

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROLAND MOSLEY, LINDA McCOY,
CHARLES MORGAN, TRACEY MELIA,
LINDA REED, THOMAS DOE and CENTER
FOR INDEPENDENT LIVING OF CENTRAL
PENNSYLVANIA, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

GARY ALEXANDER, in his official capacity
as Secretary of Public Welfare for the
Commonwealth of Pennsylvania,

Defendant.

Civil Action No. 11-2615

Class Action

SETTLEMENT AGREEMENT

I. Introduction

WHEREAS, on April 18, 2011, Plaintiffs filed this class action lawsuit, alleging, *inter alia*, that Defendant violated Title XIX of the Social Security Act by not permitting individuals to apply for certain Medical Assistance home- and community-based waiver services and by not timely determining eligibility for those who were allowed to apply and violated Title XIX of the Social Security Act and the Due Process Clause of the Fourteenth Amendment to the Constitution by not providing written notice and the

opportunity for a hearing when individuals were denied services for those programs or did not have their eligibility timely determined;

WHEREAS, by Order dated March 8, 2012, the District Court certified this case to proceed as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) on behalf of the following class: All Pennsylvanians who (a) have been or will be denied the right to apply for the Attendant Care Waiver, the AIDS Waiver, the COMMCARE Waiver, the Independence Waiver, or the OBRA Waiver (collectively, "OLTL Waivers"); (b) have not or will not have their eligibility for OLTL Waivers determined within 90 days of the date they sought to apply for services; or (c) have not received or will not receive written notice and the opportunity to appeal when they were denied the right to apply for OLTL Waivers or when their eligibility for OLTL Waivers was not determined within 90 days of the date they sought to apply for services;

WHEREAS, Defendant does not admit liability and Plaintiffs do not concede the validity of any defense;

WHEREAS, Plaintiffs and Defendant desire to resolve this lawsuit amicably and to avoid the risks and expense of further litigation;

NOW, THEREFORE, Plaintiffs and Defendant enter into this Settlement Agreement.

II. Definitions

1. “Applicant” means the individual who submits an Application or for whom an Application is submitted by a responsible third party, such as a family member or advocate.

2. “Application” means: (i) for an Applicant who is a Medical Assistance (“MA”) recipient, a request made by or on behalf of the Applicant that the Applicant be considered for participation in an OLTL Waiver; or (ii) for an Applicant who is not an MA recipient, a written or electronic request for OLTL Waiver services made by signing and submitting a PA 600L, a PA600WP, or such other form as may be designated by DPW.

3. “Application Date” means: (i) for an Applicant who is an MA recipient, the date of the In-Home Visit; and (ii) for an Applicant who is not an MA recipient, the earlier of the date on which an Application is signed and submitted in hard copy to the IEB or to the CAO, or the date an Application is submitted electronically to DPW through COMPASS.

4. “CAO” means the County Assistance Office.

5. "Department" or "DPW" means the Pennsylvania Department of Public Welfare, its officials, employees, agents, and successors.

6. "Effective Date" means the date the Agreement is signed by all parties.

7. "Eligibility Determination" means a determination by DPW that an Applicant is eligible or ineligible to receive OLTL Waiver services.

8. "IEB" means the Independent Enrollment Broker with which DPW contracts to process Applications, the IEB's officials, employees, agents, and successors.

9. "In-Home Visit" means a face-to-face encounter between the IEB and an Applicant during which the IEB describes the OLTL Waiver services, answers the Applicant's questions, and performs such other functions as may be prescribed by OLTL.

10. "Institution" means a hospital, nursing facility, skilled rehabilitation facility, an intermediate care facility for persons with other related conditions, or a personal care home.

11. "OLTL" means the Office of Long Term Living and its officials, employees, agents, and successors.

12. "OLTL Waiver" means any of the following MA home- and community-based Waivers: the Attendant Care Waiver, the AIDS Waiver, the COMMCARE Waiver, the Independence Waiver, and the OBRA Waiver.

13. "OLTL Waiver Services" means the services and supports funded through an OLTL Waiver.

III. Individuals Who May Not Have Submitted Applications Based on Information Provided by the IEB

1. No later than August 1, 2012, DPW will contact each individual who DPW determined may have been informed by the IEB that he or she was not eligible for an OLTL Waiver and for whom DPW has contact information. The notice will utilize the form in Exhibit A, which is incorporated in this Agreement.

IV. Timely Eligibility Determinations

1. Beginning no later than the Effective Date, DPW will assure that the IEB does not discourage or prevent individuals from submitting Applications.

2. DPW will assure that the IEB utilizes the script attached as Exhibit B, which is incorporated in this Agreement, to interview individuals

when they initially contact the IEB to inquire about an OLTL Waiver or to request OLTL Waiver services.

3. Except as specified in Paragraph IV.7, no later than August 1, 2012, DPW will assure that the IEB conducts the In-Home Visit within seven (7) days of an individual's initial contact with the IEB, unless the individual requests that the In-Home Visit take place at a later date or unless there are other circumstances beyond the control of the IEB.

4. Except as specified in Paragraph IV.7, no later than September 1, 2012, DPW will issue eligibility determinations for all Applications with Application Dates more than ninety (90) days before the Effective Date and for whom DPW has not issued Eligibility Determinations as of the Effective Date.

5. Except as specified in Paragraph IV.7, each Applicant who submitted or will submit an Application before September 1, 2012, but fewer than ninety days before the Effective Date will receive an Eligibility Determination dated no later than one hundred and twenty (120) days from the Application Date.

6. Except as specified in Paragraph IV.7, each Applicant who submits an Application on or after September 1, 2012, will receive an

Eligibility Determination dated no later than ninety (90) days from the Application Date. The current procedures for assessing eligibility as of September 1, 2012 are set forth in Exhibit C and may be amended as specified in Paragraphs VI.1 and VI.2.

7. In addition to any extension permitted by 42 C.F.R. § 435.911, DPW may delay an eligibility determination for an Applicant for up to six (6) months from the Application Date if:

a. The Applicant is transitioning from an institution and is not expected to be discharged within sixty (60) days;

b. The Applicant is transitioning from an institution and is awaiting housing.

If the Applicant is not discharged or does not have housing within six (6) months of the Application Date, the Application will be denied.

8. For each Applicant whose eligibility determination is delayed pursuant to Paragraph IV.7, DPW will assure that:

a. the IEB will process the Application, rather than waiting until the individual has a definitive discharge date or housing, so that DPW is prepared to make a decision promptly when the Applicant is ready to leave the institution;

b. the status of the Applicant's transition process is monitored at least once every two (2) weeks to determine when the individual will be discharged;

c. a notice of the eligibility determination is issued no later than ten (10) business days of receipt of confirmation that the Applicant has been discharged to the community, effective retroactive to the date of discharge.

V. Notice and Appeal Rights

1. DPW will assure that the IEB provides each Applicant with an information sheet, in the form attached as Exhibit D, which is incorporated in this Agreement, at the time of the In-Home Visit. The information sheet will inform the Applicant:

a. that an Eligibility Determination should be issued within ninety (90) days of the Application Date;

b. that the Applicant has the right to file an administrative appeal if he or she does not receive an Eligibility Determination dated within ninety (90) days of the Application Date; and

c. how to file an administrative appeal.

2. DPW will assure that an Applicant who is determined ineligible for OLTL Waiver services is notified in writing that his or her Application is denied. The written notice will explain the reason for the decision and provide information on the Applicant's appeal rights.

3. The Department will assure that an Applicant who is determined to be eligible for OLTL Waiver services is notified in writing that his or her Application is approved. The notice will identify the OLTL Waiver to which the Applicant has been assigned.

a. The notice will advise the Applicant that, in the event that he or she desires more or different services than are available under the OLTL Waiver to which he or she has been assigned, including an OLTL Waiver for which he or she has been placed on the waiting list, the Applicant or his or her representative can request that he or she be transferred to another OLTL Waiver. If DPW denies a request to transfer to another OLTL Waiver, DPW will issue a written denial notice that states the reason for the decision and informs the Applicant of his or her right to appeal.

b. If the Applicant is determined to be eligible for OLTL Waiver Services but there is a waiting list for the Waiver that is most

appropriate to meet the Applicant's needs, the notice will inform the Applicant that he or she is eligible for the Waiver and that he or she is on the waiting list.

VI. Changes to OLTL Waivers or Procedures

1. Nothing in this Agreement shall be construed to prevent DPW from consolidating, changing, or replacing the current OLTL Waivers or amending its procedures to assess eligibility for OLTL Waiver services, including the procedures set forth in Exhibit C.

2. Except as specified in Paragraph VI.4, if DPW consolidates, changes, or replaces the current OLTL Waivers or amends its procedures to assess eligibility, including the procedures set forth in Exhibit C, it will continue to comply with Paragraphs IV.1, IV.3 – IV.8 of this Agreement for all future Applicants and ensure that they receive written notice and appeal rights if they are determined to be ineligible.

3. Nothing in this Agreement shall be construed to amend or limit the Department's authority under state or federal law, including, but not limited to, the authority to extend the time frames for determining eligibility under 42 C.F.R. § 435.911.

4. Nothing in this Agreement shall be construed to preclude OLTL from amending the procedures in Section IV to conform to changes in federal or state law, to the extent not inconsistent with federal law.

VII. Reports and Monitoring

1. Beginning October 31, 2012 and every three (3) months thereafter until this case is dismissed pursuant to Paragraph VIII.7, DPW will provide written quarterly reports to Plaintiffs' counsel within thirty (30) days of the close of the calendar quarter. The quarterly reports will include the following information for each Applicant in the most recently completed fiscal quarter (*i.e.*, January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31):

- a. the Applicant's county of residence;
- b. the date of the Applicant's initial telephone call to the IEB;
- c. the date of the In-Home Visit and, if the In-Home Visit took place more than seven (7) days after the initial contact with the IEB, the reason for the delay;
- d. the Application Date;
- e. the date of the notice advising the Applicant of the Department's Eligibility Determination; and

f. if an Application has been pending for more than ninety (90) days since the Application Date, the reason for the delay.

2. DPW may redact the names or other identifying information of the individuals whose information is included in the monitoring reports, provided, however, that the individuals are identified with an anonymous identifier.

3. Beginning October 31, 2012, and every six (6) months thereafter until this case is dismissed pursuant to Paragraph VIII.7, no later than thirty (30) days after the close of the six-month period, DPW will provide Plaintiffs' counsel with copies of no fewer than 100 randomly selected denial notices and 100 randomly selected approval notices sent to Applicants during the preceding six (6) months. DPW may redact the names and other identifying information of the Applicants, provided, however, that the individuals are identified with an anonymous identifier.

4. DPW will submit a written report to Plaintiffs' counsel no later than October 31, 2012, to describe implementation of its obligations under Paragraphs III.1 and IV.3 of this Agreement.

VIII. Continuing Jurisdiction, Dispute Resolution, and Enforcement

1. Plaintiffs will petition the District Court for preliminary approval of the Agreement and for approval of the class notice and to schedule a fairness hearing. If the District Court grants preliminary approval, the parties will publish the notice as required by that Court and the Plaintiffs will petition for final approval of the Agreement.

2. Plaintiffs may file a motion for specific performance to enforce alleged noncompliance with the terms of this Settlement Agreement, except for the procedures set forth in Exhibit C, provided, however, that at least forty-five (45) days before Plaintiffs file any motion for specific performance, they will provide notice of the alleged noncompliance to DPW to afford DPW the opportunity to cure the alleged noncompliance and the parties to meet in an effort to resolve the dispute without judicial intervention.

Defendant reserves the right to assert any available defenses to a claim for specific performance. Notice under this Paragraph shall be directed to:

Edward G. Cherry, Senior Counsel
Department of Public Welfare
Office of General Counsel
Health & Welfare Building
3d Floor West
Harrisburg, PA 17120

3. Plaintiffs' counsel may contact DPW's counsel or designee to request that DPW address alleged delays in Eligibility Determinations of individual Applicants. DPW will investigate those alleged delays and, if appropriate, take steps to remedy them.

4. This Settlement Agreement is not nor is it to be construed as a consent decree. Plaintiffs may not seek a remedy of contempt of court for any violation of the Agreement.

5. This Settlement Agreement will be binding on all parties, as well as their successors, only if the Agreement is approved by the District Court, provided, however, that Defendant agrees to comply with the terms of the Agreement beginning on the Effective Date. If the Court denies approval of the Agreement or if final approval is overturned on any appeal, the litigation will be reinstated in the same procedural posture as it was on the Effective Date.

6. If the District Court approves the Settlement Agreement, it will retain jurisdiction over the lawsuit for purposes of interpretation and enforcement.

7. The parties will file a joint stipulation to dismiss this lawsuit within 15 days after three (3) consecutive quarterly reports that are

submitted pursuant to Paragraph VII.1 demonstrate that a quarterly average of 94% of the Eligibility Determinations were made within ninety (90) days of the Application Dates, excluding those Eligibility Determinations that are delayed as authorized by law or by this Agreement.

8. Defendant will pay Plaintiffs' counsel, within 60 days of, and subject to, the District Court's approval pursuant to Federal Rule of Civil Procedure 23(h), the sum of \$77,500.00 for attorneys' fees and costs incurred through final District Court approval of the Agreement. Nothing in this Agreement should be construed to entitle Plaintiffs to or to preclude Plaintiffs from recovery of attorneys' fees and costs incurred after final District Court approval of the Agreement.



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Counsel for Plaintiffs and the Class

Dated: July 19, 2012



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Counsel for Defendant

Dated: July 20, 2012