

**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 situation,**

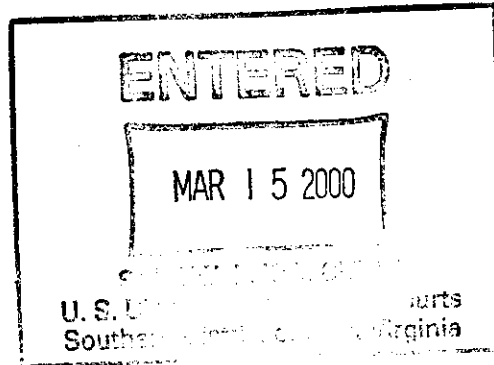
Plaintiffs,

v.

Civ. Action No. 3:99-0338

**Joan Ohl, Secretary of the Department
of Health and Human Resources,**

Defendant.



ORDER

This day came the plaintiffs by counsel and the defendant by counsel and agreed that all prospective issues raised by Counts I, II, and IV-VI are compromised and settled on the terms hereinafter set forth.

Count I concerns the comparability and amount, duration and scope of Medicaid services. 42 U.S.C. § 1396a(a)(10)(B). With respect to the comparability aspects of this claim, the parties agree that the defendant has previously received and currently seeks a waiver of the Medicaid Act comparability requirements in order to target waiver services to individuals who are mentally retarded and/or developmentally disabled and so that services not otherwise available under the

77

approved Medicaid state plan may be provided to individuals served on the waiver. The plaintiffs have agreed to dismiss Count I insofar as they claimed a violation of the federal comparability requirements.

In remaining part, Count I addresses the need for the defendant to provide a sufficient amount, duration and scope of ICF-level services. Count II concerns 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). The parties have agreed to settle these claims on the following terms hereinafter set forth in paragraphs 1 - 2.

Plaintiffs have claimed under Count IV that any individual who wishes to do so may apply for Medicaid services. 42 U.S.C. § 1396a(a)(8). The parties have agreed to settle these claims on the following terms hereinafter set forth in paragraphs 3-7.

Plaintiffs have claimed in Count V that the defendant's wait list practices are a violation of their right to received Medicaid services with reasonable promptness. 42 U.S.C. § 1396a(a)(8). The parties have agreed to settle these claims on the following terms hereinafter set forth in paragraphs 8 - 11.

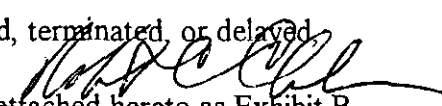
The Count VI claims concern due process under the Due Process Clause of the United States Constitution and the Medicaid Act, 42 U.S.C. § 1396a(a)(3). The parties have agreed to settle these claims on the following terms hereinafter set forth in paragraphs 12- 16.

It is hereby ORDERED and DECREED that:

1. The defendant will develop capacity within the behavioral health service delivery system to ensure Medicaid applicants and recipients who meet the level of care criteria for

ICF/MR level services shall be able to receive those services in either an ICF/MR or through the Home and Community Based Waiver Program.

2. When an individual is determined to be likely to require ICF-level care, the defendant will give the individual or his/her legal representative the choice of either institutional or home and community-based services. At the time that the individual is given such choice, the applicant and/or their legal representative will complete the "Informed Consent to a Choice of Alternatives Between Institutional and Waiver Home and Community-Based Services," which is attached to the Renewal Application.

3. The defendant will ensure that any individual or current recipient who wishes to do so may apply for Title XIX Home and Community Based Waiver Services. Applications may be presented to a behavioral health center, the Waiver Program Coordinator, or any local Department of Health and Human Resources (DHHR) office. At the time of such application, the applicant will receive a Statement of Rights. The Statement of Rights will provide the applicant with a clear description of the waiver process, including, but not be limited to: the right to apply without delay and to receive an eligibility determination within 90 days, a description of the eligibility determination process to be followed by the defendant and its agents, and a statement of rights if eligibility or services are denied, reduced, terminated, or delayed, including all rights contained in the "Notice of Decision," ~~which is attached hereto as Exhibit B~~ 

4. All persons who apply for Title XIX Home and Community Based Waiver Services are entitled to an eligibility determination within 90 days of the date of their initial application, subject to the provisions of 42 C.F.R. § 435.911(a)-(e). No person shall be discouraged from applying.

5. Plaintiffs' and defendant's counsel will meet, confer and agree as to the content of the Statement of Rights. Said Statement will be finalized by April 15, 2000 and submitted to the Court.

6. The defendant will inform persons of the opportunity to apply for home and community based waiver services and the process for making such application. The informational efforts will be both oral and written. The informational efforts will be targeted to persons on existing home and community-based waiver waiting lists, in ICF placements, aging adult care givers (including placement of information in senior centers), children in the school system who are either transitioning out of the school system or who would benefit from additional services available under the waiver, behavioral health centers, and county offices. The defendant will develop a brochure that describes the waiver program, including information regarding eligibility and services and where and how to apply.

7. The defendant has prepared *West Virginia Title XIX MR/DD Waiver Home & Community Based Services Handbook* (April 1997), which it makes available to behavioral health centers and applicants/recipients. The defendant will meet and confer with plaintiffs' counsel regarding the content of this handbook. The defendant will update the handbook.

8. The defendant will comply with the representations it has made to the U.S. Department of Health and Human Services as set forth in the home and community-based waiver application that it will submit to the U.S. Department of Health and Human Services on or about March 6, 2000, which is incorporated herein by reference. Specifically, the defendant will, at minimum, seek expansion of waiver slots as follows:

Year 1 – 225 new slots
Year 2 – 200 new slots
Year 3 – 150 new slots
Year 4 – 150 new slots
Year 5 – 150 new slots

9. The wait list maintained by the defendant will move at a reasonable pace. Reasonable pace is defined as a period, not to exceed 90 days, for individuals who are eligible for ICF-level services. Children who have a significant need for services shall have those services initiated as early as possible within the period.

10. To the extent that the demand for waiver slots exceeds the supply such that the waiting list is not moving at a reasonable pace, the defendant will attempt to find a solution and will meet and confer with plaintiffs' counsel.

11. The defendant shall contact individuals within 30 days who have been placed on the Waiting List with an expected date of services longer than 90 days, and seek clarification that (a) the applicant is aware of the expected date of service delivery indicated on the Client Needs Assessment document, (b) the applicant has elected to postpone service delivery and does not want Home and Community Based Waiver services within ninety days, and (c) where the applicant did not elect to be placed on a 90-plus day waiting list, such individuals shall be given an opportunity to elect for a shorter time frame (i.e. zero to ninety days).

12. Each individual who applies for home and community-based waiver services, will receive a Statement of Rights, referenced in ¶ 3, above, which will include a statement of rights if eligibility or services are denied, reduced, terminated, or delayed, including all rights contained in the Court approved "Notice of Decision."

13. Whenever a service is denied, reduced, or terminated, the affected individual will receive the Notice of Decision.

14. All persons shall be afforded 90 days from the date a service is denied, reduced, terminated, or delayed to request a hearing.


15. Any applicant, recipient or authorized representative may request a hearing and must do so by written form or by using the Court approved "Request for Hearing" form. Those who request a hearing shall be entitled to a final administrative action within 90 days of the date of the initial request for a hearing pursuant to 42 C.F.R. § 431.244(f), unless the applicant/recipient requests an additional period of time.

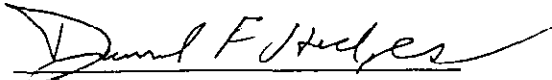
16. DHHS shall use the "Notice of Decision" and "Request for Hearing" forms in all notices to applicants or recipients in Title XIX Home and Community Based Waiver contexts, whenever services are denied, reduced, terminated, or delayed.

It is further ORDERED that:

having undertaken an independent review of the terms agreed upon by the parties to settle Counts I, II, and IV-VII, the Court finds that they are fair and reasonable; in so finding, the court affirms its ruling set forth in its earlier memorandum opinion and order; Count III, which concerns Early and Periodic Screening, Diagnosis and Treatment (42 U.S.C. §§ 1396d(a)(4)(B), 1396a(a)(43), 1396d(r)) and Count VII, which concerns the Americans with Disabilities Act (42 U.S.C. § 12101) are hereby dismissed without prejudice; the Court retains jurisdiction to assure compliance with the terms herein ordered.

Entered this 8 day of March, 2000.


UNITED STATES DISTRICT JUDGE

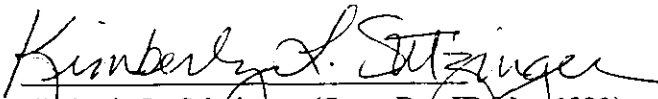


Daniel F. Hedges (WV Bar # 1660)
Mountain State Justice, Inc.
922 Quarrier Street, Suite 525
Charleston, WV 25301
(304) 344-3144
FAX: (304) 344-3145

Kent Bryson (WV Bar # 7274)
West Virginia Advocates, Inc.
1207 Quarrier St., 4th Floor
Charleston, WV 25301
(304) 346-0847

Jane Perkins
National Health Law Program
211 N. Columbia Street, 2nd Floor
Chapel Hill, NC 27514
(919) 968-6308

Regan Bailey
1806 Tilton Drive
Silver Spring, MD 20902
(301) 592-8186
COUNSEL FOR PLAINTIFFS



Kimberly L. Stitzinger (State Bar ID No. 6583)
Assistant Attorney General
West Virginia Department of
Health and Human Resources
Bureau for Medical Services
350 Capitol Street – Room 251
Charleston, WV 25301
(304) 558-6063
COUNSEL FOR DEFENDANT