

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

HELEN PITTS, et al.	*	C.A. No. 3:10-cv-00635-JJB-SCR
	*	
PLAINTIFFS	*	
	*	JUDGE JAMES J. BRADY
v.	*	
	*	
BRUCE GREENSTEIN, et al.	*	MAGISTRATE JUDGE STEPHEN C. RIEDLINGER
	*	
DEFENDANTS	*	CLASS ACTION

SETTLEMENT AGREEMENT

This Settlement Agreement (“Settlement Agreement” or “Agreement”) is entered into between Plaintiffs Rickii Ainey, Kenneth Roman, and Elizabeth Foster, by her next friend Donna Zeno (“Plaintiffs”), on behalf of themselves and a class of other similarly situated persons, and Defendants Louisiana Department of Health and Hospitals (“DHH”) and its Secretary, Bruce Greenstein (“Defendants”). Plaintiffs and Defendants are referred to herein as “the Parties.”

On September 22, 2010, Plaintiffs filed this action in the United States District Court for the Middle District of Louisiana (the “District Court”). On June 1, 2011, Plaintiffs filed a Complaint in Intervention. The Complaint in Intervention alleges that the reduction in maximum hours of Long-Term Personal Care Services imposed pursuant to its Emergency Rule promulgated in 36 La. Reg. 1752 (August 20, 2010), La. Admin. Code tit. 50, § 12915(A), deprives Plaintiffs of critical services that are necessary to permit them to remain safely in their homes, and that this violates the Americans with Disabilities Act, 42 U.S.C. § 12132 (“ADA”) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (“Section 504”), and the federal regulations implementing these statutes, by placing them at risk of unnecessary institutionalization in nursing homes. Defendants deny these claims.

The Parties mutually desire to resolve the claims asserted by Plaintiffs in this action without the need for further litigation, and without any admission of liability by any party. Accordingly, the Parties hereby agree to compromise, settle and resolve all of the claims asserted by Plaintiffs in this action on the following terms and conditions:

1. Definitions

- (a) Class: All persons who were approved to receive more than 32 hours of services through Louisiana's Long-Term Personal Care Services (LT-PCS) program as of September 5, 2010, and who are still approved to receive LT-PCS or who have a request for prior authorization pending or in process.
- (b) Long-Term Personal Care Services (LT-PCS): the personal care services funded by Louisiana Medicaid and provided to eligible individuals in their homes pursuant to Louisiana's Medicaid State plan and regulations at La. Admin. Code tit. 50, Part XV, Subpart 9.
- (c) Community Choice Waiver (CC Waiver): a program of home- and community-based services administered by DHH's Office of Aging and Adult Services pursuant to § 1915(c) of the Social Security Act, the terms of the waiver documents filed with the Centers for Medicare and Medicaid Services, and regulations at La. Admin. Code tit. 50, Part XXI.
- (d) Centers for Medicare and Medicaid Services (CMS): the agency within the United States Department of Health and Human Services that administers the federal Medicaid program.
- (e) Expedited Waiver Offer: an offer of an opportunity to receive services under the CC Waiver on an expedited basis, ahead of others on the Request for Services Registry.

2. Notice to class members of opportunity to obtain expedited waiver slots

- (a) DHH has sent one of the notices attached hereto as Attachment A to each individual who was approved for more than 32 hours of LT-PCS on September 5, 2010, and has since been approved for exactly 32 hours of LT-PCS, informing them that they may request an expedited waiver offer.
- (b) DHH will send the notice attached hereto as Attachment B to all other class members. In order to facilitate timely processing of requests for expedited waiver services, DHH will stagger the notices into three equally-sized groups. DHH will send notice to one-third of these other class members by January 16, 2012 or seven days after the Court preliminarily approves the Settlement Agreement, whichever is later. It will send notices to the second group of other class members by February 13, 2012; and to the third group of other class members by March 9, 2012. DHH will use its best efforts to prioritize the groups based on the order in which class members' LT-PCS were reduced after September 5, 2010. For example, class members whose LT-PCS were first reduced will receive the notice first.

3. Provision of expedited waiver slots

- (a) The class members described in ¶ 2(a) above may request an expedited waiver offer at any time, so long as they are approved to receive 32 hours of LT-PCS. If their hours of LT-PCS are reduced to below 32 prior to June 30, 2012, they will be permitted to apply for an expedited waiver slot until June 30, 2012, and will be provided Attachment B.
- (b) The class members described in ¶ 2(b) above may request an expedited waiver opportunity by June 30, 2012. If they are allocated 32 hours of LT-PCS, either through reassessment or through appeal, they may request an expedited waiver offer at any time following such allocation.

- (c) Subject to the provisions of Section 4 below, DHH will accept and evaluate the requests received before June 30, 2012 of all class members described in Section 2 above who contact DHH seeking an expedited waiver offer (including phone requests), and will grant a request if the class member shows that, considering the totality of the circumstances, he or she will have a decline in mental or physical health and is at serious risk of nursing facility placement in the absence of an expedited waiver offer. Consistent with DHH's rules and practices, the following criteria shall be considered in determining whether the individual will require nursing facility placement in the absence of an expedited waiver offer:
- i. support through other programs is either unavailable or inadequate to prevent nursing facility placement;
 - ii. the death or incapacitation of an informal caregiver leaves the person without other supports;
 - iii. the support of an informal caregiver is not available due to a family crisis;
 - iv. the person lives alone and has no access to informal support;
 - v. or, for other reasons, the person lacks access to adequate informal support to prevent nursing facility placement.
- (d) Applicants who are offered an expedited waiver opportunity must still satisfy all criteria for certification into the CC Waiver, including the medical, financial, and health and welfare requirements set forth in the applicable state and federal regulations and in the waiver documents filed with CMS. *See* 42 C.F.R. § 435.217; 42 C.F.R. § 441.302; La. Admin. Code tit. 50, Part XXI, §§ 8901, 8903.

- (e) DHH will continue apply the criteria set forth in ¶ 3(c) to all class members receiving 32 hours of LT-PCS who request an expedited waiver slot after June 30, 2012 but before the end date of the Agreement.

4. Appeals

- (a) This agreement neither establishes a right to appeal the denial of a request for an expedited waiver opportunity nor precludes any claim that such a right exists.
- (b) Solely for the purpose of this agreement, DHH agrees that class members described in Section 2 above will be permitted to appeal any denial of a request for an expedited waiver slot if DHH receives the request for the expedited waiver slot by June 30, 2012.
- (c) DHH will notify all class members described in Section 2 whose pre-June 30, 2012 requests are not granted that they may appeal this determination, by sending the notice attached hereto as Attachment C.

5. Interim services

- (a) For the purposes of this agreement, DHH may in its discretion provide temporary, informal accommodations to class members who have been granted an expedited waiver slot for the period before waiver services begin. Such accommodations may include, but are not limited to, providing the class member with additional hours of LT-PCS until waiver services commence.
- (b) For the purposes of this agreement, DHH may in its discretion provide temporary, informal accommodations to class members who have requested an expedited waiver slot. Such accommodations may include, but are not limited to, providing the class member with additional hours of LT-PCS until DHH acts on the request.

6. Additional CC Waiver slots

- (a) Within one week of preliminary approval of this Agreement, DHH will submit a waiver amendment to CMS to increase the number of CC Waiver slots by 200, to a total of 4,803. Upon CMS's approval of the amendment, DHH will reserve these 200 slots exclusively for class members eligible for expedited waiver slots through December 31, 2012, unless DHH determines, based on the number of class members applying for such slots, that fewer than 200 slots will be needed for class members. After December 31, 2012, or at such time as DHH determines that fewer than 200 slots will be needed for class members, DHH shall include any remaining slots in the general pool of CC Waiver slots to be offered to other individuals on the Request for Services Registry.
- (b) If the 100 slots reserved for individuals eligible for expedited waiver slots under DHH's existing regulations and the 200 slots reserved for class members pursuant to ¶ 6(a) are insufficient to accommodate the number of class members granted expedited waiver slots, DHH will ensure that additional services are provided to class members who would qualify for an expedited waiver offer, either by (1) using other available slots in the CC Waiver; (2) adding additional expedited slots to the CC Waiver; or (3) providing additional LT-PCS hours, up to a maximum of 42 hours per week, until such time as an expedited slot becomes available.
- (c) DHH will use its best efforts to have its request for 500 additional CC Waiver slots included in the Division of Administration budget request for state fiscal year 2013. The Advocacy Center and AARP will use their best efforts to support the inclusion of the additional CC Waiver slots in the state budget for state fiscal year 2013.

7. Attorneys' fees and expenses

Plaintiffs and Plaintiffs' Counsel agree to accept \$250,000 as the full and final amount of all attorneys' fees and costs for work done through the date of the final approval of this

Settlement Agreement, provided that the Court enters an order requiring Defendants to pay this amount to Plaintiffs' counsel within ten days of the date of the Court's final approval of the Settlement Agreement. Plaintiffs' counsel agrees that any attorneys' fees and costs for work related to this settlement done after final approval of the Settlement Agreement are limited to fees and costs for work performed in successfully obtaining judicial enforcement of the Settlement Agreement. The Court will not award fees and costs associated with any administrative appeal of the denial of an expedited waiver slot.

8. Reports

DHH will report the following to Plaintiffs' counsel, in both a Microsoft Excel document and in a .pdf document, within the time frames set forth below:

- (a) By February 1, 2012, the names of all class members who have already been sent notices attached as Attachment A, the dates that the notices were sent, and the addresses to which the notices were sent.
- (b) Within ten days of DHH sending Attachment B to other class members (those approved for less than 32 hours), the names and addresses (to which notices were sent) of these class members.
- (c) At the end of each month, the names of the class members for whom notices were returned as undeliverable.
- (d) By the 15th of every month, beginning March 15, 2012, and ending at the settlement ending date, the following data from the previous calendar month: the number of class members who requested expedited waiver slots, the number of class members granted interim services, the number of requests for expedited waiver slots from class members that were granted, the number of requests for expedited waiver slots from class members that were denied, the number of requests for expedited waiver slots from class members

pending as of the last day of the previous calendar month, the number of appeals from class members of denials of requests for expedited waiver slots, and the number of those appeals that were granted, the number that were denied, and the number that were otherwise resolved. These monthly reports will also include the names of all class members whose requests for expedited waiver slots were granted or denied during the previous calendar month.

- (e) By February 29, 2012, the most recent information available as to the telephone numbers of class members and their other contacts, as an update to information that was provided to Plaintiffs' counsel in the document entitled "Master Spreadsheet-Interrogatory 2 (CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER).xls" on or about July 11, 2011.

9. Relief for specific individuals

- (a) C.D. will be allowed to apply and be considered for an expedited waiver offer under the terms and conditions set forth in Sections 3 to 6 above.
- (b) Class members Elizabeth Foster, E.M.S., P.M., R.M., B.F., E.C., and M.D. will each be offered a CC Waiver opportunity.
- (c) Defendants agree to provide this specific relief to the above individuals as a settlement of disputed claims only. Defendants do not necessarily agree that any of these individuals meet the standards set forth in ¶ 3(c) for granting an expedited waiver offer.

10. Enforcement:

- (a) The enforceability of this Settlement Agreement ends on December 31, 2012, unless (i) any of the class members' requests for an expedited waiver slot received prior to June 30, 2012 have yet to be acted upon by DHH; (ii) the Division of Administrative Law ("DAL") has not yet issued a final decision on an appeal of the denial of such a request;

or (iii) CC Waiver services have not begun for any class member who has been granted an expedited slot through a pre-June 30, 2012 request under this Agreement and who has accepted the waiver slot and meets the criteria set forth in ¶ 3(d).

- (b) If the enforceability of the agreement does not end on December 31, 2012 because of the existence of any of the conditions set forth in ¶ 10(a), this settlement agreement will remain enforceable until such conditions have been met.
- (c) This Agreement shall be enforceable only by motion filed at any time after February 1, 2012, and before the end date, as defined in ¶¶ 10(a)-(b), subject to the following procedures:
 - i. No less than ten (10) days prior to filing such a motion plaintiffs shall notify defendants of any alleged noncompliance with the Agreement and request a meeting for the purpose of attempting to resolve the problems identified by the plaintiffs regarding the defendants' alleged noncompliance;
 - ii. Should the Parties fail to resolve the problems raised in the initial request for a meeting, either party may file a motion with the Court seeking a judicial determination regarding defendants' compliance with the Agreement.
- (d) The parties shall voluntarily dismiss Civil Action No. 10-cv-635 on the end date of the Agreement, as defined in ¶¶ 10(a)-(b). In the event that any party declines at that time to join in a voluntary dismissal request, any of the other parties shall be free to move for dismissal and the other parties agree not to oppose the motion, provided that the Court need not act on the motion until it disposes any pending motion submitted under paragraph ¶ 10(c).

11. Release/Bar of Claims

- (a) The claims compromised, settled and resolved by this Agreement include all claims that were raised in the Complaint in Intervention filed in this action on June 1, 2011, as well as all claims precluded by governing law, on behalf of the class as defined in Section 1 above. This agreement does not compromise, settle, or resolve, and shall in no way impair, any claims that may arise after the end date of this Agreement pursuant to Section 10.
- (b) In consideration of the commitments contained herein, and the benefits provided or to be provided hereunder, this Settlement Agreement shall fully resolve, extinguish, and finally and forever bar, and the Representative Plaintiffs and other Class Members hereby release, all claims described in ¶ 11(a) above. Upon final approval by the Court, this Settlement Agreement shall be fully binding on, and fully extinguish and release the claims of, all Class Members and the Representative Plaintiffs, and may be pled as a full and complete defense to any subsequent action or other proceeding that arises out of the claims released and discharged by this Settlement Agreement.
- (c) Nothing in this Agreement is intended to affect any rights of any party or non-party other than to the extent specifically addressed by the terms of the Agreement.

12. Redefinition of the class:

- (a) When the parties move for preliminary approval of this Settlement Agreement, they will also jointly move the Court to revise the definition of the class adopted by the Court on June 6, 2011, by adopting the definition provided in ¶ 1(a).

13. Miscellaneous provisions:

- (a) All public statements concerning the settlement by the parties or counsel are to be made by way of a joint press release.

- (b) The Parties acknowledge that this settlement agreement may prolong or otherwise affect the wait for CC Waiver slots for individuals outside the class.
- (c) The commitments of the Parties hereunder are expressly conditioned upon the Court's approval of this agreement pursuant to Federal Rule of Civil Procedure 23(e) and its entering an order requiring the parties to comply with the terms of this agreement. The Court shall retain jurisdiction of this action for the purpose of enforcing this agreement.

Agreed this _____ day of January, 2012.

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Counsel for the Plaintiffs

Attachment A

DEPARTMENT OF HEALTH & HOSPITALS
Long Term-Personal Care Services Program

Date:

Dear _____:

You have been approved to receive 32 hours per week of Long-Term Personal Care Services (LT-PCS). Because this is the most assistance that anyone can receive through the LT-PCS program, the Department of Health & Hospitals wants to make sure that you know about programs other than LT-PCS and about ways to make the most of your LT-PCS services.

Among the options that may be available to you are:

- Using services provided at an Adult Day Health Care center together with your LT-PCS services
- Considering a shared living arrangement with another person who uses LT-PCS
- Seeking additional assistance from family, friends, neighbors, or community organizations or programs
- Applying for emergency services through the Elderly and Disabled Adults Waiver

If you are considering going into a nursing home unless you receive additional assistance beyond your 32 hours per week of LT-PCS, the Department of Health & Hospitals may be able to help. You may request assistance by contacting the Office of Aging and Adult Services Help Line at 1-866-758-5035. The Department will work with you to try to find a way for you to receive additional services and supports.

DEPARTMENT OF HEALTH & HOSPITALS
Long Term-Personal Care Services Program

Date:

Dear _____:

You have been approved to receive 32 hours per week of Long-Term Personal Care Services (LT-PCS). Because this is the most assistance that anyone can receive through the LT-PCS program, the Department of Health & Hospitals wants to make sure that you know about programs other than LT-PCS and about ways to make the most of your LT-PCS services.

Among the options that may be available to you are:

- Using services provided at an Adult Day Health Care center together with your LT-PCS services
- Considering a shared living arrangement with another person who uses LT-PCS
- Seeking additional assistance from family, friends, neighbors, or community organizations or programs
- Applying for emergency services through the Community Choices Waiver

If you are considering going into a nursing home unless you receive additional assistance beyond your 32 hours per week of LT-PCS, the Department of Health & Hospitals may be able to help. You may request assistance by contacting the Office of Aging and Adult Services Help Line at **1-866-758-5035**. The Department will work with you to try to find a way for you to receive additional services and supports.

DEPARTMENT OF HEALTH & HOSPITALS
Long Term-Personal Care Services Program

Dear Participant:

You previously were approved to receive 32 hours per week of Long-Term Personal Care Services (LT-PCS). Because this is the most assistance that anyone can receive through the LT-PCS program, the Department of Health & Hospitals wants to make sure that you know about programs other than LT-PCS and about ways to make the most of your LT-PCS services.

Among the options that may be available to you are:

- Using services provided at an Adult Day Health Care center together with your LT-PCS services
- Considering a shared living arrangement with another person who uses LT-PCS
- Seeking additional assistance from family, friends, neighbors, or community organizations or programs
- Applying for emergency services through the Community Choices Waiver

If you are considering going into a nursing home unless you receive additional assistance beyond your 32 hours per week of LT-PCS, the Department of Health & Hospitals may be able to help. You may request assistance by contacting the Office of Aging and Adult Services Help Line at **1-866-758-5035**. The Department will work with you to try to find a way for you to receive additional services and supports.

Attachment B

Attachment B

[INSERT Date]

[INSERT Recipient Name]

[INSERT Street Address]

[INSERT City, State & Zip Code]

Dear Participant:

The Department of Health and Hospitals (“DHH”) wants to make sure that you know about services other than Long Term Personal Care Services (“LT-PCS”), that may be of help to you and about ways to make the most of your LT-PCS.

Among the options that may be available to you are:

- Applying for an expedited slot in the Community Choices Waiver (see attached description—formerly the Elderly and Disabled Adults Waiver).
- Using services provided at an Adult Day Health Care center (see attached description) or through another community organization or program, together with your LT-PCS;
- Asking for a reassessment for additional hours of LT-PCS (up to 32 hours per week) if your condition has changed since your last assessment;
- Considering a shared living arrangement with another person who uses LT-PCS.

You may apply for an expedited Community Choices Waiver slot any time before June 30, 2012. You are eligible to apply during this time period because you were receiving more than 32 hours of LT-PCS per week in the past, and have had your hours reduced. **To get an expedited offer, you must show that without the additional services the waiver provides, you cannot maintain your mental or physical health and are at serious risk of having to go into a nursing home.**

After June 30, 2012, you may still apply for an expedited slot if you are approved for 32 hours per week of LT-PCS. To qualify for an expedited slot, you must meet the standards described in DHH’s rules, La. Admin. Code tit. 50, Part XXI, § 8105, which can be found on the internet at:

<http://new.dhh.louisiana.gov/index.cfm/page/723>

You may request help by contacting the Office of Aging and Adult Services Help Line at **1-866-758-5035**, or by **sending your request in writing to OAAS.Inquiries@la.gov**. If you are unable to call or e-mail, you may send a letter or fax to:

Department of Health & Hospitals
Office of Aging and Adult Services
P.O. Box 2031
Baton Rouge, LA 70821-2031
Fax: 225-219-0202

DHH will work with you to try to find a way for you to get additional services and supports and can give you information about how to obtain legal assistance.

Attachment C

Attachment C

NOTICE OF DENIAL

Your request for an expedited Community Choice Waiver slot has been **DENIED**.

You did not demonstrate that without the additional services the waiver provides you cannot maintain your mental or physical health and are at serious risk of being admitted to a nursing facility because: [Give specific reason(s). For example, you did not demonstrate that 32 hours of LT-PCS are inadequate to maintain your mental and physical health and prevent nursing facility placement; you were referred to other programs to address the concerns you identified; you did not demonstrate that you lack access to adequate informal supports to maintain your mental and physical health and prevent nursing facility placement.].

You may appeal this decision. If you want to appeal, you must do so by **[date 30 days from the date of the notice]**.

If you appeal the denial of the expedited waiver slot, you will be given a fair hearing.

At the hearing, you will have to prove that you will experience a decline in mental or physical health and are at serious risk of nursing facility placement in the absence of an expedited waiver offer.

Some of the factors that will be considered are:

- a. Whether support through other programs is available and adequate to prevent nursing facility placement;
- b. Whether adequate support is available through unpaid caregivers;
- c. Whether you live alone and do not have access to enough unpaid support.

The regulations that support the decision to deny your request are La. Admin. Code tit. 50, Part XXI, § 8105, which can be found on the internet at: <http://new.dhh.louisiana.gov/index.cfm/page/723>

To appeal, fill in and sign the bottom of this letter and mail or fax it to:

Division of Administrative Law
Health and Hospitals Section
P.O. Box 4189
Baton Rouge, Louisiana 70821-4189
(225) 342-0443 phone
(225) 219-9823 (fax)

You can also file an appeal by phone at **(225) 342-5800**.

You will be notified by the Appeals Section of the date of your hearing. If you need to put it off for any reason, you will need to send in a written request.

You may represent yourself at this hearing, or you may have a lawyer, a relative, friend or other spokesman.

A list of agencies that provide no-cost legal services and that may be available to help with appeals is attached.

Request for Appeals Hearing
Denial of Expedited Community Choice Waiver Slot

_____ I disagree with the decision to deny me an Expedited Community Choice Waiver Slot. I am requesting a fair hearing.

Recipient's Name: _____

Recipient's Address: _____

City: _____, LA Zip: _____

Social Security Number: _____

Signature: _____ Date: _____

Person Assisting to Send in
Appeal: _____

(Keep a copy for yourself.)

SOURCES OF LEGAL REPRESENTATION

Statewide:

Advocacy Center (statewide assistance)
8325 Oak Street, New Orleans, LA 70118
(800) 960-7705
www.advocacyla.org

Health Law Advocates of Louisiana (statewide assistance)
4640 S. Carrollton Ave., Ste. 250,
New Orleans, LA 70119
504-267-9156
www.hlalouisiana.org

AIDSLaw of Louisiana
2601 Tulane Avenue, Ste. 630
New Orleans, LA 70119
tel: 504-568-1631
free: 800-357-5035
fax: 504-301-1357
www.aidslaw.org

Local:

Acadiana Legal Service Corporation
1020 Surrey Street, Lafayette, LA 70501
337-237-4320
www.la-law.org

Acadiana Legal Service Corporation (Alexandria Office)
1808 Jackson Street , Alexandria, LA 71309
318-443-7281
www.la-law.org

Acadiana Legal Service Corporation (Lake Charles)
1 Lakeside Plaza, Suite 710, 127 W. Broad Street, Lake Charles, LA 70601
337-439-0377
www.la-law.org

Legal Services of North Louisiana, Inc. (Monroe Office)
3016 Cameron Street, Monroe, LA 71201
318-699-0889
www.lsnl.org

Legal Services of North Louisiana, Inc. (Natchitoches Office)
134 St. Denis Street, Natchitoches, LA 71458
318-352-7220
www.cp-tel.net/klsc, www.lsnl.org

Legal Services of North Louisiana, Inc. (Shreveport Office)
720 Travis Street, Shreveport, LA 71101
318-222-7186
www.lsnl.org

Southeast Louisiana Legal Services
1200 Derek Drive, Suite 100, Hammond, LA 70403
985-345-2130
www.slls.org

Southeast Louisiana Legal Services (Baton Rouge Office)
715 St. Ferdinand St. , Baton Rouge, LA 70802
225-448-0080
www.slls.org

Southeast Louisiana Legal Services (Houma Office)
521 Roussell Street , Houma, LA 70360
985-851-5687
www.slls.org

Southeast Louisiana Legal Services (New Orleans office)
1010 Common St., Suite 1400A, New Orleans, LA 70112
(504) 529-1000 or 1008

www.slls.org

Southeast Louisiana Legal Services (West Bank Office)

4051 Westbank Expressway, Marrero, LA 70072

(504) 340-1381

www.slls.org

Southwest Louisiana Legal Services

1011 Lakeshore Drive, 4th Floor, Lake Charles, LA 70601

337-436-3308