

ENTERED

APR - 8 2009

TERESA L. DEPPNER, CLERK
U.S. District Court
Southern District of West Virginia

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**BENJAMIN H., by his next friend, Georgann H.,
DAVID F., by his guardian, Carolyn B.,
LORI BETH S., by her next friend, Janie J.,
THOMAS V., by his next friend, Patricia V.,
and JUSTIN E., by his next friend, Sherry E.,
individually and on behalf of all others similarly
situated,**

Plaintiffs,

v.

CIVIL ACTION NO. 3:99-0338

**MARTHA Y. WALKER, Secretary of the Department
of Health and Human Resources,**

Defendant.

AGREED ORDER

On the 16th day of March, 2009, came the Plaintiffs, by their counsel, Bren J. Pomponio, M. Jane Perkins, and Teresa L. Brown, and came the Defendant, by her counsel, Charlene A. Vaughan, Michael E. Bevers, and Mary G. McQuain, and came Defendants' representatives, Rocco Fucillo, Department of Health and Human Resources General Counsel and Marsha Morris, Department of Health and Human Resources Bureau for Medical Services Commissioner, upon the scheduled Final Settlement Conference.

Count I of the Complaint addressed the need for the Defendant to provide a sufficient amount, duration and scope of ICF-level services.

Count II concerned the right of an individual to be informed and given the choice of institutional or home and community-based services. 42 U.S.C. § 1396n(c)(2) and its implementing regulations.

Count IV addressed any individual wishing to do so may apply for Medicaid services. 42 U.S.C. § 1396a(a)(8) and implementing regulations.

Count V alleged that Defendant's practices violate their right to receive Medicaid with reasonable promptness. 42 U.S.C. § 1396a(a)(8).

Count VI claims concerned due process under the Due Process Clause of the United States Constitution and the Medicaid Act, 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 431.200 et seq.

WHEREAS, the parties engaged in extensive negotiations and agreed to settle Counts I, II, and IV-VI of the Complaint, and the Court approved the terms of the agreement and set them forth in an Order dated March 15, 2000.

WHEREAS, on March 28, 2008, the plaintiffs filed a Motion to Enforce the Order of March 15, 2000.

WHEREAS, on January 15, 2009, the Defendant filed her Motion for Judgment on the Pleadings, or in the alternative, Motion for Relief from Order. The Court denied Defendant's Motion on March 6, 2009.

WHEREAS, on March 11, 2009, Defendant filed her Motion for Reconsideration of Defendant's Motion for Relief from Agreed Order Entered March 15, 2000.

WHEREAS, pending before the Court is Defendant's Motion to Reconsider and Plaintiffs Motion for Enforcement, which were scheduled for hearing on March 17, 2009.

WHEREAS, on March 16, 2009 at the Final Settlement Conference, the parties represented to the Court that they wished to negotiate a settlement of the matters pending before the Court, the terms of which were to be presented to the Court within ten (10) days of the Final Settlement Conference. The Court granted an extension of time until April 7, 2009 for the parties to continue negotiations.

NOW THEREFORE, the Court, having undertaken an independent review of the terms agreed upon by the parties to settle the pending motions, the Court finds that they are fair and reasonable, and, it is hereby ORDERED and DECREED that:

1. The Defendant will develop a single eligibility process for all medical programs within her Department that may be utilized by MR/DD Waiver eligible applicants. If Defendant determines an individual is eligible for MR/DD waiver program services, but is unable to receive such services due to no waiver slot being available, defendant shall notify the individual of the other services or programs within her Department for which they may qualify. The single eligibility process will include agreed upon time frames for timely eligibility determinations for the other services or programs within the Department for which the individual may qualify. Said eligibility process shall be completed and implemented no later than October 1, 2009.

2. The Defendant's Bureau for Behavioral Health and Behavioral Health Facilities, (BHBF), DD Supports Grant program shall expand its eligibility criteria to include services to children under the age of eighteen. The DD Supports Grant program shall be limited in amount to an annual appropriation, which defendant shall request annually. Defendant will develop eligibility criteria for the grant awards by the first day of the applicable fiscal year.

3. The Defendant's Bureau for Medical Services shall prepare and file a Medicaid state plan amendment to include the provision of "personal care services" in the home or community, based on medical necessity criteria, pursuant to 42 C.F.R. § 440.167. Said state plan amendment shall be completed and filed within six months of entry of this Order.

4. The defendant shall request, pursuant to 42 U.S.C. § 1396n(c) and 42 C.F.R. § 441.305(a), approval from the Centers for Medicare and Medicaid Services (CMS), for authority

to fill MR/DD Waiver slots immediately as they become available during the fiscal year. Said request shall be completed and filed with CMS within three months of entry of this Order.

5. Defendant shall make annual budget requests to at least maintain current appropriations and contingent upon such appropriations shall, subject to CMS approval, expand the MR/DD Waiver Program as follows:

- a. 150 new MR/DD waiver slots for the waiver period beginning 7/1/2012 (FY2013);
- b. 150 new MR/DD waiver slots for the waiver period beginning 7/1/2014 (FY 2014); and,
- c. By December, 31, 2014, the Defendant shall evaluate the programs' funding and slot allotment to determine if additional slots are needed, and can be supported based on the cost efficiencies from the MR/DD Waiver program. Any resultant request would be based on such demonstrated need and funds available, not to exceed 150 slots.

6. Counsel for the Plaintiffs and the Defendant and/or her designee shall meet and confer on a quarterly basis beginning no later than July 1, 2009 to assess the efficiency and adequacy of MR/DD waiver program.

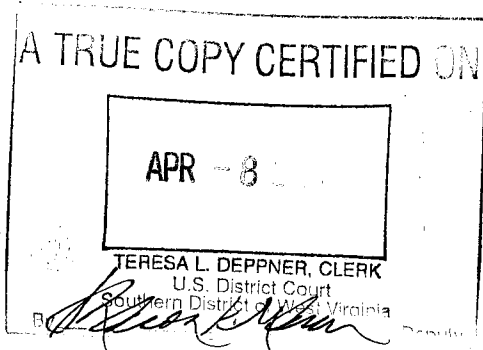
7. The Defendant shall not object to the payment of reasonable documented attorneys' fees and costs associated with filing of this enforcement action.

8. Upon entry of this Order, the Plaintiffs shall withdraw their Motion for Enforcement of the March 15, 2000 Order, filed on March 26, 2008. Plaintiffs further agree not to bring any enforcement actions regarding paragraph nine of the March 15, 2000 Order for the duration of this agreement or until December 31, 2014. Upon entry of this Order, Defendant agrees to withdraw her Motion to Reconsider.

9. Upon the execution of the terms of this Order, on December 31, 2014, the consent decree of March 15, 2000, shall be dissolved, as well as this particular Order. This action shall be stricken from the Court's active docket.

ENTERED this 8th day of April, 2009.


UNITED STATES DISTRICT JUDGE



/s/Bren Pomponio

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