

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

DUBOIS, et al.,

Plaintiffs,

v.

Case No. 4:03-CV-107-SPM

CALAMAS, et al.,

Defendants.

**SETTLEMENT**

**RECITALS**

WHEREAS, Plaintiffs, Michael Dubois, Melvin M. and Charles Smith, filed this lawsuit on April 11, 2003, on behalf of themselves and all others similarly situated concerning Defendants'<sup>1</sup> administration of Florida's Medicaid Waiver Program for persons with traumatic brain and spinal cord injuries which provides home and community based services; and

WHEREAS, the class certified as represented by the Plaintiffs in this lawsuit is defined as: all individuals with traumatic brain or spinal cord injuries who the state has already determined or will determine to be eligible to receive services from Florida's Medicaid Waiver Program for persons with traumatic brain and spinal cord injuries and have not received such services; and

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d)(1), Defendants hereby substitute the current Secretary of the Agency for Health Care Administration, Christa Calamas, for the former Secretary Alan Levine, and the current Secretary of the Department of Health, M. Rony Francois, for the former Secretary, John Agwunobi.

WHEREAS, Plaintiffs' lawsuit asserts claims under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* and implementing regulations; Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a) and implementing regulations; Title XIX of the Social Security Act (the Medicaid Act), 42 U.S.C. § 1396a *et seq.* and implementing regulations; and the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and

WHEREAS, Defendants have opposed these claims in the course of this litigation; and

WHEREAS, the Plaintiffs and Defendants have voluntarily and knowingly and for the consideration set forth below, agreed to settle this lawsuit on the terms specified in this Settlement Agreement.

### **SETTLEMENT AGREEMENT**

NOW THEREFORE, Plaintiffs and Defendants enter into and do hereby stipulate to a Settlement Agreement ("Agreement") that imposes binding obligations upon the parties and their successors to the extent stated below and constitutes a resolution of the issues in this action.

#### **A. DEFINITIONS**

As used throughout this Agreement, the following definitions apply:

1. The term "parties" refers to Plaintiffs and Defendants. As the term applies to Defendants, it includes her/his agents, employees and/or successors in office.
2. The term "CMS" refers to the federal Centers for Medicare & Medicaid Services of the United States Department of Health and Human Services.

3. The term "AHCA" refers to the State of Florida, Agency for Health Care Administration.

4. The term "DOH" refers to the State of Florida, Department of Health.

5. The phrase "TBI/SCI Waiver Program" refers to the Medicaid Waiver Program designed and requested by the Defendants and authorized by CMS and described on pages 1-5 and 1-6 of the Defendant developed Traumatic Brain and Spinal Cord Injury Waiver Services Coverage and Limitations Handbook ("Handbook"), a copy of which is attached hereto as Exhibit "A" for ease of reference for the court and class members and which certain provisions of are incorporated by reference herein.

6. The term "waiver slots" refers to the unduplicated number of individuals approved by CMS for enrollment at any one time in the TBI/SCI Waiver Program.

**B. DUE PROCESS, APPLICATIONS FOR SERVICES, FREEDOM OF CHOICE, ASSESSMENTS FOR TBI/SCI WAIVER SERVICES, RULEMAKING, DISTRIBUTION AND NOTICE**

1. In consultation with Plaintiffs' counsel, Defendants have developed a Handbook which includes, *inter alia*, policies and procedures concerning individuals' due process rights, applications for services, freedom of choice, assessments for services, and the waiting list for services. The Handbook encompasses many issues and matters that are beyond the scope of this litigation and Agreement, therefore, only certain selected provisions and pages of the Handbook, which are specifically referred to herein as being incorporated by reference, are considered to be part of the terms of this settlement. For ease of reference only, by class members and the court, the Handbook is attached hereto in its entirety. Defendants agree to make the Handbook, including all appendices thereto,

available on their websites. AHCA's website will have a link to the Handbook and the Handbook will be maintained on the Medicaid Fiscal Agent website. The Handbook has been promulgated in Florida's Administrative Code as part of Florida's administrative rules governing Defendants' actions. Fla. Admin. R. 59G-13.130.

2. Defendants agree that all persons who apply for services will receive a written determination within 90 days of the date of their application which informs them whether they will be enrolled in the TBI/SCI Waiver Program, placed on the waiting list for services, whether additional information is needed to complete their application, and/or whether they are determined not to be eligible for services. Such notice will be provided using the "Notice of Decision and Fair Hearing" contained in the attached Handbook at Appendix pages G-2 and G-3.

3. The attached provisions of the Handbook contained at page 2-5 (freedom of choice), page 2-38 (due process) and Appendix G, "Notice of Decision and Fair Hearing" at pages G-2 and G-3 (due process), in concert with applicable federal and state law and regulations, shall govern each of these specified matters for TBI/SCI Waiver Program services. The Handbook pages referred to in this paragraph are incorporated by reference herein.

4. Nothing in paragraphs 2 and 3 above shall operate as an impediment to AHCA engaging in future rulemaking on the referenced subjects provided that any such rules are consistent with federal freedom of choice requirements contained at 42 U.S.C. §1396n(c)(2) and federal due process requirements contained at 42 U.S.C. §1396a(a)(3) and 42 C.F.R. §431.200 *et seq.*. Any such rule changes shall not require any revisions to this Agreement.

5. In addition to the Handbook, Defendants have developed Internal Operating Procedures ("IOPs") for the TBI/SCI Waiver Program. The IOPs provide guidance to case workers concerning the application, assessment, due process, enrollment and waiting list procedures for the TBI/SCI Waiver Program and shall be provided, upon request, by DOH to persons on the waiting list, as well as all participants in the TBI/SCI Waiver Program. Through January 2009, DOH shall provide Plaintiffs' counsel with a copy of any proposed changes to the IOPs at least 30 days prior to their authorization. The IOPs are also available on the BSCIP website.

6. Defendants have also developed two brochures to provide information to applicants and enrollees concerning the application, assessment, due process, enrollment and waiting list procedures for the TBI/SCI Waiver Program. These brochures and any updated versions, shall be offered by DOH to all applicants for the TBI/SCI Waiver Program and shall be distributed to all Brain and Spinal Cord Injury Program (BSCIP) offices in the state, the Florida Brain Injury Association, the Florida Spinal Cord Injury Resource Center, Centers for Independent Living, and the Advocacy Center for Persons with Disabilities and local offices of the Department of Children and Families. These publications are also available on the BSCIP website. Through January 2009, DOH shall provide Plaintiffs' counsel with a copy of any proposed changes to the brochures at least 30 days prior to authorization.

7. Notwithstanding the substantial input by Plaintiffs' counsel concerning the content of the Handbook, IOPs and brochures, this Agreement does not limit the Plaintiffs' right to pursue any administrative challenges consistent with Florida's Administrative Procedures Act. §120.56, Fla. Stat. (2006).

8. AHCA accepts this Settlement Agreement as notice that, through January 2009, Plaintiffs' counsel are interested parties to whom notice of rule adoption under Section 120.54(3)(a)(3), Fla. Stat., is due regarding rulemaking concerning the TBI/SCI Waiver Program.

9. Plaintiffs agree that all requirements upon Defendants of copies or notice that run through January 2009 contained in this agreement are fully complied by Defendants by sending such copies or notice to Southern Legal Counsel, Inc., at the address supplied below. This is without limitation as to any other means Plaintiffs' counsel subsequently propose that Defendants find acceptable.

### **C. WAIVER SLOTS AND FUNDING**

1. DOH shall make it a priority to seek funding that will be sufficient to expand the TBI/SCI Waiver Program by a minimum of 50 slots for FY 2006-07, 75 slots for FY 2007-08 and 75 slots for FY 2008-09. DOH shall use its best efforts to have its legislative budget request, with each of these stated waiver slot increases for each fiscal year, included as part of the Governor's recommended budget and to obtain the necessary legislative support and funding for this expansion of waiver slots. DOH shall support this request and shall use its best efforts to obtain legislative approval of the expansion in each of these fiscal years.

2. To the extent that the expansion of the TBI/SCI Waiver Program referred to in paragraph (C)(1) depends upon federal funding or is subject to approval by CMS, AHCA shall use its best efforts to obtain such funding or approvals.

3. Through June 2009, AHCA agrees to provide Plaintiffs' counsel with copies of any approved amendments or renewals, to the state's current TBI/SCI Waiver Program

application (approved as of June 2002) within 30 days of notification of approval by CMS (for approved amendments), including but not limited to any amendments to the number of waiver slots, applied for and approved by CMS.

**D. ASSESSMENTS FOR TBI/SCI WAIVER PROGRAM SERVICES**

1. DOH agrees to perform assessments utilizing the Handbook's Home and Community Medicaid Waiver Prioritization Screening Instrument ("TBI/SCI Screening Instrument"). Within 180 days of the execution of this Agreement DOH shall use the TBI/SCI Screening Instrument to perform assessments for all persons on the Waiting List at the time of execution.

**E. CLASS NOTICE, FAIRNESS HEARING, COURT APPROVAL OF THE SETTLEMENT AGREEMENT AND ENTRY OF FINAL ORDER**

1. The parties agree that upon execution of this Agreement, they shall file with the Court a Joint Motion in which the parties will request: (a) that the Court approve the (proposed) Notice to the Class and enter an Order approving the Notice and setting a date for a Fed. R. Civ. P. 23(e) fairness hearing; (b) that pursuant to Fed. R. Civ. P. 23(e), the Court approve the Settlement Agreement and enter an Order to that effect; and (c) that at the appropriate time, the Court enter a Dismissal With Prejudice pursuant to the terms of this Agreement.

2. Upon execution of this Agreement, counsel will submit to the Court the Joint Motion together with the proposed orders and the (proposed) Notice to Class Members of Proposed Settlement and Fairness Hearing. Notice to class members, in a form approved by the Court, shall be made.

3. Defendants agree to bear the costs of providing the notice, by mail, to all

class members currently on the waiting list for services, and to post the notice on their websites and in appropriate offices.

4. The parties will request that the Court expedite the scheduling of the fairness hearing and counsel will work together to facilitate the fairness hearing. All counsel will use their continued and best efforts to obtain court approval of the Settlement Agreement and the above-referenced orders.

5. This Agreement is intended by the parties as a final expression of their agreement with respect to the subject matter hereof and is intended as a complete and exclusive statement of the terms and conditions thereof. This Agreement supercedes and replaces all prior negotiations and agreements between the parties hereto, whether written or oral.

6. This Agreement is not an admission of any wrongdoing or misconduct on the part of Defendants, nor is it an admission by Defendants that Plaintiffs would have prevailed or by Plaintiffs that Defendants would have prevailed in this litigation.

7. Dismissal of this case shall be with prejudice. The parties understand that this Agreement is not a consent decree. The parties agree that execution of this Agreement by Defendants and/or approval of the same shall not operate in any manner to confer continuing jurisdiction.

8. If the Court does not approve this Agreement or incorporate the terms of this Agreement in the Final Order, or alters or amends any portion of this Agreement, this Agreement is hereby withdrawn, and shall be null and void and all parties shall be placed in the same position as if this Agreement was never agreed to by the parties.

## **F. ATTORNEYS' FEES AND COSTS**

1. Defendants agree to pay the Plaintiffs for their reasonable attorneys' fees and costs associated with this lawsuit for the time period up to and including November 2, 2005, in the amount of \$245,000 all inclusive. This amount shall constitute full, fair and final disposition of the entire case on the issue of fees and costs and shall be paid by check issued not later than 30 days after approval of the Settlement Agreement is granted by the court.

## **G. DISPUTE RESOLUTION**

1. This Agreement shall be enforceable only in accordance with the terms described in (H)(2).

2. The parties hereby agree that if a dispute as to the performance of this Agreement should arise, it shall be resolved exclusively in the following manner:

a. Written Notification of Alleged Violations and Voluntary Correction. If Plaintiffs believe that Defendants have breached the terms of this Agreement, Plaintiffs will notify Defendants of the provision of the Agreement which they allege Defendants have not complied with, and with a written explanation of the nature of the alleged breach. Such notification shall be within ten (10) days of discovering such alleged breach. Upon receipt of this written notice and explanation ("notice"), Defendants will conduct an appropriate investigation and respond, in writing, within ten (10) business days, unless an extension is mutually agreed upon. The parties may, if warranted, take voluntary corrective action. There shall be no award of attorneys' fees or costs to either party for any actions/inactions taken at this stage, regardless of the eventual outcome of the dispute.

b. Mediation. If Plaintiffs reasonably believe that the response provided by Defendants does not resolve the issue(s) or alleged violation(s) raised in the notice, the parties shall attend mediation to resolve the dispute. The cost of the mediation shall be divided evenly between the parties. Unless otherwise agreed in writing between the parties, mediation must commence within 30 calendar days from receipt of notice unless extended for good cause shown. For alleged violations which Plaintiffs, in good faith, reasonably believe may result in immediate and irreparable harm to Plaintiffs, the notice shall so indicate this belief, and mediation must then commence within five (5) business days, if at all practicable. The parties shall conduct the mediation in good faith in an attempt to resolve the matter(s) contained in the notice, and shall therefore have a representative, with full authority to settle the dispute, attend the mediation (subject to any limitations imposed upon Defendants by state law, § 45.062, Fla. Stat.). Neither side is entitled to attorneys' fees for any time devoted toward this mediation process, regardless of outcome.

c. Exclusive Remedy. If the issue(s) of noncompliance raised in the notice is/are not resolved through mediation, then Plaintiffs' sole remedy is to file a separate contract action in a state court of competent jurisdiction in Leon County, Florida. Strict compliance with paragraphs (H)(2)(a) and (H)(2)(b) of this settlement is agreed by the parties to be a condition precedent to the filing of any such action.

#### **H. NO STRICT INTERPRETATION AGAINST DRAFTSMAN**

1. The parties have participated in the drafting of this Agreement and have had the opportunity to consult with counsel concerning its terms. This Agreement shall not be interpreted strictly against any one party on the ground that it drafted the Agreement or any

part of it.

2. All legal representations, including agreements based on legal claims, attributable to the Defendants as set out herein are solely and exclusively for the purpose of this Settlement Agreement and shall not be binding on these Defendants or Plaintiffs in any other action or proceeding with the exception of any actions filed in state court to enforce the terms of this Agreement.

**I. FACSIMILE SIGNATURES BINDING**

In order to expedite the signing of this Agreement, the parties stipulate and agree that the delivery of an executed signature page by one party to the other via facsimile transmission shall bind the transmitting party to the same extent as service of the original signature page by hand delivery. The parties stipulate and agree that a party that sends a signature page via facsimile transmission shall mail the original to the other party within three (3) business days after the facsimile transmission.

Respectfully Submitted on this \_\_\_\_ day of \_\_\_\_\_, 2006.

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