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9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF WASHINGTON**

11 **DISABILITY RIGHTS**
12 **WASHINGTON,**

13 **Plaintiff,**

14 **v.**

15 **JAY INSLEE, Governor, State of**
16 **Washington; STEPHEN**
17 **SINCLAIR, Secretary,**
18 **Washington State Dept. of**
19 **Corrections; and DONALD**
20 **HOLBROOK, Superintendent,**
21 **Washington State Penitentiary,**

22 **Defendants.**

NO. 4:18-cv-05071-RMP

FINAL SETTLEMENT
AGREEMENT

23 This Final Settlement Agreement (“Agreement”) is between Plaintiff,
24 Disability Rights Washington, by and through its attorneys, and Defendants,
25 Washington State Department of Corrections Secretary Stephen Sinclair and
26 Washington State Penitentiary Superintendent Donald Holbrook, by and
27 through their attorneys. Plaintiff and Defendants are referred to collectively
28 herein as the “Parties.”

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I. INTRODUCTION

A. Purpose of the Agreement

The purpose of this Agreement is to resolve matters identified in the Complaint filed in the Eastern District of Washington by Plaintiff Disability Rights Washington (DRW) in Cause Number 4:18-CV-5071-RMP. The Complaint alleged that Defendants confined individuals with mental illness in overly restrictive conditions due to their disability. Specifically, Plaintiff alleged individuals with mental illness who are classified as Minimum or Medium custody are confined in a more restrictive Close custody setting in the Residential Treatment Unit (RTU) of the Washington State Penitentiary's Baker-Adams-Rainier Units in order to receive mental health services, limiting the individuals' abilities to engage in programming and recreational opportunities for which they would otherwise be eligible. In their Answer, Defendants denied these allegations. Specifically, Defendants denied that individuals' placement in the BAR Units RTU is solely due to their disability and denied that such placement restricts individuals' ability to engage in programming or recreational opportunities for which they would be otherwise eligible.

1 **B. Conditions to Effectiveness of the Agreement**

2 1. The Parties enter into this Agreement with the goal of resolving the
3 claims brought by DRW, as an organizational plaintiff, on behalf of its
4 constituents.

5 2. The Department of Corrections requested and received
6 appropriations of approximately \$5,000,000 in the 2019-21 biennial operating
7 and capital budgets to implement this Agreement. The Legislature conditioned
8 the appropriations on the parties reaching this Agreement to resolve the
9 litigation.

10 3. This Agreement shall not take effect unless and until the Court
11 issues an order approving the Agreement and retaining jurisdiction to enforce
12 its terms. The Parties agree to jointly recommend to the Court that it approve
13 the terms of the Agreement. The Parties agree to take all steps and efforts
14 contemplated by the Agreement.

15 **II. TERMS OF AGREEMENT**

16 **A. Definitions**

17 1. **Agreement** shall mean this Final Settlement Agreement between
18 Plaintiff and Defendants.

19 2. **Approval Order** shall mean the final order issued by the Court
20 giving approval to the Agreement.

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- 1 3. **BAR Units** shall mean the Baker, Adams, and Rainer Units at the
2 Washington State Penitentiary.
- 3 4. **Plaintiff** shall mean DRW.
- 4 5. **Plaintiff’s Counsel** shall mean DRW attorneys Heather
5 McKimmie, Rachael Seevers, and David Carlson, as well as Andrew Biviano,
6 Breean Beggs, and Mary Dillon of Paukert & Troppmann.
- 7 6. **Defendants** shall mean Washington State Department of
8 Corrections Secretary Stephen Sinclair, and Washington State Penitentiary
9 Superintendent Donald Holbrook.
- 10 7. **Department** shall mean the Washington State Department of
11 Corrections.
- 12 8. **Parties** shall mean the named Plaintiff and the remaining two
13 Defendants in the Complaint.
- 14 9. **Mental Health Residential Treatment Units (RTU)** shall mean
15 the Department-designated living units for male incarcerated individuals who
16 need residential mental health treatment. These male RTUs are at the Special
17 Offender Unit at the Monroe Correctional Complex and parts of the BAR Units
18 at the Washington State Penitentiary.
- 19 10. **Mod** shall mean a prison unit subdivision containing a dayroom
20 area, showers, and cells. For instance, each BAR Unit consists of three mods.

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1 11. **Substantial Compliance** shall mean adherence to the
2 requirements of the Agreement in all material aspects, recognizing that 100%
3 compliance is not required. Non-systemic deviations from the requirements of
4 the Agreement shall not prevent a finding of substantial compliance, provided
5 that Defendants demonstrate that they have (a) implemented a system for
6 tracking compliance, where appropriate and practical, and for taking corrective
7 measures in response to individual instances of non-compliance, and (b)
8 instituted policies and practices that are reasonably calculated to achieve
9 durable and sustained compliance. Substantial compliance shall govern all
10 requirements for the Agreement.

11 **B. General Terms**

12 1. **No Admission of Liability.** The Parties understand and agree that
13 this Agreement embodies a compromise and settlement of disputed claims, and
14 that nothing herein shall be deemed to constitute an admission of any
15 wrongdoing by Defendants nor any admission of liability as to such claims.

16 2. **Effective Date of Settlement.** The Agreement shall be fully
17 effective and binding on the date on which the Court issues its Approval Order.

18 3. **Termination of Agreement by Court Action**

19 a. If the District Court declines to approve the Agreement, then
20 the Agreement shall automatically terminate and thereupon
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become null and void once the period of time to initiate an appeal of an order denying approval of the Agreement elapses.

b. If there is a pending appeal of an order declining to approve the Agreement, this Agreement shall not be terminated until final resolution of any such appeal, except by written agreement of the Parties.

4. **Scope of Settlement.** The Parties agree that the terms of this settlement encompass the custodial assignment and conditions of confinement of individuals in the Residential Treatment Unit (RTU) in Washington State Penitentiary’s BAR Units.

C. General Principles of the Agreement

1. The Parties agree that incarcerated individuals assessed at an RTU-level of care in the Department’s custody should be housed in the least-restrictive prison environment appropriate to their assigned custody and mental health needs and consistent with legitimate institutional security concerns.

2. The Parties agree that incarcerated individuals assessed at an RTU-level of care in the Department’s custody are protected under the Americans with Disabilities Act and creating appropriate housing for these individuals is a Department priority.

3. The Parties agree that DOC 300.380 and its Attachment 1 describe the Department’s classification practices and custody levels, including those

1 custody levels most relevant to this agreement: Close, Medium, and Minimum
2 Custody MI3 (MI3).

3 **D. Obligations of the Parties**

4 1. **Substantive Terms.** Defendants will take the following actions to
5 ensure people in the RTU at the BAR Units are placed in the least-restrictive
6 prison environment appropriate to their assigned custody and mental health
7 needs and are not housed in overly restrictive conditions because of their need
8 for mental health services.

9 a. The Department will review the custody score, assigned
10 custody, and housing assignment for each person in the RTU at the
11 BAR Units. Those individuals who have behavioral or mental
12 health needs that the multidisciplinary Facility Risk Management
13 Team (FRMT) believes necessitate their placement in a higher
14 custodial setting than the one that corresponds to their custody
15 score under DOC Policy 300.380 will have those individual needs
16 documented and provided to the Headquarters Community
17 Screening Committee (HCSC) pursuant to that policy and its
18 Attachment 1. If HCSC finds that an individual is in need of an
19 override to a higher assigned custody due to their mental health-
20 related behaviors, the HCSC will record the individualized reasons
21 in the “Formal HCSC Decision” document or other substantially
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1 similar form. If HCSC approves such an override, mental health
2 staff are responsible for developing, implementing, and regularly
3 reviewing the person's mental health treatment plan to ensure that
4 reducing behaviors and symptoms associated with placement in a
5 more restrictive setting is included as a treatment goal and that
6 specific, objective, individualized benchmarks for meeting that
7 goal are included in the treatment plan to assist the person in
8 reducing these behaviors and symptoms.

9 Defendants have established a target time frame to be in
10 compliance with this provision of within six (6) months of
11 execution of this Agreement. This time frame is established as a
12 guideline for the Parties and shall not form the basis for contempt
13 proceedings.

14 b. The Department will designate one BAR Unit as
15 Medium/MI3 security, with at least two mods on that unit
16 designated as RTU mods. Based on the custodial classification and
17 housing assignment review described in Section (D)(1)(a) above,
18 BAR Units RTU individuals who can be housed in Medium/MI3
19 security conditions will be moved to Medium/MI3 security beds at
20 BAR RTU or SOU, as beds become available. The Department
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will set forth its method for prioritizing individuals for transfer in the work plan created pursuant to Section (D)(2) of this agreement.

Defendants have established a target time frame to be in compliance with this provision of within three (3) months of execution of this Agreement. This time frame is established as a guideline for the Parties and shall not form the basis for contempt proceedings.

c. The Department will retrofit the cell doors in the new BAR RTU Medium/MI3 unit to allow individuals to access their cells by personal key or push-button control.

i. Defendants have established a target time frame to be in compliance with this provision of within eighteen (18) months of execution of this Agreement. This time frame is established as a guideline for the Parties and shall not form the basis for contempt proceedings.

ii. Pending the above physical plant modification, Defendants will ensure that people housed in the Medium/MI3 unit of the BAR Units have the ability during non-lockdown hours to enter and exit their cells on demand or, alternatively, every thirty minutes as desired, and as otherwise consistent with the facility’s count and movement

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schedule. Defendants will also ensure that an individual may enter their cell upon request in response to a mental health emergency or pursuant to the person’s Individual Behavior Management Plan or mental health treatment plan.

d. Defendants will ensure that people housed in the Medium/MI3 security RTU mods in the BAR Units have comparable access to out-of-cell time and programs and activities as are provided to people housed in the E and F units of the Special Offender Unit (SOU). These programs and activities include educational programming, work opportunities, mental health programs, and recreational opportunities.

i. Defendants will utilize the Annex A building at Washington State Penitentiary for programming, library services, and other recreational, work opportunities, educational, or treatment activities for individuals confined in the RTU of the BAR Units.

ii. Defendants have established a target time frame to be in compliance with this provision of within twelve (12) months of execution of this Agreement. This time frame is established as a guideline for the Parties and shall not form the basis for contempt proceedings.

1 e. In order to increase the overall programming available to
2 people in the RTU of the BAR Units, the Department will use best
3 efforts to recruit additional volunteer and/or community-based
4 service providers to provide additional programming. In addition,
5 the Department will continue to offer Sustainable Practices Lab
6 programs and activities to eligible individuals in the BAR Unit
7 programming areas as long as the program operates at WSP.

8 Defendants have established a target time frame to be in
9 compliance with this provision of within twelve (12) months of
10 execution of this Agreement. This time frame is established as a
11 guideline for the Parties and shall not form the basis for contempt
12 proceedings.

13 f. The Medium/MI3 unit in the BAR Units will have dayrooms
14 that are comparable to those in the SOU Medium/MI3 custody
15 units and will have similar amenities, including but not limited to a
16 microwave, improved lighting, and sound dampening. People in
17 the Medium/MI3 RTU mods in the BAR Units will have
18 substantially similar access to personal items in the dayroom as
19 that provided to people in E and F units of the SOU.

20 Defendants have established a target time frame to be in
21 compliance with this provision of within six (6) months of
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execution of this Agreement. This time frame is established as a guideline for the Parties and shall not form the basis for contempt proceedings.

g. Defendants will ensure that people housed in the RTU units in the BAR Units have comparable access to the yard as that permitted for people in the Medium and Close custody units in the SOU.

Defendants have established a target time frame to be in compliance with this provision of within six (6) months of execution of this Agreement. This time frame is established as a guideline for the Parties and shall not form the basis for contempt proceedings.

h. Defendants will ensure that people housed in the Medium/MI3 RTU mods in the BAR Units have access to comparable commissary as that permitted for people in E and F units at the SOU. Commissary items may be limited for individualized reasons, which must be documented in the individual's mental health records and reviewed, at minimum, at each treatment plan review or custody facility review. If such a limitation is approved, mental health staff are responsible for ensuring that the individual's mental health treatment plan includes

1 treatment goals and specific, objective, and individualized
2 benchmarks designed to reduce the behaviors and symptoms that
3 necessitated the limitation. This term does not refer to or affect the
4 loss of commissary items resulting from disciplinary infractions.

5 Defendants have established a target time frame to be in
6 compliance with this provision of within six (6) months of
7 execution of this Agreement. This time frame is established as a
8 guideline for the Parties and shall not form the basis for contempt
9 proceedings.

10 i. In the event that an individual is housed in the BAR close
11 custody units and is deemed unsuitable to intermingle with
12 individuals in the medium custody unit, staff will enact reasonable
13 measures to prevent that individual from intermingling with
14 individuals housed in the medium custody unit.

15 Defendants have established a target time frame to be in
16 compliance with this provision of within six (6) months of
17 execution of this Agreement. This time frame is established as a
18 guideline for the Parties and shall not form the basis for contempt
19 proceedings.

20 j. Defendants will ensure that the RTU in the BAR Units has
21 sufficient custody and mental health staff to implement the
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1 increased recreation and programming anticipated under this
2 Agreement.

3 Defendants have established a target time frame to be in
4 compliance with this provision of within twelve (12) months of
5 execution of this Agreement. This time frame is established as a
6 guideline for the Parties and shall not form the basis for contempt
7 proceedings.

8 k. Defendants will undertake in-person orientation with all
9 staff assigned to the BAR Units regarding the changes described in
10 this Agreement.

11 Defendants have established a target time frame to be in
12 compliance with this provision of within three (3) months of
13 execution of this Agreement. This time frame is established as a
14 guideline for the Parties and shall not form the basis for contempt
15 proceedings.

16 2. **Work Plan and Data Reporting.** Defendants will develop a work
17 plan, including interim benchmarks, which will guide the Defendants' progress
18 toward the above substantive changes. Plaintiff and the Department will meet
19 quarterly to discuss Defendants' progress through the work plan. Prior to the
20 quarterly meetings, the Department will provide Plaintiff with the following
21 data:
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1 a. The most recent Facility Risk Management Team Review
2 and mental health treatment plan for any individual who has
3 Medium custody points or lower and is housed in the Close
4 custody RTU at the BAR Units.

5 b. Any “Formal HCSC Decision” that uses an override to place
6 an individual in a custody setting that is higher than their scored
7 custody due to their mental health-related behavior or needs, as
8 well as all supporting documentation that was reviewed by the
9 HCSC in rendering the override.

10 c. Movement and programming schedule for the Medium/MI3
11 and Close custody RTU in the BAR Units and the Medium/MI3
12 and Close custody units at the SOU.

13 Defendants have established a target time frame of two (2) months from
14 the date of execution of this Agreement to develop a work plan. The first
15 quarterly meeting will discuss the work plan, and then the Parties will meet
16 every three months thereafter. These time frames are established as a guideline
17 for the Parties and shall not form the basis for contempt proceedings.

18 **E. Monitoring by Plaintiff**

19 1. Plaintiff DRW is entitled to conduct reasonable monitoring of
20 Defendants’ compliance with this Agreement as outlined herein.
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1 2. Nothing in this Agreement shall be deemed to limit the ability of
2 DRW to otherwise fulfill its federal mandates, including but not limited to, the
3 Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act,
4 42 U.S.C. §§ 10801-51, the Developmental Disabilities Assistance and Bill of
5 Rights (DD) Act, 42 U.S.C. §§ 15041-45, and their implementing regulations.

6 3. Plaintiff will visit the Medium/MI3 and Close custody RTU at the
7 BAR Units twice per year to monitor the terms of this Agreement, unless
8 Plaintiff is acting in accordance with its federal access authority, in which case
9 it may visit more frequently.

10 4. Nothing in this Agreement shall be deemed to limit Plaintiff's
11 ability to access individuals, staff, and incarcerated individuals' records
12 pursuant to its federal authority.

13 **F. Termination of Agreement**

14 1. **Good Faith Efforts.** The Parties intend to work in good faith to
15 achieve substantial compliance with all requirements of this Agreement within
16 twenty-four (24) months of Court approval of this Agreement. The Parties also
17 agree, given their cooperative working relationship, to work in good faith to
18 minimize the need for Court involvement in enforcing this Agreement. The
19 expectation is that the Parties will, after full implementation of the Agreement,
20 present a stipulated order terminating the Agreement and dismissing the case.

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1 2. **Agreement Term.** The parties agree that, for thirty (30) months
2 following approval of this Agreement, the Court shall have continuing
3 jurisdiction to enforce the substantive terms of Section II (D)(1). At the end of
4 thirty (30) months, absent an order extending the term of the Agreement
5 pursuant to Section II (F)(3) below, this Agreement will automatically
6 terminate, the Court's jurisdiction will end, and the Court shall dismiss the case
7 with prejudice.

8 3. **Proceedings to Extend Agreement Term.** The Parties agree the
9 Court may extend the Agreement term, and the Court's continuing jurisdiction
10 to enforce the Agreement, if the Court finds Defendants have not substantially
11 complied with the substantive terms of Section II (D)(1), or are not likely to
12 substantially comply, within thirty (30) months. Before seeking an extension of
13 the Agreement term, Plaintiff will follow the dispute resolution procedures set
14 forth in this Agreement.

15 4. **Proceedings to Shorten Agreement Term.** The Parties agree the
16 Court may terminate the Agreement and dismiss the case before thirty (30)
17 months if the Court finds, based on a stipulation of the Parties or following fact-
18 finding proceedings pursuant to this paragraph, that Defendants have
19 substantially complied with the substantive requirements of Section II (D)(1). If
20 the Parties do not agree that Defendants have substantially complied with the
21 substantive requirements of Section II (D)(1), Defendants will follow the
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1 | dispute resolution procedures set forth in this Agreement before seeking early
2 | termination of the Agreement.

3 | **G. Fees and Costs**

4 | 1. **Fees and costs incurred to date.** Within thirty (30) days of Court
5 | approval of this Agreement, Defendants will pay Plaintiff \$185,000.00 (one
6 | hundred eighty-five thousand dollars and zero cents) for all fees and costs
7 | incurred in pursuing the claims resolved through the Agreement.

8 | 2. **Monitoring costs.** As compensation for monitoring progress
9 | towards substantial compliance with this Agreement, Defendants shall pay
10 | Plaintiff the sum of \$25,000.00 (twenty five thousand dollars and zero cents)
11 | annually while this Agreement remains in effect. A year for the purposes of this
12 | annual payment will be the State of Washington's fiscal year: July 1 of one
13 | calendar year to June 30 of the next calendar year. For periods of time where
14 | the Agreement is not in effect for an entire fiscal year, the Parties agree that the
15 | amount for that fiscal year will be prorated based on the number of months
16 | during the fiscal year that this Agreement was in effect. In exchange for this
17 | annual payment, Plaintiff's counsel waives any future claim for any and all
18 | attorneys' fees or costs they may incur related to monitoring this Agreement as
19 | long as this Agreement remains in effect. The Department shall pay Plaintiff's
20 | counsel on approximately June 30 of each year.

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1 3. **Documentation.** Plaintiff agrees to continue to maintain
2 reasonable documentation of the amount of time spent on monitoring
3 Defendants' progress towards substantial compliance with this Agreement and
4 to provide it on reasonable request to the Defendants.

5 4. **Fees for Compliance Determination.** Plaintiff shall be entitled to
6 recover reasonable costs and attorneys' fees if it successfully moves the Court
7 to enforce this Agreement, including to extend the term of the Agreement
8 pursuant to Section II (F)(3), to oppose early termination of the Agreement
9 pursuant to Section II (F)(4), or to otherwise enforce substantial compliance
10 with Section II (F).

11 **H. Miscellaneous and Release Provisions**

12 1. **Governing Law.** This Agreement shall be governed by the laws of
13 the State of Washington without regard to conflict of law principles.

14 2. **Severability.** The provisions of this Agreement are not severable.

15 3. **Dispute Resolution.** In the event that a dispute arises, including
16 either allegations of systemic non-compliance or individual examples that may
17 demonstrate systemic non-compliance, the Parties shall attempt to resolve the
18 issue or issues using the dispute resolution process as follows:

19 a. If at any time during the time the Agreement is in effect,
20 Plaintiff's counsel believes that the Department is not complying
21 with this Agreement, Plaintiff's counsel shall provide the
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Department, by and through counsel of record, with prompt written notice so that the Department may review the alleged non-compliance.

b. If there is disagreement regarding the alleged non-compliance, and in order to resolve the alleged non-compliance, the Parties may exchange documents, drafts and/or other written communications.

c. If the alleged non-compliance is not resolved through the exchange of written documents, Plaintiff's counsel may request an informal meeting with designated Department administration to discuss the alleged non-compliance.

d. In the event Plaintiff's counsel requests an informal meeting, the Parties shall, in good faith, attempt to resolve the alleged non-compliance.

e. If a timely and informal resolution cannot be reached by the Parties, either Party may request formal mediation to resolve the dispute. Mediation must be requested in writing within fourteen (14) days of the informal meeting referenced above. Mediation of the disputed matter shall occur within forty-five (45) days of the written request for mediation, unless otherwise agreed to in writing by the Parties or if the mediator is unavailable.

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f. The mediator to be used will be mutually selected by the Parties at the time it is determined that mediation is necessary to resolve the dispute as identified in the preceding paragraph. Mediation costs shall be split evenly between Plaintiff’s counsel and the Defendants.

4. **Amendment.** By mutual agreement, the Parties may change the terms of this Agreement, including but not limited to, the timetables for taking specific actions, provided that such mutual agreement is memorialized in writing, signed by the Parties and approved by this Court.

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

6. **Construction.** None of the Parties hereto shall be considered to be the drafter of this Agreement or to any provision thereof for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause the provision to be construed against the drafter thereof.

7. **Principles of Interpretation.** The following principles of interpretation apply to this Agreement:

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a. **Headings.** The headings herein are for reference purposes only and do not affect in any way the meaning or interpretation of this Agreement.

b. **Singular and Plural.** Definitions apply to the singular and plural forms of each term defined.

c. **References to a Person.** References to a person include references to an entity, and include successors and assigns.

8. **Survival.** All representations, warranties, and covenants set forth herein shall be deemed continuing and shall survive the execution of this Agreement.

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

10. **Binding Effect.** This Agreement binds and inures to the benefit of the Parties and their successors.

11. **Further Assurances.** Each of the Parties agree, without further consideration, and as part of finalizing the Agreement hereunder, that they will in good faith promptly execute and deliver such other documents and take such

1 other actions as may be necessary to consummate the subject matter and
2 purpose of the Agreement.

3 12. **Protective Order.** In order to maintain confidentiality, the
4 protective order entered in this matter on July 11, 2018, shall remain in effect
5 during the time that the Agreement is in effect. The protective order shall
6 dictate the handling of confidential materials.

7 **For the Plaintiff**

8
9 By: _____ Date: _____
10 DRW Representative
Plaintiff

11 **Counsel for Plaintiff**

12 By: _____ Date: _____
13 Rachael SeEVERS, WSBA No. 45846
Disability Rights Washington

14
15 By: _____ Date: _____
16 Heather McKimmie, WSBA No. 36730
Disability Rights Washington

17 By: _____ Date: _____
18 David Carlson, WSBA No. 35767
Disability Rights Washington

19
20 By: _____ Date: _____
21 Andrew Biviano, WSBA No. 38086
Breean Beggs, WSBA No. 20795
Mary Dillon, WSBA No. 50727
22 Paukert & Troppmann PLLC

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For the Defendants

By: _____ Date: _____
Stephen Sinclair
Secretary
Washington State Department of Corrections
Defendant

By: _____ Date: _____
Donald Holbrook
Superintendent
Washington State Penitentiary
Defendant

Counsel for Defendants

By: _____ Date: _____
Tim Lang, WSBA No. 21314
Senior Assistant Attorney General

By: _____ Date: _____
Haley Beach, WSBA No. 42279
Assistant Attorney General

By: _____ Date: _____
Cassie vanRoojen, WSBA No. 44049
Assistant Attorney General