

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

JOAN BZDAWKA,
SANDRA ERLICHMAN AND
MARILYN BERDIKOFF,

CLASS ACTION

Plaintiffs,

v.

MILWAUKEE COUNTY,
WISCONSIN DEPARTMENT OF
HEALTH AND FAMILY SERVICES,
AND KEVIN HAYDEN, Secretary for
Wisconsin Department of Health and
Family Services,

CIVIL ACTION
NO. 04-C-0193

Defendants.

SETTLEMENT AGREEMENT

WHEREAS, Plaintiffs initiated this lawsuit by complaint filed January 28, 2004, in Milwaukee County Circuit Court Case No. 04-CV-0862 seeking declaratory and injunctive relief against Milwaukee County (the "County Defendants"); and

WHEREAS, the County Defendants removed Milwaukee County Circuit Court Case No. 04-CV-0862 to federal court by notice of removal filed February 25, 2004; and

WHEREAS, Plaintiffs joined the Wisconsin Department of Health and Family Services ("DHFS") and the predecessor of Wisconsin Department of Health and Family Services Secretary Kevin Hayden (collectively, the "State Defendants" and, together with the County Defendants, "Defendants") to this lawsuit by amended complaint filed April 13, 2004; and

WHEREAS, Plaintiffs subsequently sought and obtained permission to file their second amended complaint (filed April 30, 2004), third amended complaint (filed August 19, 2004), and fourth amended complaint (filed March 30, 2005); and

WHEREAS, the Court, in a Decision and Order filed February 7, 2006, has partially granted and partially denied the Defendants' motions to dismiss and, in an Order filed April 5, 2006, has denied the State Defendants' motion to certify the Court's February 7, 2006, ruling to include certification to pursue an interlocutory appeal; and

WHEREAS, as a result of the Court's prior rulings and amendments to the pleadings by the parties, this now is an action for prospective declaratory and injunctive relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, based on claims of discrimination on the basis of disability in the delivery of Family Care services; and

WHEREAS, Family Care is a federally-approved Wisconsin Medical Assistance ("MA") dual waiver program designed to deliver home and community-based services, rather than only nursing home care, to elderly and disabled persons who qualify for nursing home care via a managed care waiver, *see* 42 U.S.C. § 1396n(b) and (c); and

WHEREAS, the Court on October 13, 2006, certified a plaintiff class consisting of disabled Milwaukee County residents who are now, or will in the future, be eligible to reside in a Family Care-funded community-based residential facility ("CBRF") or adult family home ("AFH"); and

WHEREAS, all parties now want to resolve this controversy on mutually satisfactory terms by compromising disputed claims and terminating this protracted litigation;

NOW THEREFORE, in consideration of the undertakings set forth herein and intending to be legally bound thereby, it is stipulated and agreed to by the Plaintiffs, the County Defendants and the State Defendants, represented by their undersigned counsel, that all of Plaintiffs' claims for relief which were or could have been asserted in this action shall be fully resolved on the following terms as set forth in this Settlement Agreement.

I. COMMITMENTS OF THE COUNTY DEFENDANTS.

- A. The Milwaukee County Department on Aging ("MCDA") Care Management Organization ("CMO") will provide continuing education and training to care managers regarding when notices of intended adverse action must be sent pursuant to Wis. Admin. Code § HFS 10.52(3) and the 2007 Health and Community Supports Contract, at 53-55, by incorporating this information into the annual continuing education provided to care management staff. This information will be incorporated into the annual continuing education materials provided to care management staff no later than 120 days following Court approval of this Settlement Agreement.
- B. The MCDA CMO will make reasonable efforts to support enactment of that part of Governor Doyle's proposed 2007-09 budget that would provide funding for an independent advocacy program for Family Care participants.
- C. The MCDA CMO will expand its CBRF provider audit review process to include actual salary and wages, staff turnover rates, occupancy, and further details regarding

cost and wage structures, beginning with the calendar year 2007 year-end audit reviews that will occur in 2008 and also including the calendar year 2008 year-end audit reviews that will occur in 2009.

- D. No later than December 1, 2007, the MCDA CMO will refine its CBRF provider contracts to require providers to submit additional information to support the expanded audit review described in Section I.C.
- E. The MCDA CMO will conduct a bi-annual (every other year) review of audited financial statements and contracts provided by multifacility, corporate providers of 3-4 bed AFH services, including actual salary and wages, staff turnover rates, occupancy, and further details regarding cost and wage structures, for the calendar year 2008 year-end audit reviews that will occur in 2009.
- F. No later than December 1, 2007, the MCDA CMO will refine its provider contracts with multifacility, corporate providers of 3-4 bed AFH services to require those providers to submit additional information to support the audit review described in Section I.E.
- G. The MCDA CMO will consider as a relevant factor data from provider surveys released on March 26, 2007, in connection with quality performance and provider rate setting for 2008 rates. The MCDA CMO will retain its current discretion to establish the rate-setting methodology and negotiate provider rates, subject to the superintending authority of DHFS.
- H. The MCDA CMO will complete provider network adequacy reviews twice a year, beginning with one such review in calendar year 2007. The CMO will retain its current right to terminate contracts with providers whose costs are not competitive.
- I. In connection with provider rate-setting for calendar years 2008 and 2009, MCDA will provide contracted providers for CBRF, AFH and day services the factors taken into account in developing the rates offered those providers.
- J. In connection with provider rate setting for calendar years 2008 and 2009, MCDA will post on its website a summary of the factors taken into account in developing the rates offered subcontracted CBRF, AFH and day services providers.
- K. The MCDA CMO will initiate a formal process of soliciting input from CBRF, AFH and day services providers that will be considered to the extent it is relevant in future rate setting, in connection with provider rate setting for calendar years 2008 and 2009.
- L. The MCDA CMO will, at least once annually in calendar years 2007, 2008 and 2009, invite all Milwaukee County municipalities to provide input to address the issue of affordable CBRF, AFH and other housing for Milwaukee County Family Care

participants; identify impediments; and encourage the development of such housing throughout Milwaukee County.

- M. As part of its semi-annual review of provider network adequacy, as described in Section I.H. above, the MCDA CMO will conduct needs assessments of future Family Care participants and where they are living in Milwaukee County.
- N. The MCDA CMO will disseminate the results of its provider network adequacy reviews at least once annually in calendar years 2007, 2008 and 2009 to the development and/or land use planning departments of all Milwaukee County municipalities.
- O. No later than 120 days following Court approval of this Settlement Agreement, the MCDA CMO will collaborate with the MCDA Resource Center to make available to all nursing homes located in Milwaukee County materials explaining the alternate residential options available through the Family Care program and providing contact information for the Milwaukee County Aging Resource Center for persons who wish to discuss other options available to them.

II. COMMITMENTS OF THE STATE DEFENDANTS.

- A. No later than 60 days following expiration of the 30 day review and comment period described in Section II.B., DHFS will issue a contract interpretation memo reiterating that: (1) a Family Care participant, pursuant to Wis. Stat. § 46.287(2)(b), may contest the choice of residential or day services provider proposed by the CMO by pursuing Family Care grievance procedures or a fair hearing; and (2) that the standard to be applied in resolving any such disputes is whether the proposed plan would provide care, treatment or supports that are insufficient to meet the participant's needs or outcomes, or are provided in a setting that is unnecessarily restrictive or less integrated than is appropriate to the participant's needs. The contract interpretation memo will state the importance of following the notice procedures required by Wis. Admin. Code § HFS 10.52(3) and the 2007 Health and Community Supports Contract, at 53-55.
- B. No later than 120 days following Court approval of this Settlement Agreement, DHFS will provide a draft of the contract interpretation memo discussed in Section II.A., to Plaintiffs' counsel, the County Defendants' counsel, the Legal Aid Society of Milwaukee, Legal Action of Wisconsin and Disability Rights Wisconsin for review and comment before finalization. DHFS will accept written comments on the draft contract interpretation memo for a period of 30 days beginning on the date the draft contract interpretation memo is transmitted to the entities specified in this paragraph. The State Defendants will retain sole discretion to determine final content of the contract interpretation memo, and to provide drafts to any other person or organization for review and comment before finalization.

- C. Within 15 business days of issuance as described in Sections II.A. and B., DHFS will post the final contract interpretation memo on its Family Care website.
- D. No later than 60 days following expiration of the 30 day review and comment period described in Section II.E., DHFS will develop additional informational materials explaining the Resource Allocation Decision (“RAD”) method used in the Family Care program to help participants identify personal outcomes after which a participant’s care management team then works with the participant and/or the participant’s authorized representatives to find the most cost-effective way of achieving those personal outcomes via a service plan that is both reasonable and effective. The RAD instructional materials will include an explanation that Family Care participants who enter CBRFs and AFHs are not and should not be automatically disqualified from participating in day programming services outside their residences, and that it is appropriate to use the RAD to determine whether the outcomes of individual Family Care participants who reside in CBRFs and AFHs can not be met without access to outside day programming services.
- E. No later than 120 days following Court approval of this Settlement Agreement, DHFS will provide a draft of the RAD informational materials discussed in Section II.D., to Plaintiffs’ counsel, the County Defendants’ counsel, the Legal Aid Society of Milwaukee, Legal Action of Wisconsin and Disability Rights Wisconsin for review and comment before finalization. DHFS will accept written comments on the draft RAD informational materials for a period of 30 days beginning on the date the draft RAD informational materials are transmitted to the entities specified in this paragraph. The State Defendants will retain sole discretion to determine final content of the RAD informational materials, and to provide drafts to any other person or organization for review and comment before finalization.
- F. Within 15 days of issuance as described in Sections II.D. and E., DHFS will post the final RAD informational materials discussed on its Family Care website.
- G. At the same time as the final RAD informational materials are posted on DHFS’ Family Care website as described in Section II.F., DHFS also will provide the final RAD informational materials discussed in Sections II.D. and II.E. to Family Care grievance bodies (CMO Grievance and Appeal Hearing Boards or Committees, DHFS’ contracted MetaStar review team, and DHFS’ internal contract monitoring team) and Division of Hearings and Appeals administrative law judges assigned to conduct Family Care hearings.
- H. If the MCDA CMO’s 2008 annual certification application to DHFS includes submission of any revised form notices required by Wis. Admin. Code § HFS 10.52(3)(b)7. and 8., DHFS will, before certifying the MCDA CMO for 2008, provide copies of any such revised form notices to Plaintiffs’ counsel, the Legal Aid Society of Milwaukee, Legal Action of Wisconsin and Disability Rights Wisconsin for

review and comment. DHFS will allow Plaintiffs' counsel, the Legal Aid Society of Milwaukee, Legal Action of Wisconsin and Disability Rights Wisconsin a minimum time period of ten business days to submit comments on any revised form notices provided to them for review. The State Defendants will retain sole discretion to determine whether or not to certify the MCDA CMO for 2008, and to determine whether to require the MCDA CMO to make any changes in the MCDA CMO's revised form notices.

- I. If the independent advocacy program to be funded pursuant to Governor Doyle's 2007-09 budget proposal is established, DHFS will include in any contract or other document governing the independent advocacy program a requirement for semi-annual reporting by the entity operating the independent advocacy program of statistical information regarding referrals received by the independent advocacy program.
- J. If the independent advocacy program to be funded pursuant to Governor Doyle's 2007-09 budget proposal is established, DHFS will post statistical reports received within two years from the date the Court approves this Settlement Agreement from the independent advocacy program as described in Section II.I. on DHFS' Family Care website within fifteen business days of receipt by DHFS of those reports.
- K. No later than 120 days following Court approval of this Settlement Agreement, DHFS will amend its contract with its External Quality Review Organization, currently MetaStar, to require semi-annual statistical reporting regarding referrals to the state's appeals and grievances program, both at DHFS and at the Division of Hearings and Appeals; referral outcomes; requests for fair hearings; and fair hearings conducted beginning with the January – June 2008 reporting period.
- L. Within 30 days of receipt, for a period of two years beginning on the date the Court approves this Settlement Agreement, DHFS will post the statistical reports described in Section II.K. on the DHFS Family Care website.
- M. The State Defendants will continue to support creation of the independent advocacy program for Family Care participants for which Governor Doyle included funding in his proposed 2007-09 budget and will issue a request for proposals and take other necessary steps to implement the program promptly upon passage by the Legislature, if that funding is included in the 2007-09 budget as enacted.
- N. DHFS will work with the MCDA CMO to enhance openness of the MCDA/provider rate-setting process for rate years 2008 and 2009 by exploring alternate rate-setting methods for CBRF and AFH providers.
- O. No later than 90 days following Court approval of this Settlement Agreement, DHFS will provide information to CBRF and AFH members of the MCDA CMO's provider

network about locations on DHFS' Family Care web site of the webcast describing the capitated rate setting process and the Family Care actuarial rate reports describing rate development methodology.

- P. No later than 60 days following expiration of the review and comment period described in Section II.Q., DHFS will issue a contract interpretation memo reiterating the importance of appropriate and adequate pre-transfer planning so as to identify and minimize potential effects on a Family Care participant transferring from one residential setting to another.
- Q. No later than 120 days following Court approval of this Settlement Agreement, DHFS will provide a draft of the contract interpretation memo discussed in Section II.P., to Plaintiffs' counsel, the County Defendants' counsel, the Legal Aid Society of Milwaukee, Legal Action of Wisconsin and Disability Rights Wisconsin for review and comment before finalization. DHFS will accept written comments on the draft contract interpretation memo for 30 days commencing with the date the draft contract interpretation memo is transmitted to the entities specified in this paragraph. The State Defendants will retain sole discretion to determine final content of the contract interpretation memo, and to provide drafts to any other person or organization for review and comment before finalization.
- R. Within 15 days of issuance as described in Sections II.P. and Q., DHFS will post the final contract interpretation memo discussed in Sections II.P. and II.Q. on its Family Care website.
- S. DHFS will provide technical assistance to MCDA and its existing Placement Team in identifying and implementing additional practices to enhance planning for safe and effective residential moves for Family Care participants, and in assessing every move before it occurs to identify potential harmful effects on the participant and to develop strategies for minimizing those effects. DHFS will provide this technical assistance to MCDA and its existing Placement Team by preparing technical assistance materials and convening, no later than July 1, 2008, a meeting of DHFS and MCDA staff to discuss these materials and how MCDA is incorporating or might incorporate strategies identified in its practices.
- T. DHFS will assign DHFS developmental disabilities staff to conduct a one-time review of Milwaukee County Watts review¹ procedures and pursue any corrective action, to be determined by DHFS, as determined appropriate by DHFS in its sole discretion and enforceable only by DHFS in its sole discretion. The one-time review will commence no later than July 1, 2008.
- U. Within 30 days of completion of the final report for the review described in Section II.T., DHFS will provide plaintiffs' counsel with a copy of the final report.

¹*State ex rel. Watts v. Combined Comm. Svcs.*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985).

- V. Within 30 days of finalization of any corrective action plan described in Section II.T, DHFS will provide plaintiffs' counsel with copies of any final corrective action plan.
- W. Within 30 days of receipt, DHFS will provide plaintiffs' counsel with copies of any compliance reports submitted by Milwaukee County for a period of two years following finalization of any corrective action plan implemented as a result of the one-time review of Milwaukee County Watts procedures discussed in Section II.T.
- X. No later than 120 days following Court approval of this Settlement Agreement, DHFS will amend the DHFS/MCDA Family Care contract to include language that MCDA will provide services in the most integrated level of residential setting consistent with the desired outcomes, preferences and identified needs of a participant, and that is cost-effective when compared to alternative services that could meet the same needs and achieve similar outcomes.
- Y. No later than 120 days following Court approval of this Settlement Agreement, DHFS will direct its External Quality Review Organization in writing to include in the care plan review process consideration of whether a Family Care participant would be more appropriately placed in a less restrictive/more integrated residence, and of whether the individual would prefer to move to a less restrictive/more integrated facility.

III. ENFORCEMENT.

- A. If Plaintiffs determine, based upon their good faith review of available evidence, that either the County Defendants or the State Defendants are out of compliance with any provision of this Agreement, Plaintiffs will notify all Defendants in writing accompanied by supporting documentation.
- B. The parties shall engage in a good faith negotiation to reach agreement within 30 days of the receipt by the Defendants of any documentation of alleged noncompliance and any necessary corrective actions, including a time period for implementation of such corrective actions, and shall make all reasonable efforts to reach agreement. This 30 day time period can be extended for any period of time by mutual agreement of all parties, or in the absence of agreement, can be extended once for one 30 day period by each party.
- C. If no agreement on the issue of noncompliance or necessary corrective action is reached within the timeframe established in Section III.B., the plaintiffs may file a remedial motion with the Court within 30 days after expiration of the timeframe established in Section III.B.

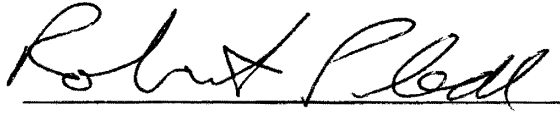
- D. The Court shall retain ultimate jurisdiction to enforce this Agreement until the termination date specified in Section IV.D.
- E. All of the provisions of this Agreement are separately and independently enforceable, except where the Agreement provides that an element or provision is not enforceable.

IV. MISCELLANEOUS.

- A. The parties agree that Family Care participants who enter CBRFs and AFHs are not and should not automatically be disqualified from participating in day programming services outside their residences. The parties further agree that it is appropriate to use the RAD to determine whether the outcomes of Family Care participants who reside in CBRFs and AFHs can not be met without access to outside day programming services.
- B. Time shall be computed under sections 990.001(4) and 801.15(1)(a) of the Wisconsin Statutes.
- C. Forthwith upon the Court's approval of the Settlement Agreement, Milwaukee County will cause to be transmitted to plaintiffs' attorneys the sum of Sixty-five Thousand Dollars (\$65,000.00) and the State of Wisconsin will cause to be transmitted to plaintiffs' attorneys the additional sum of Sixty-five Thousand Dollars (\$65,000.00) in full and final settlement of any and all claims plaintiffs may have for attorneys' fees and costs, including any costs incurred by plaintiffs for the services of expert witnesses, arising from this litigation through the date of the Court's order approving the Settlement Agreement following hearing pursuant to Fed. R. Civ. P. 23(e)(1)(C).
- D. Except for provisions of this Settlement Agreement for which some other compliance date or time period is specified, the provisions of this Settlement Agreement will terminate and cease to be enforceable on the date two years after the date of the Court's order approving the Settlement Agreement following hearing pursuant to Fed. R. Civ. P. 23(e)(1)(C).
- E. This Agreement is a full, final and complete compromise and settlement of claims, actual, doubtful or disputed, as to questions of liability, damage and remedy for the claims raised in this case or that could have been raised in this case, and is not to be construed as an admission of liability by the County Defendants, the State Defendants, their respective agents, their respective officers or their respective employees.

FOR PLAINTIFFS:

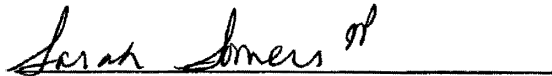
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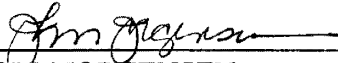
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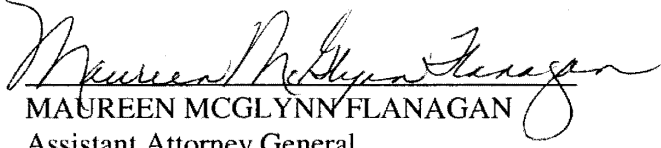
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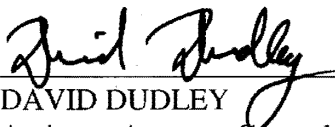
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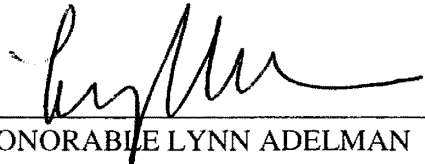
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Attorneys for Defendants
Wisconsin Department of Health
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SO ORDERED:



THE HONORABLE LYNN ADELMAN
United States District Judge

Oct. 19, 2007

DATE