

FILED ENTERED
LODGED RECEIVED

JAN 21 2004

Hon. Thomas S. Zilly

FILED ENTERED
LODGED RECEIVED

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY



00-CV-00944-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

LEVI TOWNSEND,

Plaintiff,

v.

LYLE QUASIM, Secretary of the
State of Washington Department
of Social and Health Services
(DSHS),

Defendant.

CLASS ACTION

No. C 00-0944Z

STIPULATED AGREEMENT AND
ORDER STAYING PROCEEDINGS

STIPULATED AGREEMENT FOR STAY OF PROCEEDINGS

This matter comes before the Court on the Stipulated Agreement of the parties, by and through their counsel of record, to stay these proceedings on the terms and conditions set forth as follows:

Before this lawsuit was filed, DSHS provided Medicaid nursing home services to members of the Plaintiff class, but did not provide residential or in-home waiver services where the Plaintiffs' incomes exceeded the eligibility standard for the only program providing such services, the COPES program. Plaintiffs contend that Defendant DSHS is obligated to provide services to class members in the most integrated setting appropriate, whether in residential or in-home care settings, so long as the class members meet the eligibility requirements for nursing home care, and Defendant contends that providing such

STIPULATED AGREEMENT AND
ORDER STAYING PROCEEDINGS - 1
No. C 00-0944Z
6926-2/ke/townsend/p/stip-stip-agt

ORIGINAL

MACDONALD, HOAGUE & BAYLESS
1500 HOGE BUILDING
705 SECOND AVENUE
SEATTLE, WASHINGTON 98104-1745
(206) 622-1604
FAX: (206) 343-3961

1 care constitutes a fundamental alteration of its long-term care program as it operated prior to
2 the initiation of this lawsuit.

3 The Ninth Circuit held in this case that under the ADA and its integration regulation,
4 DSHS must provide medically needy individuals who are eligible for Medicaid nursing
5 home care the option to receive residential and in-home care, so long as the cost of providing
6 such care does not constitute a fundamental alteration. It held further that the fact that care
7 is provided outside of a nursing home does not itself constitute a fundamental alteration of
8 DSHS long-term care programs.

9 The case is scheduled for trial on September 27, 2004. Under the ADA, and consis-
10 tent with the Ninth Circuit opinion, the burden is on the Defendant to prove that providing
11 home and community-based care services for the Plaintiff class would require a fundamental
12 alteration of the Defendant's long-term care programs.

13 Nothing in this Agreement changes the burden of the Defendant to establish its af-
14 firmative defense should the case proceed to litigation.

15 The parties agree to stay the litigation subject to the conditions and limitations set
16 forth in this Agreement:

17 1. DSHS agrees to provide community-based and in-home long-term care ser-
18 vices to class members on the conditions and to the extent set forth below.

19 2. To the extent that there are eligible applicants, DSHS shall continue to pro-
20 vide for six hundred (600) class members to receive long-term care services in community
21 residential settings at any given time, consistent with the current medically needy residential
22 waiver ("MNRW") program as approved by the Centers for Medicare and Medicaid Services
23 ("CMS").

24 3. DSHS agrees to use its best efforts to implement long-term in-home care ser-
25 vices for two hundred (200) class members, by reactivation of its medically needy waiver
application and active support of legislative approval for a home-based medically needy
waiver program.

4. By May 31, 2004, to the extent that (1) CMS has approved the reactivation or
reissuance of the previously approved in-home care waiver, (2) the Washington Legislature

1 has appropriated funding, and (3) there are eligible applicants, DSHS shall provide for two
2 hundred (200) class members to receive in-home long-term care services at any given time.

3 5. Plaintiffs do not concede or admit that these caseload limitations are justified
4 under the ADA or its integration regulation. Plaintiffs enter into this Agreement in the hope
5 that eligible class members may be accommodated within these caseload limitations, and in
6 compromise of their claims during the period of the stay only. Defendant does not concede
7 or admit that it is obligated under the ADA to provide residential or in-home services to
8 members of the Plaintiff class, but has agreed to do so, so long as this litigation is stayed, in
9 compromise of its defense.

10 6. When DSHS is fifty (50) applicants away from exhausting its caseload limits
11 in either the community-based or in-home care program, DSHS shall provide notice to Plain-
12 tiffs' counsel. DSHS shall further notify Plaintiffs' counsel once the number of applicants for
13 either waiver program exceeds the available caseload limits.

14 7. In the event that either waiver program approaches or exceeds the caseload
15 limits agreed to herein, the parties agree to discuss changes to this Agreement in good faith,
16 which may include the establishment of additional caseload capacity or other available
17 alternatives to further litigation. Plaintiffs may lift the stay at any time they determine that a
18 negotiated Agreement is unlikely to be obtained within a reasonable period of time.

19 8. DSHS agrees to provide quarterly reports to Plaintiffs' counsel regarding the
20 medically needy residential and in-home waiver programs, including the numbers enrolled in
21 each, average cost of services, and the number of applicants who applied for but were denied
22 long-term care services in community-based or in-home care settings solely because of fund-
23 ing limitations.

24 9. The parties agree to request that the Court stay this litigation and all deadlines
25 until no later than June 1, 2004, to give DSHS time to implement an in-home medically
needy waiver program for two hundred (200) class members as set forth in paragraphs 3 and
4 above. The parties further agree, if the in-home medically program is established, to re-
quest that the Court stay the litigation for two years, to June 1, 2006.

1 10. On or before June 1, 2006, the parties shall assess the status of the existing
2 programs and advise the Court whether they believe the case should be set for trial, whether
3 the stay should be continued, or whether the case should be dismissed. With no action by
4 either party, the case shall be dismissed by the Court without prejudice.

5 11. Should DSIHS be unable to implement the in-home medically needy waiver
6 program by May 31, 2004, for any reason, the parties agree that they will notify the Court
7 and ask the Court to re-establish a trial schedule, disclosure schedule, and deadlines consis-
8 tent with those pending at the time of entry of the stay, and to do so on an expedited basis.

9 12. Even if DSHS does implement the in-home medically needy waiver program,
10 the parties agree that nothing in this Agreement limits the right of either party to move to lift
11 the stay and abandon this Agreement upon thirty (30) days' notice to the other party. Moving
12 to lift the stay shall be the sole remedy available to either party for any perceived or alleged
13 violation of this Agreement by the other party. The foregoing does not preclude any member
14 of the Plaintiff class who has applied for and been determined functionally and/or financially
15 ineligible for medically needy residential or in-home care to appeal such determination
16 through appropriate administrative proceedings and judicial review thereof under the Ad-
17 ministrative Procedure Act. Nor does this Agreement limit any other legal rights or
18 remedies available to class members that are separate from the claims asserted in this
19 litigation.

20 If the stay is lifted, the parties recognize that the burden of the affirmative defense
21 continues to rest with the DSHS.

22 13. By virtue of this Stipulated Agreement, DSHS does not waive any defenses to
23 allegations that it is violating civil rights or legal rights of Plaintiffs, and does not admit lia-
24 bility regarding any cause of action in Plaintiffs' Amended Complaint.

25 14. By virtue of this Stipulated Agreement, Plaintiffs do not concede that the
caseload limitations for the medically needy in-home and residential programs are adequate
to meet the needs of the class.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

15. The parties acknowledge that this is a negotiated stipulation of disputed claims and does not necessarily establish or represent the legal standards applicable to Plaintiffs' claims or Defendant's defenses.

16. Within thirty (30) days of entry of the Court's order, Defendant agrees to pay Plaintiffs' counsel reasonable attorney fees and costs of \$175,000.00 in full satisfaction of the fees and costs through January 16, 2004. Nothing in this Agreement shall be construed to limit the right of Plaintiffs' counsel to seek reasonable fees for work subsequent to the date of this Agreement.

17. The parties agree that the stay applies to the named defendant and any of his successors and assigns.

18. The parties agree to prepare and file a stipulation for stay of proceedings based on this Stipulated Agreement for Stay of Proceedings, and that entry of such stay is a condition of this Agreement.

19. The Court's stay shall not preclude where necessary the filing of motions necessary to maintain the agreements contained herein, or the Court's action on the same, including, without limitation, modifications to this Stipulated Agreement, substitution or addition of class representatives, and motions for Plaintiffs' attorney fees.

DATED January 16, 2004

MacDONALD HOAGUE & BAYLESS
Attorneys for Plaintiff

CHRISTINE O. GREGOIRE
ATTORNEY GENERAL OF
WASHINGTON
Attorneys for Defendant

By Katrin E. Frank
Katrin E. Frank, WSBN 14786
Andrea Brenneke, WSBN 22027

By Alan Smith
Alan Smith, WSBN 22188
Assistant Attorney General
William L. Williams,
Senior Assistant Attorney General,
WSBN 6474

///
///

ORDER STAYING PROCEEDINGS

The undersigned Judge of the United States District Court, having reviewed the preceding Stipulated Agreement and being fully advised in the premises, hereby orders as follows:

1. The parties shall be bound by the terms of their Stipulated Agreement for Stay of Proceedings, as set forth above.

2. These proceedings are stayed until no later than June 1, 2004, to allow the Defendant an opportunity to implement an in-home medically needy Medicaid waiver program as set forth in paragraphs 3 and 4 of the Stipulated Agreement.

3. If the referenced waiver program is established by June 1, 2004, these proceedings shall be stayed for a further period of two years, to no later than June 1, 2006. On or before June 1, 2006, the parties shall assess the status of the existing programs and advise the Court whether they believe the case should be set for trial, whether the stay should be continued, or whether the case should be dismissed. With no action by either party, the case shall be dismissed by the Court without prejudice.

4. The parties shall notify the Court if for any reason the Defendant is unable to implement the in-home medically needy waiver program by May 31, 2004.

5. Within thirty (30) days of the entry of this Order, the Defendant shall pay Plaintiffs' reasonable attorney fees and costs through January 16, 2004, in the amount of \$175,000.00.

Done
~~DONE IN OPEN COURT/CHAMBERS~~ this 20th day of Dec., 2004.

Thomas S. Zilly

Thomas S. Zilly
United States District Judge

///
///
///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Approved for entry:
MacDONALD HOAGUE & BAYLESS
Attorneys for Plaintiff

By *Katrin E. Frank*
Katrin E. Frank, WSBN 14786
Andrea Brenneke, WSBN 22027

CHRISTINE O. GREGOIRE
ATTORNEY GENERAL OF WASHINGTON
Attorneys for Defendant

By *Alan Smith*
Alan Smith, WSBN 22188
Assistant Attorney General
William L. Williams,
Senior Assistant Attorney General,
WSBN 6474