, upon placement in Non-Disciplinary Restrictive

Housing, an inmate who does not possess a personal tablet or personal radio may request temporary use of a loaner radio. Within twenty-four (24) hours of the inmate's request, the inmate will be allowed the temporary use of a loaner radio, subject to availability, while in Non-Disciplinary Restrictive Housing.

V. REGULATIONS ON PROGRAMMING AND OUT OF CELL ACTIVITY

The Department agrees that, if it has not already done so as of the effective date of this Settlement Agreement, within sixty days of approval of this Agreement it will initiate the process to promulgate regulations in accordance with M.G.L. c. 30A, M.G.L. c. 127 §§ 39B (e) and 39E.

VI. INMATES WITH VERIFIED SAFETY NEEDS

Upon verification by the Department that an inmate requires separation from general population to protect the inmate from harm by others, the inmate shall not be placed in Non-Disciplinary Restrictive Housing solely for that reason for longer than seventy-two (72) hours unless the Department complies with the certification requirements set forth in M.G.L. c. 127, §39A(b). Such verification is not limited to instances where the inmate has been classified to a Special Housing Unit (SHU).

VII. DEPARTMENT DISCIPLINARY UNIT ("DDU")

Although this litigation does not raise any claims pertaining to Disciplinary Restrictive Housing, i.e., inmates who are in Restrictive Housing serving a disciplinary sanction, for purposes of settlement and without prejudice to the right of the Class Members or the Department of Correction and/or its employees to bring or defend claims under the CJRA outside the context of this Action, the Department agrees to the following:

- A. After placement in the DDU, inmates will be reviewed by the Department, either directly or through a vendor, to determine which programs would be appropriate for the inmate while the inmate remains in the DDU, and will be offered access to programming.
- B. The Department, either directly or through a vendor, with oversight from the Department's Program Services Division, will continue to offer the following programs to inmates in the DDU:

(1) High Risk Offender Program – This program is directed at inmates who have been placed in the DDU as a result of having displayed a history of staff or inmate assaults, gang activity, chronic disruptive behavior and/or who have been identified as a threat to the correctional system in general. A goal of this program is to provide inmates with the skills to prepare them for their return to general

population and participation in more intensive programs. The program consists primarily of independent workbook assignments and small group activities using a cognitive behavioral treatment model;

(2) Gateway to Treatment - This is a non-residential substance abuse treatment program designed to educate and raise awareness of the consequences of continued substance use. Emphasis is placed on biological, psychological, and social consequences of continuing to use substances;

(3) Facilitated Education - This program consists of the program requirements described in Section IV (C) above for inmates in Non-Disciplinary Restrictive Housing;

(4) OSHA - This ten-hour certification safety course includes electric and fire safety, slip and fall prevention, chemical safety, and more. As of the date of execution of the Settlement Agreement, this course satisfies the OSHA 10 certification requirement for workers on construction sites. The program content is delivered through a self-study model and the instructor provides the necessary study materials. Arrangements are made for the exam to be proctored once the inmate has expressed a readiness to take the required test. Inmates are responsible for payment of the exam fee;

(5) ServSafe - This one to four month program is designed to provide inmates with the education necessary to earn a nationally recognized ServSafe Certification. This certification is useful for obtaining employment in the food service industry. The program content is delivered through a self-study model and the instructor provides the necessary study materials. Arrangements are made for the National ServSafe Exam to be proctored once the inmate has expressed a readiness to take it. Inmates are responsible for payment of the ServSafe exam fee.

C. The Department, either directly or through a vendor, with oversight from the Department's Program Services Division, will be responsible for implementing and monitoring tablet-based programming in the DDU. The provision of tablet-based programming for inmates in the DDU is subject to the availability and receipt of appropriated funds and the competitive procurement process. The tablet-based programming may include the same programs as described in Section IV (D) above for inmates in Non-Disciplinary Restrictive Housing. If a tablet is not available, the inmate may be provided with program material in paper form, e.g., booklets, handouts, etc., necessary for the inmate to participate in the relevant program(s).

D. Inmate participation in programs will be monitored and tracked by the Department via IMS.

E. Inmates will be eligible to receive earned good time credit for successful participation in such programs at the same rate and in the same manner as inmates in general population.

F. Upon release to general population, subject to availability in the appropriate facility and/or any program wait lists, inmates may continue and complete designated programs that were begun in the DDU.

G. Upon transfer to an alternative non-restrictive housing unit, such as an STU or SAU, from the DDU, and subject to availability, inmates may continue and complete designated programs that were begun in the DDU.

VIII. RECORDS AND REPORTS

A. Four times per year during the course of the Settlement Agreement, i.e., Quarterly, subject to the Protective Order entered by the Court on April 13, 2018 or any subsequent protective order that may be entered by the Court in this Action, the Department will provide Class Counsel with a Quarterly Report or Quarterly Reports that contain the following information:

- (1) The names and commitment numbers of each inmate who is, as of the date of the report(s), in a Restrictive Housing Unit, broken down by facility;
- (2) The reason why each inmate is in a Restrictive Housing Unit as of the date of the report(s); e.g., needs protection, awaiting disciplinary hearing, awaiting out of state placement, refusal to leave RHU;
- (3) The total number of days each inmate has been in a Restrictive Housing Unit as of the date of the report(s);
- (4) Whether each inmate in a Restrictive Housing Unit, as of the date of the report(s), has an SMI and, if so, their mental health classification.

B. Within fourteen (14) business days of receipt of the report(s) referenced in Sections VIII (A) above, Class Counsel may request from the Department documentation pertaining to Enhanced Placement Reviews, 30-day CPO Reviews (i.e., CPO Review

conducted within thirty days of an inmate's initial placement in Non-Disciplinary Restrictive Housing), and 90-day Placement Reviews, up to a maximum of three (3) such reviews per inmate conducted during that Quarter for up to four (4) inmates from each facility with an RHU. For each Quarter, in lieu of requesting such documentation pertaining to inmates confined at MCI-Framingham, the Massachusetts Treatment Center, and/or NCCI-Gardner, Class Counsel may instead choose to request such documentation pertaining to the same number of inmates from another facility (e.g., instead of requesting reviews pertaining to four (4) inmates at NCCI-Gardner, Class Counsel could request reviews pertaining to eight (8) inmates at MCI-Cedar Junction).

This documentation will include, as applicable, Commissioner certifications that coincide with the reviews, notices of reviews, CPO/Placement Review Committee recommendations, inmate appeals, final decisions; any waivers signed by the inmate; and all documents and written statements submitted by the inmate. Class Counsel may only request documents created or utilized during that particular Quarter, and Class Counsel may not request documents pertaining to reviews that pre-date the effective date of this Settlement Agreement. Subject to the Protective Order entered by the Court on April 13, 2018 or any subsequent protective order that may be entered by the Court in this Action, for each of the inmates identified by Class Counsel in accordance with the preceding paragraph, the Department will provide all relevant documentation pertaining to the most recent Enhanced Placement Review (Section IV(B) above), the thirty (30) day CPO Review (Section IV(C) above), and the ninety (90) day Placement Reviews (Section IV (D) above), for any such reviews that were conducted during that Quarter. The Department will have twenty-one (21) business days from receipt of Class Counsel's request, unless a longer time is agreed to by Class Counsel, to provide the responsive documents.

C. Within fourteen (14) business days following receipt of the review documentation referenced in Section VIII (B) above, Class Counsel may request additional documents if said documents are referred to in the review documentation and relied upon by the CPO or Placement Review Committee in making a recommendation or relied upon by the decision maker in reaching the final decision. Within fourteen (14) business days of receipt of Class Counsel's request for additional documentation, unless a longer time is agreed to by Class Counsel, and subject to the Protective Order entered by the Court on April 13, 2018 or any subsequent protective order that may be entered by the Court in this Action, the Department will provide the responsive document(s), except that the Department may withhold such document(s) or portions of such document(s) that constitute Intelligence Information as defined by M.G.L. c. 6, § 167; Personal Data of Department staff as defined by M.G.L. c. 66A, § 1 (e.g., medical information, home address, personnel information); or information that would negatively impact a pending

investigation or otherwise implicate safety or security concerns. Where documents are withheld in full or in part, the Department will explain the reason for withholding.

D. Along with each Quarterly Report described in Section VIII (A), the Department shall also provide Class Counsel with a copy of the most recent quarterly report that was provided to the restrictive housing oversight committee in accordance with M.G.L. c. 127, 39D(b).

E. Along with each Quarterly Report described in paragraph (A), the Department shall also provide Class Counsel, upon request, with all recordings of Placement Reviews that were made during the relevant Quarter in accordance with this Agreement.

IX. DISPUTE RESOLUTION AND ENFORCEMENT

A. If Plaintiffs believe that the Department is not in substantial compliance with any Section of this Settlement Agreement, Plaintiffs, through Class Counsel, shall provide the Department, in writing, with specific reasons why it is believed that the Department is not in substantial compliance with such Section or Sections, referencing the specific Section or Sections. The parties agree that any minor, incidental, or isolated breach or delay in implementation of any Section of this Agreement shall not constitute substantial non-compliance. Plaintiffs may also not allege that the Department is not in substantial compliance without evidence of same with regard to that Section or Sections. The parties also agree that any disagreement between the parties as to the statutory requirements of the CJRA may not form the basis of an allegation that the Department is not in substantial compliance with this Agreement. To the extent that Plaintiffs rely on any document(s) provided by the Department to support an allegation that the Department is not in substantial compliance, Plaintiffs, through Class Counsel, shall make specific reference to said document(s) that support Plaintiff's allegation.

The purpose of Plaintiffs providing the Department with notice in writing is to give the Department a reasonable opportunity to review, discuss, respond to, and/or correct any alleged substantial non-compliance. Plaintiffs, through Class Counsel, shall also make reasonable efforts to meet promptly and in good faith with the Department to attempt to resolve the alleged substantial non-compliance.

If the Department and Plaintiffs, through Class Counsel, are not successful in their efforts to resolve the matter, they may jointly or individually seek relief from the Court to effect substantial compliance with the Settlement Agreement, but not through a petition for contempt.

B. The Court's jurisdiction shall terminate at the end of the two (2) year settlement period with respect to any Section or Sections of this Settlement Agreement for which there is no outstanding determination that the Department is not in substantial compliance with a Section or Sections of this Settlement Agreement. If the Court determines that the Department is not in substantial compliance with a Section or Sections of this Settlement Agreement at any time during the two (2) year period of the Settlement Agreement, the Court's jurisdiction with respect to such Section or Sections relating thereto may continue for the remainder of the two (2) year period or for a period to be ordered by the Court of not more than two (2) years from the date of the Court's finding that the Department is not in substantial compliance. However, the Court's jurisdiction shall not terminate while a motion for relief that was filed within the two (2) year settlement period is pending before the Court. Although the Court's jurisdiction shall not terminate while a timely motion for relief is pending, at the end of the two (2) year settlement period, the Department's obligations under this Agreement terminate unless and until such time as the Court rules on any pending motion for relief, determines that the Department was not in substantial compliance with a Section or Sections of this Agreement, and enters an order extending the settlement period for such Section or Sections.

C. If the Court finds that the Department is not in substantial compliance with a Section or Sections of this Settlement Agreement, the Court may enter an order consistent with equitable principles, but not an order of contempt, that is designed to achieve compliance.

D. If Plaintiffs, through Class Counsel, contend that the Department has not complied with an order entered under the preceding paragraph, Plaintiffs, through Class Counsel, after reasonable notice to the Department, may move for further relief from the Court to obtain compliance with the Court's prior order. In ruling on such a motion, the Court may apply equitable principles and may use any appropriate equitable or remedial power then available to it.

E. If Plaintiffs, through Class Counsel, seek relief from the Court to effect the Department's substantial compliance with the Settlement Agreement, and the Court orders relief, Plaintiffs shall not be precluded from moving for reasonable attorneys' fees and costs incurred in procuring such relief. Defendants reserve their right to oppose or otherwise respond to such motion. Nothing in this Agreement waives any party's arguments in support of or in opposition to a motion for attorneys' fees and costs brought in accordance with this paragraph or any party's right to appeal from any Court order that enters in regard to attorneys' fees and costs sought in accordance with this paragraph.

X. FORM OF AGREEMENT

A. Scope

(1) The parties hereby memorialize the terms of their agreement in this Settlement Agreement.

(2) This Settlement Agreement resolves any and all claims, as set forth in the Introduction of this Agreement, against the Defendants and shall be binding on the parties, their successors, and assignees.

(3) This Settlement Agreement constitutes the full and entire agreement of the parties and, except for any Protective Order entered by the Court in this Action, supersedes all prior agreements, representations, negotiations, understandings, and undertakings in this Action between the parties not set forth or incorporated herein.

B. Court Approval, Jurisdiction, and Enforcement

(1) The Settlement Agreement is not effective absent final approval by the Court.

(2) The parties, through counsel, shall file a joint motion for the Court to approve this Settlement Agreement. The parties shall also cooperate in presenting this Settlement Agreement to the Court for approval and/or at any hearing under Mass. R. Civ. P. 23(c). If the Court approves this Agreement, the parties stipulate that this Agreement shall not be construed as a consent decree. If the Court does not approve this Agreement in all respects, this Agreement shall be null and void and of no force and effect, and nothing herein shall be deemed to prejudice the position of any party with respect to this Action or otherwise, and neither the existence of this Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be admissible in evidence, referred to for any purpose in this Action or in any other litigation or proceeding, or construed as an admission, presumption, or concession by any defendant of any liability or the truth of any of the allegations in this Action.

(3) The term of this Settlement Agreement and the jurisdiction of the Court shall commence upon the date of final approval by the Court and shall extend for two (2) years from said date of approval, subject to Section IX (B). Subject to Section IX (B) above, the Settlement Agreement shall expire at the end of two (2) years from the date of approval by the Court and the Action shall be dismissed with prejudice.

(4) The Court (Suffolk Superior Court) shall be the sole forum for the enforcement of this Settlement Agreement.

(5) The parties agree not to seek termination or otherwise challenge this Settlement Agreement or any order approving this Settlement Agreement during the period of time that the Court retains jurisdiction pursuant to Section IX (B) above. Nothing in this paragraph shall limit the parties' rights to challenge or appeal any finding as to whether the Department is not in substantial compliance, or consequent order entered by the Court pursuant to Sections IX (C) and (D) of this Settlement Agreement.

(6) This Settlement Agreement may be enforced only by counsel for the parties thereto. Individual Class Members shall not be entitled to seek enforcement of the Settlement Agreement by filing *pro se* complaints or pleadings in any court or by filing complaints or pleadings by any attorney or attorneys other than Class Counsel. Only Class Counsel is authorized to seek enforcement of the Settlement Agreement on behalf of the class or any Class Member. In the event that any individual Class Member seeks enforcement of this Settlement Agreement by filing *pro se* complaints or pleadings with any court or by filing complaints or pleadings by any attorney or attorneys other than Class Counsel, defense counsel in this Action, after becoming aware of such filings, shall bring such complaints or pleadings to the attention of Class Counsel. Class Counsel and defense counsel shall then jointly notify the court where such complaints or pleadings were filed of this Settlement Agreement and that only Class Counsel, on behalf of the class or any Class Member, may seek enforcement of this Settlement Agreement. Nothing contained in this Settlement Agreement is intended or shall be construed to evidence an intention to confer any rights or remedies upon any person other than the parties hereto.

C. Amendments

By mutual agreement, the parties may change the terms of this Settlement Agreement, provided that such mutual agreement is memorialized in writing, signed by the parties, through counsel, and approved by the Court.

XI. Funding and Competitive Procurement Process

A. The parties acknowledge that implementation of certain aspects of this Settlement Agreement is subject to the availability and receipt of appropriated funds and/or the competitive procurement process.

B. The Department agrees to make all possible good faith efforts to seek all necessary funding to implement fully the terms of this Settlement Agreement.

C. The Department agrees to make all possible good faith efforts to utilize the public procurement process, as necessary, to implement fully the terms of this Settlement Agreement.

D. In the event that the parties are unable to agree as to whether there is sufficient funding or whether the competitive procurement process has been successfully completed, the parties shall meet and confer, and, if necessary, consult the Court. In the event the parties continue to be unable to agree, either the Department or Plaintiffs, through Class Counsel, may invoke the dispute resolution procedures in Section IX of this Settlement Agreement to seek assistance of the Court. Nothing in this Settlement Agreement is intended or shall be construed as entitling the Plaintiffs, Class Counsel, or the Court to access any non-public information related to the competitive procurement process.

XII. ATTORNEYS' FEES AND COSTS

For the purpose of compromise and settlement, the Department, through the Commonwealth of Massachusetts, agrees to pay reasonable attorneys' fees and costs to Prisoners' Legal Services (PLS), in the total amount of \$60,000.00 (sixty thousand dollars) to settle PLS's claim for attorneys' fees and costs. PLS agrees not to seek further attorneys' fees or costs with respect to work conducted prior to the date of final approval of this Settlement Agreement. PLS also agrees not to seek further attorneys' fees or costs with respect to any work that may be conducted after the date of final approval of this Settlement Agreement, except as set forth in Section IX (E) above.

XIII. MISCELLANEOUS

A. This Settlement Agreement shall be deemed to be made and entered into in the Commonwealth of Massachusetts and shall in all respects be interpreted, enforced, and governed under the laws of said Commonwealth. The parties expressly acknowledge that any subsequent changes to such laws, including changes or amendments to M.G.L. c. 127, §§ 1, 39, 39A, 39B, 39C, 39E, and 39F, or any other relevant statute, shall govern and apply to the parties and this Agreement.

B. This Settlement Agreement may not be relied upon as precedent in any future claim or litigation and shall not in any way be construed as an admission, presumption, or concession by any defendant or the Department of any liability or wrongdoing whatsoever.

C. Each party represents and acknowledges that each party is and has been represented by its own counsel. Each party further represents and acknowledges that, in executing this Settlement Agreement, no party relies or has relied upon any representations or statements made by any other party or its counsel other than the promises and representations set forth in this Agreement. Class Counsel certify that they are duly authorized by the class representatives to enter this Settlement Agreement, by which all class members shall be bound, and that Class Counsel and the Executive Director of Prisoners' Legal Services have full authority to sign this Agreement.

D. Should any part, term, or provision of this Settlement Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement.

E. This Settlement Agreement is the result of arms-length negotiation. Since all parties contributed substantially, materially, and cooperatively in drafting this Agreement, it shall not be more strictly construed against one party than the other.

F. This Settlement Agreement may be executed in a number of identical counterparts, all of which shall together constitute one Agreement, and any such execution may be evidenced by signatures delivered by facsimile transmission or other electronic means.

Class Counsel on behalf of Plaintiffs and other Class Members:

 ASB

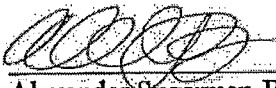
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Dated: 5/21/19

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Carol Mici

Date: 5/21/19

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 1284-cv-0250

ROBERT CANTELL, et al.,
Plaintiffs,

v.

COMMISSIONER OF CORRECTION, et al.,
Defendants.

MEMORANDUM IN SUPPORT OF
JOINT MOTION TO APPROVE SETTLEMENT AGREEMENT

The Plaintiffs and the Defendants jointly submit this memorandum in support of their motion for approval of the Settlement Agreement ("Agreement"). The Agreement is attached to the parties' motion for approval as Exhibit A. The Parties request that this Court approve the Agreement and that it retain jurisdiction for two years, as discussed below. The parties have reached this Agreement after extensive, arms-length negotiations. This memorandum is being submitted solely for the purpose of seeking court approval of the Agreement and it is not intended by the parties to alter or supersede any provision of the Agreement or to be used to interpret any provision of the Agreement; rather, the provisions of the Agreement shall stand on their own.

I. PROCEDURAL HISTORY AND BACKGROUND FACTS

The instant lawsuit was filed as a putative class action by plaintiffs Robert Cantell and Derrick Maldonado on January 20, 2012. The plaintiffs alleged that because they were held in a Special Management Unit (SMU)¹ for non-disciplinary reasons they were entitled to the procedures and protections in 103 CMR 421, Departmental Segregation Units ("DSU regulation"). They claimed that the defendants' failure to provide them with the benefits of

¹ Units formerly known as Special Management Units are now known as Restrictive Housing Units, and the practices formerly known as disciplinary and administrative segregation are now known as disciplinary and non-disciplinary restrictive housing.

that regulation violated their rights under the regulation itself and their rights to due process of law under the United States Constitution and the Massachusetts Declaration of Rights. They also claimed that their right to equal kindness under M.G.L. c. 127, § 32 was violated because they purportedly did not receive the same privileges in the SMU that they would get under the DSU regulation. The complaint sought declaratory and injunctive relief only. On April 12, 2012, an Amended Complaint was filed, which added Wilfredo Virella, John Fernandes, Luis Bizzarro, and Albert Jackson as plaintiffs. The claims alleged in the Amended Complaint were identical to those asserted in the original complaint.

On November 27, 2012, the Supreme Judicial Court decided *LaChance v. Comm'r of Correction*, 463 Mass. 767 (2012), which held that the plaintiff, an inmate in non-disciplinary restrictive housing, had been denied his right to due process under the federal constitution but found the defendants were entitled to qualified immunity. *LaChance* held that federal due process requires that such an inmate receive:

notice of the basis on which he is so detained; a hearing at which he may contest the asserted rationale for his confinement; and a posthearing written notice explaining the reviewing authority's classification decision.

LaChance, 463 Mass. at 776-777.

On January 31, 2013, in a written Memorandum and Order, the Court in this Action, finding that *LaChance* had resolved all the claims alleged in the Amended Complaint, allowed a motion to dismiss that had been filed by defendants and denied plaintiffs' motion for class certification. The Court, in its order of dismissal, ordered that defendants had to extend the benefits of *LaChance* to all inmates held in Non-Disciplinary Restrictive Housing on Awaiting Action (AA) status. The allowance of defendants' motion to dismiss was without prejudice to plaintiffs filing an amended complaint to assert any claims that the Department of Correction was not complying with the requirements set forth in *LaChance*.

On August 1, 2013, final judgment for defendants entered. All plaintiffs, except for Virella and Bizarro, appealed.

In *Cantell v. Comm'r of Correction*, 475 Mass. 745 (2016), the Supreme Judicial Court reversed, clarifying that *LaChance* had only resolved the federal due process claim, and not the state claims based on alleged violations of the DSU regulation. It vacated the dismissal and remanded the case to Suffolk Superior Court for further proceedings consistent with its decision.

After remand, plaintiffs filed a motion to amend the complaint, which was allowed on April 21, 2017, and the Second Amended Complaint, dated February 2, 2017, was accepted for filing. This Second Amended Complaint, which is now the governing complaint, adds new plaintiffs and removes two plaintiffs (Virella and Bizarro). It modifies the plaintiffs' federal due process claim such that, rather than alleging violations from failure to follow the DSU regulation, the plaintiffs allege violations stemming from purported non-compliance with the federal due process procedures set forth in *LaChance*. The complaint also maintains the claims to relief under the DSU regulation and M.G.L. c. 127, § 32.

On June 23, 2017, the Court allowed plaintiffs' motion for class certification and plaintiffs became class representatives for the Class Members. The class representatives under the governing Second Amended Complaint are Robert Cantell, Derrick Maldonado, John T. Fernandes, Albert Jackson, Dale Holloway, Tony Gaskins, Michael Courage, and Justin Garcia. They seek declaratory and injunctive relief on behalf of themselves and all inmates who are now, or may be in the future, confined on Non-Disciplinary Restrictive Housing status in Restrictive Housing Units within Massachusetts Department of Correction ("Department") correctional facilities. The defendants, named in their official capacities only, are the Commissioner of Correction and the Superintendents of each Department facility that operates a Restrictive Housing Unit (RHU).

Subsequently, an Act Relative to Criminal Justice Reform, Chapter 69 of the Acts of 2018 ("CJRA"), was signed into law. Provisions of the CJRA pertaining to Restrictive Housing went into effect on December 31, 2018 and many such provisions bear directly on claims raised in this litigation. The parties engaged in extensive discovery from January to October 2018. As the Department's planning for CJRA implementation advanced, the parties entered into settlement negotiations in October 2018 and they engaged in extensive and arms-length negotiations through the beginning of May 2019.

II. SUMMARY OF THE SETTLEMENT AGREEMENT.

This Agreement resolves all the claims that were alleged or could have been alleged in this Action, and only those claims. While provisions of the CJRA pertaining to Restrictive Housing were considered by the parties and are reflected in the Agreement as appropriate, nothing contained in this Agreement shall be construed as a limitation on the Class Members' rights to bring any claims under the CJRA, or as a limitation on the defenses to such claims that the defendants may raise. Defendants deny that they have violated any federal or state constitutional, statutory, or regulatory rights or provisions, or that the plaintiffs are entitled to the DSU procedures in 103 CMR 421 as a result of confinement on Non-Disciplinary Restrictive Housing status in RHUs.

A. Reviews of restrictive housing placements.

1. Placement Reviews Every Monday, Wednesday, and Friday.

The defendants have agreed to review the status of each inmate in Non-Disciplinary Restrictive Housing every Monday, Wednesday, and Friday by a Placement Review Committee ("PRC"), consisting of, at a minimum, a correctional staff member, a program staff member, and a mental health staff member. This review will determine whether:

- (a) The inmate's placement in Non-Disciplinary Restrictive Housing is reasonably expected to last more than thirty (30) days;
- (b) The inmate's continued placement in Non-Disciplinary Restrictive Housing is justified because the inmate poses an unacceptable risk (i)

to the safety of others or self; (ii) of damage or destruction of property; or (iii) to the operation of a correctional facility;
(c) Transfer of the inmate to an alternative unit is appropriate; and
(d) Release of the inmate from Non-Disciplinary Restrictive Housing is appropriate.

These reviews shall also consider the specific reason(s) for placement, as detailed in the Settlement Agreement, and shall be documented in the Department's Inmate Management System ("IMS"). Additionally, in the case of inmates held in Non-Disciplinary Restrictive Housing who have a Serious Mental Illness ("SMI"), as defined by M.G.L. c. 127, §1, or who have been determined by Department officials to have verified safety needs, the Commissioner or designee shall also complete any certifications required by M.G.L. c. 127, § 39A(a) and (b).

2. Requirements Upon Determination That An Inmate is Expected to Remain in Non-Disciplinary Restrictive Housing for More Than Thirty (30) Days.

Within fifteen (15) days of a determination by the PRC that an inmate's placement in Non-Disciplinary Restrictive Housing is reasonably expected to last more than thirty (30) days, the inmate shall be served with written behavior standards and program participation goals, including a list of the specific programs being recommended for the inmate while in Non-Disciplinary Restrictive Housing at that facility that will increase the inmate's chances of a less restrictive placement upon next Placement Review.

In addition, after such a determination is made, for the duration of the time the inmate remains in Non-Disciplinary Restrictive Housing, the inmate shall thereafter receive Enhanced Placement Reviews conducted by the PRC, in which inmates shall receive written notice prior to the review as detailed in the Agreement; shall have the opportunity to participate in writing; and shall receive a written decision describing the reason for retention in the RHU. After such a determination is made, inmates with SMI and those with verified safety needs shall receive Enhanced Placement Reviews every seventy-two (72) hours; those

awaiting adjudication of a disciplinary report shall receive Enhanced Placement Reviews every fifteen (15) days; and those held in the RHU for any other reason shall receive Enhanced Placement Reviews every ninety (90) days. After each Enhanced Review resulting in retention in the RHU the inmate shall be informed, in writing, as to how compliance with said standards and goals was unsatisfactory and/or whether additional time for compliance is indicated.

3. Thirty-day CPO reviews.

Within twenty-five (25) days of an inmate's placement in Non-Disciplinary Restrictive Housing, the Department shall schedule a review to be conducted by a Correctional Program Officer ("CPO"). The CPO review shall be conducted within thirty (30) days of the inmate's initial placement in Non-Disciplinary Restrictive Housing. For each such review, the inmate shall be provided forty-eight (48) hours written notice prior to the review, as detailed in the Agreement, and the opportunity to participate in the review in person and/or in writing.

During the CPO review, the inmate may offer a verbal and/or written statement and/or submit documentation to contest the rationale for his/her placement in Non-Disciplinary Restrictive Housing. If the inmate does not participate in the review in person, the inmate may still submit a written statement and/or documentation to contest the rationale for his/her placement in Non-Disciplinary Restrictive Housing. Unless safety or security concerns could be implicated or an investigation could be negatively impacted, the CPO will summarize the factual basis or bases for the Non-Disciplinary Restrictive Housing placement. The CPO will also evaluate the inmate's compliance with behavior standards and program participation goals.

At the conclusion of the review, if the inmate participated in person, the CPO shall orally inform the inmate of the recommendation as to whether there is a need for the inmate's

continued placement in Non-Disciplinary Restrictive Housing. Within two (2) calendar days of the review, the CPO shall enter a recommendation in IMS as to whether the inmate should continue to be housed in Non-Disciplinary Restrictive Housing, a copy of which shall be served on the inmate.

4. 90-day PRC Reviews.

The parties agree to placement reviews no later than ninety (90) days in restrictive housing, as required by *LaChance v. Commissioner of Correction*, 463 Mass. 767 (2012), and the CJRA, M.G.L. c. 127, §39B(c). These reviews will be conducted by a PRC consisting of one member of the security staff, one member of the programming staff, and one member of the mental health staff. The Department will provide the inmate with forty-eight (48) hours written notice before each review, as detailed in the Agreement. The inmate will have the opportunity to participate in person or in writing and may make a written submission if participating in person. After the review, if no placement change is ordered, the Department will provide the inmate with a written statement of the information relied on and the reasons for the placement decision.

5. Notice requirements.

The notice required for the thirty (30) day CPO review and ninety (90) day review must inform the inmate of the following rights: that he/she has the choice whether to participate in the review in person and/or in writing; that the Language Line will be available if the inmate has limited English proficiency; that if the inmate uses ASL, ASL interpretive services will be provided for an in-person review; that the inmate may request accommodations for a physical or mental disability; that the inmate may submit documentation and/or a written statement. The notice must also inform the inmate of the basis upon which the inmate is housed in Non-Disciplinary Restrictive Housing (e.g., awaiting a disciplinary hearing, pending investigation, etc.); and the nature of the asserted

threat requiring the Non-Disciplinary Restrictive Housing placement, in sufficient detail to permit the inmate to prepare for the review.

6. Recommendations in 30- and 90-day reviews.

The written recommendation in thirty (30) and ninety (90) day reviews shall include, but not be limited to, a description of the underlying basis that led to the Non-Disciplinary Restrictive Housing placement (e.g., pending disciplinary hearing), and a determination whether the inmate's return to general population would pose an unacceptable risk to life, property, staff or other inmates, or to the security or orderly running of the institution. Unless safety or security concerns could be implicated or an investigation could be negatively impacted, the written recommendation shall generally describe the factual basis or bases of the recommendation, including a brief description of any evidence relied upon by the CPO or PRC. The written recommendation shall also document whether the inmate made or submitted any statement or documents, and that any statement(s) and/or documents deemed relevant were considered.

Where behavior standards and goals have previously been provided to the inmate, the recommendation will detail any non-compliance with the standards and goals or whether the inmate requires more time to comply and will explain why Non-Disciplinary Restrictive Housing remains necessary. An inmate's non-compliance with the standards and goals will not foreclose a recommendation for release from Non-Disciplinary Restrictive Housing. When the recommendation is to retain the inmate in Non-Disciplinary Restrictive Housing, the CPO shall notify the inmate of the right to appeal to the Superintendent and the procedure for appealing. This notification shall be documented in IMS.

7. Standards and goals in 30- and 90-day reviews.

Within two (2) calendar days of the review, the inmate shall also be served with written notice of the behavioral standards and program participation goals that will increase

the inmate's chances of a less restrictive placement upon the next Placement Review. The written notice shall include a list of the specific programs being recommended for the inmate while in Non-Disciplinary Restrictive Housing at that facility.

8. Appeal in 30- and 90-day reviews.

If the inmate disagrees with the written recommendation of the CPO or PRC, the inmate may submit a written appeal to the Superintendent within five (5) business days of service of the written recommendation.

9. Final decision in 30- and 90-day reviews.

The Superintendent or designee shall render the final decision in IMS and provide the inmate with such decision in writing within five (5) calendar days after the closing date of the appeal period. If the decision is that the inmate should remain in Non-Disciplinary Restrictive Housing, the written decision shall explain the reasons for the inmate's continued placement/status, including but not limited to, a description of the underlying basis that led to the Non-Disciplinary Restrictive Housing placement (e.g., pending disciplinary hearing) and an explanation why the inmate's return to general population would pose an unacceptable risk to life, property, staff or other inmates, or to the security or orderly running of the institution. Unless safety or security concerns could be implicated or an investigation could be negatively impacted, the written decision shall also describe the factual basis or bases for the decision.

10. Other provisions regarding reviews.

The Agreement requires CPO assistance for inmates in all reviews and appeals as needed if the inmate is illiterate or non-English speaking or has a mental or physical disability, including assistance with reading and writing, Language Line for interpretation, and ASL interpretation for prisoners who are deaf or hard of hearing. The Agreement also requires that documentation related to each review be uploaded to the IMS, including notices

provided, statements or submissions from the inmate, recommendations, appeals submitted by the inmate, and final decisions.

11. Other substantive provisions.

The Agreement additionally:

- Requires, the Department, if it has not already done so as of the effective date of the Agreement, to initiate the process to promulgate regulations in accordance with M.G.L. c. 127, §§ 39B(e) and 39E, within sixty (60) days of settlement;
- Provides that inmates with a verified need for separation from general population to protect them from harm will be given the benefit of the CJRA, M.G.L. c. 127, § 39A(b), even where he/she has not been classified to protective custody;
- Commits the Department to certain programming and activities in Non-Disciplinary Restrictive Housing and in the Department Disciplinary Unit, without prejudice to claims that may arise under the CJRA.

12. Monitoring.

To enable the plaintiffs to monitor compliance with the Agreement, the Department agrees to provide the plaintiffs, on a quarterly basis, with rosters for each RHU as detailed in the Agreement; records of reviews conducted in each RHU, as detailed in the Agreement; and data specified in the Agreement. Upon request, the Department will provide plaintiffs with recordings of hearings.

13. Enforcement.

The Agreement contains procedures for the plaintiffs, through Class Counsel, to notify the Department of reasons why they suspect substantial noncompliance, and for the parties to confer in an attempt to resolve the issue. If these efforts are unsuccessful, either party may seek relief from the Court, though not through a petition for contempt. However, where the Plaintiffs contend that the Defendants have failed to comply with a previous order

of the Court, they may, after reasonable notice, move for further relief, and the Court may apply equitable principles and use any appropriate equitable or remedial power then available to it..

The Court's jurisdiction will terminate after two (2) years, and will extend for a period of up to two (2) years, as ordered the Court, with respect to any section or sections of the Agreement for which the Court finds substantial noncompliance. The Agreement will not terminate while a motion for relief is pending, but if the Agreement would otherwise be terminated the Department will not be required to produce the documents and reports described in the monitoring section, above.

14. Attorneys' Fees and Costs.

In the spirit of compromise and settlement, the parties have successfully negotiated attorneys' fees and costs. The Department, through the Commonwealth of Massachusetts, has agreed to pay reasonable attorneys' fees to counsel for plaintiffs, in the total amount of \$60,000.00 (sixty thousand dollars), to settle the claim for attorneys' fees and costs.

III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.

A. Standard for approval of the settlement.

Mass.R.Civ.P. 23(c) provides, in part, that a class action "shall not be dismissed or compromised without the approval of the court." The approval of a class action settlement is a matter within the sound discretion of the trial court. *Sniffin v. Prudential Ins.Co. of America*, 395 Mass. 415 (1985). To grant approval of a settlement, the court must determine that it is "fair, reasonable, and adequate." *Id.*; see also 4 Newberg on Class Actions § 11:41 (reviewing cases applying Fed.R.Civ.P. 23[e]); 2 McLaughlin on Class Actions § 6:7 (same).²

² Other Massachusetts courts have noted additional relevant factors – all of which indicate settlement to be appropriate here – in determining the fairness, reasonableness, and adequacy of a settlement. See, e.g., *Fortin v. Ajinomoto U.S.A., Inc.*, No. 022345C, 2005 WL 3739852, at *2 (Mass. Super. Dec. 15, 2005) (including "(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and

The Court's review is conducted against the backdrop of a strong judicial policy favoring settlement of class actions. *See, e.g., In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 68 (D. Mass. 2005); *In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005); *U.S. v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) ("there is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits."). *See also, Disability Law Center v. Massachusetts Department of Correction*, 960 F. Supp. 2d 271, 273 (D. Mass. 2012) ("This court has long believed that the settlement of cases involving the constitutionality of the conduct of public officials is important in our democracy. . . . [J]udges should realize that they may often best serve constitutional interests by encouraging the responsible public officials and their constituents to settle constitutional controversies on proper terms, rather than by deciding the questions such controversies present.").

B. The Settlement Resulted from Arm's Length Negotiations.

There is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's length negotiations by experienced counsel after discovery. *See M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987) ("Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair.") (internal footnote omitted); *In re Minolta Camera Products Antitrust Litig.*, 668 F.Supp. 456, 460 (D. Md. 1987); *see also* 4 Newberg § 11:41. The judgment of experienced and informed counsel in supporting a settlement is entitled to considerable weight. The Supreme Judicial Court has delineated the court's role in relation to counsel's role when evaluating a negotiated class action settlement:

fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of the proposed settlement outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the proposed settlement is fair and reasonable.").

[T]he essence of a settlement is compromise... . Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.

Sniffin, 395 Mass. at 421 (citations omitted).

Here, the plaintiffs and defendants have engaged in extensive discovery and settlement negotiations, as described above. The parties conducted substantial discovery over some ten (10) months, with the defendants producing thousands of pages of documents in response to the plaintiffs' discovery requests. The parties then engaged in numerous rounds of arms-length negotiation, culminating in a lengthy and detailed Agreement designed to obtain optimal results for all parties. Over the course of negotiations, plaintiffs' counsel sought and obtained the opinions of their clients. As set forth in the memorandum in support of class certification, plaintiffs' counsel are experienced and have extensive background in prison civil rights class actions in general and restrictive housing (segregation) litigation in particular. Similarly, defendants' counsel sought and obtained the opinions of their clients throughout the course of negotiations. Defendants' counsel are also experienced and have extensive backgrounds in representing the Department of Correction and its employees in civil litigation brought in federal and state courts involving numerous types of legal claims pertaining to matters including, but not limited to, restrictive housing and prison conditions.

C. The Settlement Provides a Significant Benefit to the Class.

The Agreement provides a substantial benefit to inmates held in Restrictive Housing where, among other things, the Department has committed to providing procedural protections that ensure meaningful reviews of restrictive housing placements that are consistent with the requirements of *LaChance* and the CJRA., including:

- The ability of inmates with serious mental illness or verified protective needs to participate in enhanced reviews every seventy-two (72) hours once it is determined that they will be in restrictive housing over thirty (30) days;
- The ability of inmates held awaiting adjudication of a disciplinary report to participate in enhanced reviews every fifteen (15) days once it is determined that they will be in restrictive housing over thirty (30) days;
- A review by a CPO within thirty (30) days for all inmates in Non-Disciplinary Restrictive Housing;
- Robust notice requirements for all enhanced reviews, as described above, which inform inmates not only of the administrative reason for their placement in an RHU but, additionally, the factual basis for the alleged unacceptable risk justifying their placement;
- Robust recommendations and decisions after the 30-day and 90-day reviews, which inform inmates, not only of the administrative reason for their placement in an RHU but, also the factual basis for the unacceptable risk found to justify their placement and the evidence relied upon to reach that finding;
- The provision of assistance in the reviews to inmates with disabilities and limited English proficiency;
- Appellate rights at each stage for the thirty (30) and ninety (90) day reviews;
- Complete documentation of all proceedings in the IMS.

The defendants additionally commit to initiate the process to promulgate regulations, if it has not already done so as of the effective date of the Agreement, in accordance with M.G.L. c. 127, §§ 39B (e) and 39E within sixty (60) days of settlement, a deadline not specified in the CJRA. They also agree to provide a range of tablet-based programming in

non-disciplinary and disciplinary restrictive housing, subject to appropriation and the receipt of appropriated funds and the public procurement process, without prejudice to any future claims arising under the CJRA. If a program tablet is not available, the inmate will be provided with program materials in paper form, e.g., booklets, handouts, etc., necessary for the inmate to participate in the relevant program(s).

For their part, the plaintiffs agree to the dismissal of all their claims. With regard to one of the central claims in this case, whether the Department's reviews meet the requirements of *LaChance* for constitutional due process, the negotiated provisions ensure a meaningful process that meets the due process requirements. A meaningful process is ensured by informing inmates of not only the administrative reason for their RHU placement, but also the reason why they are thought to pose an unacceptable risk in general population and the evidence supporting that reason, thus giving prisoners an opportunity to more effectively argue against RHU placement. Providing prisoners with behavioral standards and program participation goals which may help them achieve release from the RHU further improves this process. The Department has also agreed to schedule such reviews within eighty (80) days of inmate's initial placement to ensure that the reviews are conducted in a timely fashion.

The plaintiffs also agree to dismissal of their claims under 103 CMR 421, the DSU regulation, including the procedural protections and the substantive provisions governing privileges, programs and treatment in a DSU, as provided by said regulation, as well as their claim to equal "kindness" under M.G.L. c. 127, § 32. They have agreed to dismissal of these claims for several reasons. As regards the procedural protections of the DSU regulation, the holding in *LaChance* made clear that these protections are not constitutionally required, leaving the Department free to seek repeal of those regulations at any time. As regards the rights to minimal privileges, programs and treatment spelled out in the DSU regulation and,

as alleged by plaintiffs, required by the “kindness” statute, these have been substantially subsumed, and in some regards, surpassed by provisions of the CJRA. This settlement leaves the plaintiffs free, separate from this Action, to seek enforcement of any CJRA provisions requiring privileges, programs or treatment in an RHU if the plaintiffs believe the requirements of the CJRA are not being followed.

Finally, meaningful change for the plaintiffs and other prisoners in RHUs is assured by the Agreement’s provisions on Records and Reports, Dispute Resolution and Enforcement, and the ongoing jurisdiction of this Court for two years, or longer if a dispute is pending at two (2) years.

D. The Attorneys’ Fees and Costs Agreed to Are Reasonable.

The defendants have agreed to pay counsel for plaintiffs reasonable attorneys’ fees and costs in the total amount of \$60,000 (sixty thousand dollars) in full settlement of the attorneys’ fees and costs after good-faith, arms-length, negotiations between the parties. The parties negotiated this amount only after settlement was reached on all provisions affecting class members. Counsel for plaintiffs provided detailed, contemporaneously-recorded billing records detailing their time expenditure, which counsel for defendants fully and completely reviewed.

E. This Court has Authority to Retain Jurisdiction.

The Court may, in its discretion, retain jurisdiction to enforce a settlement agreement and retain jurisdiction. *Kokkonen v. Guardian Life Ins., Co*, 511 U.S. 375, 381–82 (1994).

Whether or not a court decides to retain ancillary jurisdiction over the settlement agreement is discretionary. See *Wright v. Prudential Ins. Co. of Am.*, 285 F.Supp.2d 515, 522 n. 17 (D.N.J. 2003) (“The exercise of [ancillary] jurisdiction to enforce its own order [of dismissal] is discretionary; the court [is] under no obligation to reserve [jurisdiction] in the first place.”)(citing *Kokkonen*, 511 U.S. at 381). If the parties wish to provide for the court’s enforcement of a dismissal-producing settlement agreement, they can seek to do so.” *Kokkonen*, 511 U.S. at 381 (emphasis in original). *Brass Smith, LLC v. RPI Indus., Inc.*, 837 F.Supp.2d 377 (D.N.J. 2011) (citations, alterations and emphasis in original).

A key factor that courts consider in deciding whether to approve settlements and to retain jurisdiction is the public interest at stake. Thus, in public system reform litigation, such as this case, it is not unusual for courts to approve settlement agreements and, in the court's discretion, to retain limited jurisdiction. "Such continuing power may also arise in the context of orders and decrees issued in institutional reform litigation, where the public interest is significantly implicated 'because such decrees reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" *Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348, 380-81 (E.D. Va. 2009) quoting *Thompson v. United States Dept. of Hous. and Urban Dev.*, 404 F.3d 821, 826 (4th Cir.2005). See also *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 7 (1st Cir. 2011) (approval of settlement agreement did not create consent decree even though court retained jurisdiction).

For these reasons, it is common for Massachusetts state courts to retain jurisdiction to enforce settlement agreements in class action cases involving prison conditions. See e.g. *Minich v. O'Brien*, Norfolk Superior Ct., C.A. 2014-00448-A (retaining jurisdiction to enforce settlement agreement in class action concerning seclusion and restraint practices at Bridgewater State Hospital); *Bentley v Sheriff of Essex County*, Essex CA No. 2011-01907 (retaining jurisdiction to enforce court approved settlement agreement in class action concerning medical care); *Souza v. Sheriff of Bristol County*, Bristol CA No. 2002-00870 (retaining jurisdiction to enforce court approved agreement in class action concerning incarceration fees). Nevertheless, as Judge Wolf stated in approving the settlement agreement in the *Disability Law Center* case, "judges should become involved in the administration of prisons only as a last resort and then only to the most limited extent necessary." 960 F.Supp. 2d at 273 and 282.

As in the *Disability Law Center* case, the parties here have agreed to a settlement that is compatible with these principles. The Court is asked to retain jurisdiction for an even shorter time than in *Disability Law Center*, for only two years, a period that counsel for the parties believe is reasonable for this case, unless a dispute is pending at two years or unless the Court has found a substantial violation. Further, the Agreement does not require the issuance of a consent decree, nor is it enforceable by contempt unless the defendants fail to comply with a remedial order that might be issued by the Court in the event of substantial non-compliance, and then only after dispute resolution efforts have failed. Specifically, the Agreement includes a process for the parties to attempt to resolve any disputes regarding the implementation of the Settlement Agreement. The parties are required to identify, discuss and, if appropriate, remedy any compliance issues, and they may resort to the Court only after the mandatory negotiated resolution process has been exhausted.

CONCLUSION

For all the foregoing reasons, the Court should allow the Parties' Joint Motion for Approval of Settlement Agreement and should retain jurisdiction as provided in the Agreement.

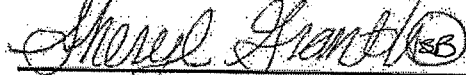
Respectfully submitted on behalf of the
Plaintiffs, by their attorney,



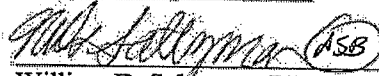
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